The International Conference

– CKS 2013 –

Challenges of the Knowledge Society

Bucharest, 17th -18th May 2013, 7th Edition

PRO UNIVERSITARIA 2013®
BUCUREŞTI

ISSN 2359-9227
ISSN-L 2068-7796

Indexed by EBSCO Database and Index
Copernicus Database

INTERNATIONAL SCIENTIFIC COMMITTEE

METHODOLOGICAL PARTICULARITIES IN INVESTIGATING HOME LARCENY

NICOLETA-ELENA BUZATU*

Abstract
The study below is meant to focus on the methodological particularities regarding the investigations concerning home larcenies. In the Romanian penal law, the simple or the aggravated theft as well as the other infringements against patrimony are charged by the special part of the penal Code. The theft from dwellings takes the most unexpected and diverse forms: the only main preoccupation of the thieves is not to be seen or caught in the act. Consequently, the main aspects to be analyzed are: establishing the flagrant infringement, investigating the scene of the deed, hearing the injured person, hearing the witnesses, searching, identifying and catching the doers, as well as other activities of penal suing necessary in investigating any home larceny.

Key words: *investigation, infringement, theft, home larceny, Penal Code, Code of Penal Procedure*

Introduction

Infringements against patrimony are charged in Title III of the Special Part of the Romanian Penal Code. The new regulation regards the patrimony in its larger sense, without making any distinction between the public and private property.

In agreement with article 208 of the Penal Code[1], theft - in its simple form - is considered to be any movable goods seized from somebody's property without the consent of the respective person but simply taken into the unjustified possession of the thief. Any energy having an economic value is also considered to be movable goods, as for example documents. The deed is considered to be a theft even if the goods partially or totally belongs to the doer and, the moment the theft was committed, it was in the legal possession of another person.

The aggravated theft is considered to be committed in one of the circumstances provided by article 209 of the Penal Code, letter a)-i): the perpetration committed by a group of two or several persons; by a person holding a weapon or a narcotic; by a masked or disguised person; an attack against a person unable to react or to defend himself/ herself; when the deed happens at night, during a period of calamity, through house breaking, climbing or by an abusing use of a proper or of a false key.

Another aspect of the aggravated theft is also the one provided in paragraph, 2 letter c): a document meant to prove the legal status or the identification of a person.

In conformity with article 211 of the Penal Code robbery is considered to be that form of theft committed with violence or menace or by making the victim become unconscious or unable to defend himself/herself, as well as the theft followed by the above mentioned means as to enable the thief to either keep the stolen object or eliminate/ remove the traces of his/her infringement, or to facilitate the doer's escape.

The same article also provides other forms of burglary at letter a)-h) as: robbery committed by a group of two or more persons, by a person holding a weapon or a narcotic; by a masked or

* Senior Lecturer, Ph.D., Faculty of Juridical and Administrative Sciences, "Dimitrie Cantemir" Christian University (e-mail: nicoleta_buzatu@yahoo.com).

[1] Law no 15 of June 21, 1968 - Romanian Penal Code - published in the Official Gazette no 79-79 bis of June 21, 1968, republished in the Official Gazette no 55-56 of April 23, 1973, and then in the Official Gazette no 65 of April 16, 1997, with further amendments.

disguised person; committed at night or during a calamity; committed within a house or in its annexes.

Incrimination practically protects the fact that a movable goods belongs to a certain patrimony.

According to the Explanatory Dictionary of the Romanian Language[2], *a dwelling* is defined as being the place, the house, the building where somebody lives or might be living; a domicile.

For a theft infraction may be recorded there shall be accomplished the following demands[3]:

- to purloin a goods from a building/house;
- the goods shall be movable, that is able to be transported or transferred from one place to another;
- the goods shall be in the possession of another person;
- the goods shall be seized without the consent of the person who owned it;
- the seizure shall have an immediate consequence;
- to exist a causality connection between the seizure and the immediate consequence.

THE MAIN ASPECTS THAT SHALL BE CLARIFIED BY INVESTIGATING A HOME LARCENY

The investigation of home larceny - as one of the forms of infringing upon the private property of the citizens - includes a series of peculiarities especially imposed by the fact that the delinquent can be an unknown person to both the injured and to the witnesses; yet, in most of the cases there is not even known the distinguishing characteristics of the one to be pursued[4].

When it is about an investigation of a home larceny, the task of the inquiry shall compulsorily settle and solve the following problems[5]:

- when and how the theft has been committed;
- what goods have been stolen and whom did they belong to;
- who was the person who committed the theft;
- where have the stolen things been deposited;

The preliminary stages in the inquiry taking place in the cases belonging to this category are the investigation at the scene of the deed and the hearing of the injured person.

Operation moods used in committing home larcenies

To know about the operation moods is of an efficacious interest in order to establish the ways of the delinquent's access, whether they were only one or more, to identify and raise the objects that helped them to commit the breaking in, to establish a group of suspects, to legally settle the deed, etc.[6]

The operating moods are varied, as follows:

- penetrating into the house after a deep and preliminary study, or in the basis of certain "sold hints";
- penetrating into a house under different pretexts or presenting false identification cards;
- penetrating into the house by breaking the windows, forcing the doors or the windows by the use of the physical force or of other breaking instruments; the use of original or false keys, master keys or of other improved instruments, the use of the "breaker" or of the "extractor" - according to the case;

---

[2] DEX – Explanatory Dictionary of the Romanian Language, ed. II-nd (Bucharest: Academy of Romania, Univers enciclopedic Printing House, 1998), 580.

[3] For more details, see Lazăr Cârjan; Mihai Chiper, Forensics. Tradition and Modernism, (Bucharest: Curtea Veche Printing House, 2009), 403-404.

[4] S.A. Golunski, *Forensics,* (Bucharest: Scientific Printing House, 1961), 466.

[5] *Idem.*

[6] For more details, see Lazăr Cârjan; Mihai Chiper – *op. cit.,* 404.

- penetrating into the house by climbing down the top of it or by breaking the ceiling or the wall, etc.

The concrete identification of the movable goods. Depending on how this problem is settled the classification of the deed will be possible, as well as the estimation of the quality and quantity of the stolen goods as for the total estimation of the whole prejudice to be recovered. A concrete identification of the stolen goods can facilitate the pursuing activity of identifying and recovering them, as well as that of catching the delinquents.

Establishing the exact moment of the perpetration is important for the legal classification of the deed: simple or aggravated theft. It also is important for the forensic investigation of the case due to the traces to be discovered at the scene of the crime and which can lead to identifying the thief.

Identifying the means and methods used in committing the infringement is also important as it serves in the legal classification of the deed in one of the categories: simple theft, aggravated theft or robbery.

Identifying the doer and his/her participation in the larceny is also important in order to analyze the deeds and to establish the penal punishment amounted to any of the co-participants or accomplices depending on each one's contribution in perpetrating the breaking in, in concealing the goods and in favoring the doer.

Identifying the injured person. For identifying the possessor of the stolen goods and their being discovered in the possession of the offender, there are plenty of cases when the goods seized from the broken-in apartments are hidden, used by the offender or sold. It is thus necessary to identify the persons whose goods belonged to. In case of robbery, the identification of the injured person is done with difficulty as the victim might be unconscious or even dead and the goods and the identifying documents could have been stolen.

Establishing the conditions that favored the perpetration has a preventive character as to support and guide those legal persons who are to take security measures. In the case of home larceny there are not the least security measures and so, the timetable of the inhabitants can be easily found out, as well as who are the visitors or what kinds of goods are sheltered there.

FIRST MEASURES TO BE TAKEN IN THE CASE OF A HOME LACERNY

If an injured person informs the authorities in a written claim, by denunciation or ex office they shall start - as soon as possible - the following procedural acts: the findings of the flagrant infringement, the investigation of the crime scene, the hearing of the injured person, the hearing of the witnesses, searches, the identification and catching of the offenders as well as other activities connected with the penal pursuit, necessary for the investigation of the home larceny.

Establishing the flagrant infringement

In agreement with article 465 of the Penal Procedural Code[7], a flagrant infringement is the one discovered right in the moment of committing it or immediately after. It is also considered a flagrant infringement that infringement whose doer - immediately after committing the crime - is followed by the injured person, by the eye witnesses and by the public roaring or, that doer who is caught in the proximity of the crime scene with weapons or any other object that could have been used in the time of the breaking-in.

In such a situation it is very easy to solve the case. The author of the crime is immediately arrested and identified. The injured person and the eye witnesses can be immediately heard and they can thus help in catching the offender avoiding any possible future mutual influence. The author can be searched and interrogated about the deed. The crime scene will be also examined and the

[7] Law no 29 of November 12, 1968 - Penal Procedural Code, published in the Official Gazette no 145 of November 12, 1968, the Official Gazette no 146 of November 12, 1968, republished in the Official Gazette no 78 of April 30, 1997, with further amendments.

conclusions shall be mentioned in the report[8]. In the light of article 467 of the Code of Penal Procedure, the report is read to the defendant as well as to the previously heard persons, who are informed that they can complete the declarations or manifest their objections. The report is signed by the penal authority, by the defendant and by the witnesses.

Examination of the crime scene is made immediately after the information regarding the robbery was received, as it is an indispensable procedural act within the examination of such an infringement.

The *crime scene* shall be understood not only as the scene proper from where the goods have been seized, but also the access entrances, the itinerary followed by the doer when coming or leaving the criminal field, the place where the acts of violence or the threats against the injured person took place, as well as the place where the goods have been hidden[9].

By examining the crime scene there can appear many important data referring to the methods and means used in committing the theft, to the number of persons and to the operating time, to the way followed by the doers and to the stolen goods.

The offender's traces and the tools used in the breaking-in shall be discovered, fixed and raised. Thus, while examining the places where the penetration took place - doors, windows, walls, ceilings, roofs - in the place where the goods used to be or from where they were taken, there can be discovered footwear traces, sole traces, instruments used in burglary, lost or abandoned things belonging to the offender[10].

The traces left by the breaking-in tools appear then when various instruments, apparata or any other specially made up or adapted objects are used during a perpetration[11].

It is impossible to enumerate all the breaking-in tools because in practice they can take the form of nails, tongs, screw drivers, hammers, crowbars, levers, pick axes, drills, spanners, monkey wrenches, and other adapted and especially manufactured.

To force the locks special devices are used; among the most spread ones being the "pontoarcă" key, the breaker, the extractor, the "cypometer" and the bulldozer.

In the case of windows, they force them by disjointing the glass from the frame by the help of a thin and curved lever or, simply, by cutting and breaking the glass.

For breaking the walls, the floors and the ceilings they use pick axes, chisels, pick-hammers, various corrosive substances and even explosive materials.

According to the type of breaking, the traces left behind can be classified in: depth or surface traces, static or dynamic, and - as a matter of fact - visible traces.

The main methods of fixing the traces created by the breaking instruments are: the report made up at the crime scene, the photography, the judiciary film, the judiciary videograme and the moulding.

Data concerning various professional habits of the author of the crime can be vindicated, as well as data concerning his/her possibility of knowing the topography of the place or of that of hiding the seized objects.

The objects lost or abandoned by the doer can be materialized in fragments of objects or remaining of sawdust, glass splinters, etc. Many of the traces specific to breaking-ins are to be found in a micro-trace form and can be also discovered on the clothes or on the body of the offender. Attention shall also be granted to the biological traces: hairs, blood traces and saliva.

---

[8] Emilian Stancu, *Forensics,* (Bucharest: Universul Juridic Printing House, 2002), 548.

[9] *Idem*.

[10] Vasile Berchesan, *The Investigation of the Crime Scene - a Main Evidence in the Penal Prosecution* (Bucharest: LITTLE STAR Printing House, 2006), 209.

[11] Elena-Ana Nechita, Forensics. Forensic Technique and Tactics, ed. II-nd (Bucharest: Pro Universitaria Printing House, 2009), 74.

After the interpretation of the traces discovered in the crime scene, the penal authority will be able to draw the first conclusions about the operating mood - from the very moment of examining the crime scene - and make the first declarations referring to the nature of the deed and to its possible authors[12].

Special attention shall be granted to the negative occurrences which can result from certain theft simulations having the aim to dissimulate another infringement.

Hearing the injured person

Hearing the injured person has the aim to clarify the following aspects[13]:

- the characteristic features of the seized goods;
- the circumstances in which the theft has been committed or in which the victim has been menaced and hit by the aggressor;
- the description of the doer or, if a known person, his/her identification data;
- the sum of money with which he/ she is playing the plaintiff's part in the criminal trial;
- the wounds proved by medico-legal documents and the civil claims he/she has;
- the possibility of recognizing the doer or the goods that have been seized/stolen;
- the way the injured person spent his/her time before, at the moment of the theft and after.

In the case of hearing the victim of a robbery, the hearing shall be made immediately, especially if there might appear the danger of the victim's death. It shall also be taken into account the psychological excitement and confusion of the victim as she/ he might exaggerate or simply might not remember anything.

Hearing the witnesses

The source of the direct witness is the immediate original perception of the deeds and of the circumstances connected with the evolution of the illicit activity of the doer - that is, those information obtained by the witness by his/her own senses[14].

The main problems to be clarified when hearing the witnesses[15]:

- the distance from where the deed was seen or heard;
- the activities developed by the doers and by the victim;
- the description of the doers, their attire and, if known, their identification data;
- the wounds caused to the victim;
- the characteristic features of the objects stolen from the victim;
- the means of transport used by the offenders;
- the possibility of recognizing the doers if photos are shown;
- the connections existing between the doers and the victim.

The place of hearing - which is not definitely stipulated by the law - is, as matter of fact - the headquarters of the judicial authority, but it also take place at the office, at the crime scene, at the hospital, at the witness' home or residence.

The search

The search is a probative procedure consisting in the examination performed over the vestments of a person, her/his body, house and vehicle, with the aim to discover and raise objects or documents - known to the judicial authority - but not willingly delivered, and also to possibly discover certain proofs necessary for the solving of the penal cause[16].

---

[12] Emilian Stancu, *op. cit.,* 549.

[13] Lazăr Cârjan; Mihai Chiper, *op. cit.,* 411.

[14] Gabriel Ion Olteanu; Marin Ruiu, *Forensic Tactics,* (Bucharest: AIT Laboratories Printing House, www.itcode.ro, 2009), 230.

[15] Lazăr Cârjan; Mihai Chiper, *op. cit.,* 410-411.

[16] Ion Neagu; Mircea Damaschin; Bogdan Micu; Constantin Nedelcu, *Penal Procedural Law. Seminar Portfolio,* ed. II-nd (Bucharest: Universul Juridic Printing House, 2011), 128.

Searches are utterly useful and necessary, as they offer the possibility that the stolen goods might be discovered; they can also bring about other material proofs to be used as evidence in clarifying the case.

Once identified and caught, the doer shall be applied body search, home search, search at the working place or at the place he/ she has been caught; the search can also be applied to the persons who have hidden the goods.

As for discovering other proofs - except the instruments used by the author - there can also be found other bearing traces objects - especially on the vestments that can present material or biological traces belonging to the victim.

Identifying and catching the doers

For identifying and catching the doers, all the data obtained from the examination of the crime scene, from the hearing of the injured person, of the witnesses, from the technical and scientific conclusions, from the forensic reports or from other judicial reports performed in the case are used.

The operation mood will also be taken into account, as it can speak about the doers' real "marks"[17].

OTHER CRIMINAL PROSECUTION ACTIVITIES IN INVESTIGATING THE HOME LARCENY

In the case of a penal prosecution, among the most important procedural actions met with in the investigation of thefts and robberies are: hearing the accused or the defendant, producing the materials and the reconstitution for recognition, setting out the judicial reports.

Hearing the accused or the defendants

The persons engaged in illicit activities charged from the penal point of view are procedurally considered suspects/accused and later defendants, once the penal action has started[18].

The hearing of the accused or of the defendant will take into consideration his/her right to defence together with the application of adequate tactical methods.

The defendants shall be interrogated on regard to the way they had planned and prepared the infringement, to the methods they used in committing the deed, to the way they made use of the stolen values and goods and to the connection they had with the persons who helped them or who had supported them with information about the respective goods as well as to the possibilities of getting to the respective places[19].

A special attention shall be granted to the alibis. It has to be clearly proved the fact that the accused or the defendant was - at the respective date - at the place where the theft or the robbery has been reported.

Presentations for recognition and reconstitutions

The procedural activity of presentation for recognising persons or objects is made that the eye witness or the injured person be able to identify the doer or other participants in the crime, and to offer details about the values and goods that made the object of the theft.

The reconstitution is the probative procedure consisting in fully or partially reproducing the ways and circumstances the deed had been committed, with a view to check and underline certain information collected by the judicial authorities[20].

Its aim is to verify and prove the concrete conditions in which the crime had been committed. Reconstitutions can also involve the witnesses so as to enlarge the perception - in the given conditions - of certain episodes or of the whole deed; there are even cases when a dissimulated infringement is planned as to hide another real deed.

---

[17] For more detalis, see Emilian Stancu, *op. cit.,* 550.
[18] Gabriel Ion Olteanu; Marin Ruiu, *op. cit.,* 238.
[19] Emilian Stancu, *op. cit.,* 551.
[20] Ion Neagu; Mircea Damaschin; Bogdan Micu; Constantin Nedelcu, *op. cit.*, 131.

Judicial report ordinances

A very important role in establishing the truth is played by the technical and scientific conclusions as well by the forensic results; in case of a robbery it also important the medico-legal conclusion.

The technical and scientific conclusions are considered evidence to be used in the penal prosecution and they are based on the knowledge of a specialist or of a technician then when there might be the suspicion that some proofs disappeared and so, certain deeds or circumstances of the cause shall be urgently clarified[21].

The report is that form of evidence used in a penal prosecution then when the complexity of the cause imposes the presence of specialists representing different domains of activity[22].

The forensic report of the trace analysis is necessary for the identification of both the offenders and of the instruments they used in committing the crime, in the base of the traces found at the scene of the crime.

Conclusions

To assure the security of citizens and of their property, to guard over the peace and public order - these are the objectives that shall be of permanent interest for the public society and for the people as well, not only for the specialized institutions of the state. The citizens shall know and observe several elements of self-protection which, once mastered, become habits meant to prevent negligence, indifference, naivety and other aspects that enable the activity of the offenders.

In order to protect the homes from larceny, one shall take into account both the technical means and the preventive attitude of the individual: not to open the door and invite in the house unknown persons, to fix an alarm device, to buy - if possible - a metallic doors having several locks, to have interphones at the entrance of the block of apartments, to fix video cameras, etc. They shall not inform their neighbours, friends, acquaintances, relatives or mates about the working time schedule or about their vacation period, etc.

References

- Agheniţei, Mihaela and Flămînzeanu, Ion. *Penal Procedure, Penal Law and Man's Rights in the International Law,* tom I The Socio-juridical culture - a factor of balance and stability in the periods of crises. (Bucharest: Universul Juridic Printing House, 2011).
- Bercheşan Vasile. *The Investigation of the Crime Scene - a Main Evidence in the Penal Prosecution* (Bucharest: LITTLE STAR Printing House, 2006).
- Cârjan, Lazăr and Mihai Chiper. *Forensics. Tradition and Modernism,* (Bucharest: Curtea Veche Printing House, 2009).
- Golunski, S.A. *Forensics,* (Bucharest: Scientific Printing House, 1961).
- Neagu, Ion; Damaschin, Mircea; Micu, Bogdan; Nedelcu, Constantin. *Penal Procedural Law. Seminar Portfolio,* ed. II-nd (Bucharest: Universul Juridic Printing House, 2011).
- Nechita, Elena-Ana. *Forensics. Forensic Technique and Tactics,* ed. II-nd (Bucharest: Pro Universitaria Printing House, 2009).
- Olteanu, Gabriel Ion and Ruiu, Marin. *Forensic Tactics,* (Bucharest: AIT Laboratories Printing House, www.itcode.ro, 2009).

[21] *Idem,* p. 133.
[22] *Idem,* p. 134.

- Stancu, Emilian. *Forensics,* (Bucharest: Universul Juridic Printing House, 2002).
- DEX – Explanatory Dictionary of the Romanian Language*,* ed. II-nd (Bucharest: Academy of Romania, Univers enciclopedic Printing House, 1998).
- Law no 15 of June 21, 1968 - Romanian Penal Code - published in the Official Gazette no 79-79 bis of June 21, 1968, republished in the Official Gazette no 55-56 of April 23, 1973, and then in the Official Gazette no 65 of April 16, 1997, with further amendments.
- Law no 29 of November 12, 1968 - Penal Procedural Code, published in the Official Gazette no 145 of November 12, 1968, the Official Gazette no 146 of November 12, 1968, republished in the Official Gazette no 78 of April 30, 1997, with further amendments.

THE PLEA BARGAIN, A "NEGOCIATION" BETWEEN THE PROSECUTOR AND THE DEFENDANT?

NADIA CANTEMIR*

Abstract:
The new Code of Criminal Procedure brings a new institution among special procedures "the recognition agreement." Those who can conclude this agreement are the prosecutor and the defendant. Will it be a fair negotiation? It provides sufficient guarantees to avoid being violated the defendant's rights? With this study we want to introduce the new elements of this special procedure, comparative aspects with other institutions or rules of criminal procedure from other countries. Last but not least, with the necessary modesty, we will criticize and we will make a proposal for law regarding the chosen theme.

Keywords: *Plea bargain, new code of penal procedure, prosecutor, defendant, reduction of sentence boundaries with 1/3.*

Introduction

This study aims to open a door to a newly established institution in the Romanian criminal procedural law, namely the plea bargain, under the regulation of Chapter I of Title IV of the New Criminal Procedure Code, chapter dealing with special procedures.

This study is of particular importance as we attorneys, interns, theorists need to be familiar with innovative elements that are covered in the New Code. We find difficult this small scientific approach but hope to take a step forward to the "new".

The need for a new codification in the criminal procedure, presentation of the institution, to break through the buncombe in order to reach the legislator's judiciousness theologically interpreting the legal text, the aspects that are comparable to other countries and why not criticism and also feedback to this procedure are the goals that we want to achieve. Taking into consideration that the Law 135 of July the 1st 2010 on the Criminal Procedure Code, published in the Official Gazette no. 486 of July the 15th 2010, is for the ones who accede to knowledge and should have stir a strong effervescence, there is no relevant doctrine on this subject. Few but important works, together with the comparative law, the explanatory memorandum of the law the rules of criminal procedure that we will interpret are ways in which we will try to answer the set objectives.

I. The context of the new regulations. Definitions.

In the explanatory memorandum[1], the current legal realities have revealed the lack of prompt conduct of criminal trials in general, mistrusts of litigants in the act of justice and the substantial social and human costs, meaning a high use of time and financial resources. All these aspects have led to the establishment of a climate of distrust in the effectiveness of the criminal justice act. The main issues that the criminal justice current system are facing are related to the overcharging prosecution and courts, the excessive duration of the proceedings, the unjustified delay of the causes and failure to complete the cases due to procedural reasons.

Therefore a legitimate question arises: was the new codification necessary in terms of criminal procedure? A famous professor, member of the drafting of the new criminal procedure code committee answered this question[2], "No, it was not necessary. The abbreviations have though a big flaw, as it can sometimes distort the meaning of what was meant to be expressed. I actually wanted to

* Ph.D. candidate, "Nicolae Titulescu" University, (email: av.nadiacantemir@yahoo.com).
[1] *Statement of reasons,* www.just.ro.
[2] ''*Nicolae Volonciu despre noul Cod de procedura penală'',* www.juridice.

say that it was not only necessary, but I would say a wider need is required". The new criminal procedure texts are harmonized with Mike Farkas's aphorism, "*the key is the one which creates music",* meaning that the buncombe language of the legislator is reduced, giving priority on the podium to a more accessible speech.

Therefore behind the New Code's curtain occur elements of negotiated justice: mediation, plea bargain and trial if the guilt is admitted. The expression of negotiated justice or consensual justice, as it is used, may be at first sight a paradoxical, contradictory expression in the context of criminal law and criminal procedure [3].

Thus, by "negotiated justice", it is understood the procedure in which the parties are allowed to intervene in a smaller or larger extent, in a positive or negative way, within the criminal proceedings, affecting through their approach the outcome of these procedures. The possibility conferred to the defendant to refuse or to accept certain proposals, isolated seen, is not likely to confer a negotiated kind of procedures. The emphasis is on the ability of the parties to submit the discussed aspects of criminal proceedings, with the power that through mutual concessions, to at least partially influence the content of those proposals, leading ultimately to a decision that represents the outcome of negotiations[4].

We draw the conclusion that the procedure is marked by three aspects: simplicity, efficiency, celerity. The new institution not only reduces the trial, but also simplifies the activity within the criminal investigation. The advantage of this procedure is of economic nature favoring almost all parts of a process, but the state is the one that has the best benefit since it has the possibility to save monetary and human resources that are absolutely essential to the needs of justice. Without neglecting the rights of the aggrieved person, the defendant has the opportunity to negotiate the terms of the agreement with his lawyer and thus to participate to the court in in determining the penalty. Such participation promotes the individual's dignity.

The plea bargain is an innovative legislative solution which will ensure solving cases within an optimal and predictable time and is also a remedy for elimination of deficiencies in the Romanian legal system, namely the long term conduct of court proceedings.[5]

II. Special procedure analysis regulated by the legislator within the Title IV, Chapter I, art. 478- art.488.

1. Holder of the plea bargain and its limits.

Reading the provisions of Article 478 of the New Criminal Procedure Code we notice that the main actors who bring to life an act of a play in the trial (plea bargain institution) are the prosecutor and the defendant. Thus, during the criminal investigation, after the prosecution starts, the defendant along with the prosecutor may conclude a plea bargain agreement. However, in order for this agreement to be admissible, its effects are passed through the filter of a hierarchically superior prosecutor for approval. It thus provides a guarantee to the defendant since the agreement cannot be completed with a conviction solution according to this urgent procedure in the event that the hierarchically superior prosecutor would notify some irregularities. This control also implies the fact that the agreement's limits are set by prior and written approval.

According to paragraph 3 of the same article, the agreement may be initiated by both the defendant and the prosecutor. In theory, one of the negotiated justice's prerequisites, also of "contractual" nature, is equality between the parties. Considering this contractual nature, almost private of the agreement, equality of arms deals with a whole new dimension compared to the

[3] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul no. 7/2010, p.188.

[4] See, F. Tulkens, M. Van der Kerchove, *La justice penale,* Brussels, 1999, p.124.

[5] *Statement of reasons,* www.just.ro.

traditional procedure, given that the essence of an agreement is not only equality of arms, but also equality between the parties[6].

The principle of equality of arms enshrined in the European Court of Human Rights involving the obligation to enable each party for a reasonable opportunity to present its case on terms which do not place a net disadvantage compared to its opponent.[7]

In specialized literature[8], it is supported the idea that the analyzed procedure is applicable in case of crimes for which the law provides at least 5 years of imprisonment (the discrepancy will be discussed below), and those who commit such crimes often come from the poorest strata of society, and especially of ethnic minorities. The author argues that those who are better prepared and armed negotiate best, and a defendant belonging to such categories does not receive any benefit, thus such court is likely to become a privileged instrument of domination of the weak by the powerful, being likely to exacerbate inequalities between the parties.

We dare not embrace this point of view because it should be noted that under the new Penal Code the penalty limits were substantially modified in the sense that they were lowered for most of the crimes. By way of example, the crime of theft in simple form is penalized under the current penal code with a penalty of between one and twelve years and in the new penal code, according to the provisions of Article 228, is penalized by imprisonment from six months to three years or a fine. Therefore, a limit of seven years by reference to the provisions of the new Penal Code constitutes an imprisonment sentence for a medium to severe crime. What balances the procedure if we accept the idea of a weak "negotiator" is the defender, considering the fact that such a procedure the legal assistance is compulsory.

In case the criminal proceedings were started for several defendants, the legislature allows the conclusion of a separate agreement with every one of them, without prejudice to the presumption of innocence for those who have used this facility. Unfortunately, consider that this regulation will cause a series of problems in practice. For example, we will have as many agreements as defendants are, will be disjunctions regarding the civil side of the case, and the separately vested courts will be unable to resolve the civil side when the defendant's liability is solidary. An indictment will be formed with regard to defendants for whom the plea was not made. Therefore, in this situation we cannot talk about the economy and celerity, the only actions will be the multiple files, in various stages, cropped state of act.

According to paragraph 6 of Article 478 the juvenile defendants cannot conclude plea bargaining agreements. Also in the specialized literature[9] the opinion was stated that this procedure should also be applicable to minors, this procedure being easily done with the consent of the legal representative and in the presence of a probation officer. We appreciate that the legislature felt the need to regulate such a provision taking into account the new changes in the field of juvenile criminal liability regime of the new Penal Code. Thus, the social defense reaction against juvenile delinquency cannot be reasonably and effectively accomplished by the same type of crimes as in the adult crimes. Therefore to the juvenile offenders one should applied a separate system of criminal sanctions, made up mainly of predominantly educational sanctions and only alternatively of repressive sanctions such as penalties. The progress made in both criminology and in other criminal science such as penology have set new guidelines for the criminal sentencing system generally,

---

[6] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010, p.194.

[7] See, M. Udroiu, O. Predescu, *Protectia europeana a drepturilor omului si procesul penal roman,* ed. C.H.Beck, Bucureşti 2008, p.658.

[8] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010, p.194.

[9] See , S. Siserman, *Consideraţii privind acordul de recunoaştere a vinovăţiei*, www.juridice.ro.

targeting the diversification of penalties, a strong focus on non-custodial penalties and the diversification of the means of penalties individualization and personalization. [10]

2.Subject, conditions, form and content of the plea agreement.

Pursuant to Article 479, the agreement's subject is the crime admitting and acceptance of the legal classification of the crime for which the prosecution was made and concerns the type and amount of penalties, as well as execution form. There seems to be a discrepancy between the way regulated by the legislature and the explanatory statement in the sense that the latter states that the agreement is subject to review by the court with regard to its object and conditions, and in case of plea the court will sentence the defendant to a penalty that shall not be greater than the one required by the prosecutor, by mutual agreement[11]. Reading Chapter I of Title IV we notice that there is no such regulation. We find that through this procedure the legislature gave the prosecutor, also the master of the following criminal investigation phase, more power, and in this manner could enter the judge's scope, setting the type, amount and form of penalty of the execution. In this respect, a notorious jurist argued that the prosecutor has become increasingly more forces, became increasingly powerful by unlimited and fast access to data and information, but this power was not balanced by increasing procedural safeguards, through the defense right and by strengthening the provisions on the innocence presumption. Unfortunately, the New Criminal Procedure Code further strengthens the power of the prosecutor.

Moreover, we notice that prejudice is brought to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the fact that the guilt of a person can be determined by an independent and impartial court of law. However, in this situation the master of the proceedings, in this case is not the judge as it is in a traditional court of law, but the prosecutor who does not comply with the objective impartiality requirements in the purposes of the Convention.[12]. We believe however that the judge's filter to which the agreement is presented, truthfully reflects on the principles governing the trial stage the contradictory and immediacy, is theoretically sufficient to compensate for any lack of impartiality of the prosecutor.

We consider that a state of law crowned by professionals serving altar of justice and bringing the contribution on both the prosecution and the defense side, may prove once again the mastery of the act of justice.

The first *sine qua non* condition concerns the special maximum penalty of imprisonment, namely seven years. Hence, no for any offense the defendant can "negotiate" his penalty, but with regard to offenses for which the law provides penalty of fine or imprisonment of up to seven years. This time we also find a discrepancy in the statement of reasons, in the meaning that the maximum limit is of five years. Given the above reasons regarding the penalty boundaries reduction in the new Penal Code, we consider that the majority of the crimes have a "vocation" through the defendant to be subject to this procedure.

This agreement may be concluded at an early stage of criminal investigations as it is necessary that out of the evidence showing the existence of sufficient data for which the criminal proceedings started regarding the defendant's guilt. The most important aspect to be mentioned is that the when concluding the plea bargaining agreement legal assistance is required. We meet therefore a new situation in which the defendant's legal assistance is mandatory, as provided in Article 90[13]. We

---

[10] See, G. Antoniu, *Explicaţii preliminare ale noului Cod penal,* ed. Universul Juridic, Bucureşti, 2011, p. 112.

[11] *Statement of reasons,* www.just.ro.

[12] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010, p.194.

[13] *See article 90, new Code of Criminal Procedure, mandatory legal assistance of the suspect or defendant: a) when the suspect or defendant is a minor, admitted to a detention center or a center of education, it is detained or arrested in another case even when it was ordered to safety measure hospital care, even in another case, and in other cases provided by law, b) if the judicial body considers that the suspect or defendant could not defend himself; c)*

ask ourselves how the defendant could agree to this procedure taking into consideration the fact that we are in the midst of criminal prosecution phase, which is governed by the non-publicity principle, in this way not having access to criminal prosecution files. Also the new Code of Criminal Procedure, in Article 94 regulates the file consulting institution. Thus, during prosecution, the prosecutor sets the date and duration of consultation within a reasonable time. We consider that in order to give effective recognition of the institution, the defendant must be allowed to study the case together with a counsel and take a decision afterwards. To proceed in other ways would bring prejudice to Article 6, paragraph 3 of the Convention which stipulates the defendant's right to be informed, in detail, not only with regard to the cause of the accusation, namely the material facts of which he is accused and on which the accusation is founded, but also and with regard to nature of the prosecution, namely the legal classification of the case.[14] .

For the sincere attitude of the defendant, for the celerity of criminal prosecution phase conduct, it benefits from reducing by one third the limits prescribed by law for punishment penalty of imprisonment and one quarter reduction to the penalty limits provided by law in case of fine penalty. We notice that the defendant "takes benefit" of the same treatment as in the plea bargain case in the trial phase, according to Article 320 index 1 of the current Code of Criminal Procedure, similar institution.

The plea agreement must be concluded in writing and include the following elements: date and place where it is concluded, name surname and the capacity of those who conclude it, data regarding the defendant, description of the crime which is the subject of the agreement, the legal classification of the crime and the penalty provided by the law, the evidence and means of evidence, the explicit declaration of the defendant in which he recognizes having committed the crime and accepts the legal classification for which the criminal proceedings started, the prosecutor's demands, signatures of the prosecutor, the defendant and the lawyer.

3. Procedure in the law court: referral, adjudication, settlement.

Following the conclusion of the plea bargain, the prosecuting attorney approaches the Court to which belongs the authority to judge the respective case, and communicates all the material prosecution agreement hitherto investigated. The problem arises in a situation where we have more criminal acts of the same person and several defendants. |In this situation, the referral is made separately with regard to the defendants and other offences, but this time the prosecutor shall send the court of law the documents relating to criminal acts and those which were the subject of the agreement. We consider that in this situation, the idea of sending a truncated file trial to the court of law, out of which certain evidence cannot be taken in order to determine whether or not the defendant's guilt is mistaken. We consider that entire file must be sent to the court of law and not fragments of it, in order for the judge to give efficiency to the truth establishing principle and to take a judgment in relation to judicial truth.

With regard to the civil action performed in criminal proceedings, if the defendant, the civil party and civilly responsible party conclude a transaction or a mediation agreement, they are presented to the court of law by the prosecutor with the plea agreement. In our opinion, the transaction or mediation agreement should be integrant part of the plea agreement, meaning that the legislature may regulate the content of Article 482 regarding the agreement and aspects of civil action and way of termination at this stage of proceeding. We state this opinion because just the idea of plea with regard to a criminal offence, the defendant's regret and desire to compensate for the injury suffered by an individual are prerequisites in the conclusion of such an agreement. We do not share the idea [15] according to which the regulation that would have been more accurate if it was

---

during the trial in cases where the law provides for the offense penalty of life imprisonment or imprisonment of more than five years.

[14] See ECtHR., Judgement of 23rd March1999, in case *Pelissier & Sassi v.France, paragr. 51.*

[15] See, S. Siserman, *Proiectul noului Cod de procedură penală,* Revista de Drept Penal no. 3/2009, p. 41.

stated that the compensation for the injury is a prerequisite for acceptance of the agreement. Such a criminal procedure provision would have limited the defendant's possibility who could not afford, for objective reasons to settle the civil side, the title in concluding the plea agreement.

The procedure before the court of law is conducted as follows: if the agreement lacks one of the compulsory particulars referred to in Articles 481-483 of the form, content and notification of the court, the judge decides to cover the omissions within a time limit of 5 days. The decision of the court of law regarding the coverage of the agreement's irregularity notifies the head prosecution who issued the plea agreement.

The type of decision which given by the court of law is a judgment. The new aspect in the criminal procedures is that the court is acting by judgment, followed by un-contradictory proceedings, in open court, after hearing the prosecutor, the defendant and his lawyer as well as the civil party if present. Thus we talk about non-contradictory proceedings before the court of law. At first sight we could say that is an exception to the principle of contradiction, but we must not forget that we are in the first phase of trial, the prosecution, which is limited, among others, by the principle non-contradiction. Therefore, the legislature intended that the proceedings before the court of law to be a formal one, in which the judge shall be responsible only to entrench the defense and prosecution bargain or they can go through their own filter of the plea agreement? In our opinion, considering how the whole procedure is regulated, the judge appearance is a formal stage of this institution. Prejudice is brought to the truth establishing principle by this non-contradictory procedure, because if the defendant was under pressure in front of the prosecuting authorities and forced to recognize an act that was not committed, he cannot reconsider the agreement before the court of law. The possibility of different opinions before the court of law makes the procedure become inconsistent. The court must find the *ex propiis sensibus*, through the declaration that is made by the defendant and by analyzing all evidence that the plea agreement is an uncorrupted manifestation of the defendant and it is not about an occult "arrangement" between the prosecutor and the defendant, or between the participants to the criminal activity in order to hide more serious offenses or to hide the true perpetrator. The judicial compromise as a form of plea agreement cannot be conceived as a means for concealing the truth, but as a way to avoid prolonging the trial when the real culprit is largely identified through the already provided evidence.[16]

Analyzing the agreement, the court of law may issue one of the following solutions:

- accepts the plea agreement and sentences the defendant to a term of imprisonment or a fine whose limits were reduced with either a third or a quarter if they meet the conditions for substantive and formal regulated in Articles 480-482, on all the offenses incriminating the defendant who made subject of the agreement;

- rejects the plea agreement and sends file to the prosecutor for further prosecution, if the conditions for and formal regulated in Articles 480-482.

Also, the court may accept the agreement only with regard to some of the defendants, and also may reject its own motion agreement with regard to the defendant's arrest. In the same judgment the court of law also pronounces the legal costs.

We note that in this case the legal text runs counter with the explanatory memorandum [17] stating that the agreement is subject to review by the court of law regarding to its object and concluding conditions, and where admission sentencing court shall order the defendant to a term not may be greater than that requested by the prosecutor in agreement. It is deficient the regulation regarding the plea agreement and the imposition of a sentence whose limits were reduced, meaning that we do not know whether the court can "validate" understanding, but to act on the penalty proposed by the prosecution and the defense. For example, suppose that the defendant committed the

[16] See, G. Antoniu, *Observaţii la proiectul Noului cod de procedură penală (IV),* Revista de Drept Penal no. 3/2009, p. 12.

[17] *Statement of reasons,* www.just.ro.

offense of cheating punishable with imprisonment from 6 months to 3 years, according to new Criminal Code. The prosecutor is the one proposing a plea bargain, decides for a penalty of 1 year imprisonment with execution, taking into account that the offense penalty limits are reduced by one third. Afterwards the court of law is seized with this agreement, and the judge, according to regulation, accepts or rejects the agreement. If the court of law considers that the conditions are being fulfilled, but the punishment of 1 year imprisonment is too high and requires a smaller sentence, or chooses as means of implementation the suspension by supervision applies or rejects such penalty? Analyzing the code provisions it should be rejected. In our opinion, such an interpretation would be absurd, and the text should be amended so that the court of law could either fully accept and validate the agreement was concluded, or be partially accepted, being able to modify it only in favor of the defendant, or modify it if the conditions are not being met. We consider that this is a fair solution, because the judge is in top judicial bodies, watches and also contributes to the judicial truth, being the arbiter between the defense and the prosecution, due to its impartiality and its tenure. According to Article 2 Law 304/2004, justice is carried out in the name of law, is unique, impartial and equal for all, being accomplished through the courts of law.

On resolving the civil side in this special procedure, we find that through the court makes the sentence if a mediation or transaction agreement is concluded, or may decide the split of the civil action and send them to the competent court according to civil law, where its resolution would hold trial solution. We also notice that the presence of civil party does not make reference to the plea agreement in court but it can be heard, if present. Thus we can draw the conclusion that its presence is compulsory in court. The new aspect consists in that the criminal court can disjoin the civil action but which is competent to solve it but it is no longer a civil court, but a criminal one.

The judgment shall include in addition to the mandatory particulars listed for all decisions also the offence for which the plea agreement was concluded and its legal classification. We consider that the legislature would have to establish that the judgment should be also comprised of references concerning the conclusion of a mediation agreement or a transaction relating to a civil action.

To proceed against an accepted or rejected judgment of a plea agreement is by means of appeal. Thus, the decision may be appealed within 10 days from the notification. According to Article 407 of the new Code of Criminal Procedure, after delivery, a copy of the minutes of the decision shall be forwarded to the prosecutor, the parties, the injured party, and if the defendant is arrested in the administration of the detention, for exercising the appeal. After drafting the judgment, they shall communicate the decision as a whole.

III. The institution of plea agreement in light of other legal systems

In the explanatory memorandum it is stated that several European countries (Germany, France, Belgium, Greece) have adopted in their legislation procedures are similar to the plea agreement. The project took elements from the French and German criminal justice systems and adapted them to the Romanian judiciary system.

The most representative system in which the "negotiated justice" is applied can be found in United States of America law, doctrinaires preferring this procedure with a contract.[18] The origin of the institution is found throughout the American people, where in the early twentieth century, for pragmatic reasons, in order to facilitate the work of the courts of law, "the plea bargaining" was born. Formally recognized in 1960, this institution appeared in the common-law system and was also taken in the Roman-Germanic legal system. If the principles are the same everywhere - an agreement between the parties that is presented for consideration by a judge – the application techniques vary from one system to another.

[18] See, R. E. Scott, W. J. Stunz, *Plea barganing as a contract,* 1992, p. 101.

In the American system, the subject of negotiation may be a penalty, the *sentence bargaining,* in this case being a vertical agreement that requires the judge, the *change barganing*, in this case being a horizontal agreement between the accused person and the prosecutor, the latter being able to either drop the charges or amend charges.[19]. In the U.S., approximately 90% of convictions are based on this type of recognition. Regarding the offenses which may fall under negotiation, it is admitted that anything can be subject to that institution. There are still states that refuse to grant defendant's right to plead guilty if they had committed a serious crime for which imprisonment is applicable in perpetuity, or for sensitive crimes (use of firearms, driving under the influence of alcohol or drugs products), federal crimes (treason, espionage). The demand or supply can be expressed on the eve or the morning of the hearing, or immediately before delivery of the verdict by the jury.[20] The judge has the task of checking whether the plea was immediate, if the defendant understands all the implications it has this manifestation of will, and that he did not act under the influence of threat, force or promises.

In Japan, the negotiation is applied to 70% of cases. Given that this guilt is established in the criminal prosecution made by the prosecutor, the judge's role being much diminished, defendants often prefer to follow the path of negotiation.

This procedure had a strong echo in the European criminal law, which emerged within the Recommendation R (87) 18 of 17 September 1987 of the Council of Ministers of the Council of Europe concerning the simplification of criminal justice.

In Germany, the principle, inquisitorial, which requires the authorities of truth finding, seems at first sight incompatible with the idea of negotiated justice. However, the special procedure of plea agreement recently underwent an upward trend to accelerate procedures. The *informal arrangements, informelle Absprachen,* are established between the accused lawyer, prosecutor and judge, and in exchange for recognition of facts from the defendant, the judge is obliged to reduce the sentence, exempt from the duty to also establish the offenses based on the evidence and to ascertain the legality and credibility of the evidence means.[21]

In the United Kingdom, although there is no explicit legal regulation of the practice, the procedure follows the American model with two types *charge bargaining* and *sentence bargaining.*

In Italy, there are two special procedures based on legal recognition of understanding the effects that occur between the accused and the prosecutor. Therefore,[22] for the first procedure, if the person is accused of committing a crime for which the law provides an imprisonment sentence of less than two years, or this, the prosecutor can ask the judge to impose a penalty on which they mutually agreed. The second procedure *giudizio abreviato,* if the first procedure, if the person is accused of committing a crime for which the law prescribes a prison sentence of less than two years, whether or prosecutor can ask the judge to impose a punishment on which they agreed. Decision may be one of acquittal or of conviction, but the penalty is reduced by one third, without that last sentence to the convicted criminal record.

In the French law it is provided a special procedure consisting in the possibility of negotiations but only on minor offenses, *comparetion immediate*, of maximum 5 years or a fine. The offender is given a 10 days reprieve to accept or reject this offer. The judge has the right to modify the agreement, having only opportunity to approve it or not.

---

[19] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010, p.188.

[20] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010, p.190.

[21] See, F. Tulkens, *Negociated justice,* Cambridge University Press, 2002, p. 663.

[22] See, M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010, p.192.

IV. Conclusion

"The negotiated justice", is without doubt an alternative to the conflict resolution in the context of too many courts of law. The special procedure of plea bargaining is perfectible but praised the legislature's intention to line up our laws to the European countries.

The U.S. Supreme Court recognizes the "negotiation" as an "essential component of justice which, if well managed, should be encouraged." On the contrary, if the provisions of criminal procedure violated the defendant's rights and the purpose of this procedure can be played by a Russian proverb "the pure way, sincere recognition, directly to jail."[23]

Through this special procedure will be solved the major problems the criminal justice system is facing namely the overloading of the prosecution and courts, the excessive length of certain proceedings, the unjustified delay of the causes and completion of the files on procedural grounds.

Every beginning starts with a handicap because the unknown is hard to decode. I look forward to bubbling in specialized legal literature on the institution of plea bargaining for students, practitioners and the curious who to understand both the letter and spirit of the law.[24]

As philosophers held that the touchstone of truth is practice[25], our wish is that the new Code of Criminal Procedure to take effect and that this new institution to overcome difficulties beginning and gradually open the way to European values leaving excessive nature of the inquisitorial exacerbated system of the communist period.

References

- Constituţia României, publicată în Monitorul Oficial, Partea I, nr. 767 din 31.10.2003.
- Codul de procedură penală al României, publicat în Monitorul Oficial, Partea I, nr. 78 din 30.04.1997, versiune modificată prin Legea nr. 202/2010, privind unele măsuri de accelerare al soluționării proceselor.
- Noul Cod de procedură penală al României, adoptat prin Legea 135/2010, publicată în Monitorul Oficial nr. 486 din 15.07.2010.
- Codul penal al României din 16.04.1997, versiune modificată prin Legea nr. 202/2010, privind unele măsuri de accelerare al soluționării proceselor.
- I. Neagu, *Tratat de procedură penală, Partea generală,* Editura Universul Juridic, Bucureşti, 2010.
- I. Neagu, *Tratat de procedură penală, Partea specială,* Editura Universul Juridic, Bucureşti, 2009.
- G. Antoniu, C. Bulai, C. Duvac, I. Griga, G. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Paşca, O. Predescu, *Explicaţii preliminare ale noului Cod penal, Vol.I,* Editura Universul Juridic, Bucureşti, 2010.
- G. Antoniu, C. Bulai, C. Duvac, I. Griga, G. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Paşca, O. Predescu, *Explicaţii preliminare ale noului Cod penal, Vol.II,* Editura Universul Juridic, Bucureşti, 2010.
- M. Udroiu, O. Predescu, *Protecţia europeană a drepturilor omului şi procesul penal român,* Editura C.H.Beck, Bucureşti, 2008.
- M. Nemeş, *Justiţia negociată în contextul dreptului penal din perspectiva Drepturilor Omului,* Revista Dreptul nr. 7/2010.
- F. Tulkens, M. Van der Kerchove, *La justice penale,* Brussels, 1999.
- S. Siserman, *Consideraţii privind acordul de recunoaştere a vinovăţiei*, www.juridice.ro.
- *Nicolae Volonciu despre noul Cod de procedura penală ,* www.juridice.ro.
- R. Stănoiu, în cadrul *Conferinţei Internaţionale privind noua legislaţie penală*, Institutul de Cercetări Juridice, 26.10.2012.
- P. Buneci, *Simplificarea reglementărilor privind activitatea de urmărire penală şi accelerarea procedurilor în cadrul acordului de recunoaştere a vinovăţiei,* Institutul de Cercetări Juridice, 26.10.2012.
- V. Păvăleanu, *Sugestii în legătură cu elaborarea unui nou Cod de procedură penală,* Revista de Drept Penal, 1/2008.
- G. Mateuţ, *Medierea penală,* Revista Dreptul, 7/2007.

[23] See S.Cazacu, *Acordul de recunoaştere a vinovăţiei, procedură fariseică?,* www. sergiucazacu.com.
[24] ''*Nicolae Volonciu despre noul Cod de procedura penală''*, www.juridice.
[25] See, www.limbalatină.ro.

- S. Siserman, *Proiectul noului Cod de procedură penală,* Revista de Drept Penal nr. 3/2009.
- G. Antoniu, *Observaţii la proiectul Noului cod de procedură penală (I),* Revista de Drept Penal nr. 4/2008.
- G. Antoniu, *Observaţii la proiectul Noului cod de procedură penală (IV),* Revista de Drept Penal nr. 3/2009.
- R. E. Scott, W. J. Stunz, *Plea barganing as a contract,* 1992.
- F. Tulkens, *Negociated justice,* Cambridge University Press, 2002.
- S.Cazacu, *Acordul de recunoaştere a vinovăţiei, procedură fariseică?,* www. sergiucazacu.com.
- www.limbalatină.ro.
- www.juridice.ro.
- www.just.ro.

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE NULLITIES IN THE ROMANIAN CRIMINAL TRIAL

MIRCEA DAMASCHIN[*]

Abstract
In the present study we are going to analyse the regime of the nullities in the Romanian criminal trial. This presentation will take into consideration the Criminal Procedure Code in force (adopted in 1968), the doctrine and the practice of the courts. Also, we took into consideration the new provisions of the Criminal Procedure Code which is going to enter into force in 2014. This study is focused on analysing the distinctive regime of the absolute and relative nullities and illustrating the situation in which absolute nullities do not lead ope legis to the annulment of the acts set up without respecting the requirements. In this way, we are going to analyse the situation in which in spite of absolute nullities existence, this sanction can be disregarded and the criminal trial will follow its course.

Keywords*: criminal procedural sanctions, criminal trial, absolute nullities, relative nullities, initiation of proceedings before the court*

1. Introduction. In the Romanian criminal trial, the most frequent situations which imply procedural errors are met in relation to the sanctioning of nullity, in both its forms, i.e. relative nullity, respectively, absolute nullity. It is true that there are numerous legal hypotheses which imply the sanctioning of delay or inadmissibility and which imply that, however, nullities represent the most frequent cases of sanctioning illegal pursuance of processual or procedural acts. Thus, in criminal trials, not only nullities, but also forfeiture of rights is *expressis verbis* regulated (forfeiture of rights sanctions delayed exercise of certain rights), as well as the sanction of inadmissibility (which takes into consideration the hypotheses that certain processual rights are exercised by persons who do not have a processual quality or the situation in which certain acts of disposal are appealed although there is not legal framework for exercising those means of appeal).

Nullity, as a procedural sanctioning, in its two regulatory forms, is provided by Article 197 of the *Criminal Procedure Code* (hereinafter referred to as *C. pr. c.*). The two categories of nullities are defined differently; thus, the criminal processual law points out a set of particularities that will be detailed in our study. In this section we only make reference to the fact that absolute nullities pose a nullifying character and are explicitly provided by the law, whereas relative nullities are not explicitly set forth and, in many circumstances, may be covered, which means that they actually produce no legal effects.

In the present research we intend to prove that even if absolute nullities cannot be covered, considering the presumption of damaging certain processual interests, in practice, in several hipotheses, the existence of absolute nullities does not lead to the annulment of the acts that were accomplished in this manner, while these acts continue to produce legal effects. In most cases, as we are going to see in our analysis, the possibility of "ignoring" the sanctioning of absolute nullity is legally grounded. Similarly, we are going to point out the existence of hypotheses that may convert absolute nullities into relative nullities (as regards the produced effects), cases in which processual damage, even if presumed, is effectless, while the trial continues; we are also going to point out hypotheses that may lead to the convertion of relative nullities into absolute nullities (as well as the consequences that derive from this convertion).

[*] Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: damaschin.mircea@gmail.com).

2. Nullities: concept and classification. Particular aspects of absolute and relative nullities. According to Romanian specialty literature[1], nullities are the most important procedural sanctions and they may occur during the criminal trial (and even after the trial is over, through an extraordinary means of appeal) any time a processual or procedural act is pursued without strictly observing the law.

The sanctioning of nullities affect procedural or processual acts that were pursued without observing the law. According to specialty literature[2], the existence of nullities as procedural sanctions in Romanian criminal processual law is closely linked to an act of processual damage, which must have been produced by pursuing a particular act under illegal conditions. In this respect, Article 197 § (1) of the *C. pr. c*. stipulates that the infringements of legal provisions that regulate the pursusance of the trial produce the nullity of the act only when they result in damage which cannot be removed unless that act is cancelled.

Under these conditions, one can infer that not any infringement of the criminal processual law can lead to the annulment of the act that was pursued in an improper manner.

As we have mentioned above, nullities can be classified, in relation to the effects that they may generate, into absolute and relative nullities.

Absolute nullities occur in those cases that are explicitly provided by criminal processual law, i.e. by Article 197 § (2) of the *C. pr. c*. (from this perspective, they are also known as *express nullities*) and can be invoked at any time during the trial and by anyone. Absolute nullities can also be invoked ex officio.

Relative nullities are incidental, and they occur whenever a legal provision – apart from the ones stipulated by Article 197 § (2) of the *C. pr. c*. – is infringed, for they are not explicitly set forth by criminal law (under these circumstaces, they are considered *virtual nullities*).

Those presented above reveal a first particular difference between absolute and relative nullities. Thus, if absolute nullities are explicitly regulated – through a limitative enumeration – by Article 197 § (2) of the *C. pr. c*., relative nullities reflect any infringements of the criminal processual law apart from those mentioned in Article 197 § (2) of the *C. pr. c*.[3]

Thus, absolute nullity sanctioning is applied for: the infringement of norms regarding subject matter competence or the competence of the person, as well as the infringement of norms regarding the notification of the court of law and the composition thereof, the public character of the trial, the prosecutor's participation, the presence of the accused or of the culprit, the assistance offered to the accused / culprit by the defense counsel, whenever these are compulsory according to the law, and, finally the infringement of the norms regarding the drawing up of the assessment report in juvenile cases. Apart from these provisions, the regime of relative nullities lacks an explicit regulation in Article 197 § (1) *C. pr. c*., according to which the infringements of legal provisions regarding the pursuance of the trial (provisions that are different from the ones stipulated by § 2) generate the nullity of the act only when the produced damage cannot be removed except for annulling that act.

We would also like to underline that the Romanian lawmaker does not use, in Article 197 § (2), the expression "absolute nullity"; however, both specialty literature and judicial criminal bodies unanimously state that the norms which regulate the institutions provided by Article 197 § (2) fall under the category of absolute nullity.

Secondly, the regime set up for the damage caused through the infringements of legal provisions is a distinctive element as regards the two forms of nullity. Thus, absolute nullity leads to the identification *de plano* of the processual damage, which is presumed *juris et de jure.* Thus, the

---

[1] I. Neagu, *Tratat de drept procesual penal. Partea generală*, second edition, revised and completed, Editura Universul Juridic, Bucureşti, 2010, p. 668; see also, N. Volonciu, *Tratat de procedură penală. Partea generală, vol. I*, Editura Paideia, Bucureşti, s.a., p. 266.

[2] I. Neagu, *op. cit.*, p. 669.

[3] Gr. Theodoru, *Tratat de drept procesual penal*, Editura Hamangiu, Bucureşti, 2007, pp. 498-499.

one who invokes nullity does not have to prove the existence of the damage, while proving the infringement of the legal norm which falls under absolute nullity sanctioning regime is sufficient. If damage is presumed for absolute nullity and its existence is beyond doubt, damage must be proved for relative nullity. Thus, for the infringement of other legal provisions than the ones set forth by Article 197 § (2) to lead to relative nullity sanctioning it is necessary to adopt a supplementary measure whose role is to prove the existence of processual damage, which was caused either through the aggrievance of the parties' rights during the trial or through the wrongful pursuance of the trial.

Thirdly, the difference between the two categories of nullities is also due to the regime of the criminal processual law infringement. Thus, relative nullities are considered only if they were invoked by the person whose processual rights were aggrieved. The person who invokes nullity must prove the damage caused through the infringement of the law during the pursuance of the processual or procedural act. As regards absolute nullities, they can be invoked by any party in the trial and are taken in consideration even ex officio.

Last but not least, absolute and relative nullities are differently regulated as regards the moment when they can be invoked during the trial. Thus, relative nullities can be invoked only while the act is pursued, when the party is present or at the first trial date with full procedure. One can identify, consequently, a temporal confinement of the right to invoke the infringement of criminal processual norms, while it is presumed that by effectively getting over these processual moments the damage that could have been retained was covered by the silence of the party interested in invoking it.

On the contrary, absolute nullities can be invoked at any time during the trial and cannot be removed in any way.

3. Processual hypotheses in which procedural flaws provided under absolute nullity do not determine the occurrence of the sanction. In the next lines we are going to make reference to situations in which, according to the criminal processual law provisions, identification of absolute nullities does not determine the removal of the acts which were pursued improperly, while the trial continues and is not affected by absolute nullity.

3.1. Infringement of norms related to subject matter competence and the quality of the person. Defined as the fundamental form of competence whereby trials are distributed between criminal judicial bodies of different degrees, subject matter competence falls under absolute nullity, as a consequence of the fact that it must ensure a legal administration of the act of justice as regards the nature and seriousness of crimes.

As regards the competence in relation to the quality of the person, this is defined as the legal criterion according to which certain judicial bodies settle certain criminal causes depending on the qualities that the wrong-doers have[4].

The regime set up by Article 197 § (2) of the *C. pr. c*. as regards subject matter competence, respectively competence in relation to the quality of the person, is also provided by Article 39 § (1) of the *C. pr. c*., according to which the exception of material non-competence and the non-competence related to the quality of the person may be invoked in the whole course of the trial until the judgement is delivered.

The provisions that set forth subject matter competence are both the norms that regulate the jurisdiction of courts of law and the norms that regulate the competence of criminal investigation bodies. In consequence, when it is found that the criminal investigation and the judgement of the case infringed the norms related to subject matter competence, the acts pursued by the investigation body which lacked competence in the matter are subject to annulment.

[4] I. Neagu, *op. cit.*, p. 360.

However, even if processual damage is presumed *juris et de jure*, the Romanian lawmaker, in order to confer trials a more dynamic nature, has included in the criminal processual law provisions that are meant to render effectless the infringement of legal provisions related to subject matter competence. Thus, first of all, in conformity with Article 42 § (2) of the *C. pr. c*., if declining was due to subject matter competence or to the quality of the person, the court of law that is trying the cause may use the accomplished acts and maintain the measures imposed by the dismissed court. In other words, the acts pursued by the court of law that did not have subject matter competence will be maintained for the cause insofar as the competent court of law decides so even if absolute nullity occurs. The provision stipulates that criminal investigation bodies must apply these acts, as well, according to Article 45 § (1) of the *C. pr. c*. related to Article 42 § (2) of the *C. pr. c*.

In this respect, one can also analyse the provisions of Article 268 of the *C. pr. c*., which sets forth the procedure that is applied in case the file is sent by the prosecutor to the competent criminal investigation body if it is found that the criminal investigation was pursued by a non-competent body. Thus, in such cases, the measures that were taken remain valid, as well as the processual acts or measures that were confirmed or approved by the prosecutor; the same is true for processual acts which cannot be pursued again. In comparison with Article 42 § (2) of the *C. pr. c*., the context described by Article 268 *C. pr. c*. only maintains acts or measures that comprise the prosecutor's decision, respectively those measures and acts that cannot be pursued again. We also took into consideration the assurance measures that can be enforced only by the prosecutor during the criminal investigation stage.

The provisions of Article 332 § (1) *C. pr. C*. also set forth the legal hypotheses in which the occurrence of absolute nullity does not lead to the annulment of pursued acts or enforced measures. Thus, this legal text stipulates the possibility of dismissing the file of the cause by the court to the prosecutor insofar as it is found that in that cause the criminal investigation was pursued by another body and not by the one which had competence and on condition that judicial investigation is not completed. *Per a contrario,* if during oral debates it is found that the criminal investigation was pursued by infringing the norms regarding subject matter competence or the quality of the person, the sanction of absolute nullity cannot intervene. In this case, absolute nullity is covered through the complete pursuance of the judicial investigation.

We can notice, by analysing Article 332 § (2) of the *C. pr. c*., the inconsistency of legislation which makes it possible for a file to be dismissed and for the criminal investigation to be pursued again if subject matter competence or competence related to the quality of the person are not observed, even if the two cases of absolute nullity are regulate in § (1) of Article 332 *C. pr. c*. as well.

3.2. Infringement of norms related to the notification of the court of law. This instance of absolute nullity refers to the infringement of legal provisions that regulate the notification of the court of law [accomplished through indictment or the aggrieved person's complaint or through the complaint of any other person whose interests were aggrieved as provided by Article 278^1 § (9) of the *C. pr. c*.] or the supplementary notification of the court (which is accomplished by extending criminal action to new material acts).

According to specialty literature the following provisions on subsequent notification[5] are considered relevant for the hypothesis of „court notification": action for annulment [Article 379 § 2 letter c)]; declining of jurisdiction (Article 42); judgement for settling the jurisdiction conflict [Article 43 § (9)]; change of venue [Article 55 § (1)].

Subsequent to confirming the infringment of norms related to subject matter competence or to the quality of the person, there are regulated exceptions for court notification, according to which

[5] N. Giurgiu, *Cauzele de nulitate în procesul penal,* Editura Ştiinţifică, Bucureşti, 1974, pp. 242-245.

absolute nullity does not have an incidental nature even if norms regulating notification were infringed.

Thus, according to Article 300 of the *C. pr. c*., if the court finds that the notification was not legally conceived and that this inconsistency cannot be removed at once, neither by establishing a deadline for this purpose, the file is resent to the prosecutor for the latter to draw up again the notification act. In other words, absolute nullity does not intervene *ope legis*, since it is necessary for more chronological stages to be pursued: 1) identifying the improper nature of the notification act; 2) finding that it is impossible to remove the identified inconsistency at once (at the moment when the consistency of the notification act was discussed); 3) identifying the impossibility to remove the inconsistency by establishing a trial date. Absolute nullity is enforceable only if it is found that the procedure flaw cannot be removed unless the file is submitted again.

In this respect, in the Supreme Court jurisprudence we identify the same manner of settling appellate review in the interest of the law. Thus, it has been held, when enforcing provisions of Art. 264 § (3) of the *C. pr. c*., that the indictment must contain the reference „verified as regards legality and grounds". The lack of this reference makes the notification act inconsistent with the law, under Article 300 § (2) of the *C.pr.c*.; thus, the notification may be removed, as the case may be, immediately or at an established term. Consequently, in such a situation, the court will enforce the procedure set up by Article 300 § (2) of the *C. pr. c*.; absolute nullity can be invoked only insofar as the procedural flaw cannot be removed[6].

3.3. Infringement of norms regarding the drawing up of the assessment report for juvenile causes. The obligation to draw up an assessment report is one of the special dispositions which are enforced for the investigation and judgment of juveniles.

Prior to the modifications brought by Law no. 356/2006, the drawing up of the assessment report was compulsory both for the criminal investigation stage and for the trial stage. Thus, in the light of the provisions that had been set forth before 2006, the criminal investigation of juvenile crimes could not lead to a trial without the juvenile assessment report. The presumption according to which the lawmaker imposed the obligation to draw up the assessment report required that it was compulsory for the juvenile to undergo this assessment before being summoned. In other words, the prosecutor's decision to serve a writ of summons had also to be grounded on the results of this assessment process. If the criminal investigation file is submitted to the court in the absence of the assessment report, the court of law will have to deal with this omission and the judge has the obligation to impose the drawing up of the assessment report.

In conformity with Article 12 of the Ordinance no. 92/2000[7], the assessment report contains data about the accused or the culprit, his / her level of training, behaviour, factors that influence / might influence his / her behaviour, as well as his / her chances to be socially reintegrated. When the report is drawn up, the probation service may collaborate with psychologists, educators, sociologists, physicians or other specialists according to the recommendation of competent authorities.

The authority which has competence to assess the juvenile, i.e. probation services, is considered to lack the functional capacity to provide these reports to the criminal investigation bodies; according to Law no. 356/2006, the assessment report is compulsory during the trial, because it provides the court of law an instrument which individualizes the punishment. Consequently, the

---

[6] The High Court of Cassation and Justice, United Sections, Decision no. 9/2008, published in the Official Gazette of Romania, no. 831/2008.

[7] See Ordinance no. 92/2000 on the organization and functioning of social services for the reintegration of criminals and the surveillance of non-custodial punishments (Official Gazette of Romania no. 423/2000). This normative act was altered by Law no. 123/2006 on the statute of probation service personnel (Official Gazette of Romania no. 407 / 10th May 2006), in the sense that this institution was to have a different name (probation service instead of service for protection of victims and social reintegration of criminals, probation directorate instead of directorate for the protection of victims and social reintegration of criminals).

drawing up of the report for the assessment of the juvenile criminal has become facultative during the criminal investigation stage and its use depends on the prosecutor.

Subsequent to these modifications, one can notice that the violation of norms related to the drawing up of the assessment report for causes that imply juvenile offenders brings about the sanction of absolute nullity only insofar as the assessment report is absent during the trial. In consequence, according to the legal provisions (Article 482 of the *C. pr. c*.), criminal investigation for juveniles may be pursued in the absence of this assessment, and the sanctioning does not apply.

4. Hypotheses in which relative nullities are transformed into absolute nullities. According to the regime of relative nullities the sanction can be invoked whenever any legal provisions apart from those laid down by Article 197 § (2) *C. pr. c*. were infringed on condition that the produced damage cannot be removed outside the annulment of that act. Nullity can be invoked, as we have pointed out, only if it was invoked during the pursuance of the act, when the party is present or at the first trial date with complete procedure if the party was absent during the pursuance of the act.

However, the last part of Article 197 § (4) of the *C. pr. c*. stipulates that the court of law considers ex officio the infringements that occur at any time during the trial if the annulment of the act is necessary for finding out the truth and for fairly settling the cause.

According to this norm relative nullity can lead to invoking the application of absolute nullity. Thus, even if procedural flaws are not provided in the explicitly limited framework of Article 197 § (2) of the *C. pr. c*., absolute nullity of the act or of the measure can be invoked provided that *it is found that the annulment act is necessary for finding the truth and the fair settlement of the cause.*

In this respect, for example, procedural flaws – which are identified when the criminal investigation material is presented – fall under the sanction of relative nullity since this type of infringement is not provided by Art. 197 § (2) of the *C. pr. c*. However, insofar as the criminal investigation material is not presented to the culprit and this procedural flaw is corroborated with the extension of criminal investigation for a new crime and the culprit is not informed about it, one can invoke the aggrievance of the right to defence during the criminal investigation. In this situation, we appreciate that it is possible for the absolute nullity to be invoked.

5. Conclusions. In the present study we have attempted to prove that relative and absolute nullities may overlap as a consequence of the fact that the legal regime set up by the provisions of the Criminal Procedure Code is different for the two categories of sanctions that imply numerous particularities.

Thus, from a legal point of view it is possible – under certain conditions – for absolute nullity to be converted into relative nullity and, in other cases, for relative nullity to be converted into absolute nullity. By making reference to criminal processual norms and jurisprudence, we have proven that absolute nullity does not necessarily lead, even when identified, to the disposal of the performed acts or of the illegally adopted measures. From the same point of view, i.e. the perspective that points out the way in which relative nullity may be invoked under the regime of an absolute nullity, one can notice that there are situations (indefinite situations that are ruled by the need to settle the cause in a fair way and to find out the truth) in which procedural flaws that fall into the category of relative nullity lead to the disposal of processual acts or measures.

References

- Giurgiu Narcis, *Cauzele de nulitate în procesul penal,* Editura Ştiinţifică, Bucureşti, 1974.
- Neagu Ion, *Tratat de drept procesual penal. Partea generală*, ediţia a II-a, revăzută şi adăugită, Editura Universul Juridic, Bucureşti, 2010.

- Theodoru Grigore, *Tratat de drept procesual penal*, Editura Hamangiu, Bucureşti, 2007.
- Volonciu Nicolae, *Tratat de procedură penală. Partea generală, vol. I*, Editura Paideia, Bucureşti, s.a.
- The High Court of Cassation and Justice, United Sections, Decision no. 9/2008, published in the Official Gazette of Romania, no. 831/2008.
- Criminal Procedure Code.
- Ordinance no. 92/2000 on the organization and functioning of social services for the reintegration of criminals and the surveillance of non-custodial punishments (Official Gazette of Romania no. 423/2000).

CONSIDERATIONS ON THE EFFICIENCY OF THE ROMANIAN NEW CRIMINAL CODE IN COMBATTING CYBERCRIME

MAXIM DOBRINOIU*

Abstract
The New Criminal Code addresses in an adequate way the challenges of the cyberspace, being a useful tool in the hands of law enforcement agencies involved in combating a large spectrum of communications and cyber-related offences. From a broad perspective, one could state that the changes made to the previous legislation are pertinent considering the real need of indictment outlined by the analysis of the judicial practice, while the new issues essentially contribute to the creation of a modern legal framework, capable of safeguarding the social values which will come up in the near future from the interaction of people with a booming information technology.

Keywords*: crime, computer system, computer data, illegal access, intercepting, computer-related forgery, computer-related fraud, child pornography, harassment, electronic vote, electronic payment instrument*

In what regards the crimes committed with the help or against computer and telecommunications systems, computer data or electronic payment instruments, the Romanian New Criminal Code preserves, in a considerable percentage and with certain „corrections", the provisions of the previous special legal acts (such as the 3rd Title – preventing and combatting cybercrime – from the Law no. 161/2003 – which, at the time, almost literally transposed the 2001 Budapest Council of Europe Convention on Cybercrime into Romanian national legislation, or the Law no. 365/2002 on electronic commerce), but also brought forward new elements, trying to provide legal solutions to certain facts or situations happened in real life (the local judicial practice).

Generally, the New Criminal Code groups in a natural way the computer-related crimes based on the traditional social values, which still need to be protected by criminal provisions, introduces new concepts (e.g. „theft with the purpose of use", „harassment", „fraud to electronic vote" etc.), reformulates relevant articles from the respective special laws, and modifies, in a way of decreasing, the quantum of the imprisonment time. On the other hand, the Romanian legislator inexplicable disposed of the definition of certain terms and expressions, although uses them in the legal texts and, moreover, and don't yet succeed to fully cover the situations, scenarios or cases which quite often occur in cyberspace.

Relevant aspects from the General Part of the Criminal Code

One could remark the definition of the *electronic payment instrument* (Article 180), with the legal text not modified from the previous one - from the Law no.365/2002 on the electronic commerce or from the Romanian National Bank Regulation no. 6 of 2006.

Also, by Article 181 one could find explained the concepts of *computer system* and *computer data*, while the texts are pretty much similar with those provided by the prior Article 35 of the 3rd Title of Law no. 161/2003. Compared to the above mentioned special law, the are no longer available the definitions of *automatic data processing* and *computer program*, elements which could have contributed to a better understanding of the computer systems functioning in the respective criminal context.

Surprisingly, there is missing a very important definition (currently existing within Law no. 161/2003), namely the phrase *without right* (or *illegal*). Most probably, this time the legislator's opinion was that the definition would be no longer needed, but, without providing instead any other explanation regarding the *illegitimate* conditions of the interaction between users/individuals and

* Lecturer, PhD in Cybercrime, Faculty of Law, "Nicolae Titulescu" University (email: office@e-crime.ro).

various elements of the virtual environment, there will be somehow difficult for prosecuting authorities to bring correct legal charges (indictments) and to request sentences in strict accordance with the real social threat.

In this context, the actors fighting cybercrime should use (and even understand) the concept of „illegal" at least in the light of the European legislators, as contained in the Explanatory Report of the CoE[1] Convention on Cybercrime, as any behaviour/act/action undertaken with no authority or without permission, irrespective if that permission is granted in a legal, executive, administrative, judicial, contractual or consensual form, and any behaviour/act/action which does not represent, according to the Code, a cause which eliminates its criminal nature.

Relevant aspects from the Special Part of the Criminal Code

By Article 208, the new Code introduces, for the first time in its existence, the crime of *harassment*, incriminating and punishing the making of phone calls or other communications by means of remote transmissions, which, by frequency or content, cause a fear to a person.

The provision comes happily to assist the prosecuting authorities which were confronted, in the past, and still have to face numerous cases like this in practice. By its form, the legal text succeed to cover most of the situations that could affect the right of a person to live his life in privacy (even when this person is present in cyberspace), without interferences or fear. Here, we are talking about defamation or making a sort of psychological pressure on webpages, forums, online chat rooms/groups, the creation of fake accounts in social media or hijacking the real account of an individual, transmitting large amounts of emails or instant messages (internet relay chat), posting defamatory messages on blogs, Facebook, Twitter or other social media, in order to achieve an „informational assault" on the victim or with the aim to produce her fear, anxiety, discomfort etc. Other methods may include the sign up of fake email accounts, by unauthorized or abusive takeover of the victim's identity, followed by sending email messages on behalf of the victim in order to discredit, defame, denigrate, undermine or intimidate her, the creation of fake profiles (by the use of real personal data and photos of the victim) on pornographic, online dating or sexual minorities' websites or blogs, so that the victim is shown in „hard-to-believe" situations or not-compliant with her real social status.

The *online harassment* concept also consists of other material acts, such as: monitoring the victim's online activity, by using electronic surveillance devices or spy-type applications, connecting to the victim's Wi-Fi router and performing illegal online activities (child pornography, computer-related fraud, even hacking), in order to intentionally mislead the authorities to wrongfully bring charges on her etc., but all of these acts can be indicted in a proper way using other legal provisions from the Criminal Code.

In other foreign legislations (ex. US, Canada etc.), but also in the specialized literature, this crime is known and referred to as: Cyberharassment, Cyberstalking or Cyberbullying.

Besides the major benefits in socio-economic environment, the new technologies also brought large number of judicial problems, one of them being the connection to public electronic communications networks or obtaining access to publicly available electronic communications services.

For that, the Romanian legislator created a distinct criminal rule, with no prior correspondent, namely *theft with the purpose of use* (Article 230 paragraph 2), which incriminates the unauthorized use of someone else's communications device or the use of a communications device illegally connected to a network, causing a loss of property. This new legal provision comes to solve controversial situations from real life or doctrine, chiefly regarding the „illegal" connections to communications networks or even to Internet using wireless-enabled electronic devices (IEEE 802.11 standard).

[1] Abbreviation: Council of Europe.

Another win resulted from this new legal text is bringing into the illicit context the situation of using someone else's communications device, while considering that, nowadays, due to technological developments, by *communications device* one could easily see a smartphone or even a personal computer, and most of the so called *voice or video communications* are now entirely based on the IP[2] technology and transmission protocol.

Computer-related fraud (Article 249) preserves almost entirely its original legal text (as in Article 49 of Law no. 161/2003) and now is placed in the large context of the „traditional" crimes against the property, but in a distinct section (Chapter IV – frauds committed by computer systems or electronic payment instruments). Compared to the previous special law, the imprisonment time was reduced (general trend), as from 3 to 12 years (in Law no.161/2003), to 2 to 7 years (in the new Criminal Code).

Same comments and notes shall apply also for the newly-shaped crime of *performing financial operations fraudulently* (Article 250), with the sole mention that the prior legal provision (Article 27 of Law no. 365/2002 on electronic commerce) contained a distinct paragraph incriminating the behaviour of the person which, according to his contractual or employment duties, conducts technical activities for producing and issuing electronic payment instruments (e.g. credit cards) or for performing specific financial operations, has access to the security measures applied to the fabrication of such instruments or has access to personal data or other security mechanisms required for performing specific financial operations, according to the law. The reasons for eliminating the above mentioned legal situations from the new Criminal Code are still unknown, and the new legal text punishes now the employee or contractual agent of credit card or financial institutions with the same imprisonment time as for the other culprits.

The *acceptance of fraudulently performed financial operations* (Article 251) represents an identical version of Article 28 of Law no.365/2002, the only difference being the decreasing of the imprisonment period (from 1 to 12 years - in Law no.365/2002 – to 1 to 5 years – in the new Criminal Code).

The privacy in the sector of electronic communications has also been protected by the new Criminal Code, where the legal provision of *violation of the secrecy of correspondence* suffers only minor changes from previous form (Article 195 of actual Criminal Code). The only aspect that draws attention is the legislator's decision to renounce to the aggravated situation when the incriminated actions are performed by an employee or official who has the legal obligation to preserve the professional secret and the confidentiality of the information he got in touch with or he got access to. In the case of the 2nd paragraph of Article 302, the crime of the *interception, without right, of a conversation or of any communication made by phone or by any mean of electronic communications* is likely to be committed in ideal concurrence with the crime of *interception, without right, of a non-public transmission of computer data* (as referred to in Article 361 paragraph 1 of the new Criminal Code), while the conversation or the communication takes place, from a technical point of view, through computer programs or *Voice over Internet Protocol (VoIP)*-type applications, a technology wide spread and largely used nowadays.

One of the most highly visible crime in the local mass-media, namely *forgery of the electronic payment instruments*, could also be found in the new Criminal Code, in the 2nd paragraph of the Article 311, along with the other „traditional" forgery-related crimes. Compared to the previous version (Article 24 of Law no. 365/2002), one could note the decreasing of the imprisonment period (the maximum of the prison punishment reduced from 12 years to 10 years), as well as the elimination of the aggravated situation when the act of forgery is committed by the employee or the contract agent of the financial or credit institution who's task is to conduct technical operations to issue electronic payment instruments or has access to personal (identification) data or to the security mechanisms associated to the respective electronic payment instruments.

[2] Internet Protocol.

Putting into circulation counterfeit values is a another crime which strengthens the gallery of forgery-related crimes committed against financial securities, bonds, values or electronic payment instruments, by two legal provisions included in the Article 313 of the new Criminal Code. In addition to the previous version (2nd paragraph of Article 24 of the Law no. 365/2002), the legislator brings new legal charges, such as *receiving* and *transmitting forged values*. Meanwhile, if the perpetrator is, in the same time, the counterfeiter, the punishment proposed by the new Criminal Code will be the same as for the initial crime of forgery, and the two crimes will be regarded as in real concurrence (according to the 2nd paragraph). A new and interesting aspect has been brought by 3rd paragraph of Article 313 of the Criminal Code, which states that is a crime the act of putting a forged value again into circulation by the person who received the respective forged value and realized that was a fake, while the punishment stays the same as for the crime of forgery, with limits reduced to half.

As regarding the crime of *possession of equipments with the purpose of forging values* (Article 314), the 2nd paragraph refers exclusively to the situation of *possession of equipments with the purpose of forging electronic payment instruments*, and, compared to the previous version of the legal text (Article 25 of Law no.365/2002), there are two new actions incriminated, respectively *receiving* and *transmitting of equipments*. Another novelty is represented by the 3rd paragraph of Article 314, which states that there will be no punishment for the person who commits the crime, if followed by handing over the equipments to authorities or informing the authorities on the existence of these equipments, but before the authorities discover the crime by themselves and the forging actions occur. Worth noting that, despite the general tendency of reducing the imprisonment period, in this case the legislator has chosen to punish more severely the committing of this crime and increased the maximum limit of the prison time with 2 more years (from 5 years, in the previous version of the legal text).

Another crime, intensively highlighted by mass-media, given its various forms encountered in the judicial practice, is the *computer-related forgery*. The legislator kept the original form of the legal text (according to Article 48 of Law no.161/2003), but decreased the quantum of imprisonment period, as from 2 to 7 years (in pre previous version) to 1 to 5 years now.

This crime has been used and, most probably, will still be used, as a „universal legal solution", to resolve all those complex situations, for that, although requests existed, the legislator did not take concrete actions to implement proper legal provisions. For example, is the case of so-called *Phishing*, that method where the culprits (con artists) send to the victims well-designed email messages (masquerading as trustworthy entities or persons), with the purpose to mislead them to click on spoofed hyperlinks in order to access spoofed webpages controlled by the attackers, where the victims are lured to provide their personal or financial information, passwords or access codes. Generally, this kind of criminal action is called *social engineering*. Although this *Phishing* is committed by multiple material acts, it is currently legally solved by the prosecuting authorities only using the *computer-related forgery* crime. But, a deep analysis shows that, technically, only one action could be regarded as forgery, namely the forgery of the webpage used by culprits to illegally obtain data from the tricked victims. In fact, this is the sole action that has all the constituents to be regarded as the crime mentioned in Article 325 of the Criminal Code.

In what regards the communication of personal information on the spoofed webpage, there is no legal provision to incriminate the actions undertaken by the victims themselves, and the less to incriminate the activity of the culprits. On the other hand, tricking or misleading a person in order to acquire his personal or financial information are for sure criminal-type activities but not yet formalized in legal provisions and then, not subject to proper punishment (*nullum crimen sine lege*). A possible legal solution would have been the creation of a distinct article (with the name *ID theft* or *ID theft by means of electronic communications*) in this new Criminal Code, with the following text (as example): *(1) the obtaining of any personal data, where there is no consent from the entitled person, or by deception, and if electronic communications means have been used, is a crime and*

shall be punished with imprisonment from <x> months to <y> years. (2) The same punishment shall apply for the crime mentioned at paragraph (1) if committed by the use of electronic or eletromechanical devices designed to capture and store optic, magnetic or electric-representations of data.

In Title VII of the new Criminal Code a distinct Chapter (VI) was created with the name „Crimes against the safety and integrity of computer systems and data", which groups the majority crimes previously existing in Title III of Law no.161/2003.

Illegal access to a computer system (Article 360) is one of the most common offences in our judicial practice and still one of the most controversial in doctrine. In the new Criminal Code, the legislator preserved, almost identically, the previous legal provisions (paragraph 1 and paragraph 2 of Article 42 of Law no. 161/2003), while in paragraph 3 tried to reformulate the previous legal text but in a way that doesn't succeed to cover the real need for incrimination.

Although had the possibility, strictly in what regards the formulation of the legal text, the legislator did not modify the Romanian correct translation for the phrase „*illegal access TO a computer system*", in order to make it compliant to the text of the CoE Convention on Cybercrime. So, again the legislator choose to protect the access AT a computer system (in the Romanian language) instead of protecting the illegal access TO (meaning INSIDE) that computer system. As stated also in the Explanatory Report on the CoE Convention on Cybercrime, the importance of the access resides only in *entering the whole or any part of a computer system*, and not the access of the culprit in the vicinity of or around the computer system.

With the reference to the paragraph 3, although the legislator's intention was the creation of a legal text to fit the incriminating needs required by the prosecuting authorities, offering in the same time adequate safety measures against any abuse by law, the respective legal provision does not bring anything new, and, moreover, does not succeed to eliminate the various interpretations formulated in the course of time by practitioners and academics on the topic of „*infringing the security measures*".

In this context, a sensitive issue that did not find yet its solving, not even by reformulating paragraph 3, is still generated by the situation when the access to a computer system protected by security measures is committed by a perpetrator already knowing or being in possession of the needed access credentials (e.g. username, password, access code etc.). For example, the attacker who knows the username and the password associated to a login interface, uses them, and then get access to the respective computer system, but, technically, this is done without „forcing" or „eliminating" that security measure (login). Similarly, there could also be scenarios when the computer system has by default certain security measures in place but they has not been modified by the legitimate user, and thus may be known (or guessed) by any other person.

Under these hypothetical (but possible) conditions, an eventual criminal charging using Article 360 paragraph 3 of Criminal Code would be inadequate, at least from the following considerations: a) from the beginning, the legal text shows that we face an unauthorised intrusion in a computer system; b) the simple existence of certain procedures, devices or applications designed to restrict or forbid the access to that computer system cannot be regarded as an aggravating circumstance, taken into consideration that, anyway, the culprit finds himself already in a „illegal", „unauthorized" or „without right" status/situation with regard to that computer system. In the previous legal text (Article 42 paragraph 3 of Law no.161/2003), and according to the CoE Convention on Cybercrime, the Romanian legislator wanted to punish more severely the action of the person who, being already in a „illegal" relationship with a computer system, chooses to continue his criminal behaviour and performs certain technical operations to overwhelm, infringe or eliminate the security measures he confronts. In other words, the previous legal provisions highlighted more clearly, as aggravated circumstance, the „aggression"-type situation against the security measures and not just the simple operation on a computer system that has in place procedures, devices or applications by which the access to that computer is restricted or forbidden, as stated in the new Criminal Code.

As for the sanctioning regime, one could note the existence of the same limits of the imprisonment period (as in the previous legal text) – for the aggravated circumstance mentioned in paragraph 3 (3 years to 12 years), a decreasing of the punishment limits – for the circumstance mentioned in paragraph 2 (6 months to 5 years – now, to 2 years to 7 years - in the previous legal text), and also the introduction of the fine, as an alternative sanction for the circumstance provided in paragraph 1.

In what regards the crimes of *illegal interception of a non-public transmission of data* (Article 361), and *data interference - or altering computer data integrity* (Article 362), the legal texts in the new Criminal Code preserved almost identically the legal provision previously provided by Article 43 paragraphs 1 and 2, and Article 44 of the Law no.161/2003. In these cases, the only difference is in the sanctioning regime, with the decreasing of the imprisonment period from 2 to 7 years – in the previous versions, to 1 to 5 years in the new Criminal Code.

To the crime of *system interference – or disrupting the operation of computer systems* (Article 363) there are also no modifications compared to the previous version of the legal text (Article 45 of Law no.161/2003). In this case, too, the legislator only spotted a decreasing of the imprisonment period, as from 3 to 12 years – previously, to 2 to 7 years in the Criminal Code.

By the creation of a separate legal provision, namely Article 364, the legislator succeeded this time to split the crime of *unauthorized transfer of data* from the previous wrong context of *data interference* provided by Article 44 paragraph 2 and 3 of Law no. 161/2003, with respect to a technical reality – so that, by transferring computer data between systems or different storage media, no data shall be altered, suppressed, deleted or damaged in any way, loosing only the confidentiality of the information contained. Consistent with his trend, the legislator also modified for this crime the limits of the imprisonment period, as from 3 to 12 years – in the previous legal text, to 1 to 5 years in the new Criminal Code.

We need to emphasize that also this time, the legislator fails to provide a representation of the phrase „unauthorized", situation which may lead to difficulties in bringing a rigorous (truth-close) legal charge. In this scenario (unauthorized transfer of data), the phrase „unauthorized" or „illegal" may be applied only in conjunction with the culprit operations against the respective computer data, with the emphasize on the permission he has (or not) or the authorization he got (or not) to dispose of these data in the way he wants to. In what regards the interaction with the computer system the data is stored in, there shall be applicable the legal provisions of Article 360 – *illegal access to a computer system*. On the other hand, if the targeted data is also protected by other legal provisions, the criminal charge should be bound to a concurrence of crimes only if the culprit's action gathers all the constituents of such an offence.

The *unauthorized transfer of data* is an interesting crime, that could be easily and successfully used in those situations the prosecuting authorities or the courts of justice failed in the course of time to offer legal solutions for certain actions, such as, for example, the *Skimming method* meaning the illegal obtaining of identification data associated with credit cards, when the victims use these cards at ATMs, by mounting fake plastic ATM interfaces which embeds micro-controllers capable of reading the magnetic stripe of the cards) – in this case the credit cards acting as data storage means.

Another legal provision with large impact in the judicial practice nowadays is Article 365 – *misuse of devices and applications (or the illegal operations with devices and computer programs)*, which also preserves, with just a few modifications, the previous legal text provided by Article 46 of Law no. 161/2003. This provision continues to offer solutions to the various real life scenarios, when, under the guise of a legitimate trade, merchants (and not only) provide interested persons with electronic devices, computer programs and applications, passwords or access codes with the purpose to be used to further commit other computer-related offences against data and systems. From the text provided by paragraph 2 of Article 365 one could note an exaggeration of the legislator in using the phrase „without right". And, again, there is no explanation for the term „without right". Thus, the legal text states that shall be a crime the *possession, without right, of a device, a computer program,*

a password, an access code or any similar data, with the purpose of committing one of the crimes provided by Articles 360-364. In other words, is hard to imagine a situation when the possession of a certain application with the intent to commit an illegal access to a computer system is carried out „with right"! Also, compared to the previous legal text, the quantum of the imprisonment period has been decreased, as from 1 to 6 years (previously) to 6 months to 3 years or a fine (for the crime mentioned in paragraph 1), respectively 3 month to 2 years or a fine (for the crime mentioned in paragraph 2).

Placed in the general legal context of Title VIII – Crimes affecting the relations of social life, the Article 374 gathers all the criminal actions committed by using child pornography materials. Compared to the previous version of the legal text (Article 51 of Law no.161/2003), there are new incriminations, such as *storage, promotion, exposure, distribution (sharing)* or *accessing* (of child pornography materials). Other changes aimed at: broadly incriminating the *production* of child pornography materials – whereas in the previous version of the legal text the same action was committed only *for the purpose of sharing*, putting the *possession* in conjunction with a certain purpose, such as: the *exposure* or the *distribution* of pornographic materials with children (compared with Law no.161/2003 which simply incriminates the *possession without right*). On the other hand, one could note that the phrase „without right" has been „moved" now just for the context of *accessing child pornography materials*, the legislator assessing that this action is the only one that could be carried out, in certain conditions, even „with right".

In what regards the sanctions, the legislator eliminated the complementary punishment of restricting certain rights to the defendant, and maintained the general trend of decreasing the imprisonment period limits, as from 3 to 12 years – in the previous legal text, to 2 to 7 years (for paragraph 2), respectively 3 months to 3 years or a fine (for paragraph 3).

Electronic vote interference (or electronic vote-related fraud), provided by Article 388 has no previous correspondent, being only mentioned as a possibility in the Government Emergency Ordinance no.93/2003 on casting the vote by electronic means to the national referendum for the revision of the Constitution. Formalized in a single legal provision, the crime consists of the printing and using false access data, illegal access to the electronic vote system, and forgery by any means of the digital ballots. As a general observation, these actions could be committed in ideal concurrence with other computer-related crimes, such as the *access to a computer system* or *computer-related forgery*. There have also been reduced the limits of the imprisonment period, as from 2 to 7 years (previously), to 1 to 5 years in the new Criminal Code.

The criminal context with regard to the electronic vote has been completed with Article 391 – *forging the electoral documents and records*, a crime previously comprised, by pieces, in Articles 60 and 61 of Law no.35/2008 – the electoral law. The text modifications are insignificant, and the quantum of the imprisonment period has been preserved in the same limits. Given the digital environment where such crimes occur, this offence might be subject of ideal or real concurrence with other computer-related crimes, such as: *data interference, system interference* or *computer-related forgery*.

Conclusions

The new Criminal Code answers in a proper way the challenges posed by cyberspace, providing useful legal tools to practitioners in combatting a wide range of criminal behaviour against computer data, systems and telecommunications.

Overall, worth to be underlined that the modifications brought to the previous Romanian legislation are relevant in relation to the actual need of incrimination resulted from the analysis of the local judicial practice, while the new aspects essentially contribute to the creation of a modern legal framework, fully able to protect in the future those social values that will not wait to emerge from the virtual interaction between individuals and a information technology in great expansion.

EXTENDED CONFISCATION IN THE NEW CRIMINAL CODE

MIHAI ADRIAN HOTCA*

Abstract
Through Law no. 63/ 2012 for the change and completion of the Criminal code of Romania and of Law no. 286/2009 regarding the Criminal code, in the Romanian criminal law, it has been introduced a new safety measure, that is the ***extended confiscation.***
Within the current article, we will analyze the conditions regarding the enforcement of this safety measure.
We will also examine if the juridical norms that regulate the extended confiscation, as well as their concordance with the fundamental law – the Constitution.

Key-words: *extended confiscation, unconstitutionality, safety measures, criminal law penalty, Criminal code.*

Introduction

In the final part of Law no. 63/2012, it is specified that this „*transposes in the national legislation art. 3 of Council Framework Decision 2005/212/JHA of February 24th, 2005 on confiscation of crime-related proceeds, instrumentalities and property, published in the Official Journal of the European Union series L no. 68 of March 15th, 2005*".

In art. 2 of Framework Decision 2005/212/JHA, it is stipulated „(*1) Each member state takes the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.*

(2) In relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence".

According to art. 3 paragraph (1) of Framework Decision 2005/212/JHA, each member state takes at least the necessary measures that would enable it, on the stipulated conditions, to confiscate, either wholly or in part, the property held by a convicted person for an offence of those mentioned within the current article.

According to art. 3 paragraph (2) of Framework Decision 2005/212/JHA, each member state takes the necessary measures to enable it to confiscate at least:

a) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;

b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;

c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

According to art. 3 paragraph (3) of Framework Decision 2005/212/JHA, Each Member State may also consider adopting the necessary measures to enable it to confiscate, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned — acting either alone or in conjunction with his closest relations — has

* Professor, PhD, "Nicolae Titulescu" University of Bucharest (mihaihotca@gmail.com).

a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.

In the recitals that accompanied the draft of Law no. 63/2012, it is shown that, although at present Romania benefits from a coherent and comprehensive legislative framework developed in accordance with the international standards in the field of crime- related proceeds, this framework has certain gaps reported to the European requirements in the field.

To be precise, at the level of the internal legislation, the above- mentioned Framework Decision is not totally transposed, as the transposition of art. 3 of the community act on the extended confiscation is missing from the national legislation. The measure of the extended confiscation has to be at least one of the three variants stipulated within article 3 paragraph (2) letters (a), (b) and (c) respectively. In all the cases, this allows the confiscation of the crime-related property that does not have a direct connection to the offence for which the person is convicted, more precisely, the direct connection between the offence that leads to the conviction and the property that is confiscated is not proved. It is a principle of the extended confiscation of the property of the convicted person. Letter (a) aims at that property if this derives from criminal activities during a period prior to conviction, while letter (b) aims at the property that derives from "similar" activities. With regard to letter (c), this aims at the disproportion between the value of the property and the level of the lawful income of the convicted person.

Further, it is pointed out that, on condition that the extended confiscation operates exclusively on criminal procedures, it aims at a list of particularly serious offences and it is applied exclusively to an already convicted person – the introduction of the extended confiscation is not incompatible with the presumption of the illicit character of the property in art. 44 item 8 of the Constitution of Romania, republished. This presumption is a relative one so that it will be turned around, depending on the case, by the administration of the evidences that create the belief of the court that the property held by the convicted person is obtained by committing offences.

In this context, the conditions stipulated within the draft and that have to be previously proved are enough to turn around the presumption without still infringing the mentioned constitutional principle.

The prosecutor would be then obliged to prove just the fact that a certain person, in a period of time, was involved in committing certain offences, such as, organized crime offences. For this reason, the judge can presume that the obtained property is the result of crime- related activities committed by the convicted person during a period prior to the conviction that is considered reasonable by the court. On this hypothesis, the task of the evidence regarding the illicit character of the obtained property would come to the convicted person. If the judge reaches the conclusion that the value of the held property is disproportionate to the lawful income of the convicted person, he can order their confiscation from the convicted person.

Further, it is specified that, in order to support those argued within the recitals, it can be invoked also the findings of the Constitutional Court that in Decision no. 799 of June 17th, 2011, made when delivering on the unconstitutionality of eliminating the presumption of the illicit acquirement of the property, pointed out also that the regulation of this presumption did not prevent the primary or delegated law giver to adopt in applying the provisions of art. 148 of the Constitution – Integration in the European Union regulations that should enable the full observing of the legislation of the Union in the field of the combat against crime.

In the end of the recitals, it is pointed out that the suggested normative deed pursues the transposition of art. 3 of Council Framework Decision 2005/212/JHA of February 24th, 2005 on confiscation **of crime-related proceeds, instrumentalities and property by observing at the same time the constitutional principles on the property right.**

The Constitutional Court delivered also on some attempts to review the same constitutional text.

Thus, through Decision no. 85/1996[1], the Court delivered on an attempt to review the Constitution through which it was suggested the replacement of the text that regulated this presumption with another one with the following content: "The property the licit acquirement of which cannot be proved is confiscated ". On this occasion, the Court retained that the presumption of the illicit acquisition of the property is one of the constitutional guarantees of the property right in concordance with the provisions of paragraph (1) of art. 41 of the Constitution [current art. 44 paragraph (1)], according to which the property right is guaranteed. This presumption is based also on the general principle according to which any juridical act or deed is licit until proved the contrary, ordering, with regard to the property of a person, that its illicit acquisition should be proved. Retaining that through the review suggestion it is pursued the turning around of the task of the evidence regarding the licit character of the property, in the sense that the property of a person is presumed to be illicitly obtained up to the contrary evidence made by its owner, as well as the fact that the juridical security of the property right on the assets that make the property of a person is indissolubly connected to the presumption of the illicit acquisition of the property and the removal of this presumption has the significance of the suppression of a constitutional guarantee of the property right, the Court found the unconstitutionality of this suggestion.

Also through Decision no. 148/2003[2], the Constitutional Court delivered the verdict on the constitutionality of the legislative suggestion of modifying the same text, change that has in view the circumstance of the presumption of illicit acquisition of the property. The suggested text established that the presumption did not apply "to the property obtained as a result of the capitalization of the offence- related revenues ".

Through Decision no. 799/2011, the Constitutional Court stated "*that it delivered the verdict also on some attempts of reviewing the same constitutional text, attempts that aimed basically the same finality: the removal of the presumption of illicit character of the property acquisition from the Constitution*"[3].

Then, regarding the issue in question, the Constitutional Court stated: "*Applying the provisions of art. 152 paragraph (2) of the Constitution, according to which no review can be done if it has as a result the suppression of the fundamental rights of the citizens or of their guarantees,* ***the Court finds that the removal of the second thesis of art. 44 paragraph (8) from the Constitution, according to which "The licit character of the acquisition is presumed" is unconstitutional, because it has as effect the suppression of a guarantee of the property right, thus infringing the limits of the review stipulated by art. 152 paragraph (2) of the Constitution*** (s.n.).

The court underlines within this context the ones retained in its jurisprudence, for instance through Decision no. 85 of September 3rd, 1996, mentioned, or through Decision no. 453 of April 16th, 2008, published in the Official Gazette of Romania, Part I, no. 374 of May 16th, 2008, in the sense that ***the regulation of this presumption does not prevent the examination of the illicit character of the property acquisition, the task of the evidence coming to the one that invokes this character. As long as the interested part proves the illicit acquisition of some assets, of a part or of***

[1] Published in the Official Gazette of Romania, Part I, no. 211 on September 6th, 1996.

[2] Published in the Official Gazette of Romania, Part I, no. 317 on May 13th, 2003.

[3] It regards Decision no. 86/1996 and Decision no. 148/2003. Therefore, for instance, through Decision no. 148/2003, the constitutional says that „this way of drawing up is criticizable and can lead to conclusions pointing out that from the way of drawing up paragraph (7^1) suggested to be inserted, it results that it is pursued the turning around of the purpose of the evidence regarding the licit character of the property, stipulating the illicit character of the property obtained through the capitalization of the revenues resulted from offence. Therefore, referring also to its Decision no. 85/1996, the Court has established that also in this case it has been aimed the suppression of a constitutional guarantee of the property right, which is against the provisions of art. 148 paragraph (2) of the Constitution [current art. 152 paragraph (2)]. On the same occasion, referring to the way of drawing up the examination norm, the Court has noted that, if the text has pursued to allow the confiscation of the licitly obtained wealth, but that was built on an amount of money coming from offences, its drawing up was incorrect ".

the whole property of a person, on those illegally obtained assets or property it can be ordered the confiscation within the law" (s.n.).

Analyzing the considerations of the Constitutional Court, we notice that this rightfully considers the presumption regarding the licit character of the property acquisition of a person as essential (fundamental).

1.What is the nature of the extended confiscation?

Out of the content of the juridical norms stipulated within Law no. 63/2012, it can be established the **juridical nature of the extended confiscation**[4]**.** More precisely, this characterization of the extended confiscation results from the provisions of art. III and IV of Law no. 63/2012.

Thus, according to art. III of the same law: "*Whenever through special laws, Criminal code or Criminal procedure code, it is made reference to art. 118 of the Criminal code, the reference will be considered to be made to art. 118 and 118*^{2} *and whenever through special laws, Criminal code or Criminal procedure code, it is made reference to confiscation as a safety measure, he reference will be considered to be made to the extended confiscation*"[5].

The introduction of the extended confiscation in the safety measure category is necessary, we say, even in the absence of some legal provisions such as those quoted above, because the juridical norms that regulate it were introduced in Title VI of the Criminal code, called the "Safety measures".

A first consequence of this characteristic of the extended confiscation is the incidence in the completion of the special provisions, general provisions on the safety measures. Only in case there are derogatory provisions, these will be applied.

On the other hand, this juridical character of the extended confiscation makes the analyzed safety measure to be considered as **criminal law penalty**, juridical category to which belong the penalties and the educative measures, besides the safety measures.

Conditions on which the extended confiscation can be ordered

1.1. Condition presentation

Analyzing the provisions of art. 118^2 of the Criminal code and those of art. 111 of the Criminal code, we consider that the analyzed safety measure can be ordered only if the following conditions are met cumulatively:

- capacity of offender of the doer;
- conviction of the offender;
- conviction for having committed one of the limitative offences stipulated by art. 118^2 of the Criminal code;
- value of the property obtained by the convicted person 5 years prior and, if the case, after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one;
- conviction of the court that the property subject to the extended confiscation comes from offences of the nature of those for which the offender is convicted;

[4] For the analysis of the provisions regarding the extended confiscation introduced in the Romanian legislation through Law no. 63/2012, see also: *M. Gorunescu, C. Toader*, Confiscarea extinsă – din contencios constituţional în contencios administrativ şi fiscal spre contencios penal, in Law no. 9/2012; *F. Streteanu*, Consideraţii privind confiscarea extinsă, in Criminal law notebooks no. 2/2012, page 11.

[5] According to art. IV in Law no. 63/2012: „Whenever through special laws, Criminal code and Criminal procedure code, it is made reference to art. 112 of Law no. 286/ 2009 regarding the Criminal code, the reference is made to art. 112 and 112^1 and whenever through special laws, Criminal code and Criminal procedure code, it is made reference to confiscation as a safety measure, the reference is considered as made also to the extended confiscation".

- by ordering the safety measure to remove a danger and to prevent the committing of new deeds stipulated by the criminal law.

From of the content of the provisions of art. 118^2 and that of art. 111 of the Criminal code, it results the **personality principle of the safety measure of the extended confiscation**, which means that the penalty cannot be given to persons that have committed only simple illicit deeds that are not stipulated by the criminal law. Moreover, through derogation from the general rule existing in the field of the safety measures according to which these can be given also to persons that commit the deeds stipulated by the criminal law (no matter if they are or not offences), with regard to the extended confiscation, in order not to able to be ordered, the deed has to be an offence and it should be delivered the conviction of the person to whom the measure is ordered.

Also, the measure of the extended confiscation cannot be ordered to other persons, that have not committed offences, than the convicted person irrespective of the relationship between these persons and the persona of the offender, because the criminal law penalties are applied only to the persons that have disregarded the criminal norms of incrimination and are carried out also by these.

Besides the juridical considerations, the personality principle of the criminal law penalties is very important for any law system, because it is unnatural and non- educative that a criminal law penalty could be ordered to persons that have not had an involvement in committing an offence.

1.2. Condition analysis of the extended confiscation

2.2.1. Capacity of offender of the doer

The condition for taking the measure of the extended confiscation is that the deed committed by the person in question should be an offence, requirement that presumes the capacity of **offender of the person** in connection to whom it is to be taken. This condition results from the provisions of art. 118^2 paragraph (1) of the Criminal code according to which other property than the one mentioned by art. 118 of the Criminal code is also subject to confiscation if the person is convicted for having committed one of the offences listed within this paragraph.

The requirement that the deed should be an offence will not be considered as met unless one of the causes that cancel the criminal character of the deed is incident. In such a case, the taking of the measure of the extended confiscation is excluded *de plano*.

Considering the above mentioned, the general provisions on the safety measures stipulated by art. 111 paragraph (2) of the Criminal code – *according to which the safety measures are taken considering the persons that have committed deeds stipulated by the criminal law* – are not to be applied with regard to the extended confiscation.

The general rule stipulated by art. 111 paragraph (2) of the Criminal code is not incident in the case of the extended confiscation, because art. 118^2 paragraph (1) of the Criminal code derogates from the general rules applicable to the safety measures.

It results from here that, as long as the deed is not an offence, it cannot be ordered the extended confiscation. For instance, the extended confiscation cannot be taken in the case of an irresponsible person (according to art. 48 of the Criminal code), that has committed a deed of those mentioned within art. 118^2 paragraph (1) of the Criminal code

2.2.2. Conviction of the offender

Another condition to be able to order the measure of the extended confiscation is that the offender should be convicted. According to art. 118^2 paragraph (1) of the Criminal code, other property than the one mentioned in art. 118 is also subject to confiscation, if the person in question is **„convicted".**

Considering the derogatory character of the provisions stipulated by art. 118^2 of the Criminal code, the provisions of art. 111 paragraph (3) of the Criminal code, according to which: „The *safety*

measures cannot be taken if the doer is not punished (...)", will not be applied with regard to the measure of the extended confiscation, because the deed is not enough to be an offence, but it has to be met also the requirement that the person having committed the offence – offender – should be convicted.

Indeed, not in all the case in which a deed is an offence, the person having committed it is convicted. Among the situations that prevent the delivery of a conviction to the person having committed an offence, there are also the causes that remove the criminal responsibility. For instance, the prescription of the criminal responsibility.

According to art. 345 paragraph (2) of the Criminal procedure code, the conviction is delivered if the court finds that the deed exists, is an offence and has been committed by the defendant. Considering the provisions of art. 345 paragraph (3) of the Criminal procedure code, we will say that the situations in which the conviction of a person is delivered imply both the meeting of the conditions stipulated by art. 345 paragraph (2) of the Criminal procedure code, as well as the inexistence of the cases stipulated by art. 10 of the Criminal procedure code (situations in which the discharge or the termination of the criminal trial are delivered).

According to art. 345 paragraph (3) of the Criminal procedure code, the discharge or the termination of the criminal trial are delivered according to art. 11 pct. 2 of the Criminal procedure code

And, according to the provisions of art. 11 pct. 2 of the Criminal procedure code, during the trial, the court delivers:

a) the discharge in the case stipulated by art. 10 lit. a)-e);

b) termination of the criminal trial in the case stipulated by art. 10 lit. f)-j).

The court orders the discharge when [art. 10 paragraph (1) of the Criminal procedure code]:

a) the deed does not exist;

b) the deed is not stipulated by the criminal law;

b^1) the deed does not have the degree of social danger of an offence;

c) the deed has not been committed by the accused or defendant;

d) the deed is missing one of the constitutive elements of the offence;

e) there is one of the causes that cancels the criminal character of the deed;

The court orders the termination of the criminal trial when [art. 10 paragraph (2) of the Criminal procedure code]:

f) the previous complaint of the injured person, the authorization and the documents instituting the proceedings or other condition stipulated by the law necessary for setting into motion the criminal action are missing;

g) the amnesty, prescription or death of the doer or, depending on the case, the erasure of the legal person when it has the capacity of doer have occurred;

h) the previous complaint has been withdrawn or the parties have reconciled or have concluded a mediation agreement according to the law, in the case of the offences for which the withdrawal of the complaint or reconciliation of the criminal responsibility;

i) it has been ordered the replacement of the criminal responsibility;

i^1) there is a clause of non- penalty stipulated by the law;

j) there is force of res judicata. The prevention causes effects even if the definitively trialed deed was given a different legal framework.

When noticing the applicable legal provisions, we conclude saying that the court can not order the conviction of a person that has committed an offence, in the case when one of the causes that cancels the criminal responsibility is incident or in the other situations regulated by art. 10 lit. f)-j) of the Criminal procedure code, for instance, if the force of res judicata is incident.

2.2.3. Conviction for having committed one of the limitative offences stipulated by art. 118[2] of the Criminal code

Art. 118[2] paragraph (1) of the Criminal code stipulates that other property than the one mentioned by art. 118 is also subject to confiscation, in case the person is **convicted for having committed one of the following offences**, if the deed is susceptible to give him a material gain and the penalty stipulated by the law is 5- year imprisonment or higher:

a) pandering;

b) offences regarding the traffic of drugs and precursors;

c) offences regarding the trafficking in human beings;

d) offences at the state borders of Romania;

e) offence of money laundering;

f) offences in the legislation regarding the prevention and combat against pornography;

g) offences in the legislation regarding the prevention and combat against terrorism;

h) association to commit offences;

i) offence of initiating and setting up an organized crime group or of adhesion or support under any form of such a group;

j) offences against the patrimony;

k) offences regarding the infringement of the regime of weapons and ammunition, nuclear materials or of other radioactive and explosive materials;

l) counterfeiting of currency and other securities;

m) revealing of an economic secret, disloyal competition, infringement of the provisions regarding the import or export operations, embezzlement, infringement of the provisions regarding the waste and residue import;

n) offences regarding the gambling organizing and exploitation;

o) trafficking of migrants;

p) offences of corruption, offences assimilated to the offences of corruption, offences related to the offences of corruption, offences against the financial interests of the European Union;

q) offences of tax evasion;

r) offences regarding the customs regime;

s) offence of bankruptcy or fraudulent insolvency;

ş) offences committed through information systems and electronic means;

t) trafficking of human organs, tissues or cells.

If a person is convicted for having committed an offence that cannot be framed with the provisions of art. 118[2] of the Criminal code, the extended confiscation cannot be ordered. It has also to be met the requirement according which the deed *in concreto* (the one that has drawn the conviction) and not *in abstracto*, is susceptible to give the convicted person a **material gain**[6] and the **penalty stipulated by the law is 5- year imprisonment or higher.** For instance, in the case of the offence stipulated by art. 4 paragraph (1) of Law no. 143/2000, it cannot be ordered the measure of the extended confiscation, because the penalty stipulated by the law is imprisonment from 6 months to 2 years or fine.

2.2.4. Value of the property obtained by the convicted person 5 years prior and, if the case, after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one

According to art. 118[2] paragraph (2) lit. a) of the Criminal code, the extended confiscation is ordered if the value of the property obtained by the convicted person 5 years prior and, if the case,

[6]See also *F. Streteanu*, quoted work, page 24.

after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one.

In art. 118^2 of the Criminal code, there are more *specifications*, as follows:

- for the application of the provisions of paragraph (2), it is considered also the value of the property transferred by the convicted person or a third party to a member of the family, to the persons with whom the convicted person has established relationships similar to those between spouses or between parents and children, in case these live together with the convicted person, to the legal persons over which the convicted person holds control [art. 118^2 paragraph (3) of the Criminal code];
- through property it is understood also the amounts of money [art. 118^2 paragraph (4) of the Criminal code];
- when establishing the difference between the licit revenues and the value of the obtained property, it will be considered the value of the property when obtaining it and the expenses made by the convicted person and the persons stipulated by paragraph (3) [art. 118^2 paragraph (5) of the Criminal code];
- if there is property subject to confiscation, in its place it is confiscated money and property up to their value [art. 118^2 paragraph (6) of the Criminal code];
- it is also confiscated property and money obtained from the exploitation or use of the property subject to confiscation [art. 118^2 paragraph (7) of the Criminal code];
- the confiscation can not exceed the value of the property obtained within the period stipulated by paragraph (2) that exceeds the level of the licit revenues of the convicted person [art. 118^2 paragraph (8) of the Criminal code].

Regarding the sphere of the property considered by the provisions of art. 118^2 paragraph (2) lit. a) of the Criminal code, in doctrine, it was judiciously shown that the property obtained or produced by having committed offences for which it was ordered the special confiscation or the restitution in favor of the civil party can not belong to the sphere of property that is to be subject to the measure of the extended confiscation and in the case of the property transfer by or to the persons listed by the legal test, the value that is to be considered is the one at the moment of its obtaining because the property of the convicted person is reported to be taken into consideration also that date[7].

In doctrine, it is discussed whether the property fictively transferred by the convicted person can be considered when ordering the measure of the extended confiscation. For instance, when a friend of the convicted person acquires a property on his name but with money received from the convicted. The found solution is that, if it reaches to a conviction for money laundering, that property is the object of the special confiscation and contrariwise, that property will be assessed as property obtained by the defendant[8].

2.2.5. Conviction of the court that the property subject to the extended confiscation comes from offences of the nature of those for which the offender is convicted

According to art. 118^2 paragraph (2) lit. b) of the Criminal code, the extended confiscation is ordered if the court is convinced that that property comes from crime- related activities as those stipulated by paragraph (1). It is the conviction of the court that the property subject to the extended confiscation comes from having committed an offence that is necessarily among those for which the defendant is convicted.

According to art. 3 paragraph (3) of Framework Decision 2005/212/JHA, the national court has to be „***fully convinced**, based on some specific deeds, **that that property is the result of some similar crime- related activities of the convicted person***".

[7] Idem, page 24 and 25.

[8] See also *F. Streteanu*, quoted work, page 25.

By comparing the two provisions, we find that the intern legislation talks about the *„conviction of the court",* while in the Framework Decision it is used the syntagm *„fully convinced"*. On these conditions, there is the inevitable question: Is there any content difference between the two provisions?

Our „conviction", „based on arguments", is that between the two analyzed provisions there are content differences considering that the opinion of the court can be made in two ways: based on evidences or on something else. Indeed, we consider that, in fact, art. 3 paragraph (3) of Framework Decision 2005/212/JHA establishes that **„the court has to be convinced"** and the intern regulation stipulates that the court **„has the conviction"**.

Also, although it might be said that the expression *„fully convinced"* has a redundant or superfluous meaning, from the juridical point of view, it means that at the file of the process there are (it has to be) evidences *„above any doubt"* that that property is the result of some similar crime-related activities of the convicted person. Art. 3 paragraph (3) of Framework Decision 2005/212/JHA states, in fact, that the court has to be „convinced" based on some administrated evidences that should create the certainty regarding the origin of the crime- related property.

Considering the above, we think that the legal provisions that set the analyzed condition are qualitatively inferior to those within art. 3 paragraph (3) of Framework Decision 2005/212/JHA.

2.2.6. By ordering the safety measure to remove a danger and to prevent the committing of new deeds stipulated by the criminal law

This condition results from the provisions of art. 111 paragraph (1) of the Criminal code, according to which the safety measures have as purpose the removal of a danger and the prevention of committing deeds stipulated by the criminal law.

Although this condition is not stipulated within Law no. 63/2012, regarding the nature of the extended confiscation, we consider that the requirement stipulated by art. 111 paragraph (1) of the Criminal code is applicable also with regard to this measure. If it were derogation from the incidence of the condition set by art. 111 paragraph (1) of the Criminal code or if we concluded that this condition was not applied, it would mean that the measure of the extended confiscation does not have the nature of a safety measure.

Through its nature, any safety measure is taken **for the purpose of removing a danger and for preventing the committing of some deeds stipulated by the criminal law**. If it does not have this purpose, it means that the penalty that we analyze cannot be considered a **safety measure.**

The preventive purpose is that of a safety measure, which means that if, when giving a penalty, it is disregarded the **necessity of removing an effective state of danger**, this should be considered **penalty,** but not a safety measure.

3.Conclusions

When applying the lawfulness principle of the criminal law penalties expressed in the adage *nulla sanctio sine lege praevia,* we consider that the safety measure of the extended confiscation can be applied only with regard to the offences committed after the coming into force of Law no. 63/2012[9].

Analyzing the provisions of art. 118^2 of the Criminal code from the point of view of their constitutional provisions, we find that they contravene some norms of the fundamental law.

[9] For details regarding the applying in time of the provisions regarding the criminal law penalties, see also *F. Streteanu*, Tratat de drept penal. Partea generală, vol. I, C.H. Beck Publishing House, Bucharest, 2008, page 251 and the following one. Regarding the applying in time of the provisions regarding the special confiscation, see also *D. Niţu*, Modificările aduse în materia confiscării de prevederile Legii nr. 278/ 2006, in Criminal law notebooks no. 3/2006, page 66.

First, we consider that the constitutional and conventional provisions (stipulated in the European Convention on Human Rights) regarding the right to a fair trial as a result of the lack of clarity and predictability of the norms that regulate the extended confiscation are infringed[10].

Among the unclear provisions, there are[11]:

- the expression „*obviously exceeds the revenues licit obtained by this one*" that is found within art. 118^2 paragraph (2) lit. a) of the Criminal code. The norm is unpredictable when applied because there is very large dose of arbitrage regarding the significance of the syntagm **„obviously exceeds"**[12] and the sense of the syntagm **„revenues licit obtained"**[13];

- the expression „*the court has the conviction that that property comes from crime- related activities*" at is found within art. 118^2 paragraph (2) lit. b) of the Criminal code. This is unpredictable when applied because it is not clear on what basis the court builds its **„conviction"** that the property comes from **„crime- related activities"**, if it considered also the „*value of the property transferred by the convicted person or a third party to a member of the family, to the persons with whom the convicted person has established relationships similar to those between spouses or between parents and children, in case these live together with the convicted person, to the legal persons over which the convicted person holds control*".

Second, the provisions of art. 118^2 paragraph (2) lit. b) of the Criminal code infringe the provisions of art. 124 of the Constitution, according to which:

„(1) Justice is made in the name of the law.

(2) Justice is unique, impartial and equal for all.

(3) Judges are independent and submit themselves only to the law".

We consider that the provision that regulates the condition that the court should have the „*conviction that that property comes from crime- related activities similar to those stipulated by paragraph (1)*" is unconstitutional because the judge should submit themselves **„only to the law".**

Besides, through Decision no. 171/2001, the Constitutional Court found the unconstitutionality of some similar provisions within art. 63 paragraph (2) of the Criminal procedure code in its forma previous to the modification through Law no. 281/2003, considering that the judges should submit themselves *„only to the law"* and not to *„their own conviction"*[14].

---

[10] In its jurisprudence, CEDO pointed out that the law had to meet certain qualitative conditions among which it was also the predictability (Order of November 22nd, 1995, delivered in the case of *S.W. vs. Great Britain* or Order of November 15th, 1996, delivered in the case of *Cantoni vs. France*). In this sense, the Court remarked that it could not be considered as „law" only a norm stated with enough precision in order to allow the citizen to control its behavior. Appealing, if needed, also to expert advice on the matter, it must be able to foresee in a reasonable degree to the circumstances of the case the consequences which could result from a particular action (Order of January 25th, 2007 in the case of *Sissanis vs. Romania*). Or, the law provisions that form the object of the current exception of unconstitutionality do not meet these exigencies. Thus, it is to be noticed that this right is a complex one that has more components and in which it is included *lato sensu* also the right to an efficient defense. (...) The judge himself is in trouble, being in the situation of opting between more possible variants in the absence of a clear representation of the applicable sanctioning regime (Decision of the Constitutional Court no. 573/2011, published in the Official Gazette no. 363 of May 25th, 2011).

[11] For the opinion that the provisions regarding the extended confiscation are constitutional, see also *F. Streteanu*, quoted work, page 15 and the following one.

[12] The word *obvious* can be understood in different ways and the applying modality becomes even more uncertain if it is considered also the provisions of art. 118^2 of the Criminal code, paragraph (8), according to which: „*The confiscation can not exceed the value of the assets obtained during the period stipulated by paragraph. (2) that exceed the level of the revenues of the convicted person*".

[13] It is not clear what the evidence means through which it is set the licit character of the revenues are.

[14] Through Decision no. 171/2001, the Constitutional Court found that: „in the Constituent Assembly, during the debates on the articles of the draft of the Constitution and Report of the Drawing up commission (published in the Official Gazette of Romania, Part II, no. 35 of November 13th, 1991 and no. 36 of November 14th, 1991 respectively), it was discussed the amendment suggestion regarding the completion of the final thesis of paragraph (2) of art. 123 of the Constitution with syntagm «[...] and their own conviction». After debates, the Constituent Assembly rejected with

At the time of declaring the unconstitutionality, the text declared unconstitutional had the following content: „*The assessment of each evidence is made by the criminal pursuit body according to* ***its conviction*** (s.n.)*, made after having examined all the administrated evidences and guiding itself by its conscience*"[15].

We ask ourselves how and on what basis the court can build the conviction that that property comes from crime- related activities. In the legal provisions it is not mentioned regarding how one should establish the „ illicit character" of the propertied submitted to the extended confiscation. According to art. 44 paragraph (9) of the Constitution: „*The property designed for, used and resulted from offences or contraventions can be confiscated only according to the law*".

Regarding the extended confiscation, the law has in view **the property „resulted from offences".** This results from the content of the provisions of art. 118^2 paragraph (2) lit. b) of the Criminal code, according to which: „*the court has the conviction that that property* ***comes from crime- related activities*** *similar to those stipulated by paragraph (1)*".

The expression *„property that comes from crime- related activities"* is equivalent to the syntagm *„property resulted from offences".* There is still no reasonable answer to the question: How does the court establish that certain property comes from the committing of offences like those listed within art. 118^2 paragraph (1), without being informed about such an item? Besides the formal aspect – the existence or inexistence of a document instituting the proceedings –the substantial nature aspect, the content of the rules of evidence based on which it is established that the property comes from crime- related activities and the effects of such an establishing respectively, is more important. If in a trial it is found that certain property has a crime- related origin, this means that the convicted person to whom it is to be ordered the extended confiscation, has committed one or more offences of those listed within art. 118^2 paragraph (1) of the Criminal code. In other words, although the court has been instituted with the trial of some **„crime- related activities"**, this can find that the convicted person has committed such activities and order the confiscation of the property that comes from these.

The effects of an order through which it would be found that a convicted person has committed also other offences than the ones for which he has been sued are inadmissible in a lawful state because it is possible that other courts that would be instituted with the trail of the deeds from which comes the property that makes the object of the extended confiscation should not have a different opinion that that of the court that has ordered the extended confiscation. It will be raised the issue of the „authority" of an order through which it is found the committing of an „criminal- related activity" in the further cases the object of which is the proceedings of this „criminal- related activity".

Another important issue is that of *establishing a correlation between the provisions on the extended confiscation and those that regulate the special confiscation*. This correlation has to be underlined because it is necessary to demarcate the application field of the two penalties. From the reading of the juridical norms that establish the content of these safety measures results an unacceptable conclusion. Basically, all the hypotheses in which the measure of the extended confiscation could be applied are framed within the provisions of art. 118 of the Criminal code that regulates the special confiscation, which means that the provisions regarding the extended confiscation are useless because they have a redundant character.

---

majority of votes this amendment expressing in this way the will that the judges should be submitted only to «the law» and not to «their own conviction»".

[15] Regarding the provision that we consider as being unconstitutional, Prof. F. Streteanu points out that „the above- mentioned decision (Decision of the Constitutional Court no. 171/2001 – *n.n.*) has a whole different significance than it is tried to be attributed to it. We believe that the idea that was intended to be underlined by our constitutional administrative court is the one according to which the conviction of the judge should be the result of evaluating the administrated evidences and not a criterion in their evaluation".

To demonstrate, *we will place in the mirror the conditions of the two safety measures*:

- in order to be able to order the measure of the extended confiscation, it is necessary the condition that the deed should be an offence (quality of offender of the doer). In the case of the special confiscation, it is enough the condition of having committed a deed stipulated by the criminal law, which means that there is a species- gender type correlation;

- the conviction of the offender is a condition for the incidence of the extended confiscation, while in the case of the special confiscation this condition is missing; the measure could be ordered even in some of the cases where the deed is not actually an offence. In the case of these conditions there is also the same correlation (species- gender);

- the conviction for having committed one of the offences listed by art. 118^2 paragraph (1) of the Criminal code is a requirement for the extended confiscation, which makes this measure have a more limitary incidence sphere than the measure of the special confiscation that can be taken irrespective of the nature of the deed stipulated by the criminal law;

- the condition regarding the fact that the value of the property obtained by the convicted person 5 years prior and, if the case, after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one, basically limits in time the application of the extended confiscation measure. For instance, it is possible that a person should have obtained the property that comes from the committing of offences more than 5 years prior to the committing of the offence for which he is convicted. In such a case, it cannot be applied the provisions regarding the extended confiscation, but, if the conditions stipulated by art. 118 of the Criminal code are met, the measure of the special confiscation can be ordered. It is noticed that, if there had not been the provisions regarding the extended confiscation, in all the case in which a convicted person would have obtained property from a criminal- related activity, this would have been to be confiscated irrespective of the period when it was obtained;

- the condition regarding the conviction of the court that the property subject to the extended confiscation comes from offences of the nature of those for which the offender is convicted [stipulated by art. 118^2 paragraph (1)], has to be considered as applicable *a fortiori* also in the case of the special confiscations, as long as it does not contravene the constitutional provisions;

- finally, in the case of both the safety measures – the special confiscation and the extended confiscation – by taking them, it has to be removed a danger state and to be prevented the committing of new deeds stipulated by the criminal law.

As a conclusion, from the above it results that the measure of the extended confiscation has as object only the **„property that comes from the committing of certain offences"**, while the measure of the special confiscation has as object the **„property designed for, used and resulted from offences"** (or from simple deeds stipulated by the criminal law – according to the drawing up of art. 118 of the Criminal code).

If this is the case, that is, if the law pursues to submit to the extended confiscation exclusively the property that comes (results) from the committing of offences, it means that the entire regulation regarding this penalty within Law no. 63/2012, is useless because there is no incidence hypothesis of this that could not be placed within the provisions of art. 118 of the Criminal code.

Considering the above, we think that the regulation regarding the extended confiscation is not only unconstitutional, but also useless because all the hypotheses in the application sphere are placed within the provisions of art. 118 of the Criminal code.

On the other hand, the provisions analyzed within this article can produce an effect contrary to the expected one because, regarding the offences listed within art. 118^2 of the Criminal code, through the passing of these provisions, the lawgiver did nothing but to limit the application of the confiscation measure regarding the property resulted from the committing of some offences (those that come from the offences stipulated by art. 118^2 of the Criminal code). Because of this, because through its regulation, it is limited the possibility of confiscating the property that results from the

committing of some deeds stipulated by the criminal law, the denomination of the extended confiscation measure is inappropriate[16].

No doubt that the provisions of Framework Decision 2005/212/JHA, according to which, in order to efficiently prevent and combat the cross- border organized crime, the efforts of the competent bodies have to concentrate on the tracing, freezing, seizing and confiscation of the proceeds related to the offence, transpose the principle that the „**crime brings** (it does not have to bring) **no gains"**[17].

As for us, we consider that the „place" of the regulation regarding the extended confiscation should not be that designed for the safety measures, but that for the penalties. Our support is based on certain provisions within the Constitution, in the Criminal code and in Framework Decision 2005/212/JHA.

According to art. 44 paragraph (9) of the Constitution: „*The property designed for, used and resulted from offences or contraventions can be confiscated only within the law*". From these provisions, it results as clear as possible that, irrespective if it is special or extended, the measure of the confiscation can be taken only if the property in question is „designed for, used and resulted from offences or contraventions".

Therefore, any „extension" of the measure to other property of a convicted person infringes the constitutional provisions. Or, the property „*designed for, used and resulted from offences*"[18] enters the category of those listed within art. 118 of the Criminal code and the property „*designed for, used and resulted from contraventions*" can be the object of confiscation – complementary contravention penalty[19].

Compared to the content of art. 44 paragraph (9) of the Constitution, it can be said that certain provisions of art. 118 of the Criminal code are contrary to the Constitution. We have mainly in view, but not only, all the provisions that enable the confiscation of a property related to simple „deeds" or „ deeds stipulated by the criminal law". For instance, art. 118 paragraph (1) lit. a) that stipulates that the „*property obtained by having committed a* ***deed stipulated by the criminal law***" is subject to confiscation. Known that not all the deeds stipulated by the criminal law are offences, it means that the property obtained through deeds stipulated by the criminal law that does not achieve the content of an offence cannot be confiscated. For instance, the committing of a deed stipulated by the criminal law by a minor that has no discernment.

In our opinion, besides the provisions that enable the confiscation from simple doers, the provisions of art. 118 paragraph (1) lit. c) second thesis, according to which: „*When* ***the property belongs to other person,*** *the confiscation is ordered if the causing, modification or adaptation was made by the owner or by the offender with the knowledge of the owner*" are also „suspect" of unconstitutionality.

Considering the above relevant realities, especially the provisions of the fundamental law, we consider that, *de lege lata*, the regulation „of the extended confiscation" as a safety measure is an „ impossible mission".

On the other hand, if through „extended confiscation" we understand a safety measure, consisting in the transfer into the state property of a property resulted from the committing of offences, we can say that Framework Decision 2005/212/JHA was „transposed" into our Criminal

---

[16] Based on the content of the regulation, the corresponding name could be „limited confiscation".

[17] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0766.

[18] Of course, with regard to the extended confiscation, the law has in view only the assets „resulted from offences thing results from the content of the provisions of art. 118^1 paragraph (2) lit. b) of the Criminal code, according to which: „the court has the conviction that that property comes from crime- related activities similar to those stipulated within paragraph (1)".

[19] According to art. 5 paragraph (2) lit. a), one of the complementary contravention penalties is the „*confiscation of the property designed for, used and resulted from offences*". We notice that the formulation of the text is similar to that in the Constitution.

code a long time ago, since, in the hypotheses considered by art. 118 of the Criminal code, it is contained all the cases aimed by the provisions of this framework decision.

For instance, we render below the definitions given by art. 1 of Framework Decision 2005/212/JHA to some notions. Art. 1 of this document stipulates that, in the sense of the current framework decision:

- „proceed" means any economic advantage *from criminal offences*. This advantage can consist of any form of property;

- „property" includes *property of any description*, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property;

- „ instrumentalities" means any property used or intended to be used, in any manner, wholly or in part, *to commit a criminal offence or criminal offences*;

- „confiscation" means *a penalty or measure ordered* by a court following proceedings *in relation to a criminal offence or criminal offences*, resulting in the final deprivation of property.

The confiscation – safety measure – existing in our criminal law, remains in question the regulation of the confiscation „as penalty".

Therefore, if the lawgiver wishes to enlarge the spectrum of the criminal penalties in the case of the offences from the committing of which the convicted persons pursue to obtain or even obtain certain property, the current regulation has to be reconsidered.

Agreeing with the idea that the persons that commit offences from which they obtain patrimonial advantages should support also certain pecuniary penalties, *we consider that the solution is the one stipulated by the new Criminal code*.

We consider the provisions of art. 62 paragraph (1) of the new Criminal code, according to which: ***„If through the committed offence it was pursued the obtaining of a patrimonial gain besides the imprisonment it can be applied also a fine"***. Such a text can be introduced after paragraph (5) of art. 63 of the Criminal code.

In order to achieve its purpose, such a regulation should, however, be accompanied by at least two changes.

The first one aims to considerably increase the fine limits that at present no longer achieve the preventive- deterrent purpose specific to penalities. Compared to the criminal fine, in many situations, the contravention fine is much higher than the criminal one.

The limits of the criminal fine from our criminal code are, if not the lowest in Europe, certainly among the lowest. We believe that the fine could be from RON 10.000 to 1.000.000.

A second change should consist in the rewriting of art. 63^1 of the Criminal code, in the sense of stipulating the possibility of replacing the fine penalty with the imprisonment, irrespective if the two are alternatively stipulated or the fine is the sole penalty.

References

- F. Streteanu, Tratat de drept penal. Partea generală, vol. I, C.H. Beck Publishing House, Bucharest, 2008.
- M. Gorunescu, C. Toader, Confiscarea extinsă – din contencios constituţional în contencios administrativ şi fiscal spre contencios penal, in Legea nr. 9/2012.
- F. Streteanu, Consideraţii privind confiscarea extinsă, in Criminal law notebooks no. 2/2012.
- D. Niţu, Modificările aduse în materia confiscării de prevederile Legii nr. 278/ 2006, in Criminal law notebooks no. 3/2006.

THE RELATION BETWEEN THE CRIMINAL ACTION AND THE CIVIL ACTION

BOGDAN FLORIN MICU*

Abstract
In Romania, the free access to the law is considered a fundamental human right, enriched by the Constitution itself. In practice, the committing of an illegal act may cause prejudice, being described as a civil offense, but at the same time may create a report of criminal law, attracting the criminal liability, in which case it is called offense. This is how we find in the jurisprudence, both civil action and criminal action, so that, in this study we try to present some singularities of these two types of actions, and of the relation between them.

Keywords: *free access to law, legal action, criminal action, civil action, the Criminal Procedure Code*

1.The Legal Action

The Romanian Constitution, in art. 21 enshrines the right of every person to have free access to law for protecting the rights, freedoms and legitimate interests of the persons, such right being qualified by the constitute legislator as a fundamental human right. Internally, the free access to law is not provided only in the Constitution; we also find it in the Law no. 304/2004 on the judicial organization.[1] Law no. 304/2004 contains 4 articles in Chapter II entitled "*the free access to law*", from which contents is revealed the legal frame of the exertion of this right, namely art. 6-9. For example, art. 6 has the following content: "*any person can address to the law for protecting his rights, freedoms and legitimate interests in exerting his right to a fair trial*". Also we note that the access to law is also consecrated internationally, such as the Universal Declaration of Human Rights art. 10: "any person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, which will decide on his rights and obligations or on any criminal charge against him", European Convention on Human Rights in art. 6, the Charter of the Fundamental Rights in art. 47, paragraph (2). Thus, according to the European regulations, the free access to law requires the fulfillment of there conditions: the validity of law, the independence of law and the impartiality of law.

The procedure whereby any person may defend his harmed rights and interests is the legal action. From the perspective of the civil law, the legal action has been defined as: "the way of law, the ability, the faculty, the legal power, conceded to anyone, of obtaining with the forms and in the conditions required by the law, the recognition and realization of a personal right, thus, it represents his social protection in its most expressive and effective form[2]". According to another opinion, from the perspective of the criminal law, the legal action is "*the mean by which the law conflict is*

* Associate Professor, PhD, Dean of the Law Faculty, "Nicolae Titulescu" University (e-mail: bogdan.micu@gmail.com).

[1] Law no. 304/2004 on the judicial organization, published in the Gazette no. 576/2004, with the latest amendment by the Government Emergency Ordinance no. 23/2012 for the amendment and completion of the Law no. 303/2004 on the status of the judges and the prosecutors and on the extension period provided in art. III from Title XVI of Law no. 274/2005 on the property and justice reform and several additional measures, published in the Gazette no. 383/2012.

[2] Herovanu, E. „*Teoria exeucuţiunei silite" (The Theory of Forced Executive),* R. Cioflec Library Publishing, Bucharest, 1942, p. 18. Ciobanu V. M., „*Tratat teoretic şi practic de procedură civilă*", (Theoretical and practical Treaty of Civil Procedure), Vol. I, „*Teoria generală" (General Theory),* National Publishing, Bucharest, 1996, p. 248.

submitted to be solved by the justice[3]*".* As the quoted author rightly states "*the legal action may also be, as the case, civil action, criminal action or offence action, but it has to be delimitated the harmed right by the illegal perpetration of the legal demand as a mean of exploitation of the right of action".*

The two actions, the civil and the criminal one have been analyzed, both from the perspective of the legislator but also from the perspective of the legal literature, in terms of the common elements, namely the factual and the legal basis or the cause, the parties or the subjects, and the object of the action. In addition, the case of the criminal action is also analyzed as the *"functional ability of the legal action"*[4], which refers to all procedural documents that may be incurred by exerting the action within the legal frame, specific to the branch of law where this action is part of.

2. The Criminal Action

The criminal action has been defined in the doctrine of specialty as *"the legal instrument by which the conflict of criminal law is submitted to be solved by the criminal judicial bodies."*[5]

2.1. The Exerting of the Criminal Action within the Criminal Trial

The exerting of the criminal action in the criminal trial requires the clarification of general procedure issues such as: the object of the criminal action, the subjects of the criminal actions, but also the specific features concerning it performance in due time, such as: the initiation of the criminal action, the exerting of the criminal action, the termination and depletion of the criminal action. According to the doctrine[6], the criminal action is customized according to its specific object and the legal frame in which is performed through the following, is a social action, belongs to the society and is performed through the state bodies invested in this respect; it is obligatory and must be necessarily performed whenever a crime has been committed; is indivisible, and it is extended to all those that have participated in the offense; as a result of the personal criminal liability, the criminal action is individual.

In accordance with art. 9 paragraph (1) of the Criminal Procedure Code, the criminal action has as its object "the criminal liability of the persons that have committed offenses". In one opinion, "the object of the criminal action, namely the liability of the persons that have committed offenses should not be confused with the criminal trial purpose that concerns the trial and the punishment of those who are guilty of violating the criminal law".[7] In the specialty literature has been appreciated that "within the criminal procedural law, the lack of legal norms on the purpose of trial determines the arbitrariness and the uncertainty in the performance and the solution of the criminal trials; the legal rules relating to the purpose of the criminal trial have their own importance: they represent a summary statement of reasons for the need and the purpose of the regulations from the Criminal Procedure Code".[8]

---

[3] Ion Neagu, *„Tratat de procedură penală", (Criminal Procedure Treaty),* Pro Publishing, Bucharest, 1997, p. 159.

[4] Neagu Ion, quoted work, p. 160.

[5] Dongoroz, V., Kahane, S., Antoniu, G., Bulai, C., Iliescu, N., Stănoiu, R., "*Explicaţii teoretice ale Codului penal român. Partea generală"(Theoretical explanations of the Romanian* Criminal Procedure Code. *The General Part".* Vol. I, Academiei Publishing, Bucharest, 1975, p. 61.

[6] Neagu Ion, quoted work, p. 163-164.

[7] Damaschin, M., *„Drept procesual penal"*, (*Criminal Procedure Law*), Wolters Kluwer Publishing, Bucharest, 2010, p. 109.

[8] Dongoroz, V., Kahane, S., Antoniu, G., Bulai, C., Iliescu, N., Stănoiu, R., quoted work, p. 39-40, 1975; Grofu, N., *„Unele reflecţii asupra procesului penal"*, (Several Reflections on the criminal trial), the Dreptul Journal 1/2012, p. 264.

Concerning the subjects of the criminal action, we also find in the case of the criminal action the active subject and the passive subject. As rightly stated in the doctrine, "the subjects of the criminal actions are in fact the main subjects of the criminal procedural legal report, namely the state as an active subject of the criminal action and the person of the offender, as a passive subject of this action".[9]

The performance of the criminal action is explained by the doctrine[10] in the sense that it means: "the performance of the procedural document provided by the law whereby the charge of committing an offense is made against a particular person and is triggered the criminal liability of this person." Thus, art. 9, paragraph 1 from the Criminal Procedure Code provides that the criminal action is performed through the act of indictment required by the law. The act of indictment required by the law may be: the decree, the indictment, the oral testimony, the court decision, according to the moment of triggering the criminal trial or to the moment of performance of the criminal action. As stated in the doctrine of specialty, "the criminal prosecution may be commenced *in rem*, it is said only on the offense even if the perpetrator is unknown, while the criminal action can be performed only within the criminal trial and is made *in personam".*[11] "The performance of the criminal action against a person confers this one the status of defendant, this procedural quality having specific resonance on the department of the rights and obligations within the criminal procedural legal report".[12]

In what concerns the exerting of the criminal action, according to art. 9, paragraph (3) the Rule of criminal procedure, this one "can be exerted all through the criminal trial", having the meaning of "*supporting it in order to achieve the criminal liability of the defendant (...) involving the implementation of activities related to the performance of the taking of evidence in the criminal case, taking certain procedural measures, application forms, the raising of exceptions, etc."*[13] Therefore, as shown from the Romanian legislator conception, the exerting of the criminal action in the judgment phase is done only by the prosecutor, and in the cases in which his participation in judgment is not mandatory, the criminal action is exerted by the injured person, in both situations the law allowing such holders, under certain situations and to waiver this right.

In what concerns the termination of the criminal action, the Romanian legislator has provided in detail the two points in time, namely before and after the performance of the criminal action. In what concerns the causes that prevent the performance of the criminal action or that terminate the criminal action, art. 10 the Criminal Procedure Code specifically details 11 cases, classified as impediments arising from the lack of cause of the criminal action (art. 10 letters a-e) and impediments arising from the lack of purpose of the criminal action (art. 10 letters f-j). The cases where the criminal action is unfounded are the following: the offense does not exist, the offense does not present the degree of social danger of an offense, the offense was not committed by the accused or the defendant, the offense lacks of one of the constitutive elements of the contravention and there is one of the causes that eliminates the criminal nature of the offense. The second group of cases, those relating to situations in which the criminal action may be exerting only in certain conditions or lacks of object, includes: the prior complaint of the injured person is missing, the authorization or notification of the competent body, or other condition required by the law, necessary for the performance of the criminal action; there have interfered the amnesty, the prescription or the death of the perpetrator or, if the case, the removal of the legal entity when it has the capacity of perpetrator; the complaint has been withdrawn or the parties have reconciled, in the case of the offenses for

[9] Neagu Ion, quoted work, p. 163.

[10] Theodoru, G.G, „*Drept procesual penal. Partea generală",(Procedural Criminal Law. The General Part),* Cugetarea Publishing, Iasi, 1996, p. 177; Damaschin M., *quoted work, p. 113.*

[11] Neagu Ion, quoted work, p. 165; Damaschin M, quoted work, p.114.

[12] Volonciu, N. ,*Tratat de procedură penală, Partea Specială", (Criminal Procedure Treat, The Special Part),* Vol II, Paideia Publishing, Bucharest 1999, p. 235.

[13] Neagu Ion, *quoted work,* p. 168.

which the withdrawn of the complaint or the reconciliation of the parties abolishes the criminal liability; it was disposed the replacement of the criminal liability with the liability which attracts a penalty with an administrative nature, there is a case of non punishment provided by the law; there is a judgment authority.

3. Civil Action

The civil action was defined in the literature of specialty as "all procedural means by which within the civil trial, is added the protection of the civil subject right – through its recognition or realization, if it is violated or challenged, or of legal situations protected by law".[14]

3.1. The Exerting of the Civil Action within the Civil Trial

The Romanian legal scenery is richer, in the sense that, since October 2011 it has new Criminal Procedure Code, which represents a new conception of the legislator on the institutions of law. Thus, the new Civil Code regulates a range of new institutions, such as for example the unification of the legislation on civil liability that includes both the civil tort liability (art. 1349) and the contractual liability (art. 1350), the defining of guilt, the introduction of new liability form, new forms of prejudice, such as prejudices by rebound (art. 1390-1393), prejudice for the loss of chance (art. 1385) etc.

If previous to the occurrence of the new Civil Code, the legal basis of the civil action was considered art. 998-999, nowadays we can talk about art. 1349. In what concerns the cumulative conditions of the civil tort liability, they are referred to in art. 1357 the new Civil Code which provides: the prejudice, the illegal offense, the causal and the guilt report of the perpetrator who has created the prejudice. We have also noted that the new Civil Code, for the determination of the subject that can be liable, in case of civil liability for the prejudice caused by animals (art. 1375) or things (art. 1376) has been defined the concept of legal security in art. 1377 the new Civil Code, which has the following content: "in accordance with the provisions of art. 1375 and 1376, *has the custody of the animal or the thing the owner or the person who, according to a legal provision or an agreement or even only in fact, exerts independently the control and the supervision of the animal and thing and use it for its own.*"

According to art. 19 the Criminal Procedure Code, the injured person who has not been constituted as a civil party within the criminal party, may introduce in the civil court an action to redress the prejudice caused by offense, and according to art. 20, paragraph (1) Criminal Procedure Code, the injured party constituted as civil party in the criminal trial may proceed an action before the civil court, if the criminal court, through a final judgment, has left unresolved the civil action. Also, the legislator expressly regulates the auxiliary exerting of the civil action in case that the claimant is a person without exerting capacity or with a limited exerting capacity, the court being obliged to auxiliary decide on the correction of the prejudice and of the moral prejudice, even if the offended party is not a civil party, according to art. 17, paragraph (3) Criminal Procedure Code.

Another problem that we have identified from the jurisprudence is the one questioning the relation between two types of liability; it refers to the situation where the liability is attracted by a traffic accident. Thus, in a case, the Huedin Court has decided that: "from the analysis of the legal provisions and of the law principles regulated by the Civil Code, the Criminal Procedure Code and the special Law no. 136/1995, issues that, in case of a traffic accident, that have resulted in a prejudice causation, for which it has been concluded a compulsory insurance contract of civil liability, coexists the civil tort liability, based on art. 998 from the Civil Code, of the person who, by

[14] V.M., Ciobanu, "*Consideraţii privind acţiunea civilă şi dreptul la acţiune*" (Considerations on the civil action an don the right of action), in S.C.J. no. 4/1985, p. 330; V.M. Ciobanu, 1996, *quoted work*, p. 250.

his offense, has caused harmful effects, with contractual liability of the insurer, based on the insurance contract, concluded under the conditions regulated by the Law no. 136/1995."[15]

As it has been revealed in the study of the jurisprudence, in case of the civil liability, the court allows the correction of the prejudice, both concerning the material side and the moral side, recognizing both forms of the prejudice, namely the *damnum emergens* and the *lucrum cesans*, of course, under the condition of proving them. Consequently, the applicable legislation of the civil action within the civil trial is the civil one.

3.2. The Exerting of the Civil Action within the Criminal Trial

The Romanian law allows that, within a criminal trial, the civil action may be joined to the criminal action, by way of constitution the offended person as a civil party. The Criminal Procedure Code details in art. 14 the object and the exerting of the civil action and in art. 15 the constitution of the civil party. Thus, the object of the civil action is the civil liability of the defendant, and of the responsible party from the civil point of view; the constitution of civil party can be done during the criminal prosecution but also during the court examination, until de reading of the act of referral. In this situation the civil action is exempt from the stamp duty. Another provision of the Criminal Procedure Code applicable to the subject in question is the one that regulates the situation in which the court has the obligation to call to be answered, the person who suffered an offense through a criminal action, and the responsible person from the civil point of view. "The offended person is put in mind that (...) Whether a material or moral offense has suffered, the person may be constituted as a civil party." As has been shown in the doctrine, for the exerting of the civil action within the civil trial, are required to be *cumulative* fulfilled the following conditions: "the offense needs to produce a material or a moral prejudice; between the committed offense and the claimed offense has to be a casualty relation; the prejudice has to be certain; the prejudice has not been corrected; it has to be a manifestation of will from the offended person in relation to his indemnity."[16]

The exerting of the civil action within the criminal object has been the object of the European Court of Human Rights jurisprudence. Thus, we note that, the optics of the Court concerning the applicability in art. 6, paragraph (1) when it constitutes as a civil party within the criminal trial, in case Perez versus France (Decision on 12.02.2004), for example, is in the sense that: "while the constitution as civil party equates a civil call in a lawsuit, it does not matter that there is not a formal request of correction of the caused prejudice. Even if the criminal procedure concerns the decision of criminal culpability of a person, through the constitution as civil part, the procedure has also a civil element. Consequently, although the Convention does not guarantee the right of any person of starting a criminal procedure, an area where art. 6 is not applicable, art. 6 becomes applicable if it has been started a criminal procedure and the victim of the offense has been constituted as civil party." Previous to the European Court f Human Rights, in the case Matthies Lenzen versus Luxembourg (Decision on 14/06/2001), has stated that: "once the constitution as a civil party within a criminal trial, the victim of an offense becomes party of a civil dispute." Also, on the same occasion, the court has concluded that: "once the constitution as a civil party within a criminal trial, the victim of an offense becomes party of a civil dispute. So that art. 6 is applicable, irrespective of the value of civil indemnities that the party requires. Therefore, the court considers, in this case art. 6 is applicable, even if the claimant has been constituted as civil party with a token amount of 1 franc."

---

[15] The Criminal Decision no. 66/R/03.02.2010

[16] Damaschin M, *quoted work,* p. 131.

4. The Relation between the Criminal Action and the Civil Action

The Civil Procedure Code in Chapter II, entitled "*the criminal and the civil action",* analyses the two types of actions, also observing the correlations between them. As we have previously mentioned, concerning the civil action which arises as a consequence of committing an offense that may be qualified both as crime and offense that produces civil prejudices, the two areas, the civil and the criminal are intertwined. It should be noted that, according to the legal provisions, the offended person has the right to opt, for the value of his civil claims, of the civil or the criminal way. In the following, we shall present several types of situations that may arise concerning the relation between the two actions.

4.1. The Exerting in Different Moments in Time of the Two Legal Actions

We distinguish two situations in which can be examined whether there is a relation between the two actions, as follows: the criminal action is resolved separately before the civil action, in which case, according to the doctrine[17] (there is no question about the relation between the two actions owing to the fact that the criminal action has been solved). On the contrary, there arises the question of existence of a relation between the two actions in case that the civil action is resolved separately and before the criminal action, according to the afore quoted author. The solving of the relation between the two actions is done according to art. 22 of the Criminal Procedure Code, in the sense that the final decision of the criminal court has authority before the criminal prosecution bodies and of the criminal court, concerning the existence of the offense, of the person who has committed it and of the guilty of this person.[18] The legislator also foresees the conversely situation, in the sense that the final decision of the civil court through which the civil action has been solved, does not have authority before the criminal proceeding body and of the criminal court, concerning the existence of the offense, of the person who has committed it and of the guilty of this person. In other words, the doctrine states: "even if the civil court has finally decided that the offense has not been committed by the defendant, this one may be sent by the prosecutor to the criminal court, a court that may convict him, bearing in mind that he has committed the offense incriminated as criminal offense if this thing arises from the evidence gathered in the criminal case."[19] Consequently, continues the quoted author, "as long as the offended party has appealed in the civil court and there is no criminal trial in which the offense that has caused the prejudiced is incriminated as criminal offense, the civil action has not any particularity; (…) it is addressed to the civil court, according to the civil procedural provisions and it is judged under the conditions of the same procedure." In what concerns the topic we are presenting, another author has stated that: "the authority of the fact judged in the criminal procedure on the civil, represents only the application of the positive effect of the criminal decision regarding the offenses discussed: the existence of the offense, the person who has committed the offense and the guilty of that person. In other words, according to the idea we have shared, in this case, it is also valid the imputability of the verification and jurisdictional debate on the common denominator between the two types of litigation."[20]

If, however, after the party has appealed the civil court, the criminal action is being started and the offended person, exerting his right of option provided in art. 14, paragraph (2), Criminal Procedure Code, understands that it has to follow the civil way for correction of the prejudice

[17] Neagu Ion, *quoted work,* p. 203.

[18] Damaschin M, *quoted work*, p. 139.

[19] Verdeş, E. C., „*Răspunderea juridică. Relaţia dintre răspunderea civilă şi răspunderea penală*", (*The legal liability. The relation between the legal and the criminal liability),* Universul Juridic Publishing, 2011, p. 448.

[20] Deleanu, I., "*Tratat de procedură civilă*", (*Civil Procedure Treaty),* vol. II, All Beck Publishing Bucharest, 2005, p. 93, Verdeş E.C., *quoted work,* p. 447.

suffered by criminal offense, and not to join the civil action to the criminal action within the criminal trial, the provisions of art. 19, paragraph (2), become conflicting and the trial in civil court is suspended.[21] The quoted author also states that: "after the criminal court has decided through a final judgment in the criminal trial, at the request at the parties the civil trial is resumed and the civil action is solved, within the limits of the compliance with the principle inserted into the text of art. 22, paragraph (1) Criminal Procedure Code". Moreover, through these provisions, the civil court is practically required to solve the case so that the solution is not in contradiction with the criminal judgment, concerning the existence of the offense, of the person who has committed the offense and of the guilty[22] of that person.

4.2. The Simultaneous Exerting of the Criminal Action and of the Civil Action:
4.2.1. Within the Same Procedural Frame

In this case, the incident texts from the Criminal Code are: art. 346, 347 and they refer to the situation in which the two actions are concurrently performed before the same courts or in two different courts. Thus, according to art. 346, entitled "*the solving of the civil action*", which concerns the situation in which the two actions are performed within the criminal trial, the court is required to decide also on the civil action, the cases expressly provided by the legislator refer to: conviction, exoneration, termination of the criminal trial. The legislator specifies when the court may call upon the correction of material and moral damage, namely: when the exoneration has been pronounced for the case provided in art. 10, paragraph (1), letter b^1, or because the court has observed the existence of a case that eliminates the criminal nature of the offense because one of the constitutive elements of the offense is missing. Civil indemnifies can not be awarded in the case that the exoneration has been pronounced owing to the fact that the alleged offense does not exist or has not been committed by the defendant. There can also be the case in which the court does not solve the civil action, case regulated by art. 346 paragraph (4), namely: when the court pronounces the exoneration for the case provided in art. 10, paragraph (1), letter b) or when the court pronounces the termination of the criminal trial for any of the cases provided in art. 10, paragraph (1), letter f) and j), but also in case of withdrawal of the prior complaint.

Another hypothesis regulated by the legislator concerns the civil action dissociating and the postponement of its judgment in another session, in case that the solving of the civil claims would cause the delay of the criminal action solving, according to art. 347 and under art 348^1, unless the constitution of the civil party, the court decides on the correction of the material and moral damage in the cases provided by art. 17 (the auxiliary exerting of the civil action) and in other cases only considering the reversion, the eradication of a register and the restoration of the situation previous to the offense. Consequently, in the doctrine, the legal action has been defined in terms of the two actions, the criminal and the civil one, as follows: "the legal mean by which the law conflict arisen from committing an offense is submitted before the judicial bodies, in order to determine the criminal and the civil liability of the guilty person and to apply the state coercion on that person, and the person's obligation to correct the prejudice committed by criminal offense, when the case".[23]

According to the High Court of Cassation and Justice, "the civil tort liability is governed by the principle of the full correction of the material and moral prejudice, caused by the offense committed, and therefore, the value of the indemnities can not be limited according to the payment possibilities of the defendant".[24] On the other hand, in the layout of the new Criminal Procedure

[21] Verdeş E.C., *quoted work,* p. 449.
[22] The same.
[23] Mateuţ, Gh., „*Tratat de procedură penală. Parte generală", (Criminal Procedure Treaty. The General Part).* C.H.. Beck Publishing, Bucharest 2007, p. 536.
[24] The High Court of Cassation and Justice, The Criminal Department, Decision no. 2617/July 9th 2009.

Code[25] is expressly provided that: "the civil action is solved within the criminal trial, if it is not overdrawn the reasonable duration of the trial, art. 19, paragraph (4)", therefore observing the tendency of the Romanian legislator to join the European legislator conception. Another novelty element in the new Criminal Procedure Code refers to: the waiver of the civil claims, the transaction, mediation and recognition of the civil claims by the defendant, these representing only some of the institutions regulated by this act.

4.2.2. Within Different Procedural Frame

Another situation existing in practice which may question the relation between the two actions refer to the situation in which the two actions are simultaneously, separately and in different courts regulated. In this sense, art. 19, paragraph (2) shows that the judgment before the civil court is suspended until the final resolution of the criminal case, this rule being known as: "the criminal action holds back the civil action".[26] The reason of this rule is to grant to the criminal court a complete independence in solving the problems submitted for judgment, in investigating and deciding without being influenced by what has been established before in the Civil.[27] In the Civil art. 244, paragraph (1), point 2, Criminal Procedure Code, provides a case of legal optional adjournment: when there appear the clues of a criminal offense, which determination would have a decisive effect on the decision to be given.

In what concerns the aforementioned articles, from the Civil Procedure Code and the Criminal Procedure Code, the Constitutional Court has noted in a decision (Decision no. 262/2002) that between the two texts, there is no identity from the point of view of the norm nature. Therefore, the court estimates that while the text from the criminal procedure art. 19, paragraph (2) includes a mandatory norm that requires the suspension of the civil case until definitely solving the criminal action, the text from the civil procedure – art. 244, paragraph (1) point 2 contains an optional provision, the court may suspend the solving of the civil action until the date of a final judgment in the criminal trial.

As stated in the doctrine, "in the content of art. 244, paragraph (1), point 2, Civil Procedure Code, there are three possible hypotheses: the civil and the criminal court have been notified at the same time with the solving of the civil action, respectively of the criminal action; before the performance of the civil action, the offended person has appealed to the civil court, prior to this, the criminal action has started; in what concerns the civil side, the person has chosen to promote a separate action after it has started the performance of the criminal action or has given up the capacity of civil party in the criminal trial and has formulated a separate action before the civil court, as enable the provisions of art. 19 Criminal Procedure Code or it has been decided the disjunction of the civil action by the criminal action, observing that the solving together the two actions would determine the delay of the judgment in the criminal case".[28] The practice of the Supreme Court is in the sense that, according to art. 224, paragraph (1), point 2, Civil Procedure Code, the court may suspend the judgment of the case if it is proved that the notification of the criminal proceeding body has been made for an offense that would have a direct effect on the solving of the pendent civil action, and not when simple assumptions are presented, without having been ordered the prosecution.[29] Given that, from the material point of view, for both actions the justification is the offense, it is natural that the criminal action to take precedence over the civil action, and the final judgment of the criminal court

[25] *The New Criminal Procedure Code*, *published in the Gazette no. 486/2010.*

[26] Neagu Ion, *quoted work,* 1997, p. 204.

[27] Anghel, I.M., Deak, F., Popa, M.F., „*Răspunderea civilă*", *(The Civil Liability),* Ştiinţifică Publishing, Bucharest, 1970, Verdeş E.C., *quoted work*, p. 435.

[28] Verdeş E.C., *quoted work,* p. 438-439.

[29] The Supreme Court, The Administrative Disputed Claims Office, decision no. 392/1996.

to have authority before the civil court.[30] In the same sense, there is also another opinion, according to which, "the criminal action takes precedence over the civil action, the unique material cause of the two actions is the commitment of the offense, and on the other hand, the solving of the civil action is subject to the solving of the criminal case in what concerns the existence of the offense, of the person who has committed the offense an of the person's guilty."[31]

As stated in the doctrine, "if the civil trial continues and there is pronounced a final irrevocable judgment which is in contradiction with the decision pronounced in the civil action, it has to be submitted the solution of promoting a new civil action under the findings made in the criminal judgment."[32]

Conclusions

A very current problem discussed both in the doctrine and in the jurisprudence refers to the applicability of the rule "the criminal action holds back the civil action", situation regulated by the provisions of art. 22 Criminal Procedure Code namely, what happens when there is not possible to proceed the criminal trial from different reasons and when subsequently there will be performed a criminal trial, the civil court invested with authority concerning the civil tort liability for the same illegal act, to have irrevocably solved the civil action. The doctrine has also identified the answer to the question: "does the civil judgment have any effect on the criminal trial; the answer is being given by the limits of art. 22, paragraph (2) Civil Procedure Code."[33] Also in the specialty literature of law has been identified another situation concerning the following: what happens when the criminal court pronounces a judgment that is in contradiction with the civil judgment pronounced in what concerns the existence of the offense, the person who has committed the offense and the guilty of that person, owing to the fact that the criminal court is not entitled to cancel the judgment pronounced by the civil court. In this respect, the literature of specialty states that: "the contradictory of the two judgments can be solved at the request of the interested party, by promoting before the civil court an extraordinary way of appeal through a revision based on the provisions of art. 323 point 7, the Civil Procedure Code".[34]

Consequently, in this study we have tried to present the subtleties of both action, civil and criminal, promoted separately or together, both within the criminal trial, but also within the different procedural frame. The jurisprudence is the one that has observed the difficulties encountered in each concrete case, so that, at this point, we observe the significant efforts of the national legislator for updating the Codes, Civil, Criminal and Criminal Procedure. Not least, we note the excellent contribution of the European Court of Human Rights jurisprudence, in what concerns the topic, in fact, being the one that, in the recent years, has established itself as an active presence, likely to inspire the national judge.

References

- Anghel, I.M., Deak, F., Popa, M.F., „*Răspunderea civilă*", *(The Civil Liability),* Ştiinţifică Publishing, Bucharest, 1970.
- Boroi, G., Spineanu Matei, „*Codul de procedură civilă comentat şi adnotat*", (The Civil Procedure Code Commented and Annotated"), Hamangiu Publishing, Bucharest, 2007.

[30] Damaschin M, *quoted work,* p. 140.

[31] Neagu Ion, *quoted work,* 1997, p. 204.

[32] Boroi, G., Rădescu, D., „*Codul de procedură civilă comentat şi adnotat*", (The Civil Procedure Code Commented and Annotated"), All Publishing, Bucharest, 1994, p. 330.

[33] Dongoroz et all, *quoted work,*2003, p. 81-82.

[34] Deleanu, I. „*Fundamentul revizuirii pentru motivul prevăzut de art. 323 pct. 7 Cod procedură civilă* (The Basis of the Revision for the Reason Provided in Art. 323, poin 7, Civil Procedure Code), Curierul Judiciar Journal, no. 3/2007, p. 57.

- Boroi, G., Rădescu, D., „*Codul de procedură civilă comentat şi adnotat*", (The Civil Procedure Code Commented and Annotated"), All Publishing, Bucharest, 1994.
- Ciobanu, V. M., „*Tratat teoretic şi practic de procedură civilă*",*(Civil Procedure Theoretical and Practical Treaty*), Vol. I, „*Teoria generală", (The General Theory),* National Publishing, Bucharest, 1996.
- Ciobanu, V. M., "*Consideraţii privind acţiunea civilă şi dreptul la acţiune*" (Considerations on the civil action an don the right of action), in S.C.J. no. 4/1985, p. 330.
- Damaschin, M., „*Drept procesual penal"*, (*Criminal Procedure Law*), Wolters Kluwer Publishing, Bucharest, 2010.
- Deleanu, I., "*Tratat de procedură civilă*", (*Civil Procedure Treaty),* vol. II, All Beck Publishing Bucharest, 2005.
- Deleanu, I. „*Fundamentul revizuirii pentru motivul prevăzut de art. 323 pct. 7 Cod procedură civilă* (The Basis of the Revision for the Reason Provided in Art. 323, poin 7, Civil Procedure Code), Curierul Judiciar Journal, no. 3/2007.
- Dongoroz, V., Kahane, S., Antoniu, G., Bulai, C., Iliescu, N., Stănoiu, R., "*Explicaţii teoretice ale Codului penal român. Partea generală" (Theoretical explanations of the Romanian* Criminal Procedure Code. *The General Part".* Vol. I, Academiei Publishing, Bucharest, 1975.
- Grofu, N., *„ Unele reflecţii asupra procesului penal"*, (Several Reflections on the criminal trial), the Dreptul Journal 1/2012.
- Herovanu, E. „*Teoria exeucuţiunei silite" (The Theory of Forced Executive),* R. Cioflec Library Publishing, Bucharest, 1942.
- Mateuţ, Gh., „*Tratat de procedură penală. Parte generală"*, *(Criminal Procedure Treaty. The General Part).* C.H... Beck Publishing, Bucharest 2007.
- Ion Neagu, „*Tratat de procedură penală", (Criminal Procedure Treaty),* Pro Publishing, Bucharest, 1997.
- Theodoru, G.G, „*Drept procesual penal. Partea generală",(Procedural Criminal Law. The General Part),* Cugetarea Publishing, Iasi, 1996.
- Tudorel, T., „*Constituţia României reflectată în jurisprudenţa constituţională"*, *(The Romanian Constitution Reflected in the Constitutional Jurisprudence),* Hamgiu Publishing, Bucharest, 2011.
- Verdeş, E. C., „*Răspunderea juridică. Relaţia dintre răspunderea civilă şi răspunderea penală*", (*The legal liability. The relation between the legal and the criminal liability),* Universul Juridic Publishing, 2011
- Volonciu, N., Tratat *de procedură penală, Partea Specială", (Criminal Procedure Treat, The Special Part),* Vol II, Paideia Publishing, Bucharest 1999.
- Romanian Constitution.
- The Criminal Procedure Code
- The Civil Procedure Code
- The New Civil Procedure Code, published in the Gazette no. 486/2010.
- The Decision of the Romanian Constitutional Court no. 262/2002, published in the Gazette no. 807/2002.
- Law no. 304/2004 on the judicial organization, published in the Gazette no. 576/2004, with the latest amendment by the Government Emergency Ordinance no. 23/2012 for the amendment and completion of the Law no. 303/2004 on the status of the judges and the prosecutors and on the extension period provided in art. III from Title XVI of Law no. 274/2005 on the property and justice reform and several additional measures, published in the Gazette no. 383/2012.
- The Supreme Court, The Administrative Disputed Claims Office, decision no. 392/1996.
- The Decision in case Perez v. France on 12.02.2004, accessed on 01.11.2012 from http://jurisprudentacedo.com/Perez-versus-Franta-Constituire-de-parte-civila-in-procesul-penal-Aplicabilitatea-art-6-CEDO.html.
- The Decision in case Matthies-Lenzen-vs-Luxembourg, accessed on 01.11.2012 from http://jurisprudentacedo.com/Matthies-Lenzen-contra-Luxemburg-Pretentii-infime-Despagubiri-Constituire-parte-civila-Proces-penal.html.
- The Criminal Decision no. 66/R/ 03.02.2010, Huedin court, accessed on 01.11.2012 from http://www.curteadeapelcluj.ro/jurisprudenta/sectia%20penala/Penal%20trim.%20I%202010.pdf.
- The High Court of Cassation and Justice, *The Criminal Department,* Decision no. 2617/July 2009, accessed on 30.10.2010 from http://www.scj.ro/SP%20rezumate%202009/SP%20dec%20r%202617%202009.htm.
- The High Court of Cassation and Justice, *The Criminal Department,* the decision of the High Court of Cassation and Justice, decision no. 1543/ February 21st 2011, The Bulletin of the Jurisprudence, the Collection of decisions on 2011, C.H. Beck Publishing, Bucharest, p. 207-217.

THEORETICAL AND PRACTICAL CONCEPTS REGARDING THE EXECUTION OF COMPLEMENTARY PUNISHMENTS APPLIED TO NATURAL PERSONS WITHIN THE REGULATION OF THE NEW CRIMINAL LEGISLATION

CRISTINA DANIELA MUNTEANU *

„The criminal law without criminal procedure is like a knife without a handle,
And the procedure without criminal law is like a handle without a blade"
MOMMSEN, Droit pénal des Romains

Abstract
In this study we aim at analyzing the complementary punishments applied to natural persons as regulated by the new criminal legislation, our motivation being the numerous amendments brought by the new criminal legislation, respectively the increase of the number of complementary punishments, the change of their enforcement starting moment and such other changes that we intend to debate in this study. Considering the changes brought to the starting moment of the complementary punishment enforcement, we focused mainly on the enforcement and execution of complementary punishments applied to natural persons, exemplifying the execution manner of each punishment, respectively: in the context of applying the complementary punishment regarding the forbiddance of rights, military degradation or the newest complementary punishment to be applied to natural persons, the publishing of the judgment of conviction. The amendments to the starting moment of the complementary punishment enforcement were brought as a result of introducing the punishment by fine and criminal punishments which may be executed on probation, in addition to which a complementary punishment may be applied. Regarding the enforcement of judgments, we have to mention the fact that it constitutes an autonomous stage of the criminal trial, governed by the regulations provided under the Criminal Procedure Act. Nevertheless, not all activities related to the enforcement of judgments are included in this stage, but only the ones triggering the start of the judgment enforcement. Such aspect imposes itself, taking into consideration the distinction between the enforcement of a judgment and the actual execution of the punishment. Regarding the effective execution of a punishment, activity performed outside the criminal trial, it is subordinated, on one hand, to the regulations provided under the criminal law, and on the other hand, to the regulations regarding the execution of punishments and of measures settled by the legal authorities during the criminal trial.

Keywords: *complementary punishments, new regulations, the execution of complementary punishments, forbiddance of rights, publishing of the judgment of conviction*

Introduction

Although the current Criminal Code, adopted through Law no. 15/1968 and effective as of the 1st of January, 1969 was drawn up by the most remarkable doctrinaires of the time (among whom, professor Vintilă Dongoroz, who had a decisive contribution), who instituted significant legal dogmas, fact proven through the constancy of the Criminal Code throughout time, starting with 1990 there was a constant preoccupation for removing the regulations that were incompatible with the requirements under the rule of law, and the changes operated throughout time were not - nor could they be – qualified to determine a structural change in the Romanian criminal regulation.

The criminal sanction regime regulated by the Criminal Code in 1968, submitted to frequent legislative interventions on different institutions, lead to a non-unitary, incoherent enforcement and

* Assistant Lecturer, PhD candidate, "Nicolae Titulescu" University of Bucharest (email: av.munteanu_cristina@yahoo.com).

interpretation of the criminal law, which had repercussions over the efficiency and finality of the justice act[1].

Although the punishment categories in the new regulation are the same as in the current Criminal Code, a systematization is made, by using as criteria the order in which such punishments, once applied, are to be executed. This is the reason according to which, as a result of a natural classification of punishments, in relation to their enforcement and execution moment, the primary punishments, the accessory punishments and finally, the complementary punishments are initially incriminated.

The enlargement of the complementary punishments enforcement area, from 5 to 15 complementary punishments, proves the orientation of the criminal policy towards an accentuate individualization of punishments, by adding complementary punishments to the primary punishments, which are relevant in what concerns the type of punishment, the seriousness of the crime committed, the actual circumstances in which the criminal action was committed, but also the criminal, with their level of responsibility, understanding, education and training, previous experience in crime, or affiliation to the legal culture of a different country.

By enlarging the content of such punishment, a better appropriateness of the punishment, in relation to the actual circumstances of the case is accomplished, therefore substantially increasing its effectiveness. Part of the sanctions which, in the Criminal Code from 1968 were found in the safety measures material, were included in the content of the complementary punishment, respectively the interdiction of staying in various localities, the expulsion of foreigners and the interdiction of returning to the family home for a determined period, whereas through their nature, they have a strong punitive pattern, having the main purpose of restricting the freedom of movement and only indirectly, due to this effect, the threat removal and the prevention of a new crime can be achieved. The extension of the enforcement area is also given by the possibility of enacting such measure, both in addition to the punishment of imprisonment, irrespective of the time, and in addition to the punishment by fine.

The elimination of the decision regarding a punishment of at least two years, for the enforcement of a complementary punishment, shall make the criminal law more flexible and more adaptable, therefore it shall allow the thorough evaluation of the type, seriousness, circumstances of the action and of the person committing the crime.

The amendments to the starting moment of the complementary punishment enforcement were brought as a result of introducing the punishment by fine and criminal punishments which may be executed on probation, in addition to which a complementary punishment may be applied. Therefore, if the current Criminal Code conditions the existence of a sentence with the imprisonment for 2 years, in order to enforce the complementary punishment, in case of a fine or of suspension of punishment execution under supervision, the complementary punishment regarding the forbiddance of rights shall commence with the final judgment of conviction moment.

Regarding the enforcement of judgments, we have to mention the fact that it constitutes an autonomous stage of the criminal trial, governed by the regulations provided under the Criminal Procedure Act. Nevertheless, not all activities related to the enforcement of judgments are included in this stage, but only the ones triggering the start of the judgment enforcement. Such aspect imposes itself, taking into consideration the distinction between the enforcement of a judgment and the proper execution of the punishment.

Regarding the actual execution of a punishment, activity performed outside the criminal trial, it is subordinated, on one hand, to the regulations provided under the criminal law, and on the other hand, to the regulations regarding the execution of punishments and of measures settled by the legal authorities during the criminal trial. Also, within the activity of enforcement of criminal and judicial fines, the rules provided in the financial law are applicable.

[1] Elaboration of arguments, of the new Criminal Procedure Act.

1. The enforcement regime of the complementary punishment regarding the forbiddance of certain rights

The new legislative regulation brings two new moments from which the complementary punishment regarding the forbiddance of rights starts: from the final judgment of conviction to punishment by fine and from the final judgment of conviction through which the suspension of the punishment execution under supervision has been decided [art. 68 paragraph (1) letters a) and b) from the Criminal Code].

Therefore, the new Criminal Code provides that the execution of the forbiddance of rights punishment starts in three different moments during the trial: from the final judgment of conviction to punishment by fine; from the final judgment of conviction, through which the suspension of the punishment execution under supervision was decided; after executing the imprisonment punishment, after absolute pardon or pardon of the remaining sentence, after completing the limitation term for the punishment execution or after the expiry of the supervision term for probation.

The first starting moment of the complementary punishment enforcement is the **final judgment to punishment by fine.** In case of a judgment to the punishment by fine, the complementary punishment regarding the forbiddance of rights shall be enforceable starting with the final judgment of conviction. In this case, the convict shall be forbidden to exercise such rights immediately after the final judgment of conviction, although the primary punishment was not executed yet or shall be executed in time, through the deferred payment of an amount constituting the scope of the criminal fine. Such provision is justified through the type of primary punishment. The convict, by not being deprived of freedom, would have the possibility to move and perform any activity, to exercise a right, after all, including those for which the temporary restriction would be necessary[2].

The second starting moment of the complementary punishment enforcement is in the **context of a final judgment of conviction deciding the suspension of the punishment execution under supervision**. The suspension of the punishment execution under supervision interferes when the primary punishment is considered to have been executed, but not in the moment of the rehabilitation by right, as provided in the current Criminal Code. This regulation is justified in the context in which, until the repeal of the suspension of the punishment execution under supervision, the convict has already executed part of the complementary punishment regarding the forbiddance of rights. After executing the punishment of imprisonment, applied as a consequence of replacing the fine or after repealing the suspension of the punishment execution, the convict shall continue the execution of complementary punishments, out of which the duration of the already executed punishment shall be deducted. If the repeal of the suspension of punishment execution under supervision and the replacement of a fine with imprisonment shall be decided, for any other reasons than for committing a new crime, the part of the complementary punishment regarding the forbiddance of rights, which was not executed at the recall or replacement date, shall be executed after the execution of the punishment of imprisonment.

The third starting moment of the complementary punishment is after the execution of the punishment of imprisonment, after absolute pardon or pardon of the rest of the punishment, after completing the punishment execution limitation term or after the expiry of the probation supervision term. In this case, the execution starts after the primary punishment's execution or after the primary punishment is considered to have been executed.

---

[2] G. Antoniu and collaborators – *Explicații preliminare ale noului Cod penal* (Preliminary explanations of the new Criminal Code)– vol. II, "Universul Juridic" Publisher, Bucharest, 2011, pg. 64, Commentary Senior Lecturer PhD. Cristian Mitrache.

For the first time the legal text expressly provides that, under the complementary punishments' execution section, the fact that its execution also starts after the expiry of the probation supervision term, which was only implicit until now.

Such starting moment of the complementary punishments' execution is a natural moment, considering the nature and content of the complementary punishments. In the situation in which the complementary punishments would be executed during the execution of the primary punishment applied, than it would substitute itself with the accessory punishments, which have the same content, respectively the suspension of certain rights, but such punishments are executed at the moment of the final judgment of conviction and until the primary punishment regarding the depriving of liberty has been executed or considered to be executed [art. 65 paragraph (3) new Criminal Code].

Pursuant to art. 160 from the new Criminal Code, the pardon results in the total or partial elimination of the punishment execution or in its commutation to an easier one, but pardon does not affect the complementary punishments and the educative, non depriving of liberty measures, unless otherwise provided in the act of grace. For this purpose, Law no. 546/2002[3] on pardon and on the pardon grant procedure provides, under art. 5, that in the case of a legal entity, both the primary punishment and the complementary punishments provided in art.139 and 140 from the new Criminal Code can be granted pardon. The execution of complementary punishments shall be made after the absolute pardon of the punishment or in case of partial pardon, after the execution of the rest of the punishment to be executed.

The execution of the complementary punishment shall start after the completion of the limitation term for punishment execution, as during the entire limitation term for the punishment's execution the convict is submitted to the execution of accessory punishments. The execution of complementary punishments until the completion of the limitation term for the punishment execution would imply the execution, at the same time, of punishments having the same scope, namely the suspension of certain rights, their overlap leading to the impossibility of a parallel enforcement.

The execution of complementary punishments after the expiry of the probation supervision term is natural, both the effects of the primary punishment and the effects of the accessory punishment operating until that term. The probation supervision term is regulated by art. 106 from the new Criminal Code, which stipulated that, in the event that the convict did not commit a new crime until the expiry of the supervision term, if the probation annulment was not decided and no annulment cause was discovered, the punishment shall be considered to be executed.

In what concerns the complementary punishment's enforcement, together with the primary or accessory punishment, the law provides certain requirements that need to be fulfilled.

For this purpose, when there are extenuating circumstances, the complementary punishment, privative of rights, provided by law for the committed crime may be eliminated.

In case of a second offense, in case of multiple offenses and in other situations in which resultant punishments are applied, the enforcement of complementary punishments is performed based on the offenses constituting the plurality and the punishments settled for each offense. In case of a conviction for multiple offenses, the enforcement of the complementary punishment regarding the forbiddance of rights is performed, when applicable, for each offense, subsequently accompanying each primary punishment settled by the court[4]. In jurisprudence, it was shown[5] that the proceeding of attaching the complementary punishment regarding the forbiddance of rights only to the resulted punishments, which are a result of conflating the settled individual punishments,

[3] Published in the Official Gazette of Romania (Monitorul Oficial al României), Part I, no. 755 from October 16, 2002.

[4] M. A. Hotca – *Drept penal. Partea generală* (Criminal Law. General part) –C.H. Beck Publisher, Bucharest, 2007, pg. 581.

[5] Bucharest Court, 1st Criminal Section, Criminal sentence no. 410/1991, site Indaco lege.

pursuant to art. 33 and 34 letter a) from the Criminal Code, is wrong and the punishments need to be settled for each offense in part.

Art. 45 from the new Criminal Code stipulates that, if for one of the crimes committed there was also settled a complementary punishment, such punishment shall be enforceable together with the primary punishment. When several complementary punishments of different nature or even of the same nature, but with different content have been settled, such punishments shall be enforceable together with the primary punishment. If more complementary punishments of the same nature, with the same content have been settled:

a) in case of multiple offenses or in case of intermediate plurality, the hardest one shall be enforced;

b) in case of a second offense, the unexecuted part from the previous complementary punishment shall be added to the punishment settled for the new offense.

In case of successive convictions for multiple offenses, the part of the complementary punishment that was executed until the date of conflating the primary punishments shall be deducted from the term of the complementary punishment applied in addition to the resulted punishment.

The sanctioning treatment of multiple offenses shall be enforceable only when at least one of the offenses in the plurality structure was committed under the new law, even if for the other offenses the punishment has been settled according to the previous, more favorable law.

Regarding certain factors (foreign citizens, persons without children, persons not holding weaponry, etc.), the enforcement of such complementary punishment is useless, as they do not own the exercise of such rights, therefore they cannot execute the complementary punishment, and the enforced punishment does not fulfill its preventive and sanctioning role. We can offer as an example the case of persons without children, whose parental rights were suspended.

The conditioned suspension of the primary punishment does not wave the court's obligation to enforce the complementary punishment regarding the forbiddance of rights whenever provided by law for the committed crime.

In the event that the conviction of the defendant to life imprisonment was decided, the enforcement of the complementary punishment regarding the forbiddance of rights is mandatory if provided by law, as in some cases, the person convicted to such punishment may be set on probation or the punishment of life imprisonment may be replaced with incarceration[6].

Moreover, in case of amnesty after conviction, the criminal responsibility being waved, in consequence it will also waive the effects of the conviction. We consider this to be the only case in which the time of the complementary punishment regarding the suspension of certain rights ceases earlier than the time settled by law, namely for a period between one and 5 years.

As a transition situation, we consider that in case of succession of criminal laws, which interfered until the final sentence, the accessory and complementary punishments shall be applied according to the law that was identified as favorable in relation to the crime committed.

When the law provides the **forbiddance of the right of occupying a public position**, the court is obliged to pronounce the forbiddance of rights provided in paragraph (1) letters a) and b), namely the right of being chosen as public authority or in any other public offices and the right to occupy a position involving the exercise of the state authority. The forbiddance of the latter rights shall be cumulatively disposed.

The complementary punishment regarding the interdiction of the right of a foreign person to stay on the Romanian territory shall not be decided when there are grounded reasons to

---

[6] Luca A. – *Aplicarea pedepsei complimentare a interzicerii unor drepturi atunci când s-a aplicat pedeapsa principală a detenţiunii pe viaţă (Enforcement of the complementary punishment regarding the forbiddance of rights when the primary punishment of life imprisonment was enforced)*, Revista Pro-Lege nr. 3/1998, pag. 177; Lupaşcu R. – *Aplicarea pedepsei complimentare a interzicerii unor drepturi atunci când s-a aplicat pedeapsa principală a detenţiunii pe viaţă*, Revista Pro-Lege nr. 3/1998, pag. 179.

believe that the life of the expulsed person is in jeopardy or that such person shall be submitted to torture or to other inhumane or degrading treatments in the state where it is to be expulsed.

The complementary punishment's enforcement procedure regarding the interdiction of the right of a foreigner to stay on the Romanian territory is regulated under art. 563 from the new Criminal Procedure Act.

In the context in which, through the sentence of imprisonment, the complementary punishment regarding the interdiction of the right of a foreigner to stay on the Romanian territory is also applied, in the writ of execution of the punishment of imprisonment it shall be mentioned that on discharge, the convict shall be turned in to the police authorities, which shall proceed to the convict's removal from the Romanian territory.

The Government Emergency Ordinance no. 102/2005[7] regarding the free movement of citizens from the member states of the European Union and from the European Economic Area, on the Romanian territory provides, under art. 30, that in case of family members who are not citizens of the European Union or of a state in the European Economic Area, against whom an accessory punishment has been decided, respectively a complementary punishment regarding the interdiction of the right of a foreigner to stay on the Romanian territory pursuant to art. 65 paragraph (2) letter c), respectively art. 66 paragraph (1) letter c) from the new Criminal Code, the provisions of the Government Emergency Ordinance no. 194/2002[8], as republished, with its subsequent additions and amendments, regarding the taking into public custody and, as the case may be, the tolerance of remaining on the Romanian territory, shall be enforced accordingly.

If the complementary punishment does not join the punishment of imprisonment, the communication thereof shall be made to the police authority, immediately after the judgment was declared final.

Regarding the enforcement of the punishment of interdiction of a foreigner to stay on the Romanian territory, the police authority may enter the domicile or residence of a person without their consent, as well as the headquarters of a legal entity without the consent of its legal representative.

If the person against which the punishment regarding the interdiction of the right to stay on the Romanian territory is not found, the police authority shall record such fact in a protocol and it shall take measures for the prosecution, as well as for detaining orders at the border crossing points. A copy of the protocol shall be sent to the enforcement court.

In the event that probation was decided, the interdiction of the right of a foreigner to stay on the Romanian territory shall be executed on discharge. Therefore, art. 68 paragraph (2) from the new Criminal Code provides an exception regarding the starting moment of the complementary punishment's enforcement in the event that probation was decided. For this purpose, during probation, the convict shall be in the process of executing the accessory punishment having as scope the forbiddance of certain rights, except for the suspension of the right to stay on the Romanian territory, and the convict shall also be in the process of executing the complementary punishment having as scope the interdiction of the right of a foreigner to stay on the Romanian territory[9].

The interdiction of the right of a foreigner to stay on the Romanian territory shall not apply in case the suspension of the punishment execution under supervision was decided.

Also, in case of life imprisonment, punishment for which the convict can be set on probation, the execution of complementary punishments won't be necessary, as the person shall be expulsed from the country immediately.

---

[7] Published in the Official Gazette of Romania (Monitorul Oficial al României), Part I, no. 646 as of July 21, 2005 with its additions and amendments, through Law no. 260/2005, with its subsequent additions and amendments.

[8] Republished in the Official Gazette, Part I no. 421 as of 05/06/2008 and updated on 31/07/2011.

[9] G. Antoniu and collaborators – *Explicații preliminare ale noului Cod penal* (Preliminary explanations of the new Criminal Code) – vol. II, Ed. Universul Juridic, Bucharest, 2011, pg. 66, Comment Senior Lecturer PhD. Cristian Mitrache.

For an accurate correlation of the Criminal Code provisions to those of the extra-criminal laws containing criminal provisions, the Government's Emergency Ordinance no. 194/2002[10] regarding the foreign citizens' status in Romania, as subsequently supplemented, gets modified by the insertion of a new article, 143^1, which stipulates that 'In the content of the present ordinance, the reference to the expulsion safety measure is deemed to be made for the accessory and complementary punishment, applied in pursuance of the provisions of art. 65, par. (2), section c), or of art. 66, par. (1), section c), of the Criminal Code.'.

Pursuant to art. 562 of the new Criminal Procedure Code, the punishment of forbidding certain rights to be exercised is applied by the enforcing court's serving a copy of the ruling enacting stipulations to the Local Council in whose area is located the convict's residence and to the organism that monitors the exercise of those rights.

Upon receiving the copy of the enacting stipulations from the decision by which the complementary punishment of forbidding one of the rights foreseen by art. 66, sections a), d) and e), of the new Criminal Code will have been enforced, the Local Council shall notify it to the competent services, for recording purposes. Any organism invited to perform an action that involves the respective person's exercising one of the rights foreseen at art. 66 of the new Criminal Code shall ask that person to issue an affidavit according to which he/she has not been inferred any conviction by which the exercise of that right was restricted. Furthermore, if deemed necessary, the competent organism shall request information from the institution responsible for keeping the records of the convicted persons [11].

For the execution of the complementary punishment, the conviction decision needs to be final. The convict shall accomplish the obligations imposed on for doing or for refraining from doing something. The execution of the complementary punishment supposes a duration of the punishment execution, of the obligation set up for the convict, which means that the punishment execution begins at a certain moment and ends at another certain moment [12].

The complementary punishment is enforced according to a certain procedure, by the organisms specifically assigned by the law, namely by the enforcing organisms, and the administrative organisms shall monitor their enforcement.

In this context, in the event that the convict was forbidden the exercise of the rights stipulated by art. 66, sections a), b) and c), of the new Criminal Code, the decision excerpt shall be submitted to the Local Council in whose area is located the convict's residence or to the People Records Community Public Department, so that these institutions could make sure that the electoral lists do not contain candidates that have been forbidden those rights or that those persons are not included on the specially drafted lists for the people who will have been forbidden the exercise of those rights. In addition, a copy of the final conviction decision excerpt shall also be notified to the Criminal Records Department, for its being able to make the necessary specifications, so that, in case that the convict wishes to enjoy the right of being elected to be part of the public authorities or in any other public positions or to hold offices that involve the exercise of the State authority, the conviction could appear in his/her criminal record certificate upon the candidature submission.

In the event that the convict was forbidden the exercise of the right foreseen by art. 66, section g), of the new Criminal Code, namely the right to hold offices, to exercise the profession or the trade or to carry out the activity that he/she has used for perpetrating the felony, the decision excerpt shall be submitted both to the Local Council in whose area is located the convict's residence and to the institution that monitors the profession, trade or activity exercise. For instance, in case that the

---

[10] As republished in Romania's Official Journal – Part I, no. 421 from June 5th, 2008.

[11] Pascu I. – *Criminal Law. General Part* – 2nd edition – Hamangiu publishing house, Bucharest, 2009, page 444.

[12] N. Volonciu, R. Moroşanu – *Commented Criminal Procedure Code* – Hamangiu publishing house, Bucharest, p. 44.

prohibition of this right was decided for a solicitor, the decision excerpt shall be notified to the bar whose list contains the name of that solicitor, with an aim to strike it off from the solicitor profession. Pursuant to art. 58, section d), of the Solicitor Profession Status, the solicitor status ceases where the solicitor was finally convicted for a deed foreseen by the criminal law and that renders him/her unworthy to be a solicitor, in view of the law.

In case of forbidding the convicted person to exercise the parental rights and the right to be a tutor or a trustee, the decision excerpt shall be submitted to the Tutorial Authority department within the town hall or city hall in whose area is located the convict's residence.

The obligation execution, if performed according to the law, shall void the obligation set up by the sentencing decision.

We think that the provisions of art. 562 of the new Criminal Procedure Code have been righteously modified by the Law concerning the enforcement of the Criminal Procedure Code, from the viewpoint of the stipulation according to which thepunishment of forbidding the exercise of certain rights shall be applied by the enforcing court's appointed judge's serving a copy of the ruling enacting stipulations, subject to the rights whose exercise will have been forbidden, **to the public law or private law legal entity authorised to monitor the exercise of that respective right.**

In this way, the legislative body of the new Criminal Procedure Code included in the 'public law or private law legal entity authorised to monitor the exercise of that respective right' expression the totality of the public law or private law legal entities compelled to monitor the exercise of the right forbidden by the final conviction decision.

The Civil Code stipulates at art. 188 that the legal entities include the entities foreseen by the law, as well as any other legally incorporated organisations that, even though not declared as legal entities by the law, are independently organised and have their own patrimonial assets meant to reach a certain licit and moral goal, pursuant to the general interest.

The public law legal entities are incorporated by the law. As an exception thereof, public law legal entities may also be incorporated by virtue of documents issued by the central or local public administration or by some other means foreseen by the law.

The following can be included in this category : the Local Council, the People Records Community Public Department, the Criminal Records Department, the Tutorial Authority etc.

By 'private law legal entities', the new Civil Code defines at art. 190 any private law legal entities that can be freely incorporated in one of the forms foreseen by the law. This category may include any private law entity incorporated under the law and authorised to monitor the execution of a court order.

2. The manner of executing the complementary punishment of the military rank loss

Military rank loss is the complementary punishment consisting in the loss of the military rank and of the right to wear the uniform by the active military, in reserve or withdrawn, convicted for having perpetrated a felony punished by a freedom-depriving punishment, as per the legal provisions.

This punishment has got a restricted application from the standpoint of the perpetrator, the law naturally limiting the enforcement of this punishment only in case of military and reservists.

The enforcement of the military rank loss complementary punishment takes place in case of perpetrating highly serious criminal deeds.

The military rank loss punishment is a right-depriving one, which supposes the loss of the right to the rank and to the uniform, as compared to the complementary punishment of prohibiting certain rights, which is a right-restrictive punishment consisting in a suspension, in a restriction of exercising certain rights for a given period of time (from 1 to 5 years), but not in their loss. In this regard, the convict is withheld from enjoying certain rights expressly foreseen by the law.

From the point of view of its mechanism of execution], the military rank loss punishment has got a negative content, the execution of this punishment being materialised in a passive attitude imposed on to the convict by the law, in the sense that this one is not forced to do something ; on the contrary, he is withheld from certain rights [13].

Aiming at depriving from certain specific civic rights, this punishment may only be enforced to the persons that are exercising these rights upon conviction [14], namely to hired active military or to reservists.

The military rank loss punishment, even though enforceable from the moment when the sentencing decision remains final, has got an absolutely depriving character, as its duration is undetermined. The Law 80/1995[15] regarding the military status, stipulates at art. 71-72 the possibility for the military rank loss complementary punishment to be annulled by another court order that has ruled acquittal or by which this punishment is no longer enforceable ; in this case there is the possibility of regaining the rank and of re-booking the military in the records. Hence we can notice that the effect of the military rank loss and of the loss of the right to wear the uniform is applied all throughout one's life.

What is more, the military who is active, in reserve or withdrawn could not lose his military rank and the right to wear the uniform all throughout his life, as an effect of the military rank loss complementary punishment enforcement. Thus, in case of pardon, reprieve or rehabilitation after conviction, the convict may be relieved the restrictions entailed from the military rank loss enforcement. Pardon, which brings forth the relief of the criminal responsibility, will also relieve the other consequences of the conviction, including those of the military rank loss complementary punishment. In principle, reprieve does not have any effects on the complementary penalties, however the reprieve document may foresee the elimination of the complementary penalties effects [16]. Pursuant to art. 160, par. (2), of the new Criminal Code, reprieve does not have any effects on the complementary penalties, save where decided so in the reprieve document.

Given that the Court cannot separate the content of the punishment upon its enforcement, the military rank loss is a punishment in character and has an irreductible content, the rights foreseen in the legal text constituting an indivisible complex of rights.

Nonetheless we think that the perpetual effect of the military rank loss can only be kept in mind only as far as the loss of the right to military pensions is concerned, which lasts all throughout one's life unless this punishment gets rescinded by a final irrevocable court order.

In pursuance of art. 69, par. (2), of the new Criminal Code, military rank loss is mandatorily applied when this complementary punishment is enforced alongside the main punishment with imprisonment longer than 10 years or life detention.

The elective enforcement - art. 69, par. (3), of the new Criminal Code - can be decided by the Court in case of the military convicts that have wilfully perpetrated the felony, the main punishment being at least 5 years and 10 years at the most. The elective character of this enforcement manner is entailed *ex lege*, the text stipulating that the military rank loss 'may be applied'.

Please note that unlike the mandatory military rank loss, which is only conditioned by the quality of the felony subject and by the amount or the nature of the main punishment set up, the elective rank loss is conditioned by the subject's quality, by the nature of the felony and by the amount of the freedom-depriving main punishment established by the judge. In this regard, the

---

[13] Dongoroz V. *et collab. – Theoretical Explanations of the Romanian Criminal Code. General Part* - book II, 2nd edition – Romanian Academy publishing house, Bucharest, 2003.

[14] Bucharest Court of Appeals – The criminal decision no. 55/2000 in T. Toader's *Criminal Law. General Part* – page 116.

[15] Published in the Official Journal – Part I no. 155 dated 20.07.1995.

[16] G. Antoniu *et collab. – Preliminary Explanations of the New Criminal Code* – book II – The Legal Universe publishing house, Bucharest, 2011, page 70 – Comments : Cristian Mitrache, Univ. Reader PhD .

following imperative conditions should be met : the enforcement of a freedom-depriving punishment set up by the Court and its wilful perpetration.

The military rank loss complementary punishment is applied irrespective of the existence or non-existence of a connection between the felony and the military status and irrespective of whe-ther the perpetrator had or not the status of military on the felony perpetration date, the important thing being that the subject should have the status of a military when the conviction verdict is ruled. Unfortunately, in the case law there have been many contrary solutions where this punishment was automatically enforced in addition to the punishment of imprisonment longer than 10 years, irrespective whether the defendant has had the status of active military or of reservist or not [17].

Being conditioned not by the main punishment foreseen by the law, but by the main punishment established by the Court, military rank loss has not been specified in the special incrimination norms, as the interdiction of certain rights was.

The military rank loss complementary punishment may be ruled both by the military Courts and by the civil ones (when judging offences perpetrated by a convict prior to this one's having acquired the status of military).

Being conditioned by the amount of the main punishment to which is added, the legislative body did not also foresee military rank loss on account of the various offences whose perpetration brings in the enforcement of this punishment.

It should be noted that both the military rank loss and the prohibition of certain rights exercise complete the main punishment when the Court assesses the necessity of unifying the direct repression, which functions cumulatively with the main punishment, several complementary penalties being sometimes enforced for the same felony (for instance, in case of a real group of offences, the complementary penalties having a different nature or even the same nature but a different content, are applied alongside the freedom-depriving punishment that the convict is to execute). Finally, the complementary penalties, being criminal sanctions like the main penalties, perform the function of general prevention and of special prevention – the latter one to a larger extent – the convict that executes the complementary punishment being put in the position of no longer perpetrating any other criminal offence.

Unlike the complementary punishment of prohibiting the exercise of certain rights, the military rank loss punishment does not have a specific duration, as its execution takes place forthwith and immediately after the sentencing decision becomes final, the loss of the military rank and of the right to wear the uniform operating right from the moment when the sentencing decision acquires the power of a judged issue, which is a situation that appears to be an exception from the rule, according to which the complementary penalties come into action after the execution of the main freedom-depriving punishment to which it is added comes to an end.

Pursuant to art. 564 of the new Criminal Procedure Code, the military rank loss punishment is inferred by the enforcing Court's serving a copy of the ruling to the commander of the military facility to which the convicted person had belonged or to the commander of the military centre in whose area is located the convict's residence, with an aim to strike him off from the military records.

The law for enforcing the new Criminal Procedure Code modifies the provisions of art. 564 thereof, stipulating that the military rank loss punishment is inferred by the enforcing Court's serving a copy of the ruling enacting stipulations to the commander of the military facility in whose records the convicted person is included and also to the County or Regional Military Centre from the convict's residence.

[17] T.B. – Criminal Ruling no. 114/2009, unpublished ; Ploieşti Court of Appeals – Criminal decision no. 185/A/1998, commented upon by Crişu S. and Crişu E. in *The Criminal Code Annotated by Judicial Practice - 1989-1999* - Argessis Print publishing house, 1999, page 204.

In this context, the new regulation brings in little name modifications, in the sense that the enforcing Court is not to send a copy of the ruling to the commander 'of the military facility to which the convicted person had belonged', but to the commander 'of the military facility in whose records the convicted person is included'.

Out opinion is that this rephrasing is more appropriate, seeing that the military rank loss represents a complementary punishment, applied alongside the main punishment, and from the procedural viewpoint, upon the execution of the ruling provisions, the convict is already withdrawn his military rank.

In this regard, the enforcing Court should serve a copy of the ruling to the commander of the military facility in whose records the convicted person is included. The procedure is thus simplified, because the commander of the military facility to which the convict had belonged had the obligation, in his turn, of notifying the ruling enacting stipulations to the military facility in whose records the former military was included.

3. The manner of executing the complementary punishment of publishing the sentencing decision

The complementary punishment of publishing the sentencing decision is applicable both to willful offences and to faulty offences and it regards all the natural entities that are inferred their criminal responsibility, as there are no categories of relieved persons. For the Court, the sanction is elective in character, as it is to assess, depending on the case, whether its enforcement is necessary, subject to the offence nature and seriousness, to the circumstances in which it will have been perpetrated and to the potential impact of the negative publicity arisen in this way [18].

The Court may decide the publication in an excerpt, in a form where the content should be explicit and comprehensible for the public, with a presentation and impact form that should be as visible as possible (on the front page, with a certain printing format, with a certain letter size or in a frame) within the page of an either local or national daily newspaper. As concerns the displaying form, the legislative body obviously refers to how the natural entity is compelled to provide the displaying of the ruling enacting stipulations, namely the advertisement format, as its sizes should be as such as to enable the advertisement noticing and reading by the people that read the local or national daily newspaper. In order to reach the sanction goal, the publication should contain a short presentation of the actual circumstances, as the same had been taken note of by the Court, as well as the elements of the ruling enacting stipulations.

Unlike the complementary punishment of posting or publishing the sentencing decision in case of the legal entities, which takes place within a time frame ranged between one month and 3 months, in case of a natural entity it shall be published once. In this way, the legislative body characterises this complementary punishment as an absolutely defined punishment, even though it appears to be an undefined one.

The publication of the final sentencing decision shall be made on the convict's expenses, by one appearance in a local or national daily newspaper.

The publication of the sentencing ruling should not prejudice the victim's subjective rights, therefore the identity of the victim or of other persons in the file may not be revealed, save where there is their own consent or their legal representative's consent thereto. The law has also regulated the situation where there appear several persons in the case circumstances, as they are also protected from the standpoint of their right to private life and their identity is not divulged. The law has not foreseen a term for enforcing the complementary punishment of publishing the final sentencing

[18] Antoniu G. *et collab.*- *The New Criminal Code* - book III, C.H.Beck publishing house, 2008, page 189.

ruling, which means that its execution may take place right after the sentencing ruling becomes final[19].

As this complementary punishment for natural entities is a new one, the Courts' practice is to develop the situations where such a punishment may be inferred besides the main punishment. The efficiency of such complementary penalties for the legal entities represented by natural entities has led to the conclusion of enforcing the measure directly in charge of the natural entities.

As regards the execution of the complementary punishment of publishing the sentencing decision, art. 565 of the new Criminal Procedure Code stipulates that this can be executed by sending the excerpt, in the form set up by the Court, to a local newspaper belonging to the area of the Court that has ruled the sentencing decision or to a national newspaper, for publishing purposes on the expense of the convicted person.

Yet we think that the moment of this complementary punishment execution commencement coincides to the moment of sending the final sentencing decision excerpt to the local newspaper that is spread in the area of the Court that has ruled the sentencing decision or to a national newspaper, and that the actual execution takes place right when it is published.

Given that the provisions of the new Criminal Code stipulate the possibility of applying the complementary penalties both when the main punishment is imprisonment and when the main punishment is a fine, we think that the insertion of the stipulations regarding the interdiction of exceeding, by the publishing expenses, of the amount of the fine applied to the natural person for the act that he/she has committed (the source of inspiration could be the provisions of art. 131-35 of the French Criminal Code) is necessary.

In case of lacking of executing the punishment in *mala fides*, the judge assigned to enforce the same may ascertain that the constitutive elements of the offence related to the criminal sanctions foreseen and punished by art. 288, par. (1), of the new Criminal Code, which is an offence punished by 3 months to 2 years of imprisonment or by a fine, are present.

If upon enforcing the ruling execution or during the execution there appear something unclear or something hindering the execution, the judged appointed to enforce the execution may signal out the execution Court.

Where the Court rules the prohibition of one of the rights foreseen at par. (1), section n) - the right of communicating with the victim or with family members thereof, with the persons with whom he/she will have committed the offence or with some other people established by the Court, or of getting close to them – and section o) – the right of getting close to the dwelling, the workplace, the school or to other places where the victim carries out social activities, under the terms set up by the Court – this one shall actually particularise the content of that punishment by taking into account the case circumstances.

Seeing that the complementary punishment of publishing the sentencing decision is a newly inserted provision, we think that this should not applied in case of the criminal offences committed prior to its inuring.

Conclusions

The new Criminal Code aims at providing the judge with a wide range of measures that could enable optimal judicial particularisations, thanks to their flexibility and diversity. In this regard, the incidence scope of the complementary penalties was significantly extended, the number of rights contained by the punishment was enlarged and a new kind of punishment was introduced, namely the publication of the final sentencing decision.

As this complementary punishment for natural entities is a new one, the Courts' practice is to develop the situations where such a punishment may be inferred besides the main punishment. The

[19] G. Antoniu *et collab. – Preliminary Explanations of the New Criminal Code* – book II – The Legal Universe publishing house, Bucharest, 2011, page 70 – Comments : Cristian Mitrache, Univ. Reader PhD.

efficiency of such complementary penalties for the legal entities represented by natural entities has led to the conclusion of enforcing the measure directly in charge of the natural entities.

We think that the provisions set up by the new Criminal Code in terms of complementary penalties are meant to provide an optimal punishment particularisation, so as to avoid, to the maximum extent possible, the non-unitary solutions from the case law.

This field of research, even though debated upon by countless doctrine experts, will keep on representing a field of analysis, seeing the modifications that are to be introduced by the new incident criminal legislation.

References

- Treatises, courses, monographies:
- ANTONIU G. şi colab. – *Explicaţii preliminare ale noului Cod penal* - vol. II, Ed. Universul Juridic, 2011.
- BASARAB M. şi colab.- *Codul penal comentat. Partea generală* - vol. I, Ed. Hamangiu, Bucureşti, 2007.
- BOROI A. – *Drept penal. Partea generală conform Noului Cod penal* - Ed. C.H.Beck, Bucureşti, 2010.
- BOROI A., UNGUREANU Ş. G., JIDOVU N., MĂGUREANU I. – *Drept procesual penal* – Ed. All Beck, Bucureşti, 2001.
- BULAI C., FILIPAŞ A., MITRACHE C-TIN., BULAI B., MITRACHE C.- *Instituţii de drept penal* – ed. a IV-a, Ed. Trei, Bucureşti, 2008.
- CRIŞU A.- *Drept procesual penal* – ed. a III-a, revăzută şi adăugită, Ed. Hamangiu, Bucureşti, 2011.
- DAMASCHIN M. – *Drept procesual penal. Curs universitar* – Ed. Wolters Kluwer România, 2010.
- DIMA T. - *Drept penal. Partea generală* – ed. a II-a, revăzută şi adăugită în baza Legii nr. 278/2006 de modificare a Codului penal, Ed. Hamangiu, Bucureşti, 2007.
- DONGOROZ V., KAHANE S., OANCEA I., FODOR I., ILIESCU N., BULAI C., STĂNOIU R., ROŞCA V. - *Explicaţii teoretice ale codului penal român. Partea generală* - vol. II, ed. a II-a, Ed. Academiei Române şi Ed. All Beck, Bucureşti, 2003.
- DONGOROZ V., KAHANE S., ANTONIU G., BULAI C., ILIESCU N., STĂNOIU R. - *Explicaţii teoretice ale codului de procedură penală român*. *Partea specială* - vol. VI, Ed. Academiei Române şi Ed. All Beck, Bucureşti, 2003.
- HOTCA M. A. - *Drept penal. Partea generală* - Ed. C. H. Beck, Bucureşti, 2007.
- HOTCA M. A. - *Noul Cod penal şi Codul penal anterior. Aspecte diferenţiale şi situaţii tranzitorii* - Ed. Hamangiu, Bucureşti, 2009.
- JIDOVU N.- *Drept procesual penal* - ed. a II-a, revăzută şi adăugită, Ed. C.H.Beck, Bucureşti, 2007.
- MICU B. – *Drept procesual penal. Partea specială* – Ed. Universul Juridic, Bucureşti, 2012.
- MIRIŞAN V. - *Drept penal. Partea generală. Prezentare comparativă a dispoziţiilor Codului penal în vigoare şi ale noului Cod penal* – ed. a IV-a, Ed. Universul Juridic, Bucureşti, 2012.
- MITRACHE C-TIN, MITRACHE C. - *Drept penal român. Partea generală* - ed. a IX-a, revizuită şi adăugită, Ed. Universul Juridic, Bucureşti, 2012.
- NEAGU I. - *Tratat de procedură penală. Partea specială* - Ed. Universul Juridic, Bucureşti, 2010.
- PASCU I., DIMA T., PĂUN C., GORUNESCU M., DOBRINOIU V., HOTCA M. A., CHIŞ I., DOBRINOIU M. – *Noul Cod penal comentat* – vol. I. Partea generală, Ed. Universul Juridic, Bucureşti, 2012.
- PAŞCA V. – *Curs de drept penal. Partea generală* – ed. a II-a, Ed. Universul Juridic, Bucureşti, 2012.

ABOUT THE PUNISHMENT ESTABLISHED FOR THE CRIME COMMITTED DURING PROBATION

CĂTĂLIN ONCESCU*

Abstract
Probation represents a measure of trust as far as the convict is concerned and it is ruled by the court for the continuation of the execution of the rest of the punishment without being detained. Exactly for this reason it is considered that when a person on probation has committed a crime while on probation, the applied punishment should be oriented according to the manner of calculation of the punishment in the case of the post-release recidivism.In this article, certain aspects of the probation institution have been analyzed, the opportunity of revocation or the maintaining of probation in case a new crime is committed between the period of probation and that of the punishment's fulfillment, and also the manner the punishment is established for this case being further examined.

Keywords*: probation, subsequent crime, merging, rest of the punishment*

1.*The notion of probation.* Probation is a measure of criminal policy of great importance for the fulfillment of the imprisonment punishment's purpose. It is considered as a stimulus for the convicts who show signs of amendment and it consists in the reduction of the time of imprisonment, being meant to accelerate the process of re-education and social reinsertion of the convict[1].

In the judicial doctrine, probation has been defined as a complementary institution of the regime of the execution of the imprisonment punishment, a mean of administrative individualization of the punishment, which consists in freeing the convict from the place of detention before the entire execution of the punishment, on condition that until the fulfillment of this period the convict should not commit any other crimes[2].

According to art. 59 of the Penal Code, art. 59^1 of the Penal Code and art. 60 of the Penal Code, the convict can be put on probation before the entire execution of the imprisonment punishment if a series of conditions, which concern the form of guilt under which the crime has been committed, are fulfilled, conditions such as: the age, the punishment's span, the work done by the convict, etc.

Therefore, the convict who needs to execute a punishment that does not exceed 10 years for a crime committed wittingly can be put on probation after one has executed at least two thirds of the punishment's span, if one is constantly working, disciplined and shows clear signs of amendment. If the punishment exceeds 10 years, the convict can be put on probation after one has executed at least three fourths of the punishment's span.

At the same time, for the negligence crimes, the convict can be put on probation before the entire execution of the punishment, after one has executed at least one half of the punishment's span for the imprisonment that does not exceed 10 years or at least two thirds for the imprisonment exceeding 10 years.

As far as the calculation means for the fractions of punishment is concerned the part of the punishment which can be considered, according to the law, as executed on the basis of the work

* Definitive Lawyer, Bucharest Bar Association (email: av.oncescu@yahoo.com).

[1] See C. Bulai, *Penal Law Workbook. General Part*, the Judicial Universe publishing house, Bucharest 2007, p. 586.

[2] See V. Dongoroz and collaboratores*, Theorethical explanations of the Romanian Penal Code, vol. II*, the Academic publishing house, Bucharest 1970, p. 42.

performed[3] is also taken into account. In this case, however, the fractions of punishment which the convict should execute before being put on probation are more reduced, as art. 59 line (2) of the Penal Code and art. 59[1] line (2) of the Penal Code stipulate.

Similar examples of the aforementioned can be diversified in multiple ways, however, mandatorily taking into consideration the conditions described in art. 59 of the Penal Code, art. 59[1] of the Penal Code and art. 60 of the Penal Code.

As far as the procedure that should be performed before the court of law can rule a probation request, one also encounters a series of provisions in Law no. 275/2006 concerning the execution of punishments and of the measures ruled by the judicial bodies during the penal trial. Therefore, according to art. 77 of the law aforementioned, probation is granted by the court of law according to the procedure stipulated in the Code of Criminal Procedure[4], as a result of a request made by the convict or at the proposal of the committee for the individualization of the regime of execution of the detention punishments. In case the committee is the one that requests probation, it should enclose its proposal in a motivated summons, together with the documents which certify the issues mentioned in the summons, and it should forward it to the court of law in whose circumscription the detention place is located. In case the committee observes that the convict does not fulfill the conditions to be put on probation, in the summons it prepares it should establish a term for the re-examination of the convict's situation, a term that cannot exceed one year. At the same time, the committee should inform the convict about the summons and it should bring to the convict's knowledge, by signature, that the convict can directly address a probation request to the court of law. When the convict chooses to directly address the court of law, requesting probation, together with the request the convict should also send the summons compiled by the committee for the individualization of the regime of execution of the detention punishments, together with the documents which certify the mentions enclosed within.

In order to solve the probation request of the convict or the request made by the committee, the court of law can examine the personal file of the convict. In case the convict's request or the request of the committee for the individualization of the regime of execution of the detention punishments is considered well-founded, the court of law shall grant probation, the convict being immediately set free.

2.*Setting the punishment for the crime committed during the probation period.* As it has been aforementioned, after granting the request of temporary freedom, the convict is set free from the penitentiary, this being the immediate effect of this penal measure. However, the convict is being set free from the penitentiary conditionally. According to the provisions of art. 61 line (1) of the Penal Code, "the punishment is considered executed if during the time span since being set free until the fulfillment of the punishment's duration, the convict has not committed any other crime". From this statement it is understood that the person convicted is still executing the punishment, even though the convict has been set free.[5]

The same law also stipulates that if during the time span since being set free until the fulfillment of the punishment's duration, "the person put on probation has committed a new crime, the court of law, taking into consideration its severity, *can* rule for *maintaining* probation, or for its *revocation*. For the latter, the punishment established for the crime committed subsequently and the

---

[3] See art. 76 of Law no. 275/2006 concerning the execution of the punishments and of the measures ruled by the judicial bodies during the penal trial (published in the Official Gazette of Romania no. 627 of July 20, 2006)

[4] See art. 450 of Romania's Code of Criminal Procedure (republished in the Official Gazette of Romania no. 78 of April 30, 1997).

[5] Also see the provisions of art. 190 line (1) of the Implementing regulation of Law no. 275/2006 „Probation (...) is ruled for the continuation of the execution of the remaining punishment freely". (The Government's Decision no. 1897 of September 21, 2006 for the approval of the Implementing regulation of Law no. 275/2006 concerning the execution of punishments and of the measures ruled by the judicial organs during the penal trial, published in the Official Gazette of Romania no. 24 of January 16, 2007).

rest of the punishment that remained to be executed from the previous punishment is to be *merged*, *an augmentation of up to 5 years being applicable*." (author's note).

One cannot help observe the similarity between this situation and one of the hypotheses described in the provisions of art. 37 line (1) letter a) of the Penal Code: "There is recidivism for an individual in the following cases: a) when after the definitive conviction to imprisonment greater than 6 months, the convict wittingly commits a new crime, before beginning to execute the punishment, *during the punishment's execution* (author's note) or in escape state, and the punishment stipulated by law for the second crime is imprisonment for more than one year." Therefore, from the facts point of view and judicially speaking, it can be considered that committing a crime while on probation could constitute a case of recidivism after conviction.

However, the punishment that can be granted to a convict on probation for a crime committed between the period of probation and that of the punishment's fulfillment is similar to the punishment stipulated by the Penal Code[6] for *multiple crimes* committed by the individual, when there had been ruled only imprisonment punishments. There have been considered the provisions of art. 34 line (1) letter b) of the Penal Code according to which, in the case of multiple crimes, the court of law shall apply the hardest punishment which can be augmented up to its special maximum level, and when this maxim level proves to be insufficient, another augmentation of up to 5 years can be added.

Hence, in case more crimes have been committed *before* a definitive conviction has been ruled for the perpetrator, the hardest punishment shall be ruled, punishment *that can be augmented up to its maximum level* (author's note), and when this maximum level proves to be insufficient, another augmentation of up to 5 years can be added.

At the same time, there is the case when a convict put on probation commits a crime during the time span between the period of probation and that of the punishment's fulfillment, time span obviously chronologically situated after the definitive conviction decision, and also after the execution of a significant fraction of the punishment. In this case as well, according to art. 61 line (1) last thesis of the Penal Code, the court of law shall *merge* the rest of the punishment that has been left to be executed from the previous punishment with the punishment established for the crime committed subsequently, an augmentation of up to 5 years being applicable. (author's note)

In reality, "the mergence" consists in choosing which of the two punishments is harder: the rest of the punishment that has been left to be executed or the punishment for the new crime. Then, unlike the case of rival punishments, the hardest punishment chosen by the court of law shall not be augmented up to its maximum level, due to the fact that this procedure is not *expressis verbis* mentioned in the present Penal Code, and a clear definition of the "merger" is offered only in the judicial specialty literature. For this reason, the courts of law have the freedom to understand the verb "to merge" as an absorption procedure or as a judicial cumulative procedure.

According to the issues aforementioned, it can be observed that the Penal Code norms define "the mergence" by means of a systematic interpretation of the provisions of art. 36 of the Penal Code[7] in relation to art. 34 of the Penal Code and art. 35 of the Penal Code. Moreover, art. 39 line (1) contains the following provisions: "(1) In the case of recidivism stipulated in art. 37 line (1) letter a), the punishment established for the crime subsequently committed and the punishment applied for the previous crime are merged according to the provisions of art. 34 and 35." Nonetheless, at a closer examination of the legal texts mentioned hereinbefore, as far as art. 34 of the Penal Code is concerned there is a judicial cumulative system for the punishments of the same kind, while art. 35 of the Penal Code describes the absorption system for the punishments of the same kind and with the same content. It is true that art. 34 of the Penal Code concerns the main punishments that can be

[6] Romania's Penal Code, enacted by means of Law no. 15/1968, republished in the Official Gazette of Romania no. 65 of April 16, 1997.

[7] Art. 36 of the Penal Code is entitled "The merging of the punishments for rival crimes committed by the individual."

applied to an individual[8], and art. 35 of the Penal Code refers to the complementary punishments[9] and the safety measures[10], however, the fact there is room for interpretation cannot be denied. For this reason, we consider that for the issues aforementioned an exact definition for the "merging" procedure of the punishments is not offered by the legislator, as a result of an authentic interpretation, being possible for the court of law to use whichever system of punishment establishing and application for the plurality of crimes.

Moreover, the exact definition of the law for the procedure that should be followed has a greater impact on the effective way the punishment is established and applied by the court of law, this judicial body knowing exactly what steps it should follow. Much more intuitive and in the same time much more imperative is the text of art. 34 line (1) letter b) of the Penal Code[11] that that of art. 61 line (1) last thesis of the Penal Code [12]. As a result, it can be said that in the norms of art. 61 line (1) of the Penal Code, the existing statement of art. 34 line (1) letter b) of the Penal Code should be used, in such a way that not only the court of law but also the penal law's addressee to explicitly know the manner in which the punishment is established and applied.

For the interpretation of the provisions of art. 61 line (1) of the Penal Code it can be observed that the legislator's statement concerning the "rest of the punishment that remained to be executed from the previous punishment" is also scarce. To which remaining part does the legal norm refer to?! On one hand, one thinks about the rest of the punishment that has been left to be executed at the date of probation. However, the legislator also states, at the beginning of the same line, that the person put on probation is – legally- executing the punishment (even though the convict is not imprisoned any more), the punishment being considered executed only at the punishment's span fulfillment. Therefore, since the convict who is put on probation is still executing the punishment, it is possible for some courts of law to consider that "the rest of the punishment that remained to be executed from the previous punishment" to be calculated since the moment the subsequent crime is committed and not since the time the convict has been put on probation. Therefore, it is considered absolutely necessary for the legislator to specify exactly the moment that the court of law should consider when establishing the rest of the punishment that remained unexecuted.

The fact that the punishments' "merging" procedure and the augmentation of 5 years at most is just as important and it shall be applied only if the court of law *considers* that probation shall be revoked (author's note). Therefore, one can easily draw the conclusion that it is possible for probation not to be revoked, and for the second crime not to be considered even a rival crime. Since the legislator does not specify which is the regime of the subsequent crime, in case probation is not revoked, the principle of the indictment legality stipulated in art. 2 of the Penal Code does not offer the possibility to consider the subsequent crime as being neither rival crime nor the second term of a post – sentencing recidivism.

The possibility to revoke or maintain probation, left by the legislator to be interpreted by the court of law, also derives from the provisions of line (2) of art. 61 of the Penal Code, according to

---

[8] According to art. 53 point 1 of the Penal Code the main punishments are life imprisonment, imprisonment from 15 days to 30 years and a fine from 100 lei to 50.000 lei.

[9] According to art. 53 point 2 of the Penal Code, the complementary punishments are: the interdiction of some rights from one to 10 years and military degradation. Also see art. 64-67 of the Penal Code.

[10] According to art. 112 of the Penal Code, the safety measure are: compulsory medical treatment, hospital admition, interdiction to occupy a position or to exercise a profession, a job or another occupation, interdiction to be in certain locations, expatriation of the foreigners, special seizure and interdiction to return to the family's home for a determined time.

[11] "b) when there have been ruled only imprisonment punishments, the hardest punishment is to be applied, which can be augmented up to its special maximum level, and when this maxim level proves to be insufficient, another augmentation of up to 5 years can be added."

[12] "(…) in this last case, the punishment established for the crime committed subsequently and the remaining punishment that remained to be executed from the previous punishment are to be merged, an augmentation up to 5 years being applicable."

which "revocation is *mandatory* (author's note) when the act committed represents a crime against the state's safety, a crime against peace and human kind, a manslaughter criminal crime, a crime committed with intent which resulted in a person's death or a crime by means of which extremely serious consequences have been produced."

Therefore, in case the court of law reaches the conclusion that it is not necessary for probation to be revoked, the previous punishment, for which the convict is put on probation therefore virtually executing it, and the punishment applied for the crime committed once again should be considered distinct and are to be autonomously executed.[13]

One can presume that the legislator has taken into account the situation when the subsequent crime has been committed out of guilt, and for this reason it does not agist the revocation of probation. This theory can also be found at the level of recidivism, when in art. 37 of the Penal Code it is stipulated that the second period of the recidivism should consist of a crime wittingly committed.

At the same time, one should also observe that, as far as the situation of multiple crimes is concerned, the form of guilt under which the respective crimes are committed it is not considered to be relevant; therefore some of them may be wittingly committed and others with intent. Hence, even though under the aspect of the *punishment's establishing* for the crimes committed during probation there may appear to exist a similarity with the situation of the multiple crimes, it should be observed that the sentencing regime is visibly easier than in the case of the plurality of crimes committed *before* the perpetrator has been definitively convicted for one of these.

Furthermore, in the judicial specialty literature there have been expressed opinions according to which "probation can be maintained even if the punishment ruled for the new crime is imprisonment which is to be executed in a place of detention, if the ruling of the new crime has occurred after the fulfillment of the punishment's execution, or if the conviction decision has remained definitive with a few days before the fulfillment of the punishment's span."[14]

One cannot agree with this thesis because, even though the new crime's rulling has occurred after the fulfillment of the punishment's span or the conviction decision has remained definitive with a few days before the fulfillment of the previuos punishment's span, it is almost ceratin that the subsequent crime has been committed between the time span since being put on probation and the moment of the punishmnett's fulfillment. The syncronization mentioned is owed to the fact that until the subsequent crime's ruling or until the ruling as being definitive of the conviction decision, there has been a phase of the penal prosecution, as well as a phase of ruling, which can also unfold at least in first court ruling and in appeal.

Furthermore, according to art. 450 line (3) last thesis of the Code of Criminal Procedure, the court of law judging the defendant for the subsequent crime is obliged to also rule upon the revocation of probation, and this court of law will surely consider the penal antecents of the defendant since these are known from within the act of aprehenssion. According to art. 263 of the Code of Criminal Procedure, it should be mentioned that the indictment should contain the data concerning the defendant[15].

Taking into consideration the fact that is clear that the punishment's establishment procedure for the crimes committed during probation, described in art. 61 line (1) last thesis of the Code of

---

[13] See C. Bulai, *Penal Law Workbook. General Part*, the Judicial Universe publishing house, Bucharest 2007, p. 595; T. Dima, *Penal Law. General Part*, Hamangiu publishing house, Bucharest 2007, p. 630.

[14] C. Mitrache, *Romanian Penal Law. General Part*, the Judicial Universe publishing house, Bucharest 2010, p.428.

[15] It is considered that the legislator has considered the provisions of art. 70 line (1) of the Code of Criminal procedure, which of course should be verified by the prosecutor:"(1) The defendant, before being heard, is asked questioned about the first and last name, nickname, date and place pf birth, the parents' first and last name, citizenship, studies, military situation, place of work, job, address where one lives, *penal antecedents* and other information for establishing the defendant's personal situation."

Criminal Procedure, is faulty one can wonder if the legislator has not referred to the provisions of art. 40 line (1) of the Code of Criminal Procedure, concerning the intermediary plurality. Thus, it has been established that there is an intermediary plurality of crimes when after the defendant's definitive conviction for a crime previously committed, the convict committs a new crime before starting to execute the punishment, *during its execution* (author's note) or in state of escape and the conditions required by the law are not fulfilled for the existence of the recidivism state. Just as it has been previously mentioned, until the fulfillment of the punishment's span the convict put on probation is virtually executing it, albeit being released from the penitentiary[16]. Thus, the commitment of a new crime during probation can be considered similar to the intermediary plurality of crimes from all points of view.

Likewise, according to art. 40 line (1) of the Penal Code, the legislator has stipulated that for the intermediary plurality of crimes the punishment is to be applied according to the regulations for the *crime contest*. However, for the situation in which a crime is committed between the moment the convict has been put on probation and the fulfillment of the punishment's span, the provisions of art. 61 line (1) of the Penal Code allow the court of law judging the subsequent crime to maintain probation. The two texts of law contain obvious inconsistences, being discriminatory and in the same time biased in relation to the convicts who have benefited from the trust of the judicial system, being set free after the execution of a fraction of the punishment.

Moreover, if one also takes into account the moment when the convict has been put on probation being therefore released from the penitentiary, moment chronologically situated towards *the end* of the punishment established by the court of law, one can also observe the similarity between this situation and the post-release recidivism. The fact that the probation has been granted by a court of law as a sign of trust for the convict is not be neglected[17]. In such conditions, it can be said that the respective convict who has committed a crime during probation, due to the fact that one has betrayed the trust that has been granted not only by the court of law but also by the commission for the individualization of the regime of execution of the imprisonment punishments (in the case when this entity was the one that has proposed the probation), should serve a punishment at least just as severe as the one resulted from the application of the provisions of art. 39 line (1) of the Penal Code, concerning the post-release recidivism, can be easily oriented towards the punishment stipulated for the post-release recidivism. Consequently, it would be right for the augmentation indicated by the provisions of art. 61 line (1) last thesis of the Penal Code to be situated between the augmentation established for the post-sentencing recidivism (7 years)[18] and the one stipulated for the post-release recidivism (10 years)[19].

Besides, one should also take into consideration the trust granted to the convict by the court of law, in the sense that the convict can socially reintegrate and reform without actually executing the entire punishment for which the convict has been imprisoned. Accordingly, one can make a slight comparison with the provisions that regulate the conditional suspension of the punishment's execution, respectively art. 81 and following of the Penal Code. More precisely, one should refer to the legal norms which concern the revocation of probation in the case a new crime is committed during the probation period. Hence, it can be observed that in case the subsequent crime has been wittlingly committed, in art. 83 line (1) of the Penal Code the following solution is described: "If during the probation period the convict has committed a new crime, for which a new definitive

[16] Art. 61 line (1) of the Code of Criminal procedure: "The punishment is considered to be executed if in the time span since being put on probation until the fulfillment of the punishment's span, the convict has not committed another crime. (...)"

[17] See art. 190 line (1) of the Implementing regulation of Law no. 275/2006, approved by means of the Government's Decision no. 1897 of December 21, 2006, published in the Official Gazette of Romania no. 24 of January 16, 2007.

[18] See art. 39 line (1) of the Penal Code.

[19] See art. 39line (4) of the Penal Code.

conviction has been ruled even after the expiry of this term, the court of law revokes the probation, ruling for the *entire* execution, punishment which is ***not*** to be merged with the punishment applied for the new crime". (author's note)

3.*The revocation of the probation in relation to the provisions of the new Penal Code.* According to art. 246 of Law no. 187/2012[20], the new Penal Code[21] is to come into effect on Feburary 1, 2014. Subsequently, at least at a theoretical level, the analysis of the revocation of probation in case a new crime is committed is imposed by the future norms of penal law. Unlike the actual Penal Code, which regulates the revocation of probation in art. 61 (marginal name "The effects of probation"), the new Penal Code stipulates the provisions concerning the revocation of probation in a distinct article. Within art. 104 of the new Penal Code (entitled "The revocation of probation"), line no. (2) contains the following provisions: "If after being put on probation the convict has committed a new crime, which has been discovered during the probation period and for which a new conviction with the imprisonment punishment has been ruled, even after the expiry of this term, the court of law revokes probation and rules for the execution of the rest of the punishment. The punishment for the *new crime* is to be established and executed, as the case may be, according to the provisions of *recidivism* or *intermediary plurality*". (author's note)

Concerning the conditions required by the the new Penal Code for granting probation, one can esily observe that there are not stipulated other derogatory provisions for the reduction of the fractions of punishment which the convict should execute, on the consideration that the crime for which the convict has been convicted has been committed out of guilt or while being a minor. Thus, according to art. 100 line (1) of the new Penal Code, the only conditions that should be fulfilled for the court of law to grant probation for the imprisonment punishments are the following:

a) the convict has executed at least two thirds of the punishment's span, for imprisonment not exceeding 10 years, or at least three fourths of the punishment's span, but no more than 20 years, for imprisonment exceeding 10 years;

b) the convict is executing the punishment in open regime or semi-open regime;

c) the convict has fully fulfilled the civil obligations established by the imprisonment decision, except for the case when it is proved that it has not been possible in any way for the convict to fulfill them;

d) the court of law is certain that the convict is reformed and can be socially reintegrated.

Moreover, according to line (6) of the article aforementioned, "the time span between the date of being put on probation and the date of the punishmnet's fulfillment represents a *surveillance term* for the convict." (author's note)

Returning to the analysis of art. 104 line (2) of the new Penal Code, one can easily observe that the revocation of probation is mandatory, if a new crime has been committed, crime that has been discovered until the fulfillment of the surveillance period. In regard to these provisions, the new Penal Code does not make any distinction between the crimes for which the revocation of probation is up to the court of law [art. 61 line (1) of the actual Penal Code] and the crimes which mandatorily imply the revocation of probation [art. 61 line (2) of the actual Penal Code].

The mandatory revocation regulated by means of art. 104 the new Penal Code has been imposed as a result of the establishment of the new system of probation for which there exists a period of surveillance, measures and obligations, surveillance by the probation service and the possibility to modify or even cease the obligations, all these for the convict'social reintegration. In case the convict, regardless of all the support, control and institutional help granted, has a mala fide

[20] Law no.187 of October 24, 2012 for the implementation of Law no. 286/2009 concerning the new Penal Code, published in the Official Gazette no. 757/12.11.2012.

[21] Law no.286/2009 concerning the new Penal Code, published in the Official Gazette no. 510/24.07.2009.

behaviour or even commits a new crime, the law does not give the court of law the possibility to grant trust anymore, but is actually obliged to revoke probation.[22]

Concerning the nature and gravity of the crime, the form of guilt or participation with which it has been committed, one can notice that the new Penal Code does not contain any specification. Thus, in principle, the court of law is obliged to revoke probation regardless of the characteristics of the subsequent crime. In today's Penal Code, the court of law can rule for maintaining probation or for its revocation, "considering the gravity"of the subsequent crime. It can be observed that the version chosen by the future Penal Code is in full concordance with the requirements that the society should have in relation to a convict who has benefitted from probation. Nevertheless, there should be made a clear distinction between the punishment established for the wittingly committed crimes and that for the crimes committed unwittingly.

Then, in order for the revocation of probation to be ruled, the new law rules imply the fact that the discovery of the subsequent crime to be made during the surveillance term. One can notice that this condition was not stipulated by art. 61 of the actual Penal Code, being taken over by the legislator from the norms concerning the revocation of the conditional suspension of the punishment's execution in case a new crime is committed [art. 83 line (2) of the actual Penal Code[23]].

Unlike the actual reglementation, it is considered that the furture norms of penal law represent a step forward for the penal sciences' endeavors to prevent and combat the commitment of new crimes by the people who have already been definitively convicted and who have benefited the institution of probation. It is obvous that the future norms of penal law are much more severe than those in effect at the present time, mandatorily tightening the applied punishment, situation which is considered necessary as it results from the first part of the present article.

According to the future Penal Code, the first effect of the commitment of a crime during the surveillance term consists in the revocation of probation and in the coercion of the convict put on probation to execute the rest of the punishment. Therefore, in the future regulation, the legislator has adopted a different treatment: the punishment established for the crime subsequently committed and the rest of the punishment which remained to be executed from the previous punishment **shall not** merge anymore (author's note), yet the arithmetic cumulation procedure shall be applied.

This procedure is sustained by the provisions regulated by the future Penal Code concerning the punishment's establishing in the case of recidivism. Just as it is stipulated in art. 104 line (2) of the new Penal Code, the punishment for the new crime is established and executed, as the case may be, according to the provisions of *recidivism* or *intermediary plurality*. (author's note)

Art. 41 line (1) of the new Penal Code contains the following provisions: "(1) There is recidivism when, after an imprisonment punishment decision greater than one year has remained definitive and until the rehabilitation or the fulfillment of the rehabilitation term, the convict commits a new crime having intent or oblique intent, crime for which the law stipulates imprisonment punishment of one year or more."

Then, one should consider only the provisions that regulate the punishment which a court of law should apply in case of post-conviction recidivism, provisions described in art. 43 line (1) of the new Penal Code: "If before the previous punishment *has been executed* or *considered as being executed* a new crime is committed in recidivism state, the punishment established for this crime *is*

---

[22] I. Pascu, V. Dobrinoiu, T. Dima et alli, *The Commented New Penal Code, vol I, General part*, the Judicial Universe publishing house, Bucharest 2012, p. 601.

[23] Art. 83 of the actual Penal Code **Revocation in case a new crime has been committed**. (1) If during the probation period the convict has committed a new crime, for which a definitive conviction has been ruled even after the expiry of this term, the court of law revokes the conditional suspension, ruling for the execution of the entire punishment, which does not merge with the punishment applied for the new crime. (2) However, the revocation of the punishment's suspension doesn't take place if the crime subsequently committed has been discovered after the expiry of this probation period. (...)

added at the previous unexecuted punishment or at the rest of the punishment remained unexecuted". (author's note)

Just as it is shown above, according to line (6) of art. 100 of the new Penal Code, "the time span between the date of being put on probation and the date of the fulfillment of the punishment's span constitutes surveillance term for the convict". Moreover, according to art. 106 of the new Penal Code, "if until the expiry of the surveillance term the convict has not committed a new crime, the revocation of probation has not been ruled and the annulment cause has not been discovered, *the punishment is considered executed*". Thus, the commitment of a crime during the surveillance period of probation is included in the conditions of post-convicition recidivism due to the fact that the post-release recidivism interferes when a new crime has been committed *after* the previous punishment has been *executed* or *considered as being executed*[24]. (author's note)

However, the new Penal Code also stipulates that the punishment for the new crime is established and executed, in certain cases, according to the provisions of intermediary plurality. According to art. 44 line (1) of the new Penal Code, "there is an intermediary plurality of crimes when, after a conviction decision has remained definitive and until the date when the punishment has been executed or considered as being executed, the convict commits a new crime and the conditions stipulated by the law in case of recidivism are not fulfilled. (2) In the case of intermediary plurality, the punishment for the new crime and the previous punishment are merged according to the provisions of the institution of multiple crimes." (author's note)

Thus, when the recidivism conditions, established by art. 41 line (1) of the new Penal Code, are not fulfilled, the punishment for the subsequent crime committed during the surveillance term of probation is established according to the provisions of the institution of multiple crimes.

According to art. 39 of the new Penal Code, "(1) In the case of multiple crimes, the punishment for each crime is to be established and the punishment is to be applied, as follows:

a)when there has been established a life imprisonment punishment and one or more punishments of imprisonment or by penal fine, the life imprisonemt punishment is to be applied;

b) when there have been established only imprisonment punishments, the hardest punishment is to be applied, to which an augmentation of a third of the total of the other punishments is to be added;

c)when there have been established only punishments by fine, the hardest punishment is to be applied, to which an augmentation of a third of the total of the other punishments is to be added;

d) when there has been established an imprisonment punishment and one by fine, the imprisonment punishment is to be applied, to which the enitre punishment by fine is to be applied;

e)when there have been established more imprisonment punishments and more punishments by fine, the imprisonment punishment is to be applied according to letter b), to which the enitre punishment by fine is to be applied according to letter c)."

Taking into account all the provisions aforementioned, one must admit that the manner in which the punishment for the subsequent crime committed during the surveillance term, but which **does not** fulfill the recidivism conditions, is to be established, is very confusing. Firstly, the institution of multiple crimes, by definition, implies the commitment of two or more crimes by the same person, by means of distict actions or lack of actions. Moreover, according to art. 44 line (2) of the new Penal Code, "in case of intermediary plurality, the punishment for the new crime and the *previous punishment* are merged according to the provisions of multiple crimes" (author's note). However, in the present situation – the revocation in case a crime is committed – only a single subsequent crime, committed during the surveillance term, is encoutered. Which should be the "previous punishment"?

[24] Art. 43 line (5) of the new Penal Code: "If after the previous punishment has been executed or considered to be executed a new crime has been committed in state of recidivism, the special limits of the punishment stipulated by the law for the new crime is to be augmented with a half."

It is absurd to consider that the legislator has taken into account the rest of the punishment that has remained unexecuted, on one hand, and the crime subsequently committed, on the other hand, which will be merged according to the applicable rules of the multiple crimes. In art. 104 line (2) of the new Penal Code it is established that in case a misdeameanor is committed during the surveillance term and an imprisonment punishment conviction is ruled (even after the expiry of this term), the court of law should act in two very precisely delimited stages:

- in the first stage, the court of law – manadatorily - revokes probation and *rules the execution of the rest of the punishment* (author's note);

- in the second stage, the court of law establishes the punishment for the new crime, which has absolutely no connection with the rest of the punishment.

In the text of art. 104 line (2) of the new Penal Code the following disposition can be found: "The punishment for the *new crime* is established and executed, as the case may be, according to the provisions of recidivism and intermediary plurality" (author's note). There exists no formulation which should lead to the idea that the punishment for the subsequent crime is to be merged with the rest of the punishment that has remained unexecuted. Furthermore, in the phrase previous to the one stated above, the legislator very clearly stipulates that the court of law revokes probation and *rules the execution* of the rest of the punishment[25] (author's note). The court of law, as far as the revocation of probation and the execution of the rest of the punishment are concerned, mandatorily takes a decision, in all the cases, prior establishing the punishment for the new crime.

Probably, the legislator has taken into account the situation in which the convict put on probation has committed a new crime during the surveillance term, and this crime is not situated in the conditions of the second term of recidivism, precisely: "an intent or oblique intent crime, for which the law stipulates the imprisonment punishment of one year or more"[26]. Hence, the only crimes which cannot constitute the second term of the recidivism are those committed out of guilt and those for which the law stipulates the imprisonment punishment of less than one year. The punishment of fine cannot be discussed because the conditions stipulated in art. 104 line (2) of the new Penal Code, ("for which an imprisonment punishment has been ruled") would not be fulfilled.

Then, one should ask oneself: which was the legislator's intention in the case of the wittingly crimes and of those for which the law stipulates the imprisonment punishment of less than one year? It is possibile that, in the case of these crimes, the legislator could have thought at the following solution: the court of law revokes probation and rules for the merging of the rest of the punishment that has remained unexecuted with the punishment established for the crime subsequently committed, according to the provisions of the institution of multiple crimes.

The legislator's intention is considered to have been good and, in all the cases, the revocation of probation must be ruled. One makes this statement due to the fact that the person put on probation should give special attention to his/her actions, in such a way as it would be impossible to commit any crime out of negligence[27].

If this has been the legislator's intention and the legislator wished to make a distinction between the situation of committing an intentionate crime and the one of committing a wittingly crime, the transposition in judicial norm is inaccurate and extremely confusing. The formulation of the text of art. 104 line (2) of the new Penal Code does not allow such an interpretation, because, just as it has been proved before, in the same line, but in the previous phrase, it was exactly the legislator

---

[25] Art. 104 line (2) of the new Penal Code "If after being put on probation the convict has committed a new crime, which has been discovered during the surveillance term and for which there has been ruled a conviction of imprisonment, even after the expiry of this term, the court of law revokes probation and rules the execution of the rest of the punishment. The punishment for the new crime is extablished and executed, as the case may be, according to the provisions of *recidivism* or *intermediary plurality*."

[26] See art. 41 line (1) of the new Penal Code.

[27] According to art. 16 line (4) letter b) of the new Penal Code, "the deed is wittingly committed when the perpetrator does not foresee the result of one's action, even though one should and could have anticipated it."

the one who unconditionally coerces the court of law to rule the revocation of probation and the execution of the rest of the punishment.

Consequently, in relation to the actual regulation, it can be said that the application of the norms concerning the punishment's establishing for the institution of multiple crimes to the situation of the punishment's establishing for the new crime committed during probation is impossible, due to the troublesome formulation of the text of art. 104 line (2) of the new Penal Code. It is true that if more crimes shall exist, then the provisions of the institution of multiple crimes can be applied, however, only concerning the new crimes committed[28]. The rest of the punishment remaining unexecuted **shall never** be merged with the subsequent crimes, due to the fact that the legislator actually coerces the court of law "to revoke probation and to dispose the execution of the rest of the punishment". As a result, concerning the rest of the punishment that has remained unexecuted and the punishment established for the subsequent crime the artihmentic cumulative process shall always apply, and not the one of the judicial cumulation, which implies a mergence.

Besides, in relation to the provisions of art. 100 of the new Penal Code, it can also be observd that, in order for the conditions of probation to be fulfilled, the convict must have executed *at least* two thirds of the punishment's span, in the case of imprisonment not exceeding 10 years, or *at least* three fourths of the punishment's span, in the case of imprisonment exceeding 10 years (author's note). Consequently, the situation of a crime's commitment during the surveillance term is very similar – at a temporal level – to the post-release recidivism. One should also take into consideration the trust that the court of law gives to the convict when ruling probation, trust that the convict put on probation defies when committing a new crime. According to art. 100 line (1) letter d) of the new Penal Code, probation can be ruled if "the court of law is certain that the convict has made amendments and can reintegrate in society".

In regard to the issues aforementioned stipulated, the following formulation is considered to be better suited for the situation created by the commitment of a new crime during the surveillance term:

"(2) If, after being put on probation, the convict has committed a new crime, which has been discovered during the surveillance term and for which an imprisonment conviction has been ruled, even after the expiry of this term, the court of law revokes probation and rules the execution of the rest of the punishment together with the punishment established for the new crime, according to the provisions of recidivism [author's note, art. 43 line (1) of the new Penal Code]. In case the subsequent crime is wittingly committed or if the law stipulates for this crime the imprisonment punishment of one year at most, the rest of the punishment remained unexecuted together with the punishment established for the new crime are to be merged according to the provisions of the institution of multiple crimes. (author's note, art. 39 of the new Penal Code)."

4.*In conclusion*, it can be observed that the provisions of art. 61 line (1) of the actual Penal Code must be reconsiderd in such a way as not to contradict the norms that regulate the plurality of crimes. Moreover, taking into consideration the severity of the punishment established for the crime committed between being put on probation and the fulfillment of the punishment's span, it is believed that this should be equivalent with the one existing at the level of the crimes committed after execution, thus consisting in an express warning of the convict put on probation in order to refrain from committing a new crime, during probation.

To the same effect, even the simple fact that the convict benefits from the clemency and evident trust of the court of law which decides the free him/her, in certain cases even after the

[28] See art. 43 line (2) of the new penal Code: "When before the previous punishment has been executed or considered executed more rival crimes have been committed, out of wich at least one is in state of recidivism, the established punishments are merged according to the provisions of the institution of multiple crimes, and the punishment resulted is added to previous punishment or to the rest of the punishment which has remained unexecuted."

execution of just half of the time for which the convict has been definitively convicted[29], should identify an correspondent in the severity of the punishment which the convict put on probation should receive, in case the convict has wittingly committed a new crime during probation. Therefore, it is believed that for the subsequent crime, the court of law can establish a punishment to which an augmentation between the augmentation established for the case of post-sentencing recidivism (7 years) and and the one stipulated for the case of post-release recidivism (10 years) can be added, and the rest of the punishment that has remained unexecuted to be arithmentically added to the respective punishment.

In what concerns the future regulations of the Penal Code which regulate the revocation of probation in case a new crime is committed during the surveillance term, it can be noticed that these – in the existent formulation- cannot be applied because they do not make a clear distinction between the wittingly committed crimes and those committed out of guilt. Furthermore, the text of art. 104 line (2) of the new Penal Code is incoherent, situation which will lead to severe problems as far as its application is concerned. For this reason, the reformulation aforementioned proposed should constitute at least a starting point as far as the advisably solving of this issue is concerned.

References

- Costică Bulai, *Penal Law Workbook. General Part*, the Judicial Universe publishing house, Bucharest - 2007.
- Traian Dima, *Penal Law. General Part*, Hamangiu publishing house, Bucharest – 2007.
- Constantin Mitrache, *Romanian Penal Law. General Part*, the Judicial Universe publishing house, Bucharest – 2010.
- I. Pascu, V. Dobrinoiu, T. Dima et alli, *The Commented New Penal Code, vol I, General part*, the Judicial Universe publishing house, Bucharest – 2012.
- George Antoniu and collaboratores, Preliminary explanations of the New Penal Code, vol. I and vol. II, the Judicial Universe publishing house, Bucharest – 2011.
- Mihai Adrian Hotca, *Penal Code, Comments and Explanations,* C.H. Beck Publishing House, Bucharest – 2007.
- Nicolae Volonciu, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1972.
- Grigore Theodoru, Lucia Moldovan, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1979.
- Vintilă Dongoroz and collaboratores, *Theoretical Explanations of the Romanian Criminal Procedural Code,* the Academic Publishing House, Bucharest – 1975.
- Vintilă Dongoroz and collaboratores*, Theorethical Explanations of the Romanian Penal Code,* the Academic publishing house, Bucharest - 1970.
- Ion Neagu, *Criminal Procedure Treaty, The Special Part,* the Judicial Universe publishing house, Bucharest - 2009.
- Ion Rusu, *The Individualization of Criminal Law Sanctions*, the Judicial Universe publishing house, Bucharest - 2011.

[29] See art. 59^1 line (1) of the Penal Code: „The person convicted for committing one or more wittingly crimes can be released on probation before the entire execution of the punishment, after one has executed at least half of the punishment's duration for the jail time that does not exceed 10 years (…)".

THE REFLECTION OF PROCEDURAL GUILT IN THE CRIMINAL PROCEDURE PROVISIONS. LIABILITY FOR UNJUST CONDEMNATION OR FOR TAKING PREVENTIVE MEASURES UNLAWFULLY

ELIZA EMANUELA OPREA*

Abstract

In the criminal proceedings of some law states the wrongful sentencing of individuals is very rare, having a comprehensive system of procedural safeguards which prevent such a situation. The purpose of the criminal proceedings is to punish only the culprits, the Criminal Procedure code frontispiece being stated the idea that no innocent person should be held criminally liable. By achieving this aspect of purpose is ensured observance of legality and the rule of law. All the basic rules and the whole organization of the criminal trial are polarized around this major goal of justice. Also the professional qualification level of those summoned to administer criminal justice in the modern state to minimizes the risk of judiciar miscarriages. The deep humanism of our law requires though the regulation of those procedural arrangements, through which in the event of an act of injustice, the wrongly convicted is able to obtain prompt repairs that society owes them. A very important aspect related to the evolution over time of the regulation of this institution, is that in its doctrine of integration in the European Union, Romania has adopted a series of laws and regulations designed to ensure our legislation's alignment with the relevant legislation of the countries from the European community and to ensure the compliance with the European Convention on Human Rights. This process is still ongoing, therefore the establishment and the subsequent modification of the special procedure concerning the remedies for the material or moral damage in the event of unjust sentence or unlawful deprivation of liberty was based on the desire to avoid the conviction situation of the Romanian state by the international courts for failure to comply with the Art. 5 paragraph 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms that 'any individual who is the victim of arrest or detention in conditions contrary to the provisions of this article shall have the right for remedy".

Keywords: *unjust conviction, deprivation or restriction of liberty, unlawful, material damage, miscarriage of justice*

Introduction

Through the complex of procedural safeguards accompanying the performance of criminal justice in our country it is ensured the achievement of the criminal process objective, which, inter alia, consists of not punishing innocent individuals**.** Through the compliance with this aspect of the purpose of criminal proceedings it is ensured the observance of legality and the rule of law. The way in which it is disciplined the criminal procedure and the level of professional qualification of those who are called to perform criminal justice generally exclude the risk of miscarriages of justice.

The person who has been unlawfully or unjustifiably subjected to restrictive measures involving deprivation of liberty has the right to seek material or moral remedies under the Constitution Article 52 line (3) and the Criminal Procedure Code Art. 504- 507.

The legal criticized provisions are part of Chapter IV " Remedies for the damage to property or moral damages in the case wrongful conviction or unlawful deprivation or restriction of liberty" of Title IV "Special procedures" of the Criminal Procedure Code and determine who has the capacity to benefit from compensation, namely the individual who has been finally convicted after the retrial was reached a final judgment of acquittal, as well as the person who, during the trial, was deprived of liberty or who has been unlawfully restricted.

* PhD candidate, "Nicolae Titulescu" University of Bucharest (email: oprea111@yahoo.com).

The European Court itself, when granting moral compensations, it does not operate with predetermined evaluation criteria, **but in equity judgments**. The provisions of Art. 505 of the Criminal Procedure Code established the criteria by which it determines the compensation for damages but does not establish the criteria to quantify them.

Liability for unjust conviction or for taking unlawful preventive measures - Special procedure Art. 504 -507 Code of Criminal Procedure

Established as a fundamental principle, the inviolability of an individual consists of the right of every person to be free to act, the achievement of these attributes can be made only in the cases and under the conditions provided by law.[1]

The current Constitution of Romania, revised in October 2003 has devoted in Article 23, individual liberty, indicating that the "Individual liberty and security of an individual are inviolable. Searching, detaining or arresting a person are allowed only in the cases and under the procedure provided by law"

However, in our view, the constitutional provisions included in Article 23 are partly too detailed and are practically substituted to provisions which, in this matter must find their place in the Criminal Procedure Code.

Guaranteeing personal freedom as a fundamental principle acquired a new regulation and the Criminal Procedure Code in force in 1990, regulation which anticipated the constitutional provision.[2]. In Articles 4 and 5 it is stipulated the possibility of the person against who was applied an unlawful or unfair preventive measure, to request remedies for the suffered damages.

Observing the rules with ranking principles of the Constitution and the Criminal Procedure Code, it follows that, according to the regulations of our country, deprivation of liberty or restriction of personal freedom in any other form is possible in right enforcement practice, but only following a judicial activity of criminal nature. The restriction of personal freedom may occur either as a preventive measure taken during the criminal trial, or as a custodial sentence placed at the end of the criminal case resolution by final judgment of the court.

If the restriction of freedom following the application of criminal sanctions as freedom depriving penalties is not evident outside the known outstanding issues in substantive law, regarding the restriction of freedom by taking preventive procedural measures were formulated numerous criticism.

Arguably no other institution of criminal procedural law has been challenged so strongly, especially in some doctrines as deprivation of liberty preventive measures.

The guarantees of freedom of the individual in criminal proceedings can be found in the regulations in which preventive measures may be stipulated, the competent authorities to require taking the preventive measures, the duration of preventive measures and checking the legality preventive measures.[3] Guaranteeing personal freedom is the fundamental principle stipulated in the Constitution, the European Convention and the Criminal Procedure Code according to which during the criminal proceedings no person may be detained, arrested or deprived in other way of freedom nor subjected to any form of restriction of freedom than that in the cases and under the conditions provided by law. Through the right to liberty it is understood the right to physical liberty of the person (the classic meaning of individual freedom *liberte d'aller et de venire),* which consists in the ability to move, to travel freely. An individual is deprived of liberty by ordering the detention, administrative management at the police station, preventive arrest, provisional arrest in the view of

[1] I.Neagu , *Tratat de procedură penală.Partea generală,* p. 90.

[2] The Law No. 32 was adopted in November 1990, one year before the Constitution.

[3] This convention was adopted in New York on 10 December 1980. România acceded to the Convention by the Law No. 19 of 10 October 1990, published in Official Gazette no. 112 of October 10, 1990.

redention or issuing an European arrest warrant, of security measure disposition of the internment, as well as in the case of the main penalty execution imprisonment or life imprisonment or the educational measure of admission into a rehabilitation center or a medical educational institute. There will be a restriction of freedom of movement of persons by forming the obligation not to leave the city or country.

If the person deprived of his liberty by preventive arrest or hospital admission, or one whose liberty has been restricted by imposing the obligation not to leave the city or country considers that the measure is illegal is entitled to make a complaint before an independent and impartial court body in which to challenge the legality of the measure to which it is subject. The final judgments taken by the the court in this matter can not be rated as force of res judicata, a new request for revocation or replacement of deprivation of liberty measure can be made at any time. The person under preventive custody may request throughout the trial a provisional release under judicial control or on bail. The person who has been unlawfully or unjustifiably subjected to restrictive measures involving deprivation of liberty has the right to seek compensation for material or moral suffered damage.

Both the Romanian Constitution, Article 52 paragraph 3 and Criminal Procedure Code, Articles 504-507 provide the possibility to initiate a civil action for damages against the Romanian state in the case of deprivation or restriction of liberty unlawfully or unfairly convicted. The compensation for the prejudice may be required in all cases in which the state authorities commit abuses of law or manifest negligence, because Article 52 of the Constitution points out excercising this right by those interested regardless the nature of the followed procedure, without refererence to conducting a criminal trial.

In case the remedies for the damage were awarded according to Article 506 and if the Romanian state was condemned by an international court of law, the recourse against those who, in bad faith or serious negligence, caused the damage generating situation is mandatory. The state may recourse against the official subjects (judges or prosecutors) whose responsibility will be held in relation to their procedural guilt.

As a result of amendments brought by Law 281/2003 the content Article 504-507 was fortified in order to increase the guarantees offered by the fundamental principles governing the criminal procedure, namely bringing the proceedings will take into account not only material damages, but also the moral damage, mental trauma caused by unjust conviction or unlawful deprivation or restriction of liberty. This extension of the special procedure object is the effect of the amendments to the criminal procedure law under which the compensation of moral damages caused by criminal offences was expressly stipulated.[4] The necessity of compensation for the moral damage can be observed in specialized literature[5] prior to Law no. 281/2003.

Conditions provided by Art. 504 -506 of Criminal Procedure Code to formulate the compensation action by the injured person by the committing a miscarriage of justice: In criminal matters, the cases of miscarriage of justice, respectively the cases in which the injured party is entitled to compensation for damages caused by miscarriage of justice in criminal trials are set by Article 504 of the Criminal Procedure Code: the person who received a final sentence is entitled to compensation for the suffered damage by the state, if following the retrial it was reached to a final judgment of acquittal. Is entitled for compensation the person who, during the criminal trial, he was deprived of liberty or he has been unlawfully restricted from freedom.

1. For the first case, of **unjust conviction**, the initiation of the compensation court implies the fact that certain conditions have to be met:

a)*the existence of a final judgment of conviction*. It cannot constitute grounds for exercising such action a criminal judgment of conviction which is not final. Judgment in question must be force

[4] I.Neagu *Tratat de procedură penală.Partea specială*. p.631.

[5] G.Antoniu, E.Dobrescu, T.Dianu, Gh. Stroe, T.Avrigeanu, *Reforma legislaţiei penale*,Ed. Academiei Române,Bucureşti, 2003, p. 280.

of res judicata and establish the existence of the offense, its commision with guilt by a natural or legal person to order its conviction either to imprisonment, or fine or penalty for individuals or the fine for legal entities. It is irrelevant whether the imprisonment penalty was ordered execution in detention or ordered with the suspension on parole or supervised suspension of penalty or its execution at the workplace. It is irrelevant whether the imprisonment was put into effect or not. *Promoting and accepting of extraordinary appeals after which it is ordered the originally convicted defendant'discharge*. The final conviction may be canceled by means of annulment appeal, be revision, or in case of rejudging the missing persons. The final conviction does not necessarily imply enforcing the judgment. Therefore, it can served as a basis for the exercise of redress, both final conviction not followed by execution and especially unjust condemnation followed by execution. The differences between these two situations, however, have implications in determining the extent of the damage, not admissibility of the application of the remedies.[6]

The restriction of initiation the special remedies procedure was mentioned in the specialized literature. [7] The same solution was definitive also for Constitutional Court[8], which stated that limiting the possibility of obtaining remedies for miscarriages of justice is inconsistent with the Romanian Constitution.

Through the declarative interpretation of the provisions of Article 504 paragraph 1 it is reached to the exclusion of the liability of patrimonial state for non-convicting solutions provided according to Article 10 letters f)- j), the judicial error will be withheld only in case of final convictions, provided that in that case the criminal proceedings were unfounded. The compensation right arises only after the cancellation or dissolution of the final conviction, the courts of law pronounce following a retrial a final acquittal decision based on any of the cases specified in Article 10 paragrapg 1 lines a) to e).

2. The second case- Remedies for the damage in the case of unlawful deprivation or restriction of liberty.

Unlawful deprivation or restriction of liberty should be determined, as appropriate, by order of the prosecutor to revoke the deprivation or restriction of liberty measure, by ordinance of discontinuing the criminal prosecution or termination the criminal prosecution for the cause provided for in Article 10. Paragraph 1 letter. j) or by court decision to revoke the deprivation or restriction of liberty measure by a final acquittal decision or by final decision of cessation of criminal procedures for the case provided in Article 10 paragraph 1 letter j). It is necessary that the preventive measure in question or the security measure of provisional admission to have been ordered with the violation of the laws under either the Criminal Procedure Code or the European Convention. And in a situation where deprivation of liberty was legal, but **unjustified**, the state may occur liable, as per E.C.H.R., since only the unjustified nature of the measure itself can be determined by the acquittal judgment or the cessation of criminal procedure.

In the case a finding of an unjust conviction or unlawful or unjustified deprivation or restriction of liberty, the injured person is entitled to claim compensation for material or moral prejudice from the Romanian state, represented by the Ministry of Public Finance by means of a civil action in tort.[9]

---

[6] I.Neagu *Tratat de procedură penală.Partea specială*. p.633.

[7] Theodoru V.p.624.

[8] Constitutional Court, Decision no. 45 of March 10, 1998 (Official Gazette no. 182 of 18 May 1998)

[9] The provisions 998-999 of the Civil Code on liability in tort shall not constitute grounds for engaging the state liability for miscarriages of justice. The legal regulation that establishes in what does the judicial errors consist of, for which the state can be held liable is Article 504 of Criminal Procedure Code compared to Article 52 paragraph 3 of the Romanian Constiturion, which states that the State bear patrimony liability for damages caused by miscarriages of justice. The liability of the state is a direct one, but only limited to the damages caused by judicial errors in criminal proceedings. Also the provisions of Article 504 paragraph 1 of Criminal Procedure Code does not constitute an application of Article 998-999 of Civil Code, such an interpretation could lead to the idea that the state, THROUGH the

In the event that, in criminal proceedings have occurred moral or material damage was caused by judicial errors, the patrimonial state will be held liable. It is about a tort liability law of the state which is legally based on Articles 998-999 of the Civil Code and also on the regulations of Articles 504-507 of the Criminal Procedure Code which provide remedies for the material or moral damages in the case wrongful conviction or unlawful deprivation or restriction of liberty.

The provisions of Articles 998-999 of the Civil Code refers to the obligation to repair of a damage caused by an unlawful act, without distinguishing whether it is a material or a moral injury. Although the law did not expressly provide, it was considered that if the legislature has used the concept of damage he wanted to protect all the rights of one individual who was harmed by committing an illegal act and has provided without distinguishing the nature of the prejudice, that any damage should be compensated, he made implicit reference to both physical damage as well as to moral damages. In order to avoid these discussions, the draft of the new Civil Code expressly states the provisions of Article 1095 paragraph 1 that the compensation obligation and the liability in tort is committed for all to material, injury or moral damage brought to a person's negligence.

In determining the extent of repairs it is taken into account the length of deprivation of freedom or restriction of liberty suffered and the consequences on the individual or family of the one deprived of his liberty or whose liberty has been restricted. The repair is the payment of a an amount of money or, taking into account the conditions of the entitled to compensation and the nature of the suffered damage, the establishment of a lifelong pension or the obligation that, on the state's expense, the one deprived of liberty or whose liberty was restricted to be assigned a social and medical assistance institute. To the persons entitled to compensation who, before deprivation of liberty were employed, are being calculated on seniority as established by law, and while they were imprisoned. The compensation is supported by the Ministry of State Finance.

It is noticed that from the title name of Chapter IV relating to deprivation or "unlawful restriction of liberty" and the content of Article 504 paragraph 3 according to which only preventive measures are taken into account as reasons for limiting the exercise of the right to freedom, there are obvious discrepancies.[10] We emphasize that the process of amending and supplementing the criminal procedure law, in general, and the analyzed special procedure, was particularly carried out having regard to the European Convention on Human Rights, which is established in Article 5 paragraph 5, that the individuals held prisoners against the law are entitled to compensation.

We consider that the present form of Article 504 paragraph 3 does not meet the requirements of the European Convention on Human Rights. Consequently, when developing a new Code of Criminal Procedure*, de lege ferenda* , either text in question will be completed to cover all situations in which the trial will operate an unlawful deprivation or restriction of liberty or will waive the rule in question. In the latter case, the jurisprudence solution for compensation is expected to be based on those procedural acts which have as their purpose finding the occurrence of the miscarriages of justice.

In these circumstances will be eligible for compensation the claims under Articles 504-507 in case the temporary release of the arrested defendant was rejected clearly unjustified.[11] Or for the case the revocation request of the precventive arrens was rejected, even though from the file results the disappearance grounds which led to taking the measure, which means that the continuation of legal proceedings involves the state of freedom of the one accused or convicted. In all cases,

---

Ministry of Public Finance, is limited and unconditional, situation in which legal rules governing the state liability in other areas are no longer justified since the principles of Article 998-999 of the Civil Code are generally applicable (High Court of Cassation and Justice, Civil and Intellectual Property Section, DECISION No. 422/2006, www.legalis.ro).

[10] I.Neagu *Tratat de procedură penală.Partea specială*. p.634.

[11] E.C.H.R., Decision of 27 August 1992 in the case Tomassi against France.

demonstrating the illegality committed leads to retention of the existence of a deprivation of physical liberty in an arbitrary fashion. [12]

The same legal system is to be applied against the assumption that the defendant it was ordered illegally a temporary security measure. Thus, if the measure of safety to hospital care in the absence of data showing that the defendant is mentally ill or drug addict and is in a dangerous condition to society, it can be initiated the remedy procedure, justified by its the restrictive nature of freedom of the procedural measures.[13]

It is entitled to remedies for the suffered damage also the individual who was deprived of liberty after inverting the prescriptio, amnesty or decriminalization act.

The action of remedy can be initiated by the person who has been deprived of liberty or whose liberty has been restricted and after his death, may be continued or started by people who were dependant.

The proceedings may be brought within an established framework of 18 months calculated from the date of the final, where necessary, by court decisions (The court of law unlawfully may order the deprivation or the restriction of liberty in what concerns the defendant in preventive arrest, the obligation not to leave town, the obligation not to leave the country, the unlawful rejection of the request for provisional release, medical admission.) or of the ordinance the prosecutor to revoke the preventive measures (the detention, obligation not to leave town and obligation not to leave the country) on the one hand, or the ordinance not to proceed to judgment (by ordering the removal of a criminal investigation or the termination of the criminal prosecution)

It is an action whose resolution is a matter court in whose district the entitled person is exempted from judicial tax.

Compensation is allowed for both actual damage (damnum emergens) and for the loss of earnings (lucrum cessans). The injured person can not sue along with the state the magistrate or magistrates who issued the judicial decisions through which the unjust conviction or the unlawful deprivation or restriction of liberty was ordered.

According to the practice of the European Court of Human Rights when a person's fundamental rights have been violated by any measures that have been proved to be unfounded, the person is entitled to full compensation for the damage caused, of both material damage and moral damages. Unlike damage claims for material prejudice, to which damage must be certain both in terms of existence and the extent, at the action or moral damages the certainty may be only about the existence of the damage, not the extent of it. **The amount of moral damage is assessed in terms of general criteria at the discretion of the judge.** This is fully justified by the fact that moral damages can not be determined by strict abstract rigors, since it varies from person to person, depending on the specific circumstances of each case. With regard to the moral damage, the literature and legal practice have pointed out that the court should not be limited to a determination of its existence as such, it is obliged to identify the elements that would determine the seriousness of the damage [14] The Former Supreme Court of Justice – The Civil Section decided that moral damage consisting in the honor or the reputation of a person or other psychiatric sufferings, justifies the granting of such compensation which shall be determined by general appreciation, but taking into account the criteria resulting from the specific case before the court of law.

---

[12] I.Neagu *Tratat de procedură penală.Partea specială*. p.635.

[13] M.Damaschin, Condamnare sau dispunere a unei măsuri preventive pe nedrept.Despăgubiri,în R.D.P., nr 3 , 2004, p.79.

[14] Ghe.Vintilă and Constantin Furtună – *Daunele morale – Stadiu de doctrină şi jurisprudenţă* – Ed.Allbeck,Bucureşti 2002, pag. 116-131).

The legislature has provided that the entitled persons, who before the deprivation of liberty were employed, they are being calculated, aside from the seniority established by law also the time in which they were imprisoned as remedies for the damage.[15]

The existence of moral damage should not be proven (unlike the material damage), but it is justified as a matter of discretion, taking into account non-property rights or interests affected, such as the right to liberty, bodily integrity, health, honor, reputation and so on, respectively the physical and mental suffering caused by the violations of these fundamental values of the human person - protected now by the Constitution and the E.C.H.R.. A quantification of moral damages or a "measuring" of the sufferings cannot be achieved by technical, accurate evidence, being a purely subjective matter, which must be concretely analyzed by taking into account the total of the circumstances related to the actual conviction (nature, duration, method of execution), as well as the adverse effects which it has produced both to family and professionally (ECHR, November 6, 1980, Guzzardi against Italy).

The European Court itself, when granting moral damages, does not operate with predetermined evaluation criteria, but **in equity judgment.** The provisions Article 505 of the Criminal Procedure Code establish the criteria by which it is determined the compensation for thesuffered damage but do not establish the criteria to quantify them.

The need to maintain the public order, including the protection of any accused is a reason that may justify the extension of imprisonment. However, it can not be considered relevant and sufficient unless it is supported by facts showing that the prisoner release would actually affect public order. Moreover, **the detention is not legitimate unless public order is indeed under threat.** [16]

In its jurisprudence, the Court set forth four fundamental reasons acceptable to the preventive arrest of a person suspected of having committed a crime: the danger that the defendant would escape (*Stögmuller vs Austria*, November 10 1969, seres A no. 9,); the risk that, once released, to prevent the administration of justice (*Wemhoff vs Germany* June 27 1968, 14), to commit new crimes (*Matzenetter vs Austria*, November 10, 1969) or to disturb public order (*Letellier vs France* and *Hendriks vs Netherlands* [Dec.], no. 43701/04, July 5, 2007). Moreover it decided that courts of law ruling with regard to the possibility of keeping the defendant in preventing arrest must consider all the specific relevant factors, which are able to confirm the necessity existence of this measure (*Mansur vs Turciei*, 8 iunie1995,).

According to paragraph (5), Artice 96 of Law no. 303, no person is entitled to compensation who, throughout the trial, **contributed in any way** in commiting a legal error by the judge or the prosecutor.

In the concept of the legislature, only the absolutely innocent person (who has not committed any unlawful act that would attract criminal and extra-criminal liability is entitled to compensation from the state - Opinion separated at the Constitutional Court, Decision no. 45 of 10 March 1998 on the plea of unconstitutionality of the provisions of Article 504 paragraph 1 of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 182 of 18 May 1998). According to the ECHR jurisprudence, the specific danger to public order it is understood as a "collective response to the offense" which, by its resonance affects the natural social balance, creates a state of indignation and disapproval, of fear and social insecurity, stimulates the fear that justice does not act strongly enough against criminal manifestations of pronounced social danger and may encourage others to commit similar acts. The Strasbourg Court has principally stated that, in time, the national authorities have the positive obligation to indicate specific elements to justify the arrest, respectively in each case the public interest.

[15] Decision no. 1888/1991 – published in Rev.Law no. 7/1992, pag. 85).
[16] *Letellier vs France*, June 26, 1991, 51, series A, no. 207).

The national court of law must to verify whether it is not possible to resort to other measures with the aim ensure the smooth running of the trial. [17]

The recourse action. According to Article 507 if the remedies for the damage have been paid to the wrongfully convicted person and whom was unlawfully relieved or restricted from freedom, as well as in a situation where the Romanian state was condemned by an international court, the recourse action against the person who in bad faith or serious negligence caused tortious situation is mandatory. In both cases, the recourse actions may be directed only against a judge or prosecutor, guilty of the crime of unjust repression [18], misconduct in office, unlawful arrest [19] and abusive research or the settlement of a criminal case in violation of the international human rights instruments ratified by Romania (violated following which the Romanian state would issue a conviction).

The civil liability of the judge or the prosecutor in relation to the provisions of Article 507 Criminal Procedure Code, for miscarriages of justice committed during criminal proceedings.

The conditions stipulated in Articles 504-506 of Criminal Procedure Code for the action formulation of compensations by the injured person by committing judicial error.:

1 The state bears patrimony liability for damages caused by miscarriages of justice.

2 In criminal matters, the cases of miscarriage of justice, or where the injured party is entitled to compensation for the damage caused by judicial errors in criminal trials are set by Article 504 of the Criminal Procedure Code: the person who was finally convicted is entitled to compensation for the damage suffered by the State, if after retrial it has been reached to a final judgment of acquittal. It is entitled to compensation also the person who, during the criminal trial, he was deprived of liberty or has been unlawfully restricted of freedom.

3 The existence of a decision of the judicial body that establishes the existence of judicial error:

a) In case of incorrect conviction a final acquital judgment is necessary rendered following the retrial; given the previous criminal procedural provisions, the restriction of initiating special remedies was mentioned.

b) In the case of unlawful deprivation or restriction of liberty:

1 the prosecutor may observe the error by revocation ordinance of the restrictive measure or deprivation of liberty, discontinuing the criminal prosecution or terminating the criminal prosecution for the cause provided for in Article 10 paragraph 1 letter j (force of res judicata) of the Criminal Procedure Code.

2 the court of law may find the error by dismissing decision of a restrictive measure involving deprivation of liberty, by a final acquittal decision or final cessation decision of the criminal procedure of the case provided for in Article 10 paragraph 1 letter j) of the Criminal Procedure Code.

3 To compensate for the the damage, the injured party may take action only against the State, represented by the Ministry of Public Finance.

4 The limitation period of the right of action against the person who takes action against the state is of 18 months from the date of the final decision, if necessary, of the court decisions or the prosecutor ordinances, according to Article 506 Paragraph 2 of the Criminal Procedure Code.

5 The action is exempt from stamp duty.

---

[17] I.C.CJ., Decision no. 1345 of April 8, 2010.

[18] The unjust repression consists in the act of activating the criminal proceedings, or ordering the arrest, of prosecuting or convicting a person knowing that he is innocent Article 268 of Criminal Code.

[19] The offense of unlawful arrest and abusive research is provided in Article 266 of Criminal Code, which states inter alia that illegal arrest or detention shall be punished with imprisonment from 6 months to 3 years.

According to Article 96, paragraph 5 of Law 303/2004 regarding the the statute of judges and prosecutors, republished [20], is not entitled to compensation in the process the person who, during the trial, contributed in any way to the unlawful deprivation or restriction of liberty.[21]

The conditions stipulated by Article 507of Criminal Procedure Code for the recourse action made by the state against the judge and the prosecutor.

1 Only the state can make recourse action against the judge or prosecutor to recover the compensation paid to the injured party by committing the legal error.

2 Compensating the damage was granted by the State pursuant to a final judgment. This aspect excludes the possibility that during the trial, the state to which legal action was taken to call as a warranty the judge or the prosecutor who issued the solution that led to judicial error. Because the state can make a recourse action, the judgment should be pronounced against him is irrevocable and also to be executed.

3 The limitation period of the right of action for the state to make recourse action is of 1 year.

4 The person against whom the state is taking action, including the judge or the prosecutor, to have acted in bad faith or serious negligence. The Article 507 of the Criminal Procedure Code refers to any person who in bad faith or negligence caused a damage generating situation, which includes judges and prosecutors. The bad faith and serious negligence must be demonstrated during the recourse action brought by the state against the judge or the prosecutor.

By analyzing the conditions which have to be met in order to initiate the recourse action by the state against the judge or prosecutor result in two important **procedural safeguards**, namely:

1 **The direct inadmissibility of the action** filed by the injured person by committing the judicial error against the judge or the prosecutor. According to Article 504 of the Criminal Procedure Code and Article 96 paragraph 6 of Law 303/2004, an the compensation claim may be made only against the State, represented by the Ministry of Public Finance.

2 **The inadmissibility of the action under warranty** filed by the state, as owner of recourse action against the judge and prosecutor during the trial of the action for damages brought by the injured party by committing a legal error. Thus, according to the provisions of Article 507 of Criminal Procedure Code and Article 96 paragraph 7 of Law 303/2004, the state recourse may be made only after the delivery of a final judgment, and the damage was covered, so only after the decision was executed.

Conclusions

In summary, for the civil liability of judges and prosecutors (THE PROCEDURAL GUILT OF THE OFFICIAL SUBJECTS) for damages caused by judicial errors made in criminal proceedings shall be instituted, under the law, as appropriate, the provisions of Article 96 of Law 303/2004 or Article 504'-06 of Criminal Procedure Code, and secondly the recourse action (compensation) of the State against the judge or the prosecutor which it is subsequent action for damages, brought by the party. The Romanian legislator intended to regulate through a special procedure provided in Article 12. of G. D. No. 94/1999 the recourse of the Romanian state against the guilty persons led to its conviction at ECHR to pay certain amounts of money.The recourse may be exercised for any amount imposed on the state by the sentence of the ECHR, that not only provides sufficient amounts order any damage suffered as a result of human rights violations (moral and material damage) but also for expenses incurred by the injured party in the internal procedures and in the European court, in order to remedy the interference, the same as for the default interest rates established by the Strasbourg court decision in case of delayed execution. Considering that the text is states about "civil liability" that the exercise must be fulfilled regression of conditions a breach

[20] Official Gazette no. 826 of 13 September 2005, with subsequent amendments.
[21] M.Udroiu, *Procedură penală.*

of the Convention, there is a final conviction pecuniary Romanian state, the causal link between the act and the injury, the existence of guilt and payment of the amounts to which the state was required. In terms of guilt presence, because the rule does not distinguish, it can take the form of guilt and blame. According to Article 12 line 3 of G.D. No 94/1999 the "civil liability" of judges is determined under conditions which will be governed by the law of judicial organization. These conditions have never been regulated by Law no. 92/1992 of Law no. 303/2004, and in the absence of proper regulation in the law of judicial organization reference made remains enigmatic.[22]

In conclusion it is intended to amendment and complete the Law no. 303/2004 regarding the the statute of judges and prosecutors, and amending and supplementing the Code of Criminal Procedure, is structured on the following regulatory principles:

- ensuring the effective possibility for the person who has suffered damage to claim compensation
- determining the cases that are right to remedies for the damage.
- strengthening the state's role as guarantor of compensation for the damage suffered by individuals.
- ensuring the independence of of judges and prosecutors in discharging their functions
- determining the cases in which the recourse action can be made as well as determining its basis.
- the conceptual delimitation of the notion of "bad faith" and "serious negligence".
- the conclusion of civil liability insurance for judges and prosecutors.

The social impact that a new law project will have is that it will lead to an improved perception of the judicial system by increasing confidence in achieving work of justice and at the same time will increase the accountability of judges and prosecutors in discharging their function.

References

- The Romanian.
- The Criminal Procedure Code.
- Ghe.Vintilă şi Constantin Furtună – *Daunele morale – Stadiu de doctrină şi jurisprudenţă* – Ed.Allbeck,Bucureşti 2002, pag. 116-131.
- G.Antoniu,E.Dobrescu,T.Dianu,Gh. Stroe, T.Avrigeanu, Reforma legislaţiei penale,Ed. Academiei Române,Bucureşti, 2003, p. 280.
- Grigore Gr.Theodoru Drept procesual penal .Partea specială,Ed. Cugetarea, Iaşi, 1998.
- Ion .Neagu *Tratat de procedură penală. Partea specială*. Ed. Universul Juridic ,Bucureşti, 2010.
- M.Damaschin, Condamnare sau dispunere a unei măsuri preventive pe nedrept. Despăgubiri,în R.D.P., 2004
- M.Udroiu *Procedură penală, 2010, Ed. C.H. Beck.*

[22] Revista Forumul Judecătorilor nr. 3/2010 p.33.

THE APPROACH OF THE EDUCATIONAL, NON-DETENTION MEASURES APPLIED TO THE MINOR, FROM THE POINT OF VIEW OF THE NEW CRIMINAL REGULATIONS AND THE ELEMENTS OF COMPARED LAW

MONICA POCORA[*]
MIHAIL-SILVIU POCORA[**]

Abstract
The criminal liability of the underaged criminals is a very delicate matter, in the sense of the criminal constraint imposed on them. The comparative approach of the sanctionary system from the point of view of the freedom of movement of the minor wishes to analyse on the one hand the regulatory framework, and on the other hand to underline the reason according to which one has to distinguish between penalties and educational measures.

Keywords*: judgement, minority, penalty, freedom, education*

Introduction

The minor charged criminally can either be applied an educational measure, or a penalty. The sanctionary system applied to the minors gives priority to the educational measures which by their action and completion are more appropriate to lead to the minors' re-education and to guide them to good conduct. The educational measures aim first of all to re-educate the minor by adequate means to people who have not reached yet their full psychophysical maturity. Unlike educational measures, penalties are intended to both the constraint and re-education of the underaged criminal. Generally speaking the safety measures mainly aim to remove the danger state, regardless if the criminal is a mature person or a minor[1].

Taking into account the aspects concerning the serving of the educational measures, the New Criminal Code considered the following instruments: The United Nations Convention regarding the child's rights, the rules of the United Nations Organization regarding the protection of the minors deprived of freedom, the minimal rules of the United Nations for the draft of some non-detention measures (The Tokyo Rules), the Protocol of the minimal rules of the United Nations concerning the administration of justice for minors (Beijing Rules), the Recommendation 87 (20) of the Committee of Ministers concerning the social reactions to juvenile delinquency.

The Beijing Rules provide that the meaning of the notion of criminal capacity has to be clearly defined and that the age for criminal liability should not be set at a too low a limit, taking into account the degree of emotional, physical and intellectual maturity of the child. The defining of the age for criminal liability has to be done in a legal framework considering the capacity, development skills and the contextual experience of a child.

According to art. 40 paragraph 3 letter a of the Convention regarding the child's rights, the Member State must establish a minimal age for criminal liability, under which children cannot he held accountable for the presumed committing of a crime.

The New Criminal Code erases the possibility of applying a penalty to the minor who committed a crime. Also, no other article provides the possibility to apply a penalty to the minor, as it

[*] Lecturer, PhD, "Danubius" University of Galati (email: monicapocora@univ-danubius.ro).
[**] Assistant Lecturer, PhD candidate, "Alexandru Ioan Cuza" Police Academy, Bucharest (email: silviupocora@yahoo.com).

[1] Autoritatea Naţională pentru Protecţia Drepturilor Minorilor, *Rolul judecătorilor şi al procurorilor în protecţia şi promovarea drepturilor copilului.* Bucureşti. 2006.

is done at the moment, the penalties that can be applied to the minor being: imprisonment and fine, their limits being reduced to half.

The educational, non-detention measures are sanctions of criminal law that apply to the underaged who committed a crime whose seriousness does not require freedom deprivation. These are: *the stage of the civic formation*, *the supervision*, *weekend confinement*, *daily assistance*. The court can impose the minor throughout the execution of the non-detention, educational measures one or more of the obligations provided in art. 121 Criminal code.

With regard to **the preventive measures that can be ruled for children who have violated the criminal law**, the new Criminal Procedure code contains some special provisions, suggesting as a general rule, the possibility to preventive detention, only if the effects of such a measure on their personality and development are not disproportionate to the legitimate purpose aimed by taking the measure, regulating at the same time the necessity to inform in writing the person subject to any preventive measure on all the rights the law grants him.

The new criminal Code provides that minors aged between 14 and 18, who committed a crime, to be applied only educational measures, these being **non-detention** (*the stage of civic formation*, *supervision*, *weekend confinement* and *daily assistance*), or **with freedom deprivation** (registration in an educational centre and internment in a detention centre), the rule being that the detention measures are to be taken only if the criminal minor is in one of the situations expressly provided here:

- the underaged has already committed a prior crime for which he was applied an educational measure which was executed before committing another crime;
- the crime for which he is trialled was committed by exercising violence or threats or ended with a person's death;
- the penalty provided by law for the crime committed is 10 years in prison or more, or life detention;
- the minor is trialled for committing a recurrent crime if by its nature, seriousness, number or frequency, the criminal's dangerous character is emphasized.

In Germany, ever since the beginning of the 20th century, a special status of the underaged criminal was adopted as opposed to the major one. In Germany, the status of the criminal minors is integrated in an ensemble of normative acts which make up a complex system of measures with social-educational and protection character, where the repressive aspects constitute an exception of the steady rules for a law well differentiated and adapted to the specific of this age group. In this sense, we should note that Germany is one of the few countries in the world where there is a Law regarding the youth welfare (Jugendwohlfahrtgesetz), which constitutes a reference act in the field of social treatment and of the measures that need to be taken so as to ensure some normal conditions of life to children and young people.

The status of the criminal minor and "young adult" (Herranwachsende) is provided in the Law of the youth court (Jugendgerichtsgesetzbuch) since 1923 with further amendments, which is completed by the provisions of the Criminal Code. Germany is one of the countries that have a distinct criminal law for minors in what concerns the general part.

The minor of up to 14 years old is considered irresponsible and he can only be punished by a social-educational measure, of protection and assistance, whose execution is placed on the competence of different institutions and authorized bodies or set-up local "youth offices" (Jugendamnt).

The minor of 14-18 years old is considered responsible, if on committing the deed he had a level of moral and intellectual development that allowed him to be aware of the illicit character of his conduct.

Towards the minor that proves he does not have this degree of maturity, there can only be applied educational and protection measures. In other words, the minor aged between 14 and 18 benefits of a relative presumption of irresponsibility that can be removed by proving his moral

maturity and the capacity of understanding the illicit character of the committed deed. This is a good thing because there are minors that develop more quickly, both physically and psychically, which allows them to become aware of the prejudicial nature of their deeds. The minor who committed a crime can basically be applied only educational measures. When these are considered insufficient, the underaged is punished with corrective measures or with a penalty. If the judge for minors thinks it is necessary, he can rule that instead of the penalty or corrective measures, the minor be placed in a psychiatric hospital or in a detention institution.

For the underaged offenders there can also be taken certain safety measures of "correction" with a preventive nature, provided by the common law, namely placing them into a psychiatric hospital, sending them in an institution with a detention regime or supervising their conduct, as well as the withdrawal of the licence to exercise a certain skill, such as driving a vehicle.

The safety measures may remain in force also after the coming of age[2] (*2011 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES* 2012). Also, the judge may rule on the minor delinquent several educational or corrective measures, as well as educational measures associated with coercive measures.

The arrest for minors cannot be cumulated with the educational measure of the educational assistance (Fursorgeerziehung). As educational measures, "the guidance for behaviour" applies – there are some indications and prohibitions ruled by the judge for minors as to how the life of the minor should be organized and his education unfold, "educational assistance and placing under care." When the judge considers that the educational and coercive measures are not enough, the prison penalty applies. The prison penalty can be for a definite period of time or indefinite.

The system of justice for minors is based on the principle of subsidiary or of the minimal intervention (Subsidariatsgrunsatz)[3]. This means that the criminal penalties are to be ruled only if they prove irreplaceable. Moreover, these penalties are limited by the principle of proportionality.

In **France,** the current Criminal Code states in art. 122 the principle of the absolute lack of criminal liability, according to which "the minors capable of judgement are criminally liable for the crimes, misdemeanours or offenses they were acknowledged to be guilty of, under the conditions set by a special law which provides measures of protection, assistance, surveillance and education, for them.

At the moment, the legal status of the delinquent minors is regulated by the ordinance no. 45-174 since 2 February 1945 regarding minor offenders. According to art. 1, the minors who committed a crime were not sent to the common law criminal jurisdiction, but to the tribunals or jury courts specialized for minors. Art. 2 stipulates that the Tribunal for minors and the Jury Court for minors rule accordingly for protection measures, assistance or surveillance measures, protection or education ones.

When the circumstances and the personality of the minor demand it, an educational sanction can be ruled for the minor aged between 10 and 18 or a penalty for the minor aged between 13 and 18, taking into account the criminal liability. The Tribunal for minors cannot give a prison punishment, with or without suspending the execution, unless by accounting for it[4]. On the minor who did not reach 13 years of age, the measure of detainment cannot be ruled for unless on exceptional cases.

If a minor of 16 was said to be held, the prosecutor or judge has to assign a doctor that examines the minor. The interrogation of the minor is subject to an audio-visual recording. The recording in original is placed under seal and its copy is filed for the record. The dissemination of the recording by a person is punished with one year in prison or 15,000 euro fine.

---

[2] *2011 Overview Of The Chancellor Of Justice Activities.* Tallin: Chancellor Of Justice, 2012.
[3] F.Dunkel, *Juvenile Justice in Germany: Between Welfare and Justice,* Berlin, 2010.
[4] http://www.unifr.ch/derechopenal/legislacion/es/rpmendix.html

The penalty regime. The minor criminals are applied a mixed penalty regime, made up of educational measures, measures for mediation-compensation and punishments, the selection of either one being left at the court's free will.

In the **Italian** legal system, in approaching the issue of the criminal minor, the main idea is that of a close connection between the criminal, substantial law and the criminal, trial law, placing on the first place the application of some compensation penalties and taking the pedagogical-educational factor, this being actually also the characteristic of the report between interest-duty of the state, imposing finally the search for the most adequate forms of re-education, with a structure entirely particular of unfolding the criminal trial[5].

The age for criminal liability coincides with the one for coming of age, meaning 18, but in certain situations it can drop to the age of 14. The sanctionary regime if made up of alternative measures and probation. The Tribunal for minors is the only competent instance. This and the magistrate for supervising the execution of the ruled measures, remain competent also after the minors reached the age of 18, up to 25 at the most.

The legal provisions state that youth are applied the same penalties as the adults, but in a subdued form[6]. With minors, the Criminal procedure code, by art. 169 gives the judge the possibility to rule for not sending to trial or give up the conviction (perdono giudiziale), if the law provides for the committed crime prison time which cannot exceed 2 years or fine. As a rule, this transferring of penalty cannot be granted more than once. The judge can replace the prison penalty exceeding 2 years with one of the following penalties: supervised freedom or semi-freedom. Also the judge has the possibility to suspend the trial for a period between 1 and 3 years, function on the seriousness of the deeds and to subject the minor delinquent to a probation period.

The provisions concerning minors are found in the **Spanish** Criminal Code and in Law no. 5/2000 concerning the criminal liability of the minors[7]. The criminal liability age coincides with the criminal coming of age. Among minors, we distinguish two categories, when applying the law and establishing the consequences for the crimes committed, from 14 to 16 and from 16 to 18. For the minors who have reached the age of 16, the law provides an aggravation in the case of committing crimes with violence, intimidation or placing the person in danger. When the committed crimes are qualified as misdemeanours (faltas), there can be ruled measures such as: reprimand, community service, with a maximal duration of 50 hours, confiscating the driver's licence and of other administrative licences.

When the deeds were done by using violence, threats or by endangering the life or physical integrity, the measure of placing in a closed-circuit institution can be ruled. When the deeds are committed in guilt, the measure of internment cannot be ruled, which underlines the main principle, of re-socialization of the law.

In **Portugal**, the Criminal Code in art. 19 sets the principle of the absolute lack of liability of the minor who has not reached the age of 16 and provides the application of a special law for young people between 16 and 21 years old. (Law-decree no. 314 from 7 October 1978 regarding the criminal status applicable to the youth).

In the case of the minors of 12 to 16 years old, who have not yet committed deeds provided by the criminal law, the provisions of the tutoring-educational law approved by Law no. 166/99 become applicable. Art. 1 provides that the present law-decree applies to all youth who have committed a deed qualified as crime. By *young person*, we mean any person who at the time of committing the crime is of 6 to 21 of age. The provisions of this decree do not apply to the young people who are not held accountable due to some psychic disorders.

---

[5] M. Pisani, A. Molari, V. Parchinuno, P. Curso, *Manuale di procedura penale,* Italy: Monduzii editore, 1994.

[6] Sedletzki, Vanessa. *Championing Children's Rights: A global study of independent human rights institutions for children*, 2012.

[7] http://www.unifr.ch/derechopenal/legislacion/es/rpmendix.html

As for the law for minors in **England and Wales**, it is to be found in the Law for preventing criminality and disturbance of Public order (Crime and Disorder Act) since 30 September 1998 and in the Police and Criminal Evidence Act since 1984.

The age of the criminal liability is 10, but the criminal coming of age is 18. According to art. 34 of Crime and Disorder Act, which abrogated the presumption of non-responsibility, minors are held accountable criminally since the age of 10. When the minor is of 12 to 14 years old, a special measure can be ruled on him, *secure training order*, lasting between 6 months to 2 years. During the execution of the first half of this measure, the minor is detained in a special centre, later is released, but is to be under the supervision of a probation agent.

The legal condition of the criminal minor in England highlights particularities that have to do with the specificity of the English system of law, based on tradition. What is characteristic to the English criminal law when it comes to the deeds committed by minors was the excessive harshness throughout time. Until the 19th century, over 200 crimes were punished with death penalty, and minors were considered after the age of 8, as adult offenders. The future growth of a legal system separated for minors, in England, constituted an answer to the threat represented by the juvenile delinquency to the order set in state, under the circumstances that the jury refused to convict them because of the penalties that were too harsh for minors to suffer.

It is no coincidence that the probation as a practice of courts to maintain the convicted defendant under surveillance and under the influence of community appears in the practice law of English courts ever since the beginning of the 18th century. At the moment, within the Ministry of Internal Affairs, that the penitentiary system belongs to, there is a probation system with offices throughout England. Among the objectives of the probation offices and the collaboration with the personnel in prisons where minors are held being the collaboration with the Establishments for minors.

In 1974 there was a breakthrough of this system by regulating the service for the use of the community. Within this programme, the minors participated in activities of carpentry, painting, gardening, maintenance of the youth clubs, helping in hospitals etc. These measures later entered into the law and practice of other states in Europe too.

A new measure is "the intermediary treatment", which is located between the supervised freedom and the placement in an institution and implies adopted programs to various categories of minors and young offenders (for example, programs for first-time offenders, for old offenders etc;) they comprise a multitude of activities which are to be unfold in the centres where the minors are summoned to spend their day; certain minors might be forced to spend their weekend there.

On avoiding, as much as possible the trial courts by the criminal minors help also "The Youth Contact Offices", which are made up of a probation officer, a police officer, a social worker and often a representative of the school system. They gather daily or weekly and assess the seriousness of each of the deeds committed by minors (or young people) on that day or in a week and decide on the corresponding educational measure.

The Criminal Justice Act of 1982 is in favour of applying the non-detention penalties to the minor offender, which establishes the principle that a sentence of the minor deprived of freedom is possible only if other forms of penalty would not work or for reasons of protecting the society in case of more serious crimes.

By the 1982 Law concerning the criminal justice, the English criminal law contains general principles of behaviour with young criminals, indicating in Title 1 the applicable penalties for them. According to these principles, the trial cannot set the prison punishment of the person that has not yet reached the age of 21 at the time when the crime was committed.

Conclusions

Regardless of the laws of the states we are talking about, the reference coordinate is the biophysical status, psycho-physical of the minor, the prison penalty being less appropriate for

attaining the purpose of the criminal law in relation to the minor offenders. This means of constraint tends to the reeducation of the major offender, while for the reeducation of the minor offenders, it would be necessary not a reeducation, meaning a recovery of the prior education, but an initial education with proper means. Moreover, the serving of the penalty in a penitentiary can affect the fragile psyche of the minor because of the harsh detention regime, as well as the negative influence of the other convicts.

References

- F.Dunkel, *Juvenile Justice in Germany: Between Welfare and Justice,* Berlin, 2010.
- http://www.unifr.ch/derechopenal/legislacion/es/rpmendix.html
- http://www.unifr.ch/derechopenal/legislacion/es/rpmendix.html
- http://www.mpublic.ro/minori_2008/minori_5_8ro.pdf
- *2011 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES.* Tallin: Chancellor of Justice, 2012.
- Autoritatea Naţională pentru Protecţia Drepturilor Minorilor, *Rolul judecătorilor şi al procurorilor în protecţia şi promovarea drepturilor copilului,* Bucureşti, 2006.
- M. Pisani, A. Molari, V. Parchinuno, P. Curso, *Manuale di procedura penale,* Italy: Monduzii editore, 1994.
- Sedletzki, Vanessa. *Championing Children's Rights: A global study of independent human rights institutions for children*, 2012.

ASPECTS OF COMPARATIVE LAW IN THE MATTER OF JUVENILE PRE-DELINQUENCY AND DELINQUENCY WITH TRENDS TOWARDS SANCTIONS AND PREVENTION

MONICA POCORA[*]
MIHAIL-SILVIU POCORA[**]

Abstract
This study aims to be an interdisciplinary, criminal-criminological approach of the minority institution in terms of criminal liability, with an evolutionary dynamic of the pre-offense and post-offense assumptions. The operative criterion is the notion of juvenile pre-delinquency (pre-deviance or potential deviance), because it refers to all the acts violating the norm of moral behaviour, which in certain circumstances may lead a teenager to appear before the court, and in other circumstances not.
The deviant conducts of minors do not necessarily have a criminal nature and not under all circumstances. If these different acts of them do not violate the criminal norms, representing only deviations from ethical rules of behaviour, they are not legally sanctioned, but only in moral forms. Thus, this approach is meant to be a criminological transition from the criminological plan to the criminal illegality.

Keywords*: criminal liability, sanction, deviance, behaviour, conflict*

Introduction

The behavioural deviations do not harm the normative-axiological system of society and at the same time act as a handicap for the perpetrator himself and the harmonious development of his personality. They cannot be classified as delinquent acts, because otherwise there is the risk to become equivalent to the worst crimes committed by an adult, thus harming relationships and the values of society as a whole. In order to go beyond the limits of the criminal norm criterion, one has to use other criteria as well in assessing the teen behaviour, not so much subjected to the moral or legal element, as to the social deviance in its widest sense. The finding that there are at least two kinds of rules - legal rules and non-juridical rules – makes it necessary to find a criterion to distinguish between delinquency and pre-delinquency, all the more so since sometimes identical behaviours are measured by different regulatory systems.

The study of juvenile pre-delinquency requires a change in the legal perspective and of the criminal or moral normative criterion with a multi and inter-disciplinary perspective of specific problems which the young person has to face, in his life environment and social existence. Such a study is useful as it suggests a multiple explanation of the "primary" causes that determine certain categories of pre-deviant teenagers to later commit acts of delinquency and of the conditions of development of the deviant minor's personality, while allowing at the same time a delineation between pre-delinquency and delinquency and between pre-delinquency and "normal" behaviour, as a sequence of acts that do not necessarily determine one another.

From this point of view, as already pointed out in other papers on the issue of juvenile delinquency, the pre-delinquent behaviours exhibited by some teenagers are not always a prelude to delinquent behaviour, as much as the latter does not represent the natural consequence of previous committing of pre-delinquent acts (*Anne-Marie*, 2012).

The relation between *pre-delinquency* and *juvenile delinquency* should not be treated solely based on the normative and sanctioning nature of rules imposed by the adult society. Many of the

[*] Lecturer, PhD, "Danubius" University of Galati (email: monicapocora@univ-danubius.ro).
[**] Assistant Lecturer, PhD candidate, "Alexandru Ioan Cuza" Police Academy, Bucharest (email: silviupocora@yahoo.com).

deviant acts committed by young people are actually their defending reactions in relation to adopting their new roles and social responsibilities and should not be interpreted as "symptoms" of an alteration of personality or as manifestations of psychopathological disorders.

Regardless of the perspective from which we approach and define juvenile delinquency, the statistics even if they cannot create a complete image, indicate that in Romania the measures of prevention and control do not have a huge impact, although at least theoretically the efforts have intensified in recent decades[1].

Juvenile law in Hungary

The Hungarian legal system is continental, which means that the guiding principles are not based on precedents, but on substantial and procedural provisions of law in jurisprudence. As for the age characteristic, the provisions of criminal investigation make a sole distinction between the authors of crimes. The convict, who at the time of the crime was already 14 years old, but did not yet reach the age of 18, is considered minor, and if he is already 18, is considered an adult. In the Hungarian system of penalties the concept of youth does not exist.

The Hungarian juvenile justice system meets the criteria prescribed in the international law in the field (the Beijing Rules, the New York Convention, and Riyadh Guidelines). These international acts define the guarantees of criminal law and criminal principles and establish the proof of criminal liability, qualifying prevention and social reintegration as a duty of the law enforcement organs involved in dealing with solving cases about participation of minors. The international agreements consider the legal consequences of the arrest as a decisive argument and specify – instead – to apply legal consequences that can replace imprisonment, the so-called alternative sanctions and the extralegal approach.

The confiscation of property cannot be applied to minors, and the fine is advisable only if the minors have independent income from salaries or corresponding property. The community service measure can be applied to a minor if he has reached the age at which the respective punishment may be imposed. If the criminal minor did not hire a lawyer, the state has to provide a defence attorney for him. During the trial, the parents or legal representatives of the child have the right to participate as witnesses. In Hungary, parents are not liable for the deeds committed by their children.

Hungary's judicial system is unitary. There are no special military courts or for minors. However there are councils for minors and military personnel, which in some relevant cases have judicial powers. There are some differences between penalties that may be imposed on juvenile offenders. The minimal and maximal duration of detention of minors is shorter. Therefore a juvenile offender can be imprisoned for a period of 15 years (Paragraph 110 Law IV of 1978 - Criminal Code). A juvenile offender cannot be put in the same cell with adults.

There are two types of correctional institutions, 14 national and 17 regional. One should note that the 12 correctional institutions include their own factories. The minor can be sent to a reformatory. The court decides the term to stay in the reformatory, ranging from one to three years (para. 118, section 2 of the Criminal Code). After a year of being in reformatory, the minor may be temporarily released following a court decision. In this case it is mandatory the supervision of the minor by a probation officer[2]. The imprisonment measure is applied if the detention in the institution is more favourable for a proper education.

Juvenile detention homes and reformatory schools are part of the Ministry of Youth, Family, Social Affairs and Equal Opportunities. On 31 December 2001 there were two houses of detention, a correctional school for boys and a home detention and correctional school for girls. The Ministry of Youth, Family, Social Affairs and Equal Opportunities should provide the necessary conditions for

[1] Barnett, R. (2009). *Restitution: A New Paradigm of Criminal Justice.* Devon: Willan Publishing.
[2] Shearing, C. (2000). *Punishment and the Changing Face of Governance*.

educating young people in these institutions, to ensure their supervision, together with the Ministry of Justice.

Juvenile Law in Estonia

If the minor comes in conflict with the law and justice, he finds himself under the supervision of police, prosecutors, probation officers and the court. In Estonia, the minor can be held criminally accountable since the age of 14. According to the law, all the police procedures on a minor (aged up to 14) has to be done with the mandatory presence of a social worker or a worker for the child's welfare. In Estonia, the prosecutors handle the cases involving participation of minors, but officially there are no judges or courts specialized in children's cases.

After the criminal investigation, a court decides the penalty for the offenders: imprisonment, probation or educational measures. The maximum penalty imposed on a minor (aged up to 18) is ten years imprisonment.

It is possible to terminate the criminal case by the prosecutor or judge if there is no public interest in the matter or the offense was done by reckless behaviour. In such cases the minor is sent to the committee for minors or has to serve from 10 to 240 hours of unpaid community service.

In 2011, there were 4,464 adults and 77 minors detained in the Estonian prisons. The male prisoners, aged from 14 to 21, serve a prison sentence in Viljandi penitentiary. The largest groups of juvenile prisoners are made up of minors aged from 14 to 18, as these people are serving a sentence for the first time. Most prisoners committed crimes against property. Viljandi Prison is the only institution in Estonia for juvenile offenders. Work within a prison for juveniles is specific as the personality of the minor is not formed yet. A young inmate is impulsive and can be easily influenced, which facilitates his re-socialization. However, 80% of male juvenile offenders commit crimes again.

Criminal minors who are not yet 14 years old or commit an illegal deed, as sanctioned by the Criminal Code or other law, are referred to the juvenile committee, court which exists in every region. This committee should be made up of people with expertise in education, social science and health, a police officer, an employee of the local government and a secretary of the committee for minors. Minors may be applied one or more of the sanctions listed below:

1). warning;

2). sanctions regarding the organization of the child's education;

3). his referring to a psychologist, social worker or other specialists in examinations;

4) counselling;

5) obligation to reside with a parent, a foster parent, a guardian, a family offering care or in an orphanage;

6) community service;

7) participation in youth programs, social or medical treatment programs;

8) sending him to schools for people with special needs.

The Estonian probation system was established on 1 May 1998. The average juvenile probation period is of up to 18 months. During this time, the probation officers have to make counselling sessions with the minors and their parents, visits to their places of residence, reports (ordinary and extraordinary), and also to conduct and develop programs of probation. For a better quality of work, the probation officers collaborate with various institutions: the police, the local municipality, work committee, school, orphanages, NGOs etc. The officer is the person that minors can trust and rely on, that will help them organize their lives so as to avoid further committing other crimes.

If the penalty of imprisonment is substituted with community service, the probation officers have to find work for the minor (usually in NGOs or local government institutions), to check on him at work and instruct the supervisor. The court may substitute community service with a penalty of up to two years imprisonment. A day of detention is considered equivalent to two hours of community service and usually takes twenty-four months before it is executed. The community service measure

can replace the imprisonment of the offender only with the offender's consent. Usually minors are applied a volume of 20 to 100 hours of unpaid community service.

Minors who are applied the probation are those with the suspended sentence (with a period of probation for 18 to 36 months); or released from prison on parole (with a probation period starting from one year); who perform community service (people whose prison term of up to two years was replaced by community service for up to 24 months) or minors who are freed from punishment. The court may exempt a person from punishment, applying probation for up to one year, period which may be extended).

Juvenile Law in Ukraine

In Ukraine there is a separate juvenile law system and specialized for the needs of minors; there are no specially appointed courts and no judges specialized in juvenile cases. The number of lawyers, social workers, social activists and officials working in the field of juvenile law in Ukraine is extremely low. There is no pedagogical approach in the juvenile court system; there are many gaps in the Ukrainian law on cases of juveniles breaking the law[3].

In Ukraine, the administration of juvenile justice is divided between various administrative and judicial bodies, which do not cooperate among themselves. Juveniles breaking the law are in conflict with society, and apparently, society is in conflict with them. State policy gives much more attention to minors who are victims of exploitation, violence, poverty and diseases. But most children in prisons are also victims: victims of exploitation, violence, poverty and disease. According to statistical data provided by the State Department of Ukraine for Execution of Sentences, in 2012 there were about 3,000 juvenile inmates in 11 institutions. More than 50% of them are convicted for theft, 25% for burglary and robbery and 10% for serious injuries. More than 13% of convicted juveniles are aged from 14 to 16, 28% are aged from 16 to 17 and 39% are of about 17-18 years. Almost every third child is sentenced to imprisonment for a term of 1-3 years, half of them - for a period of 3-5 years and about 18% - to more than 5 years.

Despite of the legal provisions in Ukraine, there were no specialized juvenile courts set up and there are no judges trained specifically for such cases. The number of lawyers, social workers, social activists and officials working in this field is very low. The long period of time from the detention to inform the detainee's family, the period from detention until hearing by the judge (72 hours) and the duration of the preliminary investigation period (18 months) are not justified. It is necessary to emphasize that responsible officials - law enforcement officials - are not yet ready to improve the situation, because of the gaps in the Ukrainian law.

Juvenile Law in Poland

In conformity with the Polish law, a minor is:

- a person from 13 to 17 years old, who commits reprehensible actions or certain law violations (illegal deeds).
- children and young people up to 18 years old who show symptoms of demoralization.
- a person up to 21 years old whom the correctional and administrative measures are applicable to.

There are criminally liable, the people who reached the age of 17. In exceptional cases, the minors aged from 15 to 16, who committed serious crimes, can be held criminally accountable as adults, according to the Criminal Code, if other conditions are also met considering the offender and offense[4].

---

[3] Yevgeniya, P. (2012). *Justiţia juvenilă: analiza situaţiei în Ucraina - Justiţia juvenilă în Estul şi Sud-Estul Europei.* Chişinău: Institutul de Reforme Penale.

[4] Wójcik, D. (2004). *O scrisoare din Polonia: Medierea în cauzele penale şi legislaţia juvenilă: Prevenirea infracţionalităţii şi securitatea comunitară* . Jurnalul Internaţional.

Usually, the minor does not commit a crime. The children above 13 years old may commit a "punishable offense", and when their age is under 13, they commit a "prohibited act" which is treated as a form of demoralization.

The basic rule of the juvenile justice system in Poland is usually the rule of the minor's best interest[5]Everything that happens during the procedure must obey this rule. So, every decision of the court has to be taken in the minor's best interest. The rule of the inquisition procedure provides that the proceedings in cases of minors cannot separate the role of the trial from the prosecution. In this case, both positions are held by the judge, as a person who conducts the prosecution procedure, and then the trial procedure. The next rule is that usually the case takes place in private session. Sometimes, if justified on educational grounds, the case can be examined in public session, but this occurs only in exceptional cases. Another rule is the competence of the juvenile court. The case may be examined under the Criminal Code only in two cases: if the minor, older than 15, committed a serious offense, as mentioned above, and committed an offense together with an adult. Please note that it is necessary to examine this issue without separating it, which is not contrary to the child's interests.

A minor who is older than 13 has full trial rights. According to the Polish law, a person, older than 13, has limited capacity of exercise, but he can appear in his own legal procedure. If under the age of 13, the child is represented by the parent. Sometimes this solution is inapplicable, because in fact parents are responsible for the crime committed by the child. As part of the process, the child is entitled to examine the case file, to give evidence and, at any stage of the proceedings may appeal against the sentence and court decisions. Theoretically, the minor has the right to participate in the trial, but here the situation is a bit complicated: according to the law, the presence of the minor is required throughout the process, but an article of the Law on treatment of minors provides that, after hearing the child, the minor can remain present in the courtroom only when it is advantageous to him, for educational reasons. In practice, after the hearing, the child is asked to leave the courtroom. The minor is entitled to one legal assistant, but in most cases parents have to pay him for services rendered. The presence of counsel is mandatory only if the minor's interests are in conflict with his parents, when the court decides how the correctional proceedings should take place or if the child is placed in a nursing home.

The parents of a minor (or his guardians) are parties in the trial. They have to be informed of the beginning of prosecution, to be present during the completion of the criminal investigation done by the police and be heard in court during case examination on trial, but their absence does not interrupt the procedure. Parents have the right to appeal against the court sentence.

The court may apply some measures to parents also. For example, a judge may force the parents to cooperate with the school or other institutions or to repair the damage caused by their child. In Poland, the cases of minor offenders are examined by courts on family cases. Judges in these structures solve each family case (custody, alimony, divorce, etc) and juvenile cases. In these courts, professional judges must have by all means psychological and pedagogical studies.

In accordance with the Law on the treatment of minors, family courts have a very broad competence. They decide all cases of vital importance for minors. After the judge is informed of the committing of an offense, he decides whether: the case is to be heard in court, is to be terminated, sent back to the school attended by the minor or to a social organization. The family judges coordinate all the procedural functions of family courts, perform the criminal investigation and examination of the case, coordinate different actions of the police and of the probation officers appointed by court, rule for the diagnosis examination, for educational, medical and correctional measures and supervise their implementation and if necessary rule for their change during execution. The family judge benefits of significant discrete capacities.

[5]Klaus, W. (2011). *Postępowanie w sprawach nieletnich – wybrane zagadnienia.* Warsaw.

The examination of the case begins with hearing procedures in order to determine whether the minor is demoralized, if indeed a crime was committed and what kind of measures should be implemented: guardianship or correctional. That stage of proceedings is also carried out by a judge. At this stage, probation officers make probation reports and the child can be examined by a psychologist. Later, the judge may decide to terminate the case, submitting it to a school or other institution, sending the case to the prosecutor, or starting the guardianship or correctional procedures.

Therefore, during the hearing procedure, the judge decides what measures shall apply to the minor: guardianship, educational or correctional. The judge may rule for the same penalties as part of the guardianship ones, or in addition, send the child to a juvenile correction centre.

Conclusions

Whether it is about a state law in criminal matters, or about criminological, pre-crime studies, one has to establish the effect-cause relationship and respectively the cause-effect one, in the sense of being necessary to set up a criminal-social-criminological committee especially in the analysis of illicit minority status. The role of the committee would be to determine the factors leading to the criminal status, in order to apply a correctional treatment, first of all as preventive and then for social reintegration.

References

- Anne-Marie, M. (2012). *Managing risk:From regulation to the reintegration of sexual offenders.* UK: SAGE Publications.
- Klaus, W. (2011). *Postępowanie w sprawach nieletnich – wybrane zagadnienia.* Warsaw.
- Wójcik, D. (2004). *O scrisoare din Polonia: Medierea în cauzele penale şi legislaţia juvenilă: Prevenirea infracţionalităţii şi securitatea comunitară* . Jurnalul Internaţional.
- Yevgeniya, P. (2012). *Justiţia juvenilă: analiza situaţiei în Ucraina - Justiţia juvenilă în Estul şi Sud-Estul Europei.* Chişinău: Institutul de Reforme Penale.
- Shearing, C. (2000). *Punishment and the Changing Face of Governance.*
- Barnett, R. (2009). *Restitution: A New Paradigm of Criminal Justice.* Devon: Willan Publishing.

CONSIDERATIONS ON THE CONCEPT OF PERSONALIZING THE PENALTIES

ION RISTEA*

Abstract:
The adaptation of the constraint related to the committed offence is a mandatory request of equity, of principles deeply rooted in the individuals' conscience namely that no sanction must overcome the gravity of the committed offence (suim cuique tribuiere – giving to each person what he deserves), principle that, in the concept of the Roman lawyers, was part of the fundamental principles of law (jus praecepta), along with other two principles: honestere vivere (having a honest life) and alterum non laedere (not harming another human being).

***Keywords**: offence, criminal liability, penalty, adaptation, individual reeducation.*

Introduction

Art 1 of the Criminal Code which has as "*nomen juris*" the purpose of the criminal law states that "the criminal law protects, against all offences, Romania, the sovereignty, independence, unity and indivisibility of the state, the human rights and freedoms, property, and the entire state of law". This disposal represents the basic norm of the ensemble of regulations of the Criminal Code, "it contains a fundamental orientation in order to serve to the understanding, explanation and appliance of all the other norms provided by the Code".

But, social protection, as a fundament of the criminal law and penalty, has not the meaning given by the doctrine or by the positivist school, which, by its illustrious members, Cesare Lombroso, Enrico Ferri and Rafaelle Garofalo, sustained among others, the principle of the offender's liability on the base of the social protection; nor the meaning given by the doctrine of "the new social protection", which, by its representatives, Adolphe Pins and Filippo Gramatica, claimed to avoid, if possible, the deprivation of liberty and re-socialization of the offenders with the appropriate treatment measures.

The modern criminal law's theorists have unanimously established that the fundamental institutions of the criminal law are offence, criminal liability and penalty, because around these three notions revolve all the legal criminal provisions, creating the pillars of the law system[1].

Content of the paper

Offence has been defined as being "any action incriminated by law and sanctioned by penalty"[2] or "action or inaction, which is considered a fault, and the legislator punished it by the criminal law"[3] or "material act stated and punished by law which can be imputed to its author"[4]. Reducing this legal category to its most simple and schematic form, Professor George Antoniu defined offence as being "a clash of wills, that of the offender and that of the legislator; as well as the result of this clash, the defeat (violation) of the legislator's will"[5].

---

* Researcher Associate of the "Acad. Andrei Radulescu" Legal Research Institute of Romanian Academy; Associate Professor at the University of Pitesti, Faculty of Law and Administrative Sciences; Prosecutor in the Prosecutor's Office attached to Pitesti Court of Appeal (e-mail: ristea_m_ion@yahoo.com).

[1] Vintilă Dongoroz et al., *Explicaţii teoretice ale codului penal român, partea generală*, 1st Volume, Romanian Academy Publishing house, Bucharest, 1969, pag. 99; Costică Bulai, *Manual de drept penal*. *Partea generală*, All Educational Publishing house S.A. Bucharest, 1997, p 150.

[2] Vintilă Dongoroz – *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000, p 159.

[3] Ion Tanoviceanu, Vintilă Dongoroz , *Tratat de drept şi procedură penală*, 2nd Edition, Bucharest, p 151.

[4] Robert Vouin et Jacques Leante, *Droit penal et criminologie*, Paris P.U.F., 1956, p 147.

[5] George Antoniu, *Vinovăţia penală*, Romanian Academy Publishing house, Bucharest 1995, p 53.

Traditionally, the Occidental criminal codes do not state regarding the offence, justifying this omission by arguing that the elaboration of this notion does not belong to the law maker, but only to the science of the criminal law. Thus, considering the special importance of this institution, the Romanian criminal code in 1968 stated in its Art 17 the essential features if the offence: social danger, guilt and its statement in the criminal code. From these essential features it results the idea that the offence is a complex, material, human, social, moral, political and legal phenomena.

But of these three key features, there is now a tendency to remove the social danger from the definition of offence. The idea is very bold and it can be argued by various controversies concerning the definition of this reality that constitutes a substantial aspect of the offence and therefore the difficulty to introduce such a factor in characterizing the concept of offence. Moreover, the legislator takes care to criminalize only those conducts that affect or threaten the social values protected and as a consequence, it is argued that social danger is not required in the definition of the offence.

Criminal liability, as a form of the legal liability, has been defined as the criminal legal relationship of constraint between the state and the offender, on the other side, a comprehensive relation whose content is given by law as representative of society to held responsible the offender and the obligation of the offender to be liable for his offence and to subject to the applied sanction[6].

The criminal liability is the judicial consequence of committing an offence, namely the immediate reaction of society against the offender.

Hence, the perpetration is the very cause of criminal liability and the resort to criminal law's penalties is the consequence of criminal liability[7].

The current criminal doctrine allegedly argued that criminal liability is only the logical consequence (not natural) of infringing the precept; criminal liability is not the product of the criminal offense in the meaning of a reality separated in time and space from the penalty, but a trial, a rational conclusion that the wrongdoer must suffer the consequences of his deed, to answer for it[8].

In the actual Criminal Code, the criminal liability concept is found in Art 17 Para 2, which states that "the offence is the only base of criminal liability".

Regulations regarding the criminal liability are found also in Title II, Chapter V, regarding the causes that removes the criminal character of the offence (Art 44-51) where the object of the regulation is the very existence of criminal liability, indissoluble related to the issue of criminal liability's existence.

Also, we find stipulations regarding criminal liability in Title VII regarding the causes that removes the criminal liability (Art 19, 121-124, 131-132), whose object are the situations in which an offence has been committed and therefore, exists criminal liability, but, subsequently, for certain considerations, is has been removed and the offender no longer bears the legal consequences.

Penalty, the third criminal law fundamental institution, is the legal sanction specific to criminal law, representing the consequence of non-complying with the criminal norms; in terms of the real content, penalty is harm, a sufferance to which the offender will be subjected to if he disobeys the criminal laws[9].

By its provision in the criminal norms, the penalty acts as a threat over the members of the collectivity for them to comply to the criminal law, thus as a mean of general prevention; by its effective appliance, the penalty acts a mean of the legal constraint; by its implementation, the penalty has a therapeutic character and function, of a severe, but necessary mean of redress[10].

---

[6] Costică Bulai, *Drept penal. Partea generală*, p 311.

[7] Vintilă Dongoroz et al., *quoted works*, 1st volume, p 19.

[8] George Antoniu, *Criminal Law Review*, No. 1/2004, p 30.

[9] Vintilă Dongoroz, *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000, p 465.

[10] Vintilă Dongoroz et al., *quoted work*, 1st Volume, p 22.

The social, political and legal justification, namely the base of penalty, is confounded with the base of the criminal law, namely the protection of society against offences.

Social protection is a protection against offences, as socially dangerous acts, potentially repeatable and only against the offenders[11].

Art 52 of the actual Criminal Code states that penalty is a mean of constraint and reeducation of the convicted and has as purpose the prevention of committing new crimes.

From the analysis of this definition it results the features of penalty: penalty is a mean of constraint; penalty is a mean of reeducation; penalty is stated by the law; penalty is applicable only by the courts; penalty is personal and individual; penalty is applicable with the meaning of preventing new offences to be committed[12].

Regarding this last feature of penalty, we sustain that the prevention or forestall of new offences to be committed is made both as a special prevention (from the side of the penalty's subject), as well as a general prevention (from the side of other persons who have the intention of committing criminal acts).

Professor Vintila Dongoroz believes that the penalty exercises its general prevention action towards the persons who have a latent criminality, towards the victim and towards the entire collectivity[13].

It should be noted that penalty carries out the preventive purpose, the *antidelictum*. Before the crime to be committed, it is forestalled the committing of criminal acts by providing the penalty in the criminal law, warning over the consequences of breaking the law.

After the committing of the offence (*postdelictum*), the penalty exercises its preventive purpose on the one hand in the moment of its implementation by the court, and on the other hand, on the entire subsequent time of execution. In both cases, the penalty influences not just the behavior of the offenders, but also the behavior of those who, from the offender's sufferance, learn the necessary to their own behavior.

The penalty applied, directly, has the purpose of avoiding the relapse, and indirectly, by resonance and exemplarity can contribute to the correction of certain persons' behavior.

But regardless of the extent in which the appliance of penalty would increase the intimidation force of the penalty's threat over the public, the concrete punishment is meant, preponderant, to influence the offender and to modify his behavior[14].

To achieve its purpose, the penalty must perform the following functions:

- The constraint function, results from the nature of the penalty as a mean of constraint;
- The function of reeducation, consists of the influence over the offender's mentality and skills;
- The exemplarity function has an adjoining feature and consists of the influence which the penalty applied to an offender has over other persons;
- The elimination function, which assumes, is achieving its purpose, the temporary or definitive elimination of the convicted one from society[15].

Art 53 of the Criminal Code, with its subsequent modifications and completions, establishes the frame of the actual penalties, referring to the main, complementary and accessory penalties.

Noteworthy is the fact that by Law no. 278/2006 inserted in the Criminal Code a new chapter regarding the penalties applicable to the juridical person, containing rules regarding the fine (as main penalty), and rules regarding complementary penalties applicable to the juridical person.

---

[11] Ştefan Daneş, Vasile Papadopol, Individualizarea judiciară a pedepselor, 2nd Edition, Judicial Publishing house, Bucharest, p 55.

[12] Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 2nd Edition, Universul Juridic Publishing house, Bucharest, 2003, p 186-187.

[13] Ion Tanoviceanu, *Tratat de drept şi procedură penală*, 3rd Volume, Bucharest, 1926, p 203.

[14] George Antoniu, *Sancţiunea penală,Concept şi orientări*, in the Romanian Law Review, nr.10/1981, p 7.

[15] Costică Bulai, *quoted work*, p 286-288.

One of the fundamental principles of the criminal law that is placed at the base of criminal sanctions is their adaptability[16].

The principle contains the rule that the criminal law sanction must have the quality of being individualized, namely to be able to be proportioned qualitative and quantitative in relation to the nature and gravity of the act and according to the concrete circumstances of the cause.

A penalty is adaptable when it can be graded quantitative, namely divisible.

Also, a penalty is adaptable when it can be shaped qualitative, namely elastic.

Usually, are adaptable long-times penalties (imprisonment) and the amount ones (fine)[17].

The penalty is susceptible of a higher dosage, the more it will be proper to answer to a just repercussion[18].

From here results the idea that the adaptable punishment leads to the accomplishment of the penalty's purpose, desiderate which can only be achieved by the complete and efficient realization of the functions of the penalty and listed above.

But the main functions of penalty, i.e. the constraint and the reeducation functions lead to the accomplishment of its purpose only if are considered some basic elements of the offence.

The offences have a different degree of social danger and the offenders, are by their nature, morally and physically very different. The psycho-physical capacity, age, occupation, cultural level, behavior are features that individualizes each offender. A penalty which would not have in count these realities would not be able to exercise an efficiently preventive influence – educative and would represent more a revenge of society against criminal offenders.

The ability to be or not be punished, the higher or lower degree of guilt and the nature more or less dangerous of the offender depends on his status.

Raymond Saleills argued that the penalty must be adaptable to the nature of the person is addressed to. If the guilty one does not have a completely perverted base, the penalty itself must not contribute to its perversion; it must help him to rise. If the offender is irrecoverable, the penalty will be against him in the status of society and will represent a radical measure of defense and prevention[19].

The committed criminal act is an important element in establishing and measuring the penalty for several grounds: it indicates to which extent has the legal order been violated and to which extent must be acted (legal value); it indicates the intensity of the dissatisfaction created in the collectivity and thus the extent in which the social group waits for a satisfaction (social value); it indicates the presence of a person more or less dangerous (symptomatic value)[20].

Another argument regarding the necessity of individualizing the penalty is the fact that the social values susceptible of being harmed by antisocial facts do not have an equal value. One cannot state that the protection of the state is equal with the protection of the patrimony assets or with the protection of life and body integrity.

The objective existence of such differences between the social values protected by the criminal law colors differently also the abstract general danger of the social manifestations against these values, fact reflected in the way of punishing these facts.

Also, the actions and inactions that harm the same social values do not have the same gravity. Some are simple, some are more direct, some are insidious, more complex; some assume more conditions of achievement, some fewer conditions, some have a larger echo in the public opinion, some a limited one etc. These aspects too justify a certain difference in sanctioning each offence[21].

---

[16] Costică Bulai, *quoted work*, p 282.

[17] Vintilă Dongoroz, *quoted work*, p 468.

[18] Ion Tanoviceanu , *quoted work*, 3rd volume, p 110.

[19] Raymond Saleills, *L'individualisation de la peine*, Paris, Felix Alcon Publishing house, 1909, p 10-11.

[20] Vintilă Dongoroz, *quoted work*, p 233.

[21] George Antoniu, *Cu privire la reglementarea cauzelor de agravare şi atenuare a pedepselor,* Romanian Law Review, no. 4/1970, p 47.

These aspects were taken into account when it was settled in the Criminal Code a more shaped system of measures that can be taken against offenders by the different degrees of social danger presented by their actions and their person. This system of measures contains: penalties, safety measures, educative measures.

Also in the purpose of the different implementation of penalty, the criminal code provided for a minimal and a maximal duration of the penalties susceptible of being applied, adopting the system of the relatively determined sanctions, which allows for a better individualization related to the concrete circumstances of each cause.

Hence, for every guilty person, the penalty must be adapted to its purpose, thus it will give the maximum possible output. The penalty must not be fixed before, rigidly, nor regulated by the law, so that it will be invariable, since its purpose is individual and must be achieved by using a special strategy adapted to each case[22].

In the legal literature, the individualization of penalty was defined as being the operation of adapting the penalty and its execution to the individual case and the offender, so as to ensure the functional ability and the achievement of its purpose[23].

The definition emphasizes the fact that the individualization of penalty is, firstly, a mean by which the penalty is concrete determined.

Secondly, the definitions points out the fact that the individualization of penalty is a mean of adapting its nature and its quantum or duration to the individual case, to the committed offence and especially to the offender's person, to his danger and his aptitudes to correct himself under the influence of the penalty.

In the criminal doctrine there are opinions regarding the necessity of reconsidering the principle of individualizing the penalty, sustaining the necessity of replacing this concept with the one of personalizing the penalties.

The most important argument refers to the fact that the sanction should materialize around the accused, the equivalent of a man deprived of his freedom, not his dignity[24].

In other words, the respect of the human dignity becomes one of the key factors of the criminal intervention, giving the possibility for some alternative solutions in the implementation of the criminal policy. To the same effect, Raymond Saleilles argued that the penalty, to achieve its purpose, must not lead to the loss of honor, but, on the contrary, must help to its regain, thus the dignity can retake its place inside the conscience[25].

Moreover, the respect for human dignity is mentioned also in the Universal Declaration of Human Rights and subsequently recognized by numerous international documents; is has an absolute feature, promoting the idea of the necessity to protect against treatments that will harm his health, body integrity and dignity of the persons detained.

The protection of the human dignity which involves the personalization of penalties is an imperative that aims the ensemble of the criminal and execution process, but does not mean that from respect to human dignity, the offenders must not be punished. On the contrary, undertakes us to elaborate norms and structures to recognize and ensure this major goal, with the prospect that the human dignity gains a decisive place inside person's own conscience[26].

Another important argument lies in the changing of the regulatory framework. Law No. 278/2006 inserted in the Criminal Code regulations relating to penalties for the legal person. In this situation, no longer about an individual as such, the penalty applying to natural and legal persons,

---

[22] Raymond Saleills, *quoted work*, p 11.

[23] Vintilă Dongoroz et al., 2nd volume, p 119.

[24] Theodore Papatheadoru, *De l´individualisation, des peines et la personalisation des sanctions*, Revue internationale de criminologie ed de police technique, No 1/1993, p 109.

[25] Raymond Salleilles, *quoted work*, p 243-245.

[26] Ortansa Brezeanu, *De la individualizarea la personalizarea sancţiunilor*, Romanian Criminal Law Review, no.1/2000, p 47-50.

taking into count its specific features, it is natural that this concept be called or possibly even replaced with the personalizing the penalties.

Thus, French criminal law prefers the term of personalizing the penalty instead of individualizing it, on the ground that the latter term, valid for individuals, is no longer adequate for moral persons who, in the vision of the French criminal law, can also be criminally punished[27].

Conclusions

Any transformation of the principle of individualization of penalty into the principle of personalizing the penalty assumes a new way of approaching institutionally or doctrinaire the adaptation of penalty.

We believe that, though there are reasons to replace the expression of individualizing the penalty with another one able to accurately express the idea of adequacy of penalty in relation to all criteria used for this purpose, and compared both with the individual and the legal persons with the legal person, *the term of individualization should not be abandoned*, because on the one hand, the individualization is achieved not only in terms of the offender's persons, but also by his deed, and on the other hand, has a long tradition and entered into the criminal legal terminology.

References:

- Vintilă Dongoroz et al. – *Explicaţii teoretice ale Codului penal român, partea generală*, 1st Volume, Romanian Academy's publishing house, Bucharest, 1969.
- Costică Bulai – *Manual de drept penal. Partea generală*, All Educaţional S.A. Publishing house, Bucharest, 1997.
- Vintilă Dongoroz – *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000.
- Robert Vouin et Jacques Leante – *Droit penal ed criminologie*, Paris P.U.F., 1956.
- George Antoniu – *Vinovăţia penală*, Romanian Academy's publishing house, Bucharest, 1995.
- George Antoniu – *Partea generală a Codului penal într-o viziune europeană*, in the Romanian Criminal Law Review, no 1/2004.
- Ştefan Daneş, Vasile Papadopol – *Individualizarea judiciară a pedepselor*, 2nd Edition, Juridical Publishing house, Bucharest, 2003.
- Constantin Mitrache, Cristian Mitrache – *Drept penal român. Partea generală*, 2nd Edition, Universul juridic Publishing house, Bucharest, 2003.
- Ion Tanoviceanu – *Tratat de drept şi procedură penală*, 3rd Volume, Bucharest, 1926.
- George Antoniu – *Sancţiunea penală, Concept şi orientări*, in the Romanian Law Review, no 10/1981.
- Raymond Saleills – *L´´Individualisation de la Peine*, Felix Alcon Publishing house, Paris, 1909.
- George Antoniu – *Cu privire la reglementarea cauzelor de agravare şi atenuare a pedepselor* in the Romanian Law Review, no 4/1970.
- Theodore Papatheadoru – *De l´individualisation, des peines et la personalisation des sanctions* in the Revue internationale de criminologie ed de police technique no 1/1993.
- Ortansa Brezeanu – *De la individualizarea la personalizarea sancţiunilor*, in the Romanian Criminal Law Review, no 1/2000.
- Philippe Salvage – *Droit penal general*, Grenoble, 1994.

[27] Philippe Salvage, *Droit penal general*, Grenoble, 1994.

SOME APPROACHES ON THE OFFENSE OF MURDER OR INJURY OF THE NEWBORN COMMITTED BY THE MOTHER, PROVIDED IN ARTICLE 200 OF THE NEW CRIMINAL CODE

MIHAELA ROTARU*

Abstract
In addition to the innovations included in the new Criminal Code, the legislator of this legal act makes a number of amendments to the existing institutions and offenses in the criminal law. Such a situation is encountered for the offense of murder or injury of the newborn committed by the mother provided in Art. 200 N.C.C., offense that partly corresponds to the offense of infanticide described in Art. 177 of the Criminal Code in force. The legislator considered it necessary to also criminalize in the new Criminal Code the act of injury of the newborn committed by the mother, along with the action of killing, a situation that rightly caused the change of the marginal name of the offense. Moreover, another interesting aspect that also constitutes the focus of our approach is represented by the two phrases which are different from those in the legal text in force, i.e. ,,immediately after birth but not later than 24 hours" and ,,state of mental disorder", which are designed to equalize the views expressed in the criminal literature regarding the analyzed crime and the practice in the field.

Keywords: *killing, injury, newborn, mother, disorder.*

Introduction

The objective of this study is to analyze two very important, even essential issues in order to characterize the offense of murder or injury of the newborn committed by the mother, referred to in Art. 200 of the new Criminal Code[1]. The first aspect is related to the choice of the legislator to limit the situation of being newborn for the passive subject of the crime to the first 24 hours after his birth. The second aspect relevant in supporting our approach is related to the active subject this time, represented by the mother of the newborn child, which should be in ,,state of mental disorder" in order to apply to her an attenuated punitive treatment, according to the legal provisions of the Art. 200 N.C.C., if she kills or hurts her newborn child.

The starting point in this study is represented by the provisions of the new Criminal Code and the issues raised in the Explanatory Memorandum[2] to the new Criminal Code which determined the form in which the text of the offense was written in the new Criminal Code, on the one hand, and the provisions of the Criminal Code in force and the jurisprudence and doctrine, on the other hand.

1. Approaches Regarding the Content of Art. 200 N.C.C.

The offense of murder or injury of the newborn committed by the mother is provided in Art. 200 N.C.C., of the Chapter III, called ,,Crimes Committed against a Family Member", of the title I of the special part of the new Criminal Code, entitled ,,Crimes against the Person".

---

* Assistant Lecturer, Ph. D. candidate, Faculty of Law, "Alexandru Ioan Cuza" Police Academy, Bucharest (email: mihaela.rotaru@academiadepolitie.ro).

[1] Represented by Law no. 286/2009, published in ,,The Official Gazette of Romania" no. 510 of July 24, 2009 and most recently amended by Law no. 187/2012, published in ,,The Official Gazette of Romania" no. 757 of November 12, 2012. Further N.C.C.

[2] "Explanatory Memorandum to the new Criminal Code", accessed: August 4, 2009, <http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf>.

We will not continue the existing discussion[3] in the doctrine whether it is appropriate or not to create this third chapter dedicated to the description of the offenses committed against a family member, which contains only two crimes, and which is not found in the Criminal Code in force, as it is not the object of this study.

Article 200 N.C.C. reads: „(1) killing the newborn immediately after birth, but no later than 24 hours, committed by the mother in a state of mental disorder shall be punished with imprisonment of one to five years. (2) If the facts set out in Art. 193-195 are committed to the newborn immediately after birth, but no later than 24 hours, by the mother being in a state of mental disorder, the special limits of the penalty shall be of one month and three years respectively".

For a better understanding of the option of the legislator of the new Criminal Code to draft in this way the legal text we believe that it is important to know the provisions set out in the Criminal Code in force related to the topic taken under consideration.

Thus, we can say that the variant described in para. (1) of Art. 200 N.C.C. corresponds to Art. 177 Criminal Code in force, where the crime of infanticide is described as „killing the newborn immediately after his birth by the mother which is in a state of disorder caused by the birth is punished with imprisonment from 2 to 7 years".

It is true that the variant described in para. (2) of Art. 200 N.C.C. has no counterpart in the Criminal Code in force. We consider appropriate to create this legal text because if the legislator chose to apply a lower sentence for the mother who, in a state of disorder caused by birth, kills her newborn baby, she is also entitled to a reduced penalty if, in the same conditions relative to her mental health, the mother causes harm to her newborn immediately after birth.

We agree with what it was stated in the Explanatory Memorandum to the new Criminal Code on this issue, that the desire was to „eliminate the gaps and the inconsistencies caused by the successive amendments of the criminal code in force".

Moreover, we believe the legislator made an inspired option to change the marginal name of the offense from "infanticide", as described in Art. 177 Criminal Code in force, to "murder or injury of the newborn committed by the mother" because the marginal name has to be consistent with the legal text in question.

Relative to the provisions of Art. 200 N.C.C. we believe that the legislator opted for the inclusion in the same article of the Criminal Code of two distinct offenses, namely: the offense of killing the newborn committed by the mother in para. (1) of Art. 200 and the offense of injury of the newborn committed by the mother in para. (2) of Art. 200.

An argument in issuing this hypothesis is the existing legal text of Art. 266 Criminal Code in force, which is called „Illegal Arrest and Abusive Investigation" and that, in fact, comprises two distinct offenses individually described in paragraphs (1) and (2) of the article in question.

Another argument in supporting the thesis is the very presence of the conjunction "or" in the marginal name of Art. 200 N.C.C. If the legislator used in the existing Criminal Code the conjunction "and" in stating the marginal name of Art. 266 Criminal Code in force, thus showing that in practice there may be a situation in which the offense of illegal arrest, contained in para. (1) of Art. 266, and the offense of abusive investigation, referred to in para. (2) of Art. 266, may be withheld in contest, the usage of the conjunction "or" in the marginal name of Art. 200 N.C.C. was required for reasons of logical order. Thus, in practice there cannot be a situation in which the provisions of para. (1) and those of para. (2) of Art. 200 to be withheld in contest as the legal classification of the offense is based on the immediate consequence of the action or inaction which is the material element of the

[3] Petre Dungan, Tiberiu Medeanu & Viorel Pasca, *Handbook of Criminal Law. The Special Part. The Offenses against the Person. Crimes against Property*, (Bucharest: Legal Universe Publishing House, 2010), 103-105. The authors believe that „the intention of the legislator to build a section with only two offenses is not very inspired" because „the concern of the legislator to create a separate legal framework will not lead to reducing domestic violence and especially to eradicate it".

offense, taken also into consideration the other requirements imposed by law. In that case the immediate consequence of the offense of killing the newborn committed by the mother, referred to in Art. 200 para. (1) N.C.C. is the death of the baby who was born alive, and the immediate consequence of the offense of injury of the newborn committed by the mother, referred to in Art. 200 para. (2) N.C.C., is the harm of the newborn. We can never withheld in contest the two offenses if we have the same passive subject, although it is true that killing a person inevitably involves producing injury and suffering to the passive subject in question, but they are inherent in the action of killing, which immediate results in the death of the passive subject.

2. Approaches regarding the phrase "immediately after birth but not later than 24 hours"

Another aspect that we intend to analyze is relative to the legislator's option on fixing two extremely precise time limits in characterizing the quality of newborn of the passive subject, namely the period between the end of the birth, because it is stated that the offense must be committed "immediately after birth", and the end of the first 24 hours following that moment.

Although medical opinions[4] about the condition of the newborn are not unitary, in the criminal literature[5] it is said that this state lasts a relatively short period, id est from the moment of the completion of birth by cutting the umbilical cord to 10-14 days, while the child's body still preserves the signs of birth[6].

In another opinion[7] it is stated that legally speaking "immediately after birth" has the meaning of the period in which the recent signs of the birth still remain on the baby's body and it can last up to three days after birth, although medically speaking the state of newborn is kept in the first 28 days of extra-uterine life of the child.

However, under the new Criminal Code, the literature[8] stated that the condition of the newborn remains only in the first 24 hours following birth. This time interval is in fact a condition to characterize the offense.

It is true that the expression „immediately after birth" of Art. 177 Criminal Code in force is ambiguous and has over time generated non-unitary solutions in the judicial practice, but we consider that the time condition required to be fulfilled in order to be in the presence of the offenses described in art. 200 N.C.C. is extremely limited, respecting of course the other requirements imposed by the legal text. Therefore we propose replacing for the future regulation the term „immediately after birth but not later than 24 hours" with the phrase „immediately after birth, but not later than 14 days", taking also into account the existence of a state of mental disorder for the mother.

However, the essence of the offense of killing or injury of the newborn is represented by the quality of newborn for the passive subject and by the condition of mental disorder of the active

---

[4] „Newborn" is the name for the baby from birth until the age of 28 days; accessed: December 23, 2012, http://www.romedic.ro/nou-nascutul-prima-luna-de-viata-0C429. In another opinion it is stated that „the newborn is the name given to the baby born alive in the first 30 days of life"; Dungan, Medeanu & Pasca, *Handbook of Criminal Law*, 110.

[5] Ioana Vasiu, *Criminal Law. Special Part*, volume I, (Cluj-Napoca: Blue Publishing House, 1997), 122, cited by Ilie Pascu & Mirela Gorunescu, *Criminal Law. The Special Part, 2nd* edition, (Bucharest: Hamangiu Publishing House, 2009), 115.

[6] In medical science it is stated that "the skin of the newborn may present edema which may resolve spontaneously within the first week with kidney involvement, (...) staining pink skin gradually becomes yellowish, physiological jaundice starting in the third day and gradually disappearing in 10 - 14 days, (...) umbilical stump to mummify and detach within 2 weeks (...) on the forehead, shoulders and back we can see very fine hair that falls in about 2 weeks (...)". "Signs of birth", accessed: February 10, 2013, http://www.nou-nascuti.ro/neonatologie/nou-nascutul-normal.html.

[7] "Forensic course", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.

[8] Vasile Dobrinoiu & Norel Neagu, *Criminal Law. Special Part. Theory and Legal Practice under the New Criminal Code*, (Bucharest: Legal Universe Publishing House, 2011), 73.

subject. However, as described in Art. 200 N.C.C., given the maximum time limit of 24 hours after birth, if the mother being in a state of mental disorder kills her newborn baby within 30 hours after birth, the act would comply with the provisions of Art. 199 N.C.C., relative to the description of the offense of domestic violence, and the punishment would be more severe than that provided in Art. 200 N.C.C. In the judicial practice[9], it has been established that there was not committed the offense of infanticide, according to Art. 177 Penal Code in force, but the offense of murder under the Art. 174 and Art. 175 letters a), c), d) and i) Penal Code in force, in the case of a newborn killed 4 days after his birth by his mother, and this situation was not due to the lack of quality of the passive subject, but to not complying with the condition of the state of mental disorder of the active subject.

The existence of the state of mental disorder of the active subject is established by forensic means in each case held before the Court because it will be appreciated from person to person depending on certain factual data and this state may exceed the 24 hours following the child's birth.

It was stated in the criminal literature[10] that the introduction of this time condition ,,not later than 24 hours" will lead to ,,a more precise and uniform judicial practice".

This statement is correct, but at the same time, it seems unacceptable the situation where, the fact of murdering a newborn by his mother being in a state of mental disorder, according to Art. 200 N.C.C., at, say 30 hours after birth, to be assigned to the offense of domestic violence provided in Art. 199 N.C.C., and not to those of Art. 200 N.C.C., and applying a more severe punishment because the condition of time was not respected.

3. Approaches regarding the phrase „state of mental disorder"

Another important aspect that we want to analyze is that relative to the phrase ,,state of mental disorder", which is prerequisite for the active subject in order to find the hypothesis of the offenses described in Art. 200 N.C.C.

In Art. 177 Criminal Code in force, we find the phrase ,,state of disorder caused by birth". As shown in the criminal literature[11], this condition, which has to be established in the concrete conditions of each case brought before the Court, excluded the situations in which the state of disorder was pre-existing or has appeared after the birth by reasons such as fear of parental reaction, the public stigma, lack of subsistence, separation of the mother and father of the newborn and so on. For these reasons the legal practice was uneven.

In one case[12] the defendant was charged with the offense of murder referred to in Art. 174 and Art. 175 letters c) (of a close relative) and d) (taking advantage of the helplessness of the victim to defend herself) and not with the crime of infanticide, provided in Art. 177 Criminal Code in force, for the fact of hiding her pregnancy and giving birth alone in her parent's home, unattended by a physician, and killing the baby immediately after birth in order his cry not to be heard by the defendant's parents and hiding the body in a bag held under her pillow for 4 days until she got sick and, presenting herself to the doctor, the offense was discovered. When brought before the court the offense of infanticide could not be retained as the forensic examination established that the defendant did not show postpartum psychiatric disorders, and the offense was committed with discernment. The conflicts prior and with no connection to the birth such as the fear of parental reaction, the public

[9] „The Supreme Court of Justice, Criminal Section, Decision no. 4457/2003", available online at: http://legeaz.net/spete-penal-csj-2003/decizia-4457-2003 (accessed: December 29, 2012).

[10] Dungan, Medeanu & Pasca, *Handbook of Criminal Law*, 109.

[11] Dobrinoiu & Neagu, *Criminal Law*, 74-76, Pascu & Gorunescu, *Criminal Law*, 116.

[12] S.C.J., Criminal Section, Decision no. 4956 of October 9, 2004, cited by Lia Savonea & Daniel Grădinaru in *Crimes against Life, Bodily Integrity and Health. Jurisprudence*, (Bucharest: Hamangiu Publishing House, 2011), 51-56. The court noted that ,,the state of disorder caused by birth" within the meaning of Art. 177 Criminal Code ,,is due to labor, to the physical act of birth, and not to a general concern, due to educational deficiencies, the circumstances accompanying physiological process of birth, which leads naturally to the idea of concealing an act considered as illegal".

stigma, affecting the psyche of the defendant have the value of motives of the crime and not the meaning of a state of disorder caused by birth.

In another case[13], the defendant was acquitted because the attempted infanticide is not punishable. It was established that, at night, the defendant gave birth to a baby at home, unassisted, and immediately after that she introduced the newborn in a plastic bag and threw him through the garbage collection piping where he was found alive the next morning by the maid, who also alerted the authorities. The conclusions of the forensic report showed that the defendant was at the time of the offense in a state of disorder caused by birth, which affected her judgment. The evidence in the case showed that the defendant had decided to keep the pregnancy despite being in conflict with her concubine and she even was registered in the medical records of a specialist for monitoring her pregnancy and the fact she had not announced the birth was due to the lack of means of communication.

Bound to the state of disorder caused by birth to the mother the phrase „puerperal fever" is used, and it represents all the „mental disorders during pregnancy, childbirth and lactation"[14].

In an opinion[15] the psychiatric disorders caused by birth, may be in the form of „confusional states, anxiety, delirium" leading to denial of motherhood and the commission of the crime, and this states characterize the post-partum period lasting up to 42 days .

All these aspects found in the legal practice caused the legislator to choose for the new Criminal Code the phrase „state of mental disorder".

We believe that the scope of this concept is too broad because one can say that every mental disorder of the mother, even of pathological nature, which only diminishes her judgment, may be considered as part of the concept introduced by the legislator in the new Criminal Code. Assuming that at the time of the offense, the person could not realize the meaning of her actions or inactions or could not control them either because of mental illness or for other reasons, then the irresponsibility operates according to art. 28 N.C.C., which is a question of non-imputation.

We agree with the view expressed in the criminal literature[16] that the concept in question is „closely related to the pregnancy and the birth process and the implications they have on the pregnant woman psychologically and socially".

Criminal law is strictly interpreted and applied and in order to eliminate ambiguity of expression and support doctrinal explanations about the meaning of the term in question, we propose for the future legislation the addition of the phrase as follows „state of mental disorder generated by the pregnancy as a whole".

4. Approaches on the Comparative Law

4.1. Costa Rica

In the Second Book, „About Crimes", title I, „Crimes against Life", section I, „Homicide", of the Costa Rican Criminal Code we find Art. 113 para. (3), which reads: „the mother who by reasons of hiding the shame and maintaining her good reputation kills her newborn within maximum 3 days after birth is punished with imprisonment from 1 to 6 years".

As in the Romanian criminal law both the active subject and passive subject are qualified in the person of the mother or the newborn child. Although there is no indication on the mental state of the active subject at the time of the offense, it is interesting to note that the legal text refers to the mobile of the crime, the mother acting „to hide the shame and keep good reputation".

---

[13] S.C.J., Criminal Section, Decision no. 1948 of March 22, 2007, not published, cited by Savonea & Grădinaru, *Crimes against Life*, 131-133.

[14] "Puerperal fever", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.

[15] "Mental disorder caused by birth", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.

[16] Dobrinoiu & Neagu, *Criminal Law*, 74-75.

If the Romanian Criminal Code in force provides the temporal condition of the offense „immediately after birth" and the new Criminal Code narrowly defines this condition between the limit „immediately after birth" and the first 24 hours of life of the newborn, the Criminal Code under review provides a distinct temporal condition, id est, „within a maximum of 3 days after birth".

The minimum special limit of the penalty is the same in both criminal laws, namely one year, and only the maximum special limit varies, which is higher in the Costa Rican Criminal Code, namely 6 years, comparative to the Romanian Criminal Code and to 5 years in the new Criminal Code.

Compared with the existing Criminal Code, which provides the penalty of imprisonment from 2 to 7 years, in the new Criminal Code and the Criminal Code of Costa Rica there are lower limits, id est the minimum special limit is of 1 year and the maximum special limit is of five, respectively 6 years.

4.2. Dominican Republic

The Article 300 of the Dominican Criminal Code provides that „the one who kills a newborn baby is guilty of infanticide" and in Art. 302 of the same Criminal Code it is stipulated that „it is punishable by 30 years in prison the one guilty of murder, parricide, infanticide and poisoning".

In the Dominican Criminal Code we find the offense of infanticide and, as can be seen from the legal text, the active subject is not circumstantial, as in the Romanian criminal law, but it can be any person who meets the general conditions of criminal liability.

The passive subject, as in our law, is a newborn baby, but the Dominican legislator provided no time condition relative to the commission of the crime.

The Dominican legislator has a different perspective on this crime from the Romanian legislator, fact proven by the situation that the penalty imposed is 30 years in prison, also applicable for murder or for other crimes against the person. Thus, infanticide is not perceived as an attenuated version of the offense of murder.

4.3. Tunisia

In Article 211 of the Tunisian Criminal Code it is provided that „it is punishable by 10 years in prison the mother for killing her child at birth or soon after".

Unlike the Romanian criminal law existing or future, the Tunisian Criminal Code provides a bigger punishment for the analyzed offense, that of 10 years in prison.

As the Romanian Criminal Code, the active subject and the passive subject are circumstantial, in the person of the mother and the newborn. The Tunisian legislator makes no statement about the condition of the mother at the time of the offense, but he is only interested the act to be committed „at birth or soon after".

4.4. Canada

In Article 233 of the Canadian Criminal Code it is provided that „a woman commits infanticide when by a willful act or omission causes the death of her newborn child, if at the time of the action or inaction she may still feel the effects of child birth or those of early lactation and therefore her judgment is diminished".

In the Canadian Criminal Code we find the offense of infanticide, that can be committed by action as well as by omission, like in the Romanian criminal law, by the mother to her newborn child.

Although there is no time condition provided for the commission of the offense, the Canadian legislator is extremely precise about the causes that are likely to diminish the discernment of the active subject, causes that are related either to the birth process or to the physiological changes in the mother's body onset of lactation.

We believe that Canadian legislator's option to specify the exact causes that may diminish the discernment of the active subject of the analyzed crime is necessary because it leaves no room for ambiguity and it creates no problems in interpreting the legal text and in applying it to the concrete cases that have to be judged.

Conclusions

By criminalizing an act we protect certain specific social relations that emerge and develop on certain social values including the person with her attributes. The legislator considered it appropriate in the new criminal code to criminalize the injury of a newborn along with the infanticide, which is also found in the penal code in force in view of the fact that if the mother will receive a low sentence for killing her newborn child, much more she must have the same kind of punishment if she only harms him. The legislator of the new Criminal Code used an already known legal arrangement from the Art. 266 penal code in force, and he included two distinct offenses in the same article, describing in the first paragraph of Art. 200 the offense of killing the newborn committed by the mother, and in the second paragraph, the offense of injury of the newborn committed by the mother.

With regard to the second issue which is the subject of our study, we believe that the legislator provided an excessively limited time condition in characterizing the offenses described in Art. 200 N.C.C., as in the first 24 hours of life of the newborn, and we have proposed for the future legislation that the final limit of this time condition to be represented by the first 14 days of life of the newborn.

Considering that the term „state of mental disorder" that characterize the active subject of the crime is considered a concept with a broader range of coverage, we have proposed to improve the legislation by completing this formulation as follows „state of mental disorder generated by the pregnancy as a whole".

Since the Law no. 286/2009 for the new criminal code was amended in a single year, 2012, by three acts, although it is not yet in force, we should continue to observe this aspect and also how the regulations of the offenses listed in Art. 200 N.C.C. develop.

References

- Law no. 286/2009 on the Criminal Code, published in the „Official Gazette of Romania" no. 510 of July 24, 2009 and most recently amended by Law no. 187/2012, published in „The Official Gazette of Romania" no. 757 of November 12, 2012.
- Dobrinoiu, Vasile & Neagu, Norel, *Criminal Law. Special Part. Theory and Legal Practice under the New Criminal Code*, Bucharest: Legal Universe Publishing House, 2011.
- Dungan, Petre, Medeanu, Tiberiu & Paşca, Viorel, *Handbook of Criminal Law. The Special Part. Offences against the Person. Crimes against Property*, Bucharest: Legal Universe Publishing House, 2010.
- Pascu, Ilie & Gorunescu, Mirela, *Criminal Law. The Special Part., second edition*, Bucharest: Hamangiu Publishing House, 2009.
- Savonea, Lia & Grădinaru, Daniel, *Crimes against Life, Bodily Integrity and Health. Jurisprudence*, Bucharest: Hamangiu Publishing House, 2011.
- „Explanatory Memorandum to the new Criminal Code", accessed: August 4, 2009, http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf.
- „The Supreme Court of Justice, Criminal Section, Decision no. 4457/2003", accessed: December 29, 2012, http://legeaz.net/spete-penal-csj-2003/decizia-4457-2003.
- „Signs of birth", accessed: February 10, 2013, http://www.nou-nascuti.ro/neonatologie/nou-nascutul-normal.html.
- „Newborn" accessed: December 23, 2012, http://www.romedic.ro/nou-nascutul-prima-luna-de-viata-0C429.
- "Forensic course", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.
- "Mental disorder caused by birth", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.
- "Puerperal fever", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.

ELECTORAL CRIMES - CONCEPT AND EVOLUTION UNTIL 1990

MIRCEA CONSTANTIN SINESCU[*]

Abstract
Throughout this paper, the author tries to configure the concept of electoral crime, by presenting the legal, philosophical and historical opinions emerged centuries ago and also by drawing a line between political criminality and ordinary criminality. Furthermore, the study aims also to synthetically highlight the important moments of the legislative evolution in the specified area of interest, starting from the early nineteenth century, during the monarchical regime and ending with the totalitarian government of Romania until the Revolution in 1990. Taking into consideration the new incrimination of electoral frauds in the New Criminal Code adopted in 2009, examining the historical - teleological conditions of the former regulations of these crimes appears as a necessary intercession, in order to ponder upon the new Criminal policy of the legislator.

Keywords: *elections, democracy, political crime, legislative change, fundamental human rights*

I. The concept of electoral offense

In the universal doctrine was attempted, over the time, the emphasizing of a demarcation between the ordinary and political crime, where such offenses were also classified.

In the year 410 BC, Demofantes's Decree was engraved on a bronze column located near the entrance of the Senate, reminding all citizens that:

"If somebody threatens the democratic government of Athens, he will be considered an enemy of the Athenians, he may be killed without a trial, and his fortune will be confiscated. The one who will kill or support his murder will be presumed innocent and blameless. All Athenians shall make the following oath: I will kill, with my own hands, if I can, the one who will destroy the democracy in Athens ..., the one who will proclaim himself a despot or help someone to become a despot. If someone else will kill him, he will be presumed innocent and pure before the gods, like the one who killed at war an enemy of Athens"[1].

Finally, it should also be cited another political punishment, specific to the Ancient Greece: it is about ostracism.

This political measure was intended to remove all those who seemed to be dangerous for the established political order and it is applied when there was insufficient evidence for an actual indictment.

That measure was taken by the Assembly of the people, which could be seized by any citizen, and consists in removing the offender from the fortress for 10 years, without impairing his honor or goods; that measure was also revocable at any time within 10 years, also by the decision of the Assembly of the people[2].

The renowned Professor R. Garraud stated that what characterizes the political offense, in the objective opinion, is the nature of the right affected by it. Therefore, "the infringement to the two categories of rights is subject, in most of the modern Codes, to two categories of crimes: the crimes against the external security of the State (Landesverrath), the crimes against the internal security of

---

* Assistant Professor, Ph.D. candidate, Faculty of Law, "Nicolae Titulescu" University (email: mircea.sinescu@sinescu-nazat.ro).

[1] Cf. Thoisseu, Criminal Law of the Athenian Republic, page 196, a quote by V. Pantea in *Infracţiunea politică şi dreptul penal contemporan* [*Political offense and contemporary Criminal Law*], Lumina Lex Publishing House, Bucharest 1998, page 13.

[2] C. Lombroso, *Political offense and revolutions*, 2nd volume, pages 221-222.

the State (Hochverrath). Any aggression against the political order, provided that they are incriminated by the criminal law, has a political nature."[3]

Therefore, the purely political offense is the one which has not a predominant, but an exclusive and unique object, to destroy, alter or disturb the political order in one or more of the particulars thereof.[4] The political order is the ensemble of the powers holding the general interests of the country. It includes: on the outside, independently of the nation, the integrity of its territory and the relationships of the State with other States; on the inside, the type of government, the organization of public powers, their mutual relationships and finally the political rights of citizens. However, shall be acknowledged, without objection, the purely political offenses: to have relationships with the enemy; to bring weapons against their country; to conspire in order to change the type of government; to join illicit political societies; press offenses (except for the attacks against individuals); offenses to the rules concerning the political elections, public meetings; all these offenses do not violate the law and the political interest.

As a conclusion, Garraud appreciated that the political offenses are less directed against the bases of social life than against the established order: therefore, they have not the same nature as the common law offenses – "The reasons which impel us to act in political offense are, most of the times, disinterested, sometimes even commendable; the goal we want to achieve has not such a personal and selfish nature which inspire the ordinary perpetrator: the political offense has not the same immorality as the common law offense. A rational legislation will suppress these two kinds of offenses by different punishments."[5]

Thus, although, over the time, there were also opinions which placed such offenses in a range of deviant behaviors considered less dangerous to society, the consecration of importance of the fundamental political rights worldwide, especially from the second half of the twentieth century, led to an increased attention to such criminal acts.

Professor V. Dongoroz appreciated that "there is no intrinsic, overall difference between these two categories of offenses (common law offenses and political offenses – n.n.) – since, whenever, an ordinary offense may become a political offense, due only to the entirely intrinsic circumstances"[6].

This is what I. I. Haus firmly argue: "By political offenses we must understand the offenses and crimes hitting only the political order"[7].

A closer definition also suggests the great jurist Franz von Liszt who considers political offenses the ones affecting the existence and security of their own state or of a foreign state, as well as those directed against the head of the government and against the political rights of citizens.

Or, more synthetic and highly accurate: "the political offenses are the crimes and offenses hitting only the political order, either external or internal"[8].

Therefore,, I. Tanoviceanu has considered the electoral offenses "also a type of political offenses," an assertion also repeated by T. Pop in 1923.

But I. Tanoviceanu, soon after he made this statement, says that they (the electoral offenses) could be considered as a third category of offenses, besides the political and common law offenses, which obviously leads to a lack of clarity of the concept.

The French legal doctrine considers the political nature of the electoral offenses beyond any doubt, arguing his point of view with the jurisprudence[9]; they say it is about crimes and offenses against the Constitution and, in particular, electoral frauds.

---

[3] R. Garraud, *Traite theorique et pratique du droit penal francais*, 1898, p.197-207.

[4] A. De Stieglitz, *Etude sur l'extradition* (Paris, 1883). D. Lowenseld Zeitschrift fur die gesamte Strafrechtswissenschaft, 1885, p.55.

[5] R. Garraud, quoted works, p. 211.

[6] Vintilă Dongoroz, *Drept penal* (Criminal Law), Bucharest, 1939, page 314.

[7] I.I.Haus, *Principes genereaux du droit penal – belge*, Paris, 1889, vol. I, page 252.

[8] G. Vidal, *Principes fondoumentaux de la penalite*, Paris, 1890, pag. 76.

[9] R. Merle, A. Vitu, *Traite de droit criminel*, Ed. Cujas, Paris, 1997, pag.239.

The electoral offenses may be defined as "that category of acts provided by the criminal law having as object the social relations involving the normal conduct of political life."[10] Another definition of the electoral offenses was given by the Professor T. Pop, as follows "the electoral offenses are those offenses affecting the cleanliness and legality of elections for the legislative bodies"[11].

Thus, starting from the legal object of this category of offenses, it is found that they concern an essential attribute defining the notion of politics.

It stands to reason that these offenses affect precisely those essential elements by which is manifested the political composition of the society; the occurrence of violence, frauds, forgeries in the electoral process - so crimes -, denoting the actual existence of the sides which define, at least in terms of subjective criteria, the qualification as a political crime.

Given the foregoing, it is noted that the criminalization of the electoral offenses "protects the essential attributes of the free exercise of the political rights of citizens: the right to vote and to be elected, secrecy of the vote, correctness of vote, health and physical integrity of the electorate, defense against the electoral frauds"[12].

At least seven methods of election fraud populate the Romanian political imagination. From the fraudulent voting system (taking over of the sealed ballots by electors at the entrance to the polling station and handover, in exchange, of the unsealed ballots on exit), to the baton (the simplest version of the previous consisting of failure to submit some sealed ballots by some of the first electors and handing them to the representative of the party who distributes them to other electors then entering the logic of the fraudulent voting system), from the blue shirt (another version of the first method when the voter who declare that he is unable to focus on the vote requires the assistance of a particular member of the polling station - for example the one dressed in a "blue shirt") takes as much terrestrial the replacement (the substitution of the voted ballots and replacing them with other „properly" sealed ballots); the insecurity and handling of ballots play an important role in the mythology of the Romanian elections. On the other hand, the infiltration (the submission of some persons to a polling station, other than the one to which they belong, where, with the complicity of the representative of the party, they would vote on behalf of a systematically absent voter), hikers (a formula inspired by the existence of the special lists allowing the voting of the electors belonging to another station or from another place) or non-transportable (use of mobile ballot box to force the vote of older people who otherwise would not have participated in the poll) indicates another direction, that of multiple voting or administratively conditioned vote.[13]

Obviously, the punishment of the electoral offenses aimed to protect some values related to the state sovereignty, including, on the one hand, the social relations concerning the creation and compliance with the general organizational framework for conducting the electoral process, in complete safety and watching the democratic process for the election of the public authorities which must take place in complete fairness in order to confer legitimacy to the results of the vote of the electoral body.

II. Evolution of the regulation of the electoral offenses in Romania until 1990

The regulation of the electoral offenses was due to the electoral frauds existing right from the beginning of the organizations of popular consultations and of the first appointments of some governors for leading the Romanian countries in the nineteenth century.

---

[10] Gh. Diaconescu, *Infracţiunile în legile speciale şi legi extrapenale* [*Offenses in special laws and other courts laws*], Sirius Publishing House, Bucharest 1994, p.36.

[11] T. Pop, *Drept procesual penal. Parte introductivă* [*Criminal Procedural Law. Introductory part*], 1st volume, Ed. Universul Juridic (Legal Universe Publishing House), Bucharest, 2011, page 257.

[12] V. Pantea, quoted works, page 64.

[13] Pro Democracy Association – History of a disagreement: the uninominal vote, 2008, www.apd.ro, p.11.

Thus, in 1857, at the first elections in the Principalities for the ad hoc Divan also broke out the first scandal of fraud whose international impact marked the history of the Union. And, at that time, not the vigilance or organization of the unionists allowed the disclosure of counterfeiting of the elections in Moldova by the Caimacam Nicolae Vogoride, but the courage of his wife, Ecaterina (Cocuţa) Conachi, the stepsister of Costache Negri and the daughter of the famous chancellor - the poet Costache Conachi. She discovered the secret correspondence between the governor and his relatives of Phanar proving the intervention of the Gate for the falsification of the elections. Handed over to her brother and published in L'Etoile d'orient, edited in Brussels, the documents could justify the unionists' pressure for canceling the elections. Meanwhile, in Moldova this evidence circulated as an Extract of the secret letters sent to the Caimacam of Moldova by great political figures and contributed to the relaunching of the electoral process. This was the context which launched Alexandru Ioan Cuza on the first stage of the political life, a chief magistrate of Galati at that time, otherwise a relative of Vogoride (who appointed him and facilitated his rapid ascent in the army), whose resignation resulted in maximizing the scandal. Faced with the refusal of the Ottoman Empire to cancel the elections, France, Russia, Prussia and Sardinia broke the diplomatic relations with the power from Istanbul.

The tensions between England, Austria, encouraging the Gate not to accept new elections, and the other states participating in the Congress of Paris reached the brink of a war which was prevented only by the meeting in Osborne between Napoleon III and Queen Victoria after which the elections falsified by Vogoride were canceled.

After becoming a Lord of the United Principalities in 1859, Cuza did not hesitate to use, in the confrontation with the Opposition, some authoritarian methods and to influence the results of the elections. Introducing the Senate as a "balancing body" in the Developing Statute was a coup constitutionally intended to limit the role of the Chamber of Deputies. By the institution which this year celebrates its 140 years of existence, consisting of senators by law and senators appointed by the Lord, Cuza ensures his absolute control over the political life, so that not only the conservative majority, but also the parliamentarism was affected.[14]

In the Electoral Law voted in July 1866 there is a provision which foresees that any abuse of the electors shall be punished by fine or imprisonment, and five electors had the right to file a lawsuit for punishing the offenses committed during the elections, if the public ministry had no initiative.

During the monarchial period, the only elections not suspected of fraud are those of 1928 won by Peasants on the background of the Liberals' crisis after the unexpected death of Ionel Brătianu in 1927. The constitutional system inaugurated in 1866, kept after the constitutional changes of 1923, assumed the appointment firstly of the Prime Minister and then the convening of the elections. Any government which held elections in Romania, except for the Tătărăscu government in 1937, never lost such elections. The used means varied according to the size of the electorate. Until the imposition of the universal suffrage, in 1919, the control of the polling stations was sufficient to designate the winning party. Constantin Bacalbaşa in the "Bucharest of yesteryear", a witness and a victim of the electoral practices of the late nineteenth century and the early twentieth century, describes the *a la romaine* use of the electoral agents, actually some bullies paid to prevent the renowned electors of the adverse party to exercise their electoral right. The party which thus obtained the control of as many polling stations won the elections, and the complicity of the authorities was more than transparent. Miming the elective process has contributed to the undermining of the democracy and has provided an alibi for the extremist movements thriving after the First World War.

According to the law of 1918, the elector should remove or cut with a pencil the lists or the names of the candidates who did not want to choose and to make visible only the selected list or the name of the favorite candidate. The number of candidates who are not removed from the ballot could not exceed the number of mandates of that constituency, but the elector was allowed to vote for

[14] Pro Democracy Association – History of a disagreement: the uninominal vote, 2008, www.apd.ro, p.9.

fewer candidates. Nothing else could be added on the ballot, any sign being construed as an attempt at deception.

Since the introduction of the universal suffrage in 1919, the method of fraud was adapted. The falsification of the results could no longer be achieved by the contribution of the "street agitators", but in the regions under martial law, such as Bessarabia and the Quadrilater, the victory of the Government was assured.

The elections in 1922, organized and conducted by the Liberal government, by Ion I.C. Brătianu, were held, in the same manner for the Chamber, between 5 to 7 of March 1922, and for the Senate, during the 4 days - 1, 2, 9 and 10 of March 1922 (although the law provided only 2 days). The citizens who had certificates of elector were forced to vote in the section or subsection "to which belongs the village of residence"; those who did not exercise such right "without a legal basis" were sent to the competent justice of the peace and punished with a fine of up to RON 500.

A Peasant candidate exiled in a constituency of Quadrilater during the elections in 1926, Grigore Gafencu stated in "Political notes" the experience of his detention by the representatives of the Ministry of Interior, managed by Octavian Goga, in full campaign and his liberation once the results have been published.

The fragmentation of the political life and the emergence of the coalition governments justified the introduction of the electoral premium, another method of circumventing the vote and artificial insurance of absolute majority. Following the amendments to the Electoral Law of 1926, the party which achieved 40% of votes received, as a premium, 50% of mandates, and from the other half a number of mandates equivalent to the share of the obtained votes.

The vote based on qualification between 1866 and 1919 allowed a type of fraud, the proportional representation between 1919 and 1937, another, but the result was the same: the crisis of democracy. In 1937, Carol the Second believed that it was the time for a personal government, so that prevented the accomplishment of the 40% threshold by the Liberals who still occupied the first position with 36%. However, the government was set up by the National Christian Party, managed by Octavian Goga and A.I. Cuza, ranked the fourth with 9.15%. The coup of 10 February 1938 became justifiable, and the authoritarian government became possible. The plebiscite for the Constitution of 1938 was a simulacrum where underwent the open vote, only 5,483 Romanians having the courage to vote against, versus 4,300,000.

The last elections in the Kingdom of Romania of November 19, 1946 had been rigged by reversing the shares. The government of Groza, represented by the Bloc of Democratic Parties, claimed 70% of the votes, and the remaining 30% of the seats were divided to the other parties (the National Peasant Party - 13%, the Hungarian People's Union - 8%, the National Liberal Party - 4%). The repressive electoral campaign and the circumvention of the electorate's will reached its peak.

In the Criminal Code of Carol the Second was legislatively established the complex political offense, in the provisions of article 27, paragraph 1, being stipulated as follows: "when from the circumstances in which it was committed or due to the reason is found that an offense ... has a political nature, but it is sanctioned by law with common law punishments, the court shall replace the common law punishment with a political punishment".

Therefore, the Criminal Code of Carol the Second implicitly stipulated the political offenses by providing some punishments exclusively intended to this category of offenses. In the article 22, paragraph 2 and article 23, paragraph 2, of the Criminal Code of Carol the Second, establishing the punishments for the political offenses, provided the following grid:

a)Punishments for crimes in the political field:

- Hard life detention;
- Hard detention from 5 to 25 years;
- Rigorous detention from 3 to 20 years;

b) Punishments for each offense in the political field:

- Easy detention from 1 month to 12 years;

- Fine from RON 2,000 to 20,000, except when the law provides another maximum.

There was no political punishment in the correctional field.

In the articles 36, 37 and 38, the Criminal Code of 1936 explained in detail how the punishments were executed in the political field, essentially the difference between the hard and rigorous detention and easy detention, consisting in the fact that those convicted to the first two categories were subjected to the isolation regime during the night and forced to perform a work while the person convicted to an easy detention, besides he/she was not subject to the isolation regime and had other rights, quite large: free communication with the family members, the permission to receive books, magazines and journals, the possibility to support themselves on their own.

Regarding in terms of punishments, the Criminal Code of Carol the Second established as political offenses, among others: the crime of overthrowing the constitutional order (article 207); the crime of rebellion (article 210); the crime of military usurpation (article 212) etc., those referring to offenses against the internal security of the state, offenses against the security of foreign states, peace and good international relations law: offense against the good international relations (article 225); plot (article 227) and others; to the offenses against the exercise of the political and civil rights: the crime of electoral fraud (article 235); the crime of rebellion against the legislative assembly (article 258); the crime of clash of authority (article 331) and others.

Thus, we note that the electoral offenses enjoyed a special regulation: "in the second title of the Criminal Code of 1936, the electoral offenses were treated as *offenses against the exercise of the political and civil rights* and they were provided in the articles 232, 235, particularly referring to acts of violence or threat, preventing the exercise of the political and civil rights, as well as the electoral fraud"[15].

The law contains some inadvertencies, considering the same offense, when it is a political offense, when it is a common law offense. For example: the crime of hindering the political or civil rights is as such in the article 232, being punishable with an easy detention from 3 months to 1 year; while the qualified offense, provided in the article 234 is punishable by law with correctional imprisonment from 1 to 3 years.

The situation remained unchanged even after amending the Criminal Code in 1948 and its republishing in 1958, indicating that in the 60s, the Criminal Code has undergone a series of amendments which completely distorted the meaning and reason of criminalization of the political offenses, the punishments being applied with utmost severity, for minor or inexistent offenses.

Note that, with the advent of the Criminal Code in 1968, any difference between the common law offenses and political offenses disappeared, the Romanian law considering all the offenses as being common law offenses; consequently, automatically disappeared also the political punishments[16].

One of the debated issues concerning the electoral offenses of that time was related to the procedure, which was different from the common law offenses, namely "the limitation period for the criminal liability was unreasonably short, more precisely one month after the proclamation of the election results, an issue criticized by the theorists of that time"[17]. The same Professor Vasile Pantea said that in the legislation "was also provided an original way, suigeneris, implementing the criminal action, being stipulated that it can be triggered, besides the victim and prosecutor, by minimum 20 electors. Such offenses enjoyed a privileged sanctioning regime, both by shortening the punishments, and by the fact that, in this field, the preventive arrest was forbidden; as regards the jurisdiction, the electoral offenses were submitted to the Courts of assizes"[18].

[15] V. Pantea, quoted works, page 65.
[16] V. Pantea, quoted works, page 65
[17] T. Pop, quoted works, page 257.
[18] V. Pantea, quoted works, page 65.

The last legislative regulation in the field of electoral offenses may be found in the Law no. 67 of December 20, 1974, the electoral law of the Socialist Republic of Romania[19] which included, in the article 104, two offenses, as follows:

"(1) Shall be punished with imprisonment from 6 months to 5 years and the interdiction of certain rights:

a) hindering by any means the free exercise of the right to vote or to be elected;

b) falsification by any means of the electoral works or the outcome of the vote.

(2) Attempt shall be punished."

We note that the exposure of the regulations in the field of electoral offenses until the revolution of 1989 is required only for reasons of historical and teleological analysis, given that, during the period 1858-1938, the democracy in Romania was too early for implementing the compliance with the fundamental political rights, and after the reassessment of their importance worldwide, the insertion of certain criminal rules to protect such social values was strictly formal in the context of the Carlist and then of the totalitarian regime.

References

- New Criminal Code (Law no. 286/2009).
- Criminal Code in force.
- Criminal Code of Carol the Second.
- Constitution of 1866.
- Constitution of 1923.
- Constitution of 1938.
- Constitution of 1952.
- Constitution of 1965.
- Constitution of 1991.
- Basarab M. and others – Commented Criminal Code. 1st Volume. General part, Hamangiu Publishing House, Bucharest, 2007.
- Basarab M., V. Paşca, Gh. Mateuţ, T. Medeanu, C. Butiuc, M. Bădilă, R. Bodea, P. Dungan, V. Mirişan, R. Mancaş, C. Miheş – Commented Criminal Code. 2nd Volume. Special part, Hamangiu Publishing House, Bucharest, 2008.
- Constantinescu T. – Effects of electoral law and the lessons arising from the choices made after the war – Bucharest, Independenţa Printing House, 1927.
- De Tocqueville A. – About democracy in America – 1st Volume – Humanitas Publishing House, Bucharest, 1995.
- Garraud R. – Traite theorique et pratique du droit penal francais – Paris, 1989.
- Gilia C. – Electoral systems and procedures – C.H. Beck Publishing House, Bucharest, 2007.
- Gorghiu A. – Offences against the electoral rights – Universul Juridic (Legal Universe) Publishing House, Bucharest, 2012; Pantea V. – Political offense and Contemporary Criminal Law – LuminaLex Publishing House, Bucharest, 1998.
- www.roaep.ro.
- www.aec.gov.au.
- www.apd.ro.

[19] Published in the Official Gazette no. 161 of December 23, 1974.

AGAIN ABOUT GENDER BASED VIOLENCE IN ROMANIA LEGISLATIVE MODIFICATIONS PROMULGATED ON MARCH 2012

LAVINIA MIHAELA VLĂDILĂ*

Abstract
The article continues our last year article, presented in the same conference, on the evolution of the legislation on domestic violence in Spain and in Romania. This new study shall approach only the legislative modifications of the Law No 217/2003 inserted in March 2012 after the shooting at "Perla" Hairdresser in Bucharest, which influenced not only the lives of those involved, but also legislative changes, as an attempt from the Government to offer a better protection for women, who are usually the victims of this type of violence. The present study is dedicated to these new modifications ad their social and legal impact.

***Keywords**: gender based violence, new regulation, restraining order*

I. Introduction. Regarding our preoccupation of the past few years in knowing and study the issue of gender based violence we drafted this article. Though in our previous study we have presented the evolution of the Romanian and Spanish regulation after 2000, we have not approached the latest modifications brought to the Law No 217/2003 after the shooting at "*Perla*" Hairdresser in Bucharest, inserted in March 2012. The present study is dedicated to these new modifications and their social and legal impact, especially the impact on those women subjected to gender based violence.

Despite that in Romania there are few statistics on gender based violence, and the existing ones are not very recent, it has resulted that this plague is one of the most present in Romanian society. According to the Statistical Bulletin on Labor and Social Protection – 2009, presented by the Ministry of Labor, Family and Social Protection[1], in South-Muntenia Region (formed by Argeş, Călăraşi, Dâmboviţa, Giugiu, Ialomiţa, Prahova and Teleorman counties) were registered most cases of domestic violence (3262), followed by South-East Region (formed by Buzău, Brăila, Constanţa, Galaţi, Tulcea and Vrancea counties) with 1759 cases, the fewest cases being registered in the Western Region (formed by Arad, Caraş-Severin, Hunedoara and Timişioara counties) with 1109 cases. From another Romanian study called "*National Research on Domestic and Work related Violence*", research conducted in 2003 by the Partnership for Equality Center[2] stated that between 2002-2008, 827.000 women were frequently subjected to acts of domestic violence in one of its many forms, thus:

- 695.000 women were insulted, threatened or humiliated;
- Over 316.000 women were physically abused and a similar number suffered different abuses resulted in forced restriction of social relations;

---

* Lecturer Ph.D., Faculty of Law and Socio-Political Sciences, "Valahia" University of Târgovişte (email: laviniavladila@yahoo.com).

[1] Available on the Ministry of Labor, Family and Social Protection official website: http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Buletin%20statistic/2009/protectiafamiliei2009.pdf

[2] The information was taken from the study *National Research on Domestic and Work related Violence* published on the Partnership for Equality Center official website: http://www.cpe.ro/romana/index.php?option=com_content&task=view&id=27&Itemid=48 p.132.

The research was conducted by the IMAS – Marketing and Polls in July-August 2003, on a representative sample group: 1800 persons aged 18 and above, from who 1200 were women and 600 men; 182 representatives with decision attributions in public institutions; 190 experts from local authorities, Police, Institutes of Legal Medicine, generalist doctors, emergency hospitals and NGOs. The PCE promoted this project with the support of the Center for Legal Resources, with funds from the Open Society Institute.

- Over 227.000 women had not their personal money or were striped of money without their consent by other family members;
- Over 70.000 women were abused in different ways, including sexually.

This shows that violence against women is a wide spread phenomenon which must be closely researched in order to be fully understood and to find the most adequate regulation, in the conditions of a deficient analysis and research, both from the deciders local and central public administration) as well as from the judicial system.

The analysis of the new regulation is a first important step in the understanding of this phenomenon, in order to evaluate the social and legal impact of the existent legislative modifications and inconsistencies even after they occurred.

II. Modifications promulgated on March 2012 of the Law No 217/2003 and their social and legal impact. The modifications of March 2012 were the result of a case which tends to become well known, namely the shooting at *"Perla"* Hairdresser in Bucharest. In this case, a woman noticed the police in many times regarding the possibility that her husband is trying to murder her, because they were separated and he continuously threatened her with physical violence, and the police did nothing. The silence of the police allowed her husband, who has a firearm license, to come at the victim's working place – a hairdresser – and, in broad daylight to fire without discrimination in all the persons who were there, employees and customers. The victim and other persons deceased, while others were seriously injured.

A human sacrifice not without result, but totally useless!!! In its aftermath the legislative adopted Law No 2/2012 which modified Law No 217/2003 on domestic violence[3].

The modifications are very important, but are still uncorrelated with other provisions, and sometimes inefficient. So, in a brief analysis we shall see the novelties brought by the modifications inserted in March in Law No 217/2003.

The concept of "domestic violence", as defined by Law No 217/2003, on its prevention and combat, is circumscribed, as shown in Art 2 *"...any physical or verbal action deliberately perpetrated by a family member against another member of the same family that causes a physical, psychological, sexual suffering or a material prejudice, including threats of such actions, arbitrary coercion or deprivation of freedom*". In our opinion, all these are forms of **direct violence** perpetrated by a family member against other members of that same family. Outside this form, the law states **a form of assimilated violence** namely, "*the hindering of the woman to exercise her fundamental rights and liberties*"[4]. From this definition were excluded the offences committed by negligence, being contradictory with the opinion of some authors, who include this type of offences in the definition of the concept[5].

Also, at a national level, the issue of domestic violence was defined as *a problem of public health*[6], which made the law to state its solving within the attributions of four (now five) ministries which must collaborate, but have specific roles, in this institutional mechanism: Ministry of Labor, Family and Social Protection, Ministry of Administration and Internal Affairs[7], Ministry of Public Health, Ministry of Education, Research, Youth and Sport.

In this context, the Ministry of Labor, Family and Social Protection received the attribution to draft the social assistance policy, to promote the rights of the victims of domestic violence, as well as

---

[3] Law No 25/2012 for amending and supplementing Law no. 217/2003 on prevention and control of family violence published in the Official Gazette No. 165 of March 13, 2012.

[4] According to Art 3 Para 2 of the Law No 217/2003 amended.

[5] Ortansa Brezeanu, Aura Constantinescu, *Violenţa domestică. Reflecţii*, in the Romanian Penal Law Review, No 2/2007, p.75.

[6] According to Art 1 Para 2 of the Law No 217/2003 amended.

[7] In the actual governmental structure there are two ministries: Ministry of Administration and Ministry of Internal Affairs. It would be desirable that the attributions be shared by both of them.

to draft and apply, by its central and territorial specialized structures, special measures to integrate the victims on the labor market[8]. In the actual structure of the Government, the Ministry of Public Health and the Ministry of Administration and Internal Affairs drafts and spreads documentary on the causes and consequences of domestic violence[9]. The Ministry of Education, Research, Youth and Sport implements educational programs for parents and children in order to prevent domestic violence, with the support of other ministries and in collaboration with different NGOs[10]. These attributions cover different sides of the phenomenon: the Ministry of Labor, Family and Social Protection creates the general policy and aims the labor reintegration of the victims; the two ministries, namely the Administration and Internal Affairs and Public Health aim to nationally recognize the cause-effect of the phenomenon by informing the population; the Ministry of Education, Research, Youth and Sport aims to stop from the root this phenomenon, in that after the causes and effects were discovered, the childhood education of citizens, especially in the relation with their parents, shall lead to its substantial diminish. So: application program, victims' integration, information on cause-effects, perseverance in canceling causes. We appreciate that such a vision is auspicious for stopping the phenomenon and healing the wounds it might have caused already.

With these ministries, the law understood to assign attributions also to the *probation service*, which has the possibility to manage the social reintegration of the *persons convicted for domestic violence*, closing the cycle of those involved in the phenomenon[11].

Another positive aspect of this law is the fact that it states *a series of principles* which should be as a "*bible on domestic violence*" for those who apply the law: principle of equality, principle of respecting human dignity, principle of preventing domestic violence, principle of celerity, principle of equal opportunities and treatment[12]. Even though nowadays human dignity is protected only by civil means (granting compensations in the limits of the Civil Code), other laws are adopted, beside the Constitution[13], declaring it as a reality which deserves to manifest and to be protected.

The framework for applying the law, according to Art 5, and in the meaning of the special law, refers to:

- *Close relatives*, as defined by Art 149 of the Criminal Code, namely ascendants, descendants, brothers and sisters or their children, as well as the persons who by adoption became such relatives. We can notice that Art 5 Point a) of the law on domestic violence *no longer states the condition that close relatives must live or household with the aggressor*, thus the term "family member" of the special law is broader than the one stated in the actual Criminal Code (Art 5 Point a)).

- *Husband/wife*, as well as *ex-husband/ex-wife* (Art 5 Point b)). Adding on the list of persons protected by law or authorities the ex-spouses, expresses the integration of the new ideas on domestic violence and on the persons who can be considered "*close*".

- To these categories are added those who have established a relation similar to marriage (*paramours*) or to those between parents and children, if they cohabit (Art 5 Point c)).

- The tutor or other person exerting, de facto or de jure, the rights in the name of the child (Art 5 Point d)). The provision aims to protect the child against violence manifested by his protectors. It is a novelty compared to the previous provision.

- The legal representative or other person who cares for the person mentally ill, with intellectual disability or physical handicap, except those who perform these as professional duties (Art 5 Point e)). It is a new concept that the law integrates showing the legislator's preoccupation for

[8] According to Art 8 of the Law No 217/2003 amended.
[9] According to Art 9 of the Law No 217/2003 amended.
[10] According to Art 10 of the Law No 217/2003 amended.
[11] According to Art 11 of the Law No 217/2003 amended.
[12] According to Art 2 of the Law No 217/2003 amended.
[13] According to Art 1 Para 3 of the Romanian Constitution revised.

persons with disabilities against violence that may be provoked not only from blood or civil relatives, but also by those who must take care of them, a premiere in Romania.

A positive aspect of the law is that it encourages NGOs to support the programs for assisting the victims of domestic violence[14], as well as public-private partnership[15].

In order to assist the victims of domestic violence, also of the aggressors, the law created 4 types of institutions, called *units for the prevention and combat of domestic violence*, namely: domestic violence shelters (women's shelters), centers for the rehabilitation of victims of domestic violence, centers for assistance destined to aggressors and domestic violence awareness centers. All these types of units can be founded and sponsored by public or private funds or in a public-private partnership, the institution financing being responsible for spending these funds. Founding these units can be made only by social services providers, accredited according to the law. These units offer free assistance for victims of domestic violence, based on *a contract for performing social services*[16].

The centers for sheltering victims of domestic violence, further on called shelters, are social assistance units, with or without legal personality, which provide protection, accommodation, attendance and counseling to the victims of domestic violence, forced to resort to this social assistance service. Shelter units offer assistance both for the victim, as well as for the minors in his care, for free and for a determined period protection against the perpetrator, medical care, food, housing, psychological and legal assistance. The location of the shelter units is secret to the public[17]. Beside the shelter units, the law stated the foundation of *recovery centers*, which ensure, in addition to housing and care, social rehabilitation and reinsertion for the victims. The law does not forgot the aggressors, for whom it stated the foundation of assistance centers, created as units of social assistance with or without legal personality working as daycare centers, ensuring social rehabilitation and reinsertion for them, educational, counseling and family mediation measures. For them, the measures of family mediation are supplemented by specific treatment, namely psychiatric or rehab performed in medical units with who were concluded agreements. Regardless of the situation, the assistance and hospitalization of victims or aggressors in the above mentioned units is made only with their consent. For juveniles the consent belongs to the non-violent parent or legal representative[18]. The fourth type of assistance units are the *domestic violence awareness centers*, providing information and education services, social assistance and an emergency hotline for information and counseling.

The law states *mediation* as a mean of solving domestic conflicts, without being mandatory. In exchange, the law states for convicts for domestic violence to participate in special counseling and social reinsertion programs implemented by the institutions where they are executing their penalties[19].

Legally, for the first time in our legislation, the law states *the restraining order*, as a mean designed to estrange the victim from the perpetrator and to ease other legal measures, including solving the children's situation, if necessary.

The restraining order can be issued if the victim's life, physical or physical integrity, freedom are endangered by an act of violence from a family member.

It consists in the implementation of one of more measures:

- Temporary evacuation of the perpetrator from the family home, regardless if he is the owner;

---

[14] Ortansa Brezeanu, Aura Constantinescu, *Violenţa domestică. Reflecţii*, in the Romanian Penal Law Review, No 2/2007, p.75.

[15] According to Art 16 Para 1 and 6 of the Law No 217/2003 amended.

[16] According to Art 15-16 of the Law No 217/2003 amended.

[17] According to Art 17 of the Law No 217/2003 amended.

[18] According to Art 16 of the Law No 217/2003 amended.

[19] According to Art 22 of the Law No 217/2003 amended.

- Victim's and his children reintegration in the family home, if they were cast away from the common home;

- Ordering the perpetrator to maintain a minimal distance from the victim, his children or other relatives, his residence, working place or school of the protected person;

- Banning all kind of contact, including by phone, mail or other type with the victim;

- Ordering the perpetrator to hand over the police any weapons he owns, even if are legally owned;

- Entrusting minors or establishing their place of residence elsewhere than the residence where they suffered or witnessed domestic violence;

- Ordering the perpetrator to pay the rent and/or maintenance of the temporary residence where the victim, children or other family members reside, or are about to reside due to the impossibility of remaining in the family home.

The *Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the protection of women against violence*[20] splits these measures in two, the court may order two types of orders: a *restraining order*, which prohibits any contact of the aggressor with his victim for a certain period of time and a *protection order* aiming the other types of measures. Such distinction is necessary only in the hypothesis in which in first allowed to issue the restraining order for the protection of the victim against a possible physical contact with the aggressor, and after that, in a more elaborated procedure, to issue the protection order.

The procedure to issue the protection order should be performed with celerity. The competent court is the first instance tribunal; the procedure has short terms and can be appealed within 3 days from its issuance if the parties were summoned or from the communication, if the parties were not summoned. The prosecutor's presence is mandatory in both trials and also, the aggressor's legal assistance. The order can be issued for a maximum period of 6 months. The protection order is applied by the police and its non-abidance is the offence of non-abidance by court decisions, being sanctioned by imprisonment from one month to one year, for this penalty the conditional suspension not being possible[21].

III. Conclusions and proposals for a new regulation, correlated with a case study. Although all analyzed legislative modifications were major, they are also subjected to critics and to the need of improvement.

1. A first critic brought regards the way in which the texts referring to the Criminal Code are drafted. Due to the scanty legislative technique chosen by the legislator, this law is not considered a special criminal law. It is not even a civil law with criminal provisions[22], but just another law regarding a social area, tangential with criminal law. This is why it is not reflected in the Criminal Code[23], being only completed by it. These allegations are not hazardous. In the "*Explicaţii teoretice ale Codului penal român*" published under the auspices of the Romanian Academy and of its Legal

[20] The document is available on the Council of Europe official website: https://wcd.coe.int/ViewDoc.jsp?id=280915&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[21] According to Art 23-35 of the Law No 217/2003 amended.

[22] In accordance with the Romanian doctrine, the streams of the criminal law are: Constitution, Criminal Code, special penal laws, civil laws stating penal provisions. Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală*, Universul Juridic Publishing-House, Bucharest, 2012, pp.33-35.

[23] V. Dongoroz, I. Fodor, S. Kahane, N. Iliescu, I. Oancea, C. Bulai, R. Stănoiu, V. Roşca, *Explicaţii teoretice ale Codului penal român. Partea specială, vol. IV*, 2nd Edition, Romanian Academy Publishing-House and All Beck Publishing-House, Bucharest, 2003, pp.859-861; the authors consider that a provision from a law other than the Criminal Code has penal feature only if it incriminates an offence punishable by a penal sanction, from those stated by Art 53-54 of the Code, or if that provision is expressly connected to one of the Criminal Code, which Law No 217/2003 does not state.

Research Institute, the authors consider that a provision from other law than the Criminal Code, has a penal feature only if it incriminates an offence for which Art 53-54 state a penal sanction or that provision is related to one of the Code, which Law No 217/2003 does not do[24]. In this context, Law No 217/2003, even after the 2012 modifications, must be in accordance with the Criminal Code, as well as with the new Criminal Code, so that such an atypical situation will cease to exist.

2. Another critic refers to the fact that even though the law states the offence of domestic violence convicting the aggressor, Law No 217/2003 amended does not state these offences; the previous regulation (before March 2012) stated over 25 offences from the Criminal Code[25]. With the legislator itself withdrawing the listing can we be able to relate to these? In the same context, it must be noticed that the actual Criminal Code does not define the offence of domestic violence nor connects it to a certain offence (in the meaning that there is no title, chapter or section regarding domestic violence or to have a similar name as it is – for example – in the new Criminal Code on 2009). There are only four offences committed with violence, which clearly refer to the subjects of the offence as family members (Art 180 Para 1^1 and 2^1 – hitting or other forms of violence and Art 197 Para 2 Point b) – rape) or to the spouse and close relatives (Art 175 Para 1 Point c) – first degree murder), but according to the definition of domestic violence – offences committed in these situations are many more, the range covered by the previous Art 1 Para 2 being wider. In addition, these four offences have as main object the social relations on the life and physical or psychical integrity or health of the person, and in subsidiary affect family relations, which in the case of a special regulation dedicated to domestic violence, the situation would be reversed.

3. The experience of a case in which I have studied the application of the new provisions on the protection order revealed the existence of other dysfunctions of the actual regulation. According to Art 17 Para 4 of the Law No 217/2003 amended, the state must endorse the setting up of secret centers for sheltering victims of domestic violence. In fact they are the same with the ones used for other social cases and can be found on the websites of the local Directions for Social Assistance and Child Protection or in Bucharest, the information regarding them being public.

4. Knowing the legislation in the area of domestic violence is limited and interpreted in a restrictive manner, without understanding the **urgent need of solving the cases**. Despite Art 27 Para 1 of the analyzed law, the case[26] had in view was delayed for over more than four month (was initiated at the end of August and the solution became irrevocable in mid-January next year), both in first instance and in appeal, which in the terms of a precarious situation of the victim would have made the legal provisions be ineffective. The pressures of the aggressor-defendant, the lack of a support from the state, of specialized free assistance determined the victim to call off the action.

The study "*Protecting women against violence*" published in 2007 under the auspice of the Council of Europe by two teachers from the German University of Osnabruck[27] determined

---

[24] V. Dongoroz, I. Fodor, S. Kahane, N. Iliescu, I. Oancea, C. Bulai, R. Stănoiu, V. Roşca, *Explicaţii teoretice ale Codului penal român ...*, op. cit., pp.859-861.

[25] Former Art 1 Para 2 of the Law No 217/2003 stated as forms of domestic violence the following types of offences: Art 175 – first degree murder, Art 176 – particularly serious murder, Art 179 – determining or facilitating suicide, Art 180 – hitting or other forms of violence, Art 181 – bodily harm, Art 182 – serious bodily harm, Art 183 – hitting or injury causing death, Art 189 – illegal deprivation of freedom, Art 190 – slavery, Art 191 – subjection to forced or obligatory labor, Art 193 – threat, Art 194 – blackmail, Art 197 – rape, Art 198 – sexual intercourse with a minor, Art 202 [*Art 205 – insult and Art 206 – slander – abrogated*], Art 211 – robbery, Art 305 – desertion of family, Art 306 – ill treatment applied to minors, Art 307 – non-abidance by measures for child custody, Art 309 - venereal contamination and transmission of the acquired immune deficiency syndrome (AIDS), Art 314 - jeopardizing a person unable to look after him/herself, Art 315 – leaving persons helpless, Art 316 – leaving persons helpless by failure to notify and Art 318 - preventing the freedom of the cults.

[26] The case was trialed by the Târgovişte First Instance Court, File No 7873/315/2012 and the appeal was trialed by the Dâmboviţa Tribunal.

[27] *Protecting women against violence – Analytical study on the effective implementation of Recommendation Rec (2002)5 on the protection of women against violence in Council of Europe member States,* study published in 2007 on the Council of Europe website http://www.coe.int//equality/, p.21.

immediate measures, in the so called "golden hours" after the conflict started. But it is necessary that the police are empowered to act, even in the absence of a court decision (for instance, separating the aggressor from the victim, evacuating him from the common house or supporting the victim in finding a shelter which provides psychical counseling). This study offers as a positive example the Austrian situation, which by a law in 2007 incremented the police powers, its actions being independent from the victim's consent, being able to issue a restraining order for maximum 10 days, the police managing the situation for the first three days. Based on the new law, the aggressor must hand over the police the keys from the common residence, and if he is caught violating the restraining order (which assumes his evacuation from the common residence) shall be punished by fine or can be arrested. If the victim allowed him to enter the common residence, she as well can be fined.

5. Despite the fact that Romania informs in some European reports[28] that it has ensured the training of magistrates, policemen, media personnel and social assistants on the phenomenon of domestic violence, in fact just a small number of magistrates enjoyed such training, and the next two categories did not. Regarding the training of magistrates, from our knowledge, it was a local project concluded in 2007, resulted from the cooperation of the American Bar Association with the Ministry of Labor, Social Protection and Family (with its previous name), together with other Romanian partners, which involved as a working group only two judges, two attorneys, one prosecutor and one representative from the National Agency for Family Protection, National Coalition for Domestic Violence and the Ministry of Justice and whose activity included complex seminars in Alba Iulia, Braşov, Bucharest, Craiova, Iaşi, Ploieşti and Timişoara. The trainers in the program were three judges from the Courts of Appeal of Bucharest, Braşov, Iaşi and a prosecutor from the Iaşi Territorial Office of the Directorate for Investigating Organized Crime and Terrorism[29]. But even so, there still are many professional categories with no training in this area such as: attorneys, medical staff involved in helping the victims, psychologists, teachers in schools, high-schools or universities. Until today in Romania there is not a master degree program dedicated to this subject, and the media, written or audio-video, has not promoted a commercial or a message informing about the dangers, effects and cases of domestic violence, just limited themselves in presenting news, unaccompanied by necessary legal comments. Regarding the police, they still consider the issue of domestic violence a private one, the simple draft of a criminal complaint solving the case from their perspective. Though the Criminal Code states their direct involvement, but just in cases of physical violence[30], in fact it is expected the "alarm signal" triggered by the victim, which is very rare, or just in extreme cases, when nothing can be done (as the case of the "*Perla*" Hairdresser in Bucharest).

6. From the medical staff's perspective, even though they provide immediate medical care for more serious cases for the victims of domestic violence, without discrimination or priority, they are not required to report milder cases (where the victim can file a prior complaint) to the police, social assistants or shelter units to take the victim and offer her specialized assistance, according to her case.

When medics face psychological violence the situation is vaguer, because without a qualification in this area, these cases are treated as usual, and the results are a partial efficiency and the waste of precious time waiting for the problem to be solved. In the case above mentioned, the victim, who requested a protection order against her husband, has been previously treated twice in psychiatry, the doctor recommending "*family support*" for her emotional state, knowing the fact that

[28] Ibid., Annex of the Table No 16, p.78.

[29] See the Final Report of the Project Domestic Violence in Romania: the law, the court system – American Bar Association, Central European and Eurasian Law Initiative and USAID.

[30] We are talking about the offences stated by Art 180 Para 1^1, 2^1 and Art 181 Para 1^1 of the Criminal Code, which state the initiation of the criminal proceedings ex officio, not just by the lodging of a prior complaint from the victim.

her psychic disorder was caused by relationship with her husband. The question was from where should the victim had family support, as long as the relationship with her parents was tensed, she rarely saw her brother to whom she sometimes talked about her family situation, she only had a close friend, and the conditions of her working place did not allowed to talk about her family situation? Only her children would have been a real support in this case, but the children who stayed with the husband started with his "help" to detach themselves from their mother unwilling for a relationship with her.

Thus, even though every possible professional category involved in this type of cases – medics, nurses, social assistants, police, magistrates, attorneys – can act as good professionals in their activity, the lack of coordination between these institutions determining the lack of efficiency in these cases.

7. From a procedural perspective, in the analyzed case in appeal was raised the issue of the mandatory presence of the defendant and of the plaintiff. In our standpoint, from the correlative interpretation of Art 27 Para 3 and 4 with Art 30 of the Law No 217/2003 amended, legal assistance is mandatory for the defendant only in first instance tribunal, not in appeal, and for the victim the law states the principle of legal assistance. The provisions of the law are interpretable regarding the situation of the defendant, this is why we consider that a clear and general statement – where Art 27 refers to first instance trial, and Art 30 to appeal – would be welcomed. In addition, as shown before, if the victim waved her defender, because she wanted to cease the litigation and filed a motion for withdraw, the appeal court ensured mandatory legal assistance and registering the motion for withdraw established the judicial expenses to be paid by the victim, though Art 6 Para 1 Point e) of the Law No 217/2003 states the principle of free legal assistance.

8. Another lack in the law is detailing the mean of allowing and administrating the evidences. The law should expressly state the possibility for the court to admit the interrogation of the parties or witnesses because in the lack of such a provision Art 189 of the former Criminal Procedure Code or Art 315 of the present Criminal Procedure Code is applicable. Due to the nature of the case often such cases are known first in family and sometimes by different friends of the parties. Also, regarding management of such cases the law should state the possibility of hearing the witnesses earlier than a week, in court in order to ensure both the celerity and continuity of the trial.

9. In procedural terms, another inconsistency with the existing legislation is found in the case of admitting the request for protection order, simultaneously with the file for divorce, very possible in these cases. Art 614 of the former Civil Procedure Code, still applicable for cases filed before 15 February 2013, the obligation of the victim to be present in first instance hearings could cause problems in respecting the protection order (because it states the mandatory presence of both parties in first instance hearings). The new provisions of Art 920 mostly reiterate Art 614 and state the representation by attorney without a special order in the four cases above mentioned (imprisonment, a serious illness, placing the plaintiff under interdiction, residing abroad), but does not entirely solve the special case stated by the special legislation on domestic violence. In the absence of an express text, we consider helpful Art 921 of the new Civil Procedure Code stating that the unjustified absence of the plaintiff, in first instance court, correlated with the presence of the defendant, can lead to the rejection of the file for divorce as untenable. Therefore, if the plaintiff (man or woman) can prove that his/her absence is justified by the protection order, the court can continue the hearings in his/her absence, only by legal representative.

10. Ultimately, but not less important, it must be mentioned that in May 2011, in Istanbul, the Council of Europe drafted and subjected for approval and ratification by the Member States a Convention on preventing and combating violence against women and domestic violence. Until today, Romania has not signed or ratified this Convention. But, in the case of a hypothetic ratification, its provisions may bring new legislative modifications, especially if our country has no reserves, though in some cases, would be grounded. The analysis of the compatibility between the actual legislation and the Istanbul Convention will be the subject of a future study.

All these observations have an exhaustive feature. The practice shall prove the logic of our arguments and the need to adopt the proposed improvements, but also the existence of other possible irregularities or misinterpretations of the current legislation.

References

I. Treaties and monographs

- Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală*, Universul Juridic Publishing-House, Bucharest, 2012.
- V. Dongoroz, I. Fodor, S. Kahane, N. Iliescu, I. Oancea, C. Bulai, R. Stănoiu, V. Roşca, *Explicaţii teoretice ale Codului penal român. Partea specială, vol. IV*, 2nd Edition, Romanian Academy Publishing-House and All Beck Publishing-House, Bucharest, 2003.

II. Studies

- *Cercetarea Naţională privind violenţa în familie şi la locul de muncă*, presented on the Partnership for Equality Center, published by the IMAS Marketing and Polls.
- Ortansa Brezeanu, Aura Constantinescu, *Violenţa domestică. Reflecţii*, in the Romanian Penal Law Review, No 2/2007.
- *Protecting women against violence – Analytical study on the effective implementation of Recommendation Rec (2002)5 on the protection of women against violence* in Council of Europe member States, published in 2007.
- Final Report of the Project *Domestic Violence in Romania: the law, the court system* – American Bar Association, Central European and Eurasian Law Initiative and USAID.

III. Official websites

- Council of Europe official website: https://wcd.coe.int/ViewDoc.jsp?id=280915&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.
- Romanian Ministry of Labor, Family and Social Protection official website: http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Buletin%20statistic/2009/protectiafamiliei2009.pdf .

IV. Legislation used

- In force Romanian Criminal Code amended.
- Romanian Constitution, revised in 2003.
- Law No 217/2003 amended and republished.
- Law No 25/2012 for amending and supplementing Law no. 217/2003 on prevention and control of family violence published in the Official Gazette No. 165 of March 13, 2012.
- The new Civil Procedure Code.
- The former Civil Procedure Code.

TYPOLOGY OF ROMANIAN CRIMINAL TRIAL. REALITIES AND TRENDS

ANDREI ZARAFIU[*]

Abstract
The New Criminal Procedure Act that will soon become effective will also determine a transformation of the position and of the rights of the people involved in legal relations that are specific to the criminal trial. This study is meant to identify the main characteristics of the current criminal trials, as seen in the Romanian legal system. The lengthy process through which Romania became a full-rights member of the European Union caused a radical transformation of the existing criminal trial and it shifted it towards the European model. Identifying the essential elements of the Romanian criminal trial model allows us to frame it in a pattern that will determine the nature of the relations between state and citizen. Last but not least, the study tries to identify the current disruptions, in view of offering effective and precise solutions for overcoming the problems that may surface during the legislative process.

Keywords*: criminal trial model, system, features, elements*

Introduction

Unlike the private lawsuit, the criminal trial has its own legal nature and specific particularities and nature of its own, entailed by the importance of legal relationships it implies.

Currently, the trial model that circumscribes the Romanian criminal trial, which is on the verge of a radical change, may be classified in a certain general typology.

Establishing the correct legal nature and identifying the specific particularities allows the orientation of the trial type towards the European model.

At the same time, this operation brings forward serious advantages as well, designed to identify any procedural obstacles but also to propose practical and useful solutions to overcome them.

The core institution of the criminal procedure or criminal procedural law is undoubtedly the criminal trial. Beyond the theoretical implications involved in identifying the technical semantic scope of that concept, the practical, applied dimension of the institution is the having the uttermost relevance in reality.

Following an intensive use at the conceptual level, the term risks losing its identity as a concept and being confused with the subject (content) on which it relates.

Both repair and repression are required as a result of the imbalance in the legal order caused by committing an offense.

Discovering crimes, identifying and catching the perpetrators, gathering and administrating evidence, and criminal liability constitute a complex activity, carried out by specialized state bodies, called *criminal trial.*[1]

Therefore, a lawsuit filed by a company lies between the crime ascertained and the punishment, when the rule of law has been violated, against the offender, in order to enforce a judicial punishment provided by law.[2]

The criminal trial has also been defined as the activity required by law, carried out by competent bodies, with the participation of the parties and other individuals, aimed at ascertaining, timely and completely, the facts that constitute the offense, so that any individual having committed

[*] Lecturer, PhD, Faculty of Law, University of Bucharest (andrei.zarafiu@mnpartners.ro).
[1] *A. Crişu,* Drept procesual penal, Ediţia a 3 a, revizuită şi actualizată, Ed. Hamangiu, Bucureşti, 2011, p. 1.
[2] *G. Stefani, G. Levasseur, B. Bouloc,* Procedure penale, 16[e] ed, Dalloz, Paris, 1996, p. 1.

an offense would be punished according to its guilt, and no innocent person would be held criminally liable.[3]

Furthermore, criminal trial has been defined as the activity carried out in a criminal case by the judicial bodies, with the participation of the parties and other individuals, as holders of rights and obligations, aimed at ascertaining, timely and completely, the crimes and criminal liability of those who have committed them, so as thereby to ensure the rule of law and protect the rights and lawful interests of individuals.[4]

All these definitions revolve around the essential elements of the criminal trial, setting out its specific features as well.

These basic elements are relevant for our analysis to the content as a whole, systemically creating a certain pattern. Over time, during the evolution of the criminal trial, three types or systems of criminal trial are known, different in their structure by development and basic rules. These are: *the adversarial trial, the inquisitorial trial and the mixed trial.*[5]

The oldest type of trial, *the adversarial trial*, assumed the existence of a prosecutor to make accusations against the person considered guilty. Originally, the victim of the crime could file the charges, and subsequently, especially for much serious crimes, other persons (accusers) could make charges.[6]

The criminal trial did not take place in the absence of the accusation made by the prosecutor, without the possibility of referral ex officio of those who settled the dispute.

Initially, those who made up the court were citizens of the community, and later on, after many years, professional judges performed the judgment. The trial within the adversarial court system is characterized by public debate, orality, adversarial character; the accuser is obligated to prove its accusation and the defendant its innocence. The judge had a limited role, without being able to intervene or act for knowledge and other situations, circumstances than those indicated by the parties, intervening in the trial only to ensure the compliance of judgment rules.[7]

The system has been criticized on the grounds that it offers the accused too many guarantees and too few to the prosecution, and does not create sufficient guarantees for social protection, many of the crimes not being brought to court due to lack of accusation.

The *inquisitorial* system emerged along with the creation of the state as authoritarian body, circumstances in which the interests of state power are much present against the individual ones.

In this context, it was considered that crimes affect both the state and the individual, which is why the state has undertaken to organize the procedural frameworks for the guilty individual to be punished. The intimation could be made both by the victim and ex officio, by the state representatives. Therefore, the support necessary for triggering the procedures for criminal liability of offenders is represented by the overall social interest, justifying state intervention in organizing criminal repression; the final enforcement of the punishment is perceived as the public reaction to the crimes committed by different individuals.[8]

Referral to the court in this system falls on an authorized person with the status of magistrate. Moreover, the designation of the trial type (inquisitorial) is given by the investigation procedure (*per inquisitionem*) used by these people.[9] Subsequently, the Public Ministry performs these tasks. Courts were composed of professional judges, appointed by the government, who were able to intervene in the trial, regardless of the position of the parties involved. Unlike the adversarial system, the trial was conducted in secret, written and non-contradictory (the accused was not allowed to argue the merits

[3] *I. Neagu,* Tratat de procedură penală, Partea generală, Ed. Universul Juridic, Bucureşti, 2008, p. 19.
[4] *N. Volonciu,* Tratat de procedură penală, Partea generalkă, vol.I, ed.Paideia 1997, p. 13.
[5] *Gr. Theodoru,* Drept procesual penal. Partea generală, Ed.Fundaţiei Chemarea, 1996, p. 10.
[6] *A. Crişu,* op.cit., p. 8.
[7] *J.C. Soyer,* Droit penal et procedure penale, 1er ed., L.G.D.J., Paris, 1994, p. 255.
[8] *A. Crişu,* op.cit.p.8
[9] *J.C. Soyer,* op.cit.p. 254-255.

of the evidence against it, and it could only appeal in writing), and the system of evidence allowed consisted of evidence whose value was predetermined by law.

From a historical point of view, this system originates from the canon law enforceable in the ecclesiastical courts, to be adopted subsequently by royal courts, and became in time the system of common law in many countries.[10]

The *mixed* criminal trial system is a combination of the two systems above, created by taking some features from the inquisitorial system consisting of the pre-trial phase, and other specific judgment-related features, common for the adversarial system.

However, it is different from the inquisitorial system, as specialized bodies carry on their activity in the preliminary phase (prosecutors attached to the prosecutors' offices, which form the Public Ministry) and conduct investigations, deciding in the end if the court needs to be intimated. There is a separation of the trial functions (research, prosecution, judgment). Hearings are public, taking place in oral and adversarial conditions, and the courts are composed of judges, and in some cases, other people without legal training (jurors), who decide in free evaluation of evidence, according to their intimate belief.[11]

This crime settlement system was originally present in France, through an interim legislation, and subsequently, knew its final consecration through the Criminal Training Code in 1808; later on, the model was adopted by most European countries, including the Romanian criminal procedure.

Which is the current typology of the criminal trial system in Romania?

Based on the qualifications set out above, we can consider the Romanian criminal trial model as principally being, in terms of guarantees and rights defended, a European model,[12] as it includes features and relies on principles arising from the European Convention on Human Rights. In the absence of European criminal procedural legislation, directly enforceable in the Member States, the European model is inspired by the binding case law of the European Court.

From a systemic point of view, the Romanian model has also an original character that corresponds to the mixed criminal trial system type, featuring elements such as inquisitorial and adversarial type. Composite features of this mixed type interfere, are not legally stable, meaning that they oscillate between adversarial and inquisitorial nature. The essence of such a system, however, is the existence of at least two phases: an instructive one (investigation) with predominantly inquisitorial elements, and an adversarial one (trial) with predominantly adversarial elements.

We can identify the following adversarial type elements in the Romanian criminal trial model:

- the existence during the trial procedure of a *super partes* judge, different from the rights and freedoms judge and the preliminary chamber judge;
- the formal legality between the parties (only during the trial phase);
- immediacy, adversarial character and oral debates;
- the evidence are assembled and administered contradictorily between the prosecution and the defense;
- fair trial;
- the regulation of the presumption of innocence;
- the exclusive jurisdiction of the judge, even during criminal prosecution phase in respect of the *status libertatis* of the defendant

The inquisitorial type elements concern:

- the prosecutor's status of "*dominus*" during the prosecution phase, and the supereminence of the prosecution against the defence at this stage;
- the judge's interference in searching and assembling the evidence;

---

[10] *Idem, p. 254.*

[11] *A. Crişu,* op.cit.p. 9.

[12] *M. Delmas - Marty,* Vers un modèle européen de procès penal, în Culegerea Procès pénal et droits de l'homme**,** op.cit., p. 291-303.

- limitations on the procedural rights of the defense in the criminal prosecution phase;
- pre-assembling the evidence, mainly in written and under secrecy, to be used by the judge hearing the debates;
- accepting the possibility of temporary detention as a form of compromise of the presumption of innocence

To summarize, without attempting a detailed analysis of the Romanian criminal trial model, we can acknowledge that although it corresponds to the mixed type, its character is balanced.

Thus, the elements defining the phases of a system are sometimes found in the other system. For example, we have shown that the existence of a preliminary phase, of investigation, with predominantly secret character and lacking contradictoriality is specific to the inquisitorial system. However, some stages of this phase comprise adversarial aspects, primarily characterized by *contradictoriality*. In Romanian criminal trial, contradictory aspects are found in the phase lacking publicity, and contradictoriality during the prosecution phase, [13] in proceedings concerning the settlement of the preventive arrest of the accused or the defendant (art. 146 and art.149^1 CPC), when the judge rules, after hearing the prosecutor and the accused or the defendant, with the possibility for the latter to consult the file which was held secret up to that moment.

Contradictoriality is also encountered in the procedure ordering an expertise in the criminal prosecution phase when, in consideration of the provisions of art. 120 of the CPC, the prosecution body sets a term when the expert and the parties are summoned, to let them know the objectives of the expertise; these individuals have the right to comment and ask the amendment or modification of the questions.

Furthermore, during trial, specific to the adversarial system, characterized by publicity and contradictoriality, inquisitorial type aspects are present in the form of secret and unilateral procedures. Such a procedure involves *changing the trial date* governed by the provisions of art.293 paragraph 3^1 CPC.

Some comments on changing the trial date are necessary.

First, regarding the scope of the institution, the changing of the trial date was expressly included in the trial general provisions (art. 287, 312), which constitute the common regulatory framework for conducting any trial, regardless of its level or type (in the first instance, in ordinary and extraordinary ways of attack).

Therefore, the changing of the trial date can occur in any activity of judicial nature covering the trial (settlement on the merits) of a criminal case after conferring, under the law, a panel of judges.

Per a contrario, changing the trial date time is an impermissible procedure within the other jurisdictional activities which have as object the settlement of claims, complaints or incidents of any such litigation, and do not judge on the merits.

As many of these activities involve a sequence of trial dates (solving the demands on interrupting the execution of sentences, appeals to enforcement, rehabilitation demands etc.) the enforcement by analogy of the institution in these matters would be useful to overcome procedural obstacles.

As for the general terms of changing the trial date, this occurs primarily ex officio or at the request of the parties.

Whereas it is not a party in the criminal trial, the prosecutor does not receive legal standing to that effect, so that its request must be dismissed as inadmissible.

The changing of the trial date may relate either to the first term or to the term taken cognizance of.

---

[13] *B. Micu,* Drept procesual penal. Partea Specială, Ed. Hamangiu, Bucureşti, 2010, p. 10-13.

Even if the law does not expressly provide it, I appreciate that changing the trial date may refer to any trial date whether it is received in full knowledge or not, as long as the obligation of summoning the parties on the new trial date was set up.

The only condition is that the changing of the trial date comply with the principle of continuity of the panel.

The grounds for changing the trial date are the impossibility of conducting the judgment, for objective reasons, on the initial term assigned or expediency resolution of the case.

Although following the vesting the court carries out its activity and fulfills its tasks in a panel under the law, within the legal department, the legal procedure of changing the trial date is conducted by graceful appeal.

In this respect, the law provides that the changing of the trial date is ruled by judge resolution in the counsel camera and without summoning the parties.

It is not clear whether if another judge of a panel of several judges aside the president could rule the changeover resolution.

In any case, if not a member of the panel hearing the proceedings, another judge may not rule the changeover, regardless of its administrative position (court or department president).

Even though the trial date was taken cognizance of, the parties shall be mandatorily and immediately summoned for new trial date.

The resolution to change the trial date hearing is not a legal solution, it does not take the form of a judgment, needs not to be reasoned (apart from indicating the grounds that generated the measure) and cannot be appealed either separately or with the merits.

Returning to the subject of this study, I consider that it is necessary to include a brief overview of future criminal trial model brought by the new Criminal Procedure Code of Romania.

After the adoption of the new Criminal Code of Romania [14], the issue of a new Criminal Procedure Code is no longer a matter of political choice but a matter of urgent legal fulfillment of a legal need.

In order to understand this assessment it is sufficient to invoke the organic, indissoluble connection between the substantive criminal law and procedural criminal law, regarded both as branches of law and as legal sciences.

This connection was pictured by the illustrious Romanist T. Mommsen who said, in the nineteenth century, that criminal law without criminal procedure is like a handle without knife, and criminal procedure without criminal law is like a knife without a handle.[15] The same author considered that separating legal rules from their enforcement, pursuant to the usual formula of law and procedure, generally scientifically regrettable, is not at all convenient for the Roman law and it is, at least in part, responsible for legal weakness of this matter.[16] Moreover, great authors [17] considered criminal procedure as far more important than prohibition and sanction (substantive criminal law).

The close connection between the criminal law and criminal procedural law is particularly highlighted by the correlation between the criminal law legal relationship and the legal criminal procedure legal relationship, given that the rights and obligations of the subjects within the criminal relationship is made only through the criminal procedure relationship.[18]

---

[14] Romania's new Criminal Code was adopted by Law 286/2009 and will become effective on a subsequent date to be set out in the law for its implementation.

[15] *T. Mommsen,* Droit pénal des Romains, T.I., pag. XIV din prefaţă, apud I. Tanoviceanu, Curs de Procedură Penală română. Atelierelele grafice Socec & Cp, Societate anonimă, Bucureşti, 1913, pag. IV din prefaţă.

[16] *T. Mommsen,* op. cit., p. 6, în acelaşi autor, pag. V din prefaţă.

[17] *F. Carrara,* Programma del corso di diritto criminale, 8-va edizione, Firenze, 1897, Sect. a III-a, T.II, p. 198 în acelaşi autor, pag. III din prefaţă.

[18] *I. Neagu,* op. cit., Partea generală, p. 34.

In this context, the construction and enforcement of the new substantive rules will be essentially conditioned by the viability of procedural rules.

In the explanatory memorandum of the draft of Code of Criminal Procedure (the form sent to the Parliament) the social and legal framework that determined the need for this normative act is illustrated.

Thus, the realities of current legal domain revealed a lack of expediency in conducting criminal trials, the mistrust of litigants in social justice and the significant human and material costs, translated into higher consumption of time and financial resources. All these aspects have led to the establishment of a climate lacking confidence in the effectiveness of the criminal justice ruling.

The main issues facing the criminal justice system are related to overloading current prosecution offices and courts of justice, the excessive duration of proceedings, unjustified tergiversation of cases and undue delay in settling cases on procedural grounds.

Among these, the aspects relating on the preventive custody, duration of proceedings, assigning competences and evidence in criminal matters were the subject of several cases before the European Court of Human Rights, to which Romania is a party. That being so, the need to eliminate the deficiencies that led to the repeated conviction of Romania by the European Court of Human Rights became obvious.

The current procedural system governed by the Code of Criminal Procedure, subject to frequent legislative intervention on various institutions, led to inconsistent enforcement and interpretation of the criminal procedure law. Therefore, the need to create the appropriate framework for the High Court of Cassation and Justice to carry out its role in the interpretation and application of the criminal procedure law is obvious.

Considering the shortcomings facing criminal procedural system, the necessity of thinking of a modern system, responsive to the imperatives of justice adapted to social expectations and enhancing the quality of the public service has emerged.

This being said, a legislative intervention is required, aiming at reducing the duration of trials and simplifying criminal proceedings by introducing new institutions, such as plea bargain, making the current evidence or evidence procedures consistent with the European standards thereon, reducing levels of jurisdiction, and regulating the appeal in cassation, as extraordinary way of appeal.

In this context, it appears imperative to adopt the new Criminal Procedure Code to ensure the creation of a uniform national jurisprudence, with observance of the highest international standards of criminal procedure, namely the European Court of Human Rights standards.

The draft of the new Criminal Procedure Code essentially aims at creating a modern legal framework in criminal procedure, fully responsive to the imperatives of running a modern justice adapted to social expectations and the need to increase the quality of this public service.

The provisions of the new Code of Criminal Procedure draft are designed to meet some current requirements as well as to speed up the duration of criminal proceedings, simplifying them and creating jurisprudence in line with the European Court of Human Rights.

Equally, the project aims to meet the requirements of predictability of legal proceedings arising from the European Convention on Human Rights and Fundamental Freedoms and therefore of the ones stated in the European Court of Human Rights jurisprudence.

The Government Decision 829/2007, published in the Official Gazette of Romania no. 556 of 14 August 2007, Part I, approved the preliminary theses of the Code of Criminal Procedure draft.

As noted in this document, which was the basis for the draft, it was not intended that the new Criminal Procedure Code contain original solutions at all costs, as compared with the existing solutions which have proven to be viable in practice, or whose use is a habit to practice, but to properly modify all the solutions that have become obsolete or have revealed a number of anomalies in practice, and introduce new solutions based on comparative experiences or targeting positive or favorable effects expected, all following the study of the criminal law doctrine of the internal and European systems.

Therefore, the draft of the new Criminal Procedure Code preserves its predominantly continental Europe, but as a novelty, it introduces many adversarial elements, properly tailored to our own legal system.

Thus, although the goal is to preserve all viable solutions in the current Criminal Procedure Code, a number of new solutions are introduced, which essentially focus on enabling a fast and efficient decision-making process in a criminal case, giving in full respect of fundamental rights and freedoms of all subjects of criminal proceedings.

Objectives pursued by the draft of the new Criminal Procedure Code are the following:

1. creating a framework in which the criminal trial is faster and more efficiently, thus significantly less expensive;

2. uniform protection of human rights and freedoms guaranteed by the Constitution and international legal instruments;

3. conceptual harmonization with the provisions of the new Criminal Code draft, with special attention being paid to the new definition of the act which constitutes an offense;

4. appropriate regulation of our country's international obligations regarding the normative acts of the procedural criminal law;

5. establishing a proper balance between the requirements for effective criminal proceedings, protection of basic procedural rights, and fundamental human rights of the participants in the criminal trial and uniform observance of the principles concerning the fair conduct of the criminal trial.

Analyzing the contents of the desiderata declaratively announced in this explanatory memorandum, but also a general and particular legislative framework to materialize the judicial activity, we may try to outline the typology (in systemic terms) of the future Romanian criminal trial model.

To begin with, it must be emphasized the observation concerning the model of inspiration for the future criminal procedural legislation. In this regard, the authors of the Code draft have abandoned the traditional Romanian normalization approach, preferring, in terms of the model of inspiration, the Italian system against the French one.[19]

This preference for the Italian model is expressively illustrated by regulating new procedural institutions, which do not exist in the current regulatory framework, and especially in the matter of individual liberty in criminal proceedings.[20]

In this regard, we can recall the introduction, along with the classical principles category, of new fundamental principles, amongst which one will produce major changes in the conduct of criminal justice, namely the principle of separation of judicial functions.

This principle declares and guarantees that four functions are exercised in the criminal trial: prosecution (by criminal investigators and prosecutors), ruling on the fundamental rights and freedoms during prosecution (by the judge of rights and freedoms), verification of the legality of prosecution or decision not to prosecute (by preliminary procedure chamber) and judgment (by the courts of justice).

Italian model also regulates the participants to a criminal trial, the institution to which the project makes several substantial changes compared to current regulation.

Thus, the judicial bodies, along with the courts and prosecution, include: the judge of rights and freedoms and the preliminary chamber judge, who will have specific responsibilities on human rights and freedoms of the suspect or defendant, respectively on verifying the legality of

[19] For French origins of ancient criminal procedure codes see *I. Tanoviceanu*, op. cit., Introducţiune, p. 1-14; *Gr. Theodoru,* op. cit., p. 64-65.

[20] In matters of individual freedom, a French-inspired institution is the provisional freedom, conceived as an alternative to preventive arrest.

administering evidence in the criminal prosecution phase and the legality of intimating the court by the prosecutor.

Furthermore, the parties in criminal trial have also been defined (the defendant, the civil party and civilly responsible party), with their rights and obligations. Along with parties, amongst the participants to a criminal trial are also the main procedural subjects (the suspect and the injured party) and other procedural subjects (the witness, the expert, the interpreter, the procedural agent, special ascertainment bodies etc.). Their specific rights and obligations are also highlighted.

The Italian model was chosen as inspiration in the matter of individual liberty. Thus, the absolute novelty for the Romanian criminal procedural law is the proposed settlement of a new preventive measure, namely the house arrest, pursuant to the Italian Code of Criminal Procedure, aiming, by entering this institution, at broadening opportunities for individualization of preventive measures in relation to the above-mentioned principles.

To ensure the observance of the eminently preventive character of the arrest ruled during a criminal trial in progress, the draft, inspired by the Italian Criminal Procedure Code, proposes the establishment of maximum limits of preventive arrest and the trial phase.

Considering the similarities between the criminal upcoming Romanian model and the Italian model, we may outline the typology of this model based on systemic findings made in this regard by the Italian doctrine.

Thus, the Italian model of criminal trial was described as being a mixed criminal trial type, of original character, that has vague similarities with the Anglo-Saxon type processes with prevailing adversarial elements.[21]

In conclusion, without attempting a detailed analysis of future Romanian criminal trial model, we may assert that although it corresponds to the mixed type, its character is primarily adversarial.

Conclusions

Based on the analysis presented, we may qualify the Romanian criminal trial as being a mixed type trial, with original character, featuring both inquisitorial type elements and adversarial type elements.

Systemically, the Romanian criminal trial model is primarily, from the point of view of defended safeguards and rights, a European model whereas it features characteristics and relies on principles arising from the European Convention on Human Rights.

In the absence of European criminal procedural legislation, directly enforceable in the Member States, the European model includes as source of inspiration the mandatory jurisprudence of the Strasbourg Court.

The Romanian criminal trial model also has an original character, its composite characters interfering, having no legal stability, meaning that it oscillates between the adversarial and inquisitorial nature.

References

- F. Carrara, Programma del corso di diritto criminale, 8-va edizione, Firenze, 1897, Sect. a III-a, T.II.
- A. Crişu, Drept procesual penal, Ediţia a 3 a, revizuită şi actualizată, Ed.Hamangiu, 2011.
- M. Delmas - Marty, Vers un modèle européen de procès penal, în Culegerea Procès pénal et droits de l'homme.
- M. Mercone, Diritto processuale penale, XI edizione, Edizione giuridiche Simone, Gruppo Editoriale Esselibri-Simone, Napoli, 2003.
- B. Micu, Drept procesual penal. Partea Specială, Ed.Hamangiu, Bucureşti, 2010.

[21] *M. Mercone,* Diritto processuale penale, XI edizione, Edizione giuridiche Simone, Gruppo Editoriale Esselibri-Simone, Napoli, 2003, p. 36-38.

- T. Mommsen, Droit pénal des Romains, T.I.
- I. Neagu, Tratat de procedură penală, Partea generală, Ed.Universul Juridic, Bucureşti, 2008.
- J.C. Soyer, Droit penal et procedure penale, 1er ed., L.G.D.J., Paris, 1994.
- G. Stefani, G. Levasseur, B. Bouloc, Procedure penale, 16e ed, Dalloz, Paris, 1996.
- I. Tanoviceanu, Curs de Procedură Penală română. Atelierelele grafice Socec & Cp, Societate anonimă, Bucureşti, 1913.
- Gr. Theodoru, Drept procesual penal.Partea general, Ed.Fundaţiei Chemarea, 1996.
- N. Volonciu, Tratat de procedură penală, Partea generală, vol.I, ed. Paideia 1997.

THE IMPORTANCE OF VENTURE CAPITAL

IRINA ANGHEL-ENESCU*

Abstract
Created in the United States of America, Venture Capital is an asset class which attracted recently the attention of the policy makers all over the world. But the concept is still not clearly defined and understood. This paper attempts at introducing in the concept, its characteristics, and reviewing some of the benefits Venture Capital investments can bring at both the macroeconomic level, by looking at the correlation with the economic growth, and at the microeconomic level, for the portfolio companies.

Keywords: *venture capital, growth, macro-economy, impact, value-added.*

I. Introduction

Venture capital is a term used intensely in the United States, where it was invented, and where it became an important part of the culture, one of the buzz-words widely used and less understood. The truth is though that the Venture Capital model really worked in the United States: venture capitalists provided financing and added value to start-ups, and in the process contributed significantly to transforming entrepreneurs into rock stars of the start-up world and the companies into world famous multi-billion dollar brands like Microsoft, Google, Apple, Intel, Cisco Systems, Sun Microsystems, Dell Computers, Federal Express, Genentech, Home Depot or Starbucks, to name just a few.

II. Terminological clarifications: What is Venture Capital in Europe vs. United States

The two main organizations dealing with the venture capital industry on the two sides of the Atlantic (European Venture Capital Association in Europe and National Venture Capital Association in the United States) seem to have different definitions in terms of the stages of investment and in terms of inclusion in the category of private equity, which creates more confusion for the rest of the world, which becomes more and more interested in this phenomenon.

For the purposes of this study we will rely on the definition provided by EVCA in its Glossary[1] and understand Venture Capital as being "Professional equity co-invested with the entrepreneur to fund an early-stage (seed and start-up) or expansion venture. Offsetting the high risk the investor takes is the expectation of higher than average return on the investment. Venture capital is a subset of private equity."[2] In the US, private equity is generally equated to buy-outs, referring to investments in later stage deals. In order to avoid terminological confusion, we represented the two approaches in the table below, and for the purposes of this paper the term private equity includes venture capital investments.

* Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University (irina.anghel.law@gmail.com).

[1] http://www.evca.eu/toolbox/glossary.aspx.

[2] For another definition see for example Lerner 2009 "Venture Capital represents independently managed dedicated pools of capital that focus on equity or equity linked investments in privately held, high growth companies."

EUROPE	Private Equity	
	Venture capital Seed, start-up, Expansion	Buy-outs
United States	Venture Capital Seed, start-up, Expansion	Private Equity (Buy-outs)

The venture capitalists pool together capital for investing in private companies from various private and institutional investors who allow the investment process to be delegated to fund managers with significant experience and proper incentives to screen, evaluate and select potential companies with expected high growth opportunities, companies that develop new products and technologies. After making the investment, the venture capitalists have a hands-on approach and through mentoring and monitoring they add value to the portfolio companies, in order to realize significant capital gains on disposing of the shares during the exit process.[3]

Venture Capital is actually an asset class represented by a medium to long term investment, with a significant element the element of risk, and generally venture capitalists are investing in a portfolio of companies expecting some of them to fail, but hoping that the returns on the successful ones will not only compensate for the write-offs, but also generate significant returns for the investors. Considering this risk element, it becomes clear from the beginning the importance of the expertise of the fund manager in screening and selecting companies, and then in adding value throughout the administration phase and later on sourcing best exit opportunities.

It is generally accepted that Venture Capital is the only alternative for some companies which: (i) cannot be financed otherwise (due to risky growth options plus information asymmetry between the bank and the entrepreneur) or (ii) are founded by entrepreneurs who realize need and appreciate the opportunity to team up with professionals to reach faster to the next level (we refer to those who acknowledge their need for external support with extensive knowledge of the industry and managerial expertise, support brought by the experienced Venture Capitalists).

The table below presents the main characteristics and challenges of the early-stage investments done by Venture Capitalists.

Start-up and early stage investment characteristics and associated risks (adapted from Eggerz 2009)
For the target companies • An interesting idea but generally no income, only uncertain costs; • Customers and competitors are vague; • The technology is commonly high and the due diligence very complex; • Pricing is very difficult;

[3] For a literature definition, see Brander, J., Du, Q. & Hellmann, T., 2010 saying that: "Venture Capitalists are financial intermediaries that seek out and invest in high-potential entrepreneurial ventures, predominantly in high-technology sectors, and that often provide managerial assistance to enterprises that they invest in."

- Generally there is an one person team with "vision"; Hands on involvement of the Venture Capitalists is critical;
- Significant illiquidity;

For the investors
- Research & monitoring costs/deal size ratio is high;
- Historically poor rates of return in Europe compared to the US;
- More investment is needed to spread fund risk;
- Smaller deal sizes so more investment needed and monitoring is more difficult;
- Long term investment horizon;
- Outright failure considerations.

III. Why Venture Capital?

Thomas Friedman was writing in his New York Times Op-Ed (Friedman 2009) that instead of spending the 20 billion on supporting the auto-making industry, the United States government should use the bailout money to give 1 million dollars to each of the top twenty Venture Capital firms in America to fund the best ideas that come their way. But if Venture Capital is so risky as we described above, and it requires so much time and such specials skills, why is it still regarded as the secret sauce by so many people, including more and more governments and local administrations all around the world? The simple answer is that Venture Capitalists bring money but also entrepreneurial know-how to the table, and by using their market savvyness they are screening and selecting ideas and companies, are making educated bets on the most promising ones and are pushing them towards success through hands-on co-management and use their contacts for expansion and exit.

In this section we will have a look at the macro-level effects, as well as the impact at the level of the portfolio companies.

The macro-level benefits

By looking at the history, at its peak, in the year 2000, US VC investing reached the level of 1.1% of the country's GDP, and today United States of America are still the global leader, with less than 0.2% of its GDP. However, the impact of this small percentage is absolutely astonishing: according to National Venture Capital Association (2009) the venture-backed companies have revenues of 2.9 trillion USD, representing 21% of the gross domestic product of the United States of America, and employ 12.1 million people, which represent 11% of the country's private sector employment. In Europe as well, even though Venture Capital investments account for a far smaller percentage of the gross domestic product (0.053% in 2008 – information obtained in a telephonic interview with Zornitsa Pavlova, former head of research at the European Venture Capital Association), the impact on job creation is significant. In the absence of more recent studies, it is worth quoting the figures from the EVCA (2005), according to which employment in venture backed companies in Europe grew by an average rate of 30.5% annually over the period 1997-2004, which is nearly forty times the annual growth rate of total employment in the EU 25 member states between 2000 and 2004 and 73% of the surveyed venture-backed companies increased the number of employees by more than 25% on average per year. The same study points to some interesting findings in terms of research and development, showing that venture-backed companies when surveyed spent on average €3.4m per year on research and development activities, their average research and development expenditure by employee being €50,500, which is six times more than the research and development expenditure per employee of the 500 companies in the EU 25 with the highest research and development spending at €8,500. Moreover, every third employee in those

venture-backed companies when surveyed worked in research and development with 13% of the employees holding a PhD or equivalent degree. So Venture Capital is not only creating jobs, but it is creating jobs for the best educated people, preventing the brain drain or even generating brain regain.

Another documented effect of Venture Capital is that it tends to promote innovation, as Brander, Du, & Hellmann 2010 conclude after reviewing extensively the literature. Venture Capitalists are steering portfolio companies' innovation strategy towards commercial success and recent studies show that Venture Capital investments improve the absorptive capacity, and have a significant positive effect on innovation itself.

In terms of economic growth, the theoretic model according to which an analysis of the European Venture Capital performed by Deutsche Bank Research reports that an increase in private-equity investments by 0.1% of GDP is associated statistically with an increase of real economic growth of 0.2 pp if the investments are done at the buyout stage, 0.4 pp at the venture-capital stage and 1 pp if investments are done at early-stages – other things being equal (Meyer, 2006). The results of the analysis underline the economic potential of Venture Capital backed entrepreneurship. If Germany's Venture Capital investments were to rise to the European average, economic growth could increase by ¼pp – statistically speaking. However, this would require Germany to more than double the size of its venture capital market from 0.056% of gross domestic product to 0.113% of gross domestic product without compromising on the quality of financing, which is quite unrealistic in the short run.

Impact at the micro level

Besides the overall macro-level impact that has been demonstrated for Venture Capital, it is interesting to look also at its micro-level impact, at how do venture capitalists support the companies in which they invest. And there are two main directions in which their support is focused: providing capital and adding value to the portfolio companies. Providing money for growth is of the essence of venture capital investment. So much so that many still believe that this is all Venture Capitalists do, and this belief has important negative consequences, both for the venture capital industry (which misses out on opportunities due to the fact that its full benefits are unknown) and for the entrepreneurs, who might be in for a big surprise if they expect to be left alone with the money after securing venture capital financing. The reasonable expectation would be for the venture capitalists to be quite involved in the way the money they injected and then the money produced will be spent. And even though at times these "intrusions" of the venture capitalists will be regarded as uncomfortable by the entrepreneur (who by definition is used to decide by himself/herself), it is accepted more and more that good venture capitalists add more value with their mentoring and monitoring than with the money they are contributing as investment. But the entrepreneurs, who psychologically tend to be rather the "I know it all"-type perceive the need of capital far more acute than the need of guidance and mentoring, so they seek the venture capitalists for financing their companies, hoping to minimize the interventions and the rights the venture capitalists will have post investment.

Providers of capital

Many start-ups fail for lack of financing, since the banks are not lending them money and they never make it out of the "valley of death". Start-ups have few tangible assets that could serve as collaterals for bank financing, and the banks do not have the relevant expertise to assess the ideas, or the risk profile required to invest in such promising but incipient ventures. Therefore the Venture Capitalists are supporting entrepreneurs to finance their businesses in exchange of equity in the company, allowing them not only to survive, but also to grow.

Adding value to the portfolio companies

Even if the banks would finance such start-ups, as debt holders the bankers have lower incentives to push for innovation, for taking risks, for a more aggressive business strategy[4], while Venture Capitalists do push for all these, due to their "diversification across portfolio" and "few home runs" strategy (Senor & Singer 2009). And for early-stage investments, the services provided by the Venture Capitalists, their expertise and networks are at least as important as the financing component.

The approach of the Venture Capitalists varies from company to company and also from fund to fund, their contribution ranging from providing business contacts and brand-equity to strategic advice and to, in some cases, even integrating themselves to the day to day operations of the portfolio company and getting involved at all levels.

In an attempt to capture the recipe used by private equity investors to increase the value of their portfolio companies, Gadiesh & MacArthur from Bain Capital identify "six lessons from private equity any company can use", as follows (Gadiesh & MacArthur, 2008):

Lessons from Private Equity any company can use

- Define full-potential – How high is up? Focusing on the right/critical issue
- Develop the blue-print - Who, What, When, Where and How? Emphasis on measurable actions, milestones;
- Accelerate performance;
- Harness talent;
- Make equity sweat – eliminating unproductive and underperforming capital;
- Foster a result oriented mind-set – and developing a repeatable formula, demand accountability.

Source: Based on Gadiesh & MacArthur, 2008 (adapted)

It is important to note that Venture Capitalists are not adding value only during the administration phase, but also during the pre-investment activity (the due-diligence exercise helps entrepreneurs learn a lot about what is important for managing their business and also helps them organize the operations better) and at exit (when the rubber stamp of the Venture Capitalists has significant weight).

Moreover, a review of the literature points to the Venture Capitalists as investors adding value by other means, such as:

- Decreasing substantially the required time to introduce an innovation to market (Da Rin Penas 2007), speeding up product commercialization (Helleman and Puri 2000) and strengthening companies commercialization strategy (Gans, Hsu, Stern 2002, HSU 2006);
- Adoption of HR policies (Helleman and Puri 2000)
- Timing market conditions (Gompert et al 2007);
- Providing certification (Megginson and Weiss 1991);
- Leveraging the network of relationships (Hochberg, Ljungqvist, Lu 2007);
- Promoting export behaviour (Lockett, Wright, Burrows, Scholes, Paton 2008)

Venture capitalists are company builders, who influence innovation as much as they influence professionalization and innovation strategies (Da Rin, Penas 2007), and they have an active role as

[4] This is why the author of this paper strongly believes that entrusting the venture capital operation of a group to the people who have banking experience is a recipe for disaster, as it has been proved in Thailand. The bankers have a completely different risk profile based on their expertise, and would not have the skills to steer the entrepreneur in the right direction.

mentors and monitors of inexperienced entrepreneurs shaping management teams and boards, and giving them more credibility (Lerner 2009).

Impact on innovation

For a long while the literature has confirmed that Venture Capital is essential for bringing innovations to the market. More recently, research has proved that Venture Capital does provide support to the build-up of absorptive capacity. An interesting finding comes from the comparison of the effect of private venture funding with that of public funds. Da Rin & Penas found that venture capitalists selectively push portfolio companies towards choosing innovation activities which result in the accumulation of absorptive capacity, and towards more permanent in-house research and development efforts. They found a clear difference between the role of (private) venture financing and public funding, as the latter relaxes financial constraints but does not provide any additional strategic guidance. This provides novel evidence on the special role of venture funding in driving companies towards successful innovation strategies. (Da Rin, Penas 2007)

VI. Conclusion

Venture Capital continues to be a fancy term, insufficiently understood. In this paper, we made an attempt at clarifying the concept, by reviewing its definitions on both sides of the Atlantic, and we focused then on analysing the impact at the macroeconomic level (economic growth, development of entrepreneurial ecosystems) and at micro level (how the companies are benefiting by receiving not only financing, but also other type of value added services from the Venture Capitalists, and also how Venture Capital is impact positively the innovation capacity). Considering our findings, which lead to the conclusion that Venture Capital is an asset class which can contribute significantly to development, further research should be dedicated to what prevents Venture Capital funds from generating the sought after effects in some parts of the world.

References

- Brander, J., Du, Q. & Hellmann, T., (2010) *The Effects of Government-Sponsored Venture Capital: International Evidence.*
- Da Rin, M, and Penas, M.F, (2007) *The Effect of Venture Capital on Innovation Strategies*. NBER Working Paper No. W13636. Available at SSRN: http://ssrn.com/abstract=1033761.
- Eggerz, S. J. A. (2009). *Early-Stage Venture Capital in Europe - The Case of Germany and Italy: The myth of supply side problems of funds* Saarbrucken, Germany: VDM Verlag Dr. Muller.
- EVCA, (2008). *Benchmarking European Tax and Legal Environments. Indicators of Tax and Legal Environments Favoring the Development of Private Equity and Venture Capital, and Entrepreneurship in Europe*. Brussels, Belgium.
- EVCA, (2005) *Employment contribution of Private equity and venture capital in Europe, Research paper* Brussels, Belgium.
- Friedman, *T* (2009) *Start Up the Risk Takers* The New York Times (21 February).
- Hellmann, T., & Manju, P (2004) T *On the Fundamental Role of Venture Capital*. Federal Reserve Bank of Atlanta Economical Review - Fourth Quarter.
- Gadiesh, O. & MacArthur, H., (2008). *Lessons from Private Equity Any Company Can Use (Memo to the CEO)*, MA: Harvard Business School Publishing.
- Gans, J. S., Hsu, D. H. & Stern, S., (2002) *When Does Start-Up Innovation Spur the Gale of Creative Destruction?* Rand Journal of Economics., volume number 33, issue number 4. Retrieved from: http://ideas.repec.org/a/rje/randje/v33y2002iwinterp571-586.html.
- Lerner, J., Sorensen, M., & Strömberg, P., (2009). *What Drives Private Equity Activity and Success Globally?*' in Globalization of Alternative Investments. Working Papers Volume 2.

- Lerner, J., (2009). *Boulevard of Broken Dreams: Why Public Efforts to Boost Entrepreneurship and Venture Capital Have Failed--and What to Do About It*, NJ: Princeton University Press.
- Lockett, A., Wright, M, Burrows, A., Scholes, L., Paton D., (2008) *The export intensity of venture capital backed companies* Published online: 2 April 2008_ Springer Science+Business Media, LLC.
- Meyer, T., (2006) *Private Equity - Spice for European Economies.* Journal of Financial Transformation, Vol. 18, pp. 61-69, 2006.
- Meyer, T., (2007) *The Public Sector's Role in the Promotion of Venture Capital Markets.*
- National Venture Capital Association (2009) *Venture Impact: The importance of Venture Capital-Backed Companies to the U.S.*
- Nijkamp, P., Zwetsloot, F. & Van der Wal, S., (2010). *Innovation and Growth Potentials of European Regions: A Meta-Multicriteria Analysis*. European Planning Studies, volume number 18, issue number 1. Retrieved from: http://www.informaworld.com/smpp/content~content=a920000327~db=all~jumptype=rss.
- Penas, M. F. & Da Rin, M. (2007) *The Effect of Venture Capital on Innovation Strategies* The National Bureau of Economic Research.
- Senor, D, & Singer, S. (2009). *Start-up Nation The Story of Israel's Economic Miracle*, NY: Grand Central Publishing.

THE PROHIBITION OF DISCRIMINATION OF ART. 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN MATTERS OF INHERITANCE AND AFILLIATION REGARDING THE PROVISIONS OF THE NEW CIVIL CODE

CARLA ALEXANDRA ANGHELESCU[*]
GABRIEL BOROI[**]

Abstract
Taking into consideration the provisions of the New Civil Code that has recently entered into force, the study focuses on the analysis of its provisions regarding matters of inheritance and affiliation in order to establish their compliance with the established case-law of the European Court of Human Rights in interpreting article 14 of the European Convention on Human Rights.

Key words: *Non-discrimination, inheritance, affiliation, European Court of Human Rigths, the New Civil Code.*

1. Introduction

The paper aims at establishing the rules stated out in the European Court of Human Rights' case-law regarding the application of the principle of non-discrimination in matters of inheritance and affiliation. After pointing out the principles set out by the Court, the study analyses the compliance of the provisions of the New Civil Code with the principle of non-discrimination as it was interpreted by the Court.

In this way, the study refers to both matters of inheritance and affiliation including by interpreting and applying the provisions of the New Civil Code to possible situations.

The universality of human rights recognition and necessarily requires the equal application to all individuals, all human beings are born free and equal in dignity and rights, proclaimed aspect of the first article of the Universal Declaration of Human Rights of 1948. This means that the rights and freedoms recognized all individuals without any discrimination, whatever its source, ie without any discrimination.

The non-discrimination principle is enshrined in virtually all treaties and international instruments for the protection of human rights. Article 2 par. 1 of the Universal Declaration states that everyone is entitled to all rights and all the freedoms it proclaims, without distinction of any kind, such as race, color, sex, language, religion, political or any other opinion, national or social origin to national, his wealth, birth or other status derives. This principle requires equal treatment of all before the law.

Article 14 of the European Convention provides that the exercise of all rights and freedoms that it recognizes them to be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national origin or social origin, association with a national minority, property, birth or other status.

The European Convention does not contain a general prohibition of discrimination, which should be considered, therefore, all the rights and freedoms recognized in national legal systems of the Contracting States, being covered separately in Protocol no. 12 Additional to the Convention

[*] PhD candidate at the Faculty of Law, "Nicolae Titulescu" University, Bucharest (anghelescu_carla@yahoo.com).
[**] Professor, PhD, The Faculty of Law, "Nicolae Titulescu" University of Bucharest (gboroi@gmail.com).

concerning the general prohibition of all forms of discrimination, adopted by the Council of Ministers of the Council of Europe on 26 June 2000 and entered into force on 1 April 2005[1].

As a legal right to non-discrimination laid down in art. 14 of the Convention is a substantial subjective right, which has an independent existence in the system of European protection of human rights and fundamental freedoms on which it shall establish, as it can be invoked only by reference to them, but it may appear as autonomous by that in a given situation, it is possible that he may be breached without notice and an infringement on which has been invoked. Evidence of discrimination, therefore, a violation of art. 14 of the Convention can be done but only in relation to other rights protected by the Convention[2].

2. The prohibition of discrimination of art. 14 of the European Convention on Human Rights in matters of adoption

The Court held that art. 14 of the Convention aims to prevent discrimination on the rights and freedoms which it guarantees, in cases where there are different ways to comply with its provisions. Notion, discrimination "within the meaning of the text, generally encompasses cases in which an individual or group of individuals is seen, without adequate justification, treated better than another, even if the Convention does not require that they it be given more favorable treatment.

The difference in treatment is discriminatory within the meaning of art. 14 of the Convention only when the state, introduced distinctions between analog and comparable situations without it is based on objective and reasonable justification.

As consistently held the European court if this text provides protection against any discrimination in the exercise of rights and freedoms which the Convention guarantees, any difference in treatment does not mean, automatically, its violation. For such a violation to occur, it must be established that persons placed in situations analogous or comparable terms, receive preferential treatment and that this distinction cannot find any objective or reasonable justification. In this regard, the Court held that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences between analogous or comparable situations are distinctions justify legal treatment[3].

The scope of this margin depends on the specific circumstances of each case, the fields and the context in question, as well as the presence or absence of a common legal system of the Contracting States in a given area may be a relevant factor in determining this margin.

The court also noted that European existence situations justify a different treatment of the same kind are to be assessed by reference to the purpose and the means used by the action taken in the light of the principles prevailing democratic INR. A distinction regarding treatment under the Convention right must not pursue a legitimate aim, art. 14 is violated when it is clear that there is a reasonable relationship of proportionality between the means employed and the aim pursued.

In matters of adoption, the Court applied this principle derived from case law domain consisting of equal rights for children born out of wedlock with one born in wedlock. Thus, in light of the case law of the European Court, when adopting a child, it acquires the same legal status at the child's biological adoptive parents, in all respects, including those relating to property rights derived from a difference of treatment will be justified only extremely well-founded reasons[4].

---

[1] Bîrsan, Corneliu, *Convenţia Europeană a drepturilor omului. Comentariu pe articole*, (Bucureşti: volume I, All Beck, 2005), 889-890.

[2] CEDO, case *Van Raalte c. Olandei*, 21.02.1997, par. 33, www.echr-coe.int.

[3] Chiriţă, Radu, *Convenţia europeană a drepturilor omului. Comentarii şi explicaţii*, *Second Edition*, (Bucureşti: CH Beck, 2008), 611.

[4] CEDO, case *Pla and Puncernau v. Andorra*, 13.07.2004, par. 61, www.echr-coe.int.

From this point of view, the Romanian legislation on the matter this principle governed both by the provisions of the Civil Code and the law on children's rights.

In this sense, art. 471 of the Civil Code regarding the relationship between the adopter and the adopted child establishes that the latter has to adoptive rights and duties which every person has towards its natural parents.

Applying this legal text by the courts must be made on non-discrimination. European court ruled in Case Pla and Puncernau v. Austria, that although the law in matters testamentary succession does not make any distinction between biological children and adopted child by it, the courts have interpreted the provisions of the will in question in achieving a difference in treatment to the detriment of the applicant, who had been adopted, although the testator expressly does not remove the inheritance.

In the light of the circumstances of the case, the Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized". In the present case, the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure, moreover), the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his or her family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.

On this occasion, the Court reiterated that the Convention is a dynamic text establishes Positive obligations of the Contracting States and a living instrument which must be interpreted in the light of current conditions, emphasizing the importance given today by the Council of Europe Member States the principle of equality between children born in wedlock and children born out of wedlock as regards their civil rights. Therefore, if the testamentary provisions of national courts were subject to interpretation, that interpretation could only be done in accordance with the social realities of the time of writing the act or the date of death of the author, the more that these two points passed a considerable period of time, in this case about 50 years. If the course of a long period during which social realities, economic and legal were subject to change, domestic courts cannot ignore these new realities in interpreting and determining the effects of a legal act.

The same remarks are applicable if the will, any interpretation of its provisions shall subsume the testator and will be made for the purposes of its use and without overlook the importance of interpreting testamentary clauses in a manner corresponding to both domestic law and the Convention, as interpreted in the Court[5].

Consequently, the effect is remarkable disappearance adoption by small and keeping only the adoption of the new Civil Code in full effect, the institution under which the adopted child and coming, so the adopter wedlock acquires the same rights as a child of the adopter marriage, including rights derived from inheritance. Also, the application of the European Court judgment in relation to the provisions of the Civil Code concerning the institution of adoption, it follows that the courts have an obligation to respect the principle of non-discrimination enshrined in art. 471 para. (1) and (3) of the New Civil Code and the art. 448 Civil Code on the purposes of interpretation of art. 14 the European Court's case-law.

[5] *idem*, par. 62.

3. The prohibition of discrimination of art. 14 of the European Convention on Human Rights in matters of inheritance

Non-discrimination issues in the application presented in succession in cases of differential treatment of children born out of wedlock whose legal situation was governed by legal rules that establishes a system distinct from the situation of children born out of wedlock, with the latter legal status under which enjoy certain rights that were conferred and child out of wedlock.

In this respect, a first judgment of the Court relevant matter is the one given in the Case Marckx v. Belgium[6] the affiliation to the mother of a child born out of wedlock could not be established on the basis of the birth, as was the case of the married mothers, but only after an explicit recognition by the mother or a judicial declaration of adoption, in which case the period between birth and the time to establish filiation parent, the child did not have any legal relationship with family his mother could not be any legatee of his own mother.

In this case, the Court first identified the existence of differential treatment between children born out of wedlock to the mother for whom parentage can be determined only after explicit recognition or admission of the action with this object, and children born in wedlock, to the mother whose daughter was proven by simple phrases in the act of birth.

The existence of a legitimate aim, the European Court held that supporting and encouraging the traditional family concept is such a purpose worthy of consideration, but subject to this end by means which undermine family interests deemed illegitimate, and the present case. The Court accepts that, when adopting the Convention in 1950, the existence of differences in inheritance between family, self and illegitimate could be regarded as permissible and acceptable to most European countries. However, bear in mind the quality of the Convention to be a living instrument which must be interpreted in the light of present social realities, the Court emphasizing legislative changes made by the majority of the Contracting States in this matter in order to comply with equality of the two categories of children, especially in recognizing the principle already established, arguing east mater semper.

In conclusion, the Court found no objective and reasonable justification of the existence of differential treatment on the determination of parentage to the mother of the child born out of wedlock and therefore held an infringement on art. 14 in relation to Art. 8 of the Convention.

Regarding economic ties between the child born out of wedlock and his mother, namely those arising from the succession, there was a difference in treatment between children born in wedlock and those born out of wedlock in that first had intended to acquire more fewer rights through testamentary succession than those in the second category.

And on this difference in treatment, the Court did not accept the validity of any reasonable justification, finding a violation of Article. 14 in relation to Article 8 of the Convention on the legal status of both the mother and the child born out of wedlock.

The legal provisions of the New Civil Code in this matter conform to the ruling stated by the European Court. Thus, on the establishment of parentage to the mother, art. 408 para. (1) Civil Code establishes that it arises from the fact of birth, being able to establish and by recognition or by court order, while art. 409 para. (1) Civil Code provides that parentage is proven by the document of birth registered in the civil register, as well as birth certificate issued on the basis thereof.

It should also be noted that, according to art. 448 Civil Code, the equality of rights of children refers to children born out of wedlock relationships both to parents and to their relatives, their legal case is identical to that of a child born in wedlock.

A similar situation is one that has been Mazurek v. France[7] case in which the estate of the deceased, the mother of two children, one born out of wedlock, was divided unequally between the two situations are analogous, under the provisions of the French Civil Code in force at the time.

---

[6] CEDO, case *Marckx v. Belgiei*, 13.06.1979, www.echr-coe.int.

[7] CEDO, case *Mazurek v. France*, 01.02.2000, www.echr-coe.int.

Regarding the legal provisions governing the devolution, the Court concludes that a different treatment of the two brothers' inheritance rights, the difference could not be based solely on the presence of an objective and reasonable justification, that is, pursue a legitimate aim and involving have a relationship of proportionality between the means employed and the aim pursued.

In this sense, the Convention reaffirmed the position of being a living instrument subject to interpretation in the light of contemporary social relations and increased attention lately by contracting states equality between children born in wedlock and those born out of wedlock, including the adoption of the European Convention of 1975 that has this object and the Convention of Child Rights in 1989 within the United Nations that explicitly enshrines the principle of non-discrimination between the two groups on this criterion.

Thus, the Court held, finally, the possibility (however small) of the will of the state to protect the traditional family concept as being a legitimate aim.

The relationship of proportionality between the means employed and the legitimate aim pursued, it was considered that a child born out of wedlock does not attributable to that fact and, therefore, that fact cannot be relevant and sufficient reasons for this lie with a legal succession rate lower than that set by the law for a child in marriage, for which the Court found a violation of art. 14 in relation to Article 1 of the Additional Protocol no. 1. Inheritance rights are considered in this case as the goods under the Convention and therefore attracting the applicability of the latter text the law.

It should be noted that the provisions of the Romanian Civil Code in matters of legitimate meets the established guidelines set out by the European Court in the abovementioned judgment, art. 975 para. (1) of the New Civil Code establishing the right of inheritance of descendants, ie the children of the deceased and their survivors straight up forever, without making any distinction as they come in late or outside marriage. Also, the application of the text is achieved through systematic interpretation, in addition to art. 448 of the New Civil Code expressly stipulating equal rights of children, referring to the two categories.

With regard to testamentary succession becomes interesting analysis of the European Court in Case Merger and Gros v. France[8] and by reference to the provisions of the New Civil Code which establishes special the legal portion of the estate of succession available to the surviving spouse.

In that case, the plaintiff, a child born out of wedlock, was as universal legatee of his father, along with his other four children, but which had the status of children in marriage, and widow of the deceased. Under the statutory provisions of the French Civil Code on inheritance reserve and the possibility of the deceased to dispose of his assets through donations for the heirs, the applicant was afforded a smaller share of inheritance rights that could be acquired by testamentary because act as a child out of wedlock.

In that case, the Court concludes that differential treatment between persons in analogous situations, but found no reasonable or objective justification for this differential treatment, sitting, therefore, on a breach of art. 14 in relation to Article 8 of the European Convention on Human Rights.

This case brings into focus the provisions on special crankshaft available to the surviving spouse, institution maintained by the provisions of art. 1090 of the New Civil Code. According to it, the liberties of the surviving spouse who comes to inheritance in competition with other descendants than common ones that they cannot exceed one quarter of the progeny inherit or receive the least.

At first glance, one cannot find any different treatment depending on the circumstances offspring born out of wedlock with deceased spouse text realizing such a difference, or, where the law does not distinguish, we do not need to distinguish (*ubi lex non distinquit, nec nos distinquere debemus*). Thus, if the deceased had made some donations for the surviving spouse, children inherit both the book and the rest of what will be the difference between the total and the children's estate, the surviving spouse and the special cotitatea available will be divided deceased children equally, whether or not the quality of children from the marriage, and the art aspect provided. 975 para. (4) of the New Civil Code.

[8] CEDO, case *Merger and Gros v. France*, 22.12.2004, www.echr-coe.int.

However, it must be made certain clarifications on the differences between the situation of children born out of wedlock with deceased spouse who comes in competition with the latter, and assuming the child born of the marriage of the deceased spouse.

In the first case, if the deceased leaves entire inheritance by the surviving spouse, child out of wedlock shall be entitled to receive a share of 5/8 which is subject to the law of succession established in art. 1088 of the New Civil Code reported at 975 para. (3) of the New Civil Code, while the surviving spouse will only return a share of 3/8.

Paradoxically, if the child is common descendant of the deceased and the surviving spouse, thus coming out of their marriage, in the same case, the child will return only share 3/8, while the surviving spouse shall be entitled to receive a share of 5/8 of inheritance.

Such differential treatment cannot be justified even by reason often cited by the contracting states, namely the protection of the traditional family institution as if its existence, the child will receive a lower share of the inheritance of the would have received if they had the quality of a child born out of wedlock.

Another hypothesis is the statement of a surviving spouse who, although holding the quality of spouse acquires fewer rights than a person who, in practice, had the quality of life of the deceased partner. In this situation, to be applied on a case by case principles established by the European Court in the matter of family life provided for by art. 8 of the Convention which refers not only to the legal institution of marriage, but also to the specific circumstances of the case, the case in which a spouse of the deceased would be in a situation similar to surviving spouse.

In this case, under current rules, where the deceased would have a child, but it is not common descending and his life partner, the latter would inherit 4/8 of the estate, so half of the estate of the deceased, the other back half child. In contrast to this situation, if the deceased would have married, her husband would return only a share of 3/8 of an inheritance, and child of the deceased, a share of 5/8 of inheritance.

Thus, again paradoxically, both existing treatment difference if husband unlike spouse and if the deceased child, they get a different rate depending on how the deceased was married or not at the time of death, cannot be justified on the grounds of the will of the state to protect the institution of marriage and the traditional family because, as noted, his deceased person bequeaths his property by will to acquire more than the spouse who has the same universal bound, leading is that possibly more legacy to leave her husband to divorce it late in life. It should also be noted that the proportions Inheritance incumbent vary depending on a child element not be attributable to him, although, in fact, the situation is similar.

4. Conclusions

The study above presented underlines the major principles set out by the European Court of Human Rights in matter of inheritance and affiliation in accordance with the application of article 14 of the European Convention on Human Rights stipulating the general principle of non-discrimination.

As a result of the legal research set forth in the study in comparison with the provisions of the New Civil Code which entered into force in October 2011, there appears to be a compliance of the national legislation in matters of inheritance and affiliation with the principle of non-discrimination. Thus, the legal provisions do not establish any differences between the legal status of the children born in wedlock and those born out of wedlock.

A hypothetical question remains in matter of testamentary succession regarding the spouse of the testator and the persons who find themselves in similar situations as the spouse (for example, the partner of the deceased), topic that could form the subject of further theoretical and academic analysis regarding the interpretation set out by the European Court of Human Rights in this area according to the contemporary social developments.

THE CONSUMPTION LOAN AGREEMENT PARTICULAR ASPECTS REGARDING CONTRACTING CAPACITY OF PARTIES

DANA SIMONA ARJOCA*

Abstract
The study contains a short presentation of loan contract, with a special view of condition for the validity of the contract that refers to the capacity of the parties to conclude such contract. The study proposed to analyze the doctrine, jurisprudence and legal texts of the old and the new Civil Code regarding the capacity of parties to conclude a consumption loan agreement, the rule and the exceptions.

Key words: *loan contract, consumption loan, condition for the validity of contract, loan of consumption, anticipated legal capacity.*

Introduction

The paper covers aspects regarding Civil Law, Commercial Law, Consumer Law, and Civil Procedure Law

The importance of study is given by:

- The newness in civil law doctrine;
- The new regulations of consumption loan;
- The importance of knowledge of condition for the validity of contract to assure the stability of commerce;

For answering to these problems I will try to analyze the legal framework of consumption loan and, in particular, capacity of parties to conclude such contract, to analyze the Romanian and foreign doctrine, the jurisprudence, and to propose an interpretation of the new regulations regarding the capacity of physical and juridical person to conclude the consumption loan.

Content

1. The Loan Contract in Civil Code

Traditionally, a loan is defined to be the contract by which a person, called the lender, transmits the use or ownership of property to another person, called the borrower, under an obligation on the part of the borrower to return the property in kind or other goods of the same quantity and quality[1].

Unlike the former Civil Code[2] which regulated in Book III, Titles X and XI, the commodatum and the loan as two distinct contracts, the Civil Code currently includes the Book V. Of obligations, Title IX. Various special contracts, Chapter XIII. Loan contract. The chapter has three sections: general provisions, loan for use and loan for consumption, thus responding more

* Judge, Bucharest Court of Appeal – Civil Section; PhD candidate, "Nicolae Titulescu" University of Bucharest (e-mail: dana_mhlc@yahoo.com).

[1] See in this respect L. Stănciulescu, *Curs de Drept Civil. Contracte* (*Course of Civil Law. Contracts)*, Hamangiu Publishing House, Bucharest, 2012, p. 395, C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român (Romanian Civil Law Treatise)*, 2nd vol., Restitutio, All Publishing House, Bucharest, 1997, p. 622.

[2] Please note that throughout the paper we refer to the old Civil Code as to the Civil Code of 1864, published on 26.11.1864 and entered into force on 1.12.1865, and the phrase "Civil Code" shall mean the current Civil Code covered by the Law no. 287/2009, published in the Official Gazette of Romania no. 511 of 24.07.2009 and republished in the Official Gazette of Romania no. 505 of 15.07.2011.

accurately to the requirements of theoretical classification, since the essence of the two contracts is the same.

The Civil Code, in the general provisions of chapter XIII, by Art. 2.144, provides that there are two types of loans: the loan for use, also called *commodatum* (or free loan) and the loan for consumption (or *mutuum*).

Thus, at present, the hearth of the subject matter is constituted by Art. 2.158 – 2.170 of the Civil Code, The Book V. Of Obligations, Title IX. Various Special Contracts, Chapter XIII. Loan Contract, Section III. Loan for Consumption.

Art. 2.158 defines the loan for consumption as the contract by which the lender remits to the borrower an amount of money or other similar fungible and consumable goods, and the borrower binds himself to return, after a certain period of time, the same amount of money or quantity of goods of the same kind and quality.

Although the legislator has enlarged the legal definition, including elements outlined in the doctrine over the years by various authors, however, criticism has been aimed at the fact that no reference is made to the transfer, at least temporarily, of the ownership, considered essential in this context[3].

It is characteristic of loan for consumption that the good loaned shall be consumed by the borrower, who will not be able to return the identical property but instead of which he will return other property of the same kind, quality and quantity[4].

It may be noted that, unlike the provisions of the Civil Code of Québec, the definition of the Romanian Civil Code expressly refers to fungible goods (according to classification given by Art. 543), qualification of goods that is not found in the Canadian Civil Code.

The Romanian legislator has not assumed the provisions of Art. 1894 of the French Civil Code which expressly excludes from the category of goods that may be subject of a loan for consumption those immovable goods, individually determined movable goods or goods that, although are of the same species, varies by individual characteristics, the animals being given as an example[5].

II. The loan contract validity condition – The Capacity of Parties to conclude a loan agreement

As Section 3, Chapter XIII of Book V of the Civil Code, dedicated to the loan for consumption, does not contain special rules on the contract validity conditions, then the contract must fulfill the essential and general conditions for the validity of any contract, as provided by Art. 1.179 par. 1 of the Civil Code, though with some particularities regarding capacity of parties, their consent and the object of the agreement, which particularities are generated by the characteristic of the loan for consumption.

Sometimes, in the doctrine[6], the conditions of validity specific for the loan of consumption have been outlined, being estimated that the following elements must be met: lender should be the owner of the amount of money or of the other fungible goods that constitute the material object of the respective loan for consumption, the transfer of the ownership to the borrower which implies the effective delivery of the good, express assumption of obligation to restitute the exact amount received by the borrower, valid consent of the parties having legal capacity, legal object and cause.

---

[3] G. Boroi, L. Stănciulescu, *Institutii de Drept Civil în reglementarea noului Cod Civil (Civil law institutions to regulate the new Civil Code)*, Hamangiu Publishing House, 2012, p. 505.

[4] Frédéric Leclerc, *Droit des contrats spéciaux*, LGDJ, 2007, p. 287.

[5] Pascal Puig, *Contrats spéciaux*, 3e édition, Dalloz, 2009, p. 432.

[6] E.g. T. Prescure, A. Ciurea, *Contracte civile* (*Civil contracts),* Hamangiu Publishing House, 2007, p. 263.

The first condition for the validity of a contract provided by Art. 1.179 par. 1, point 1 of the Civil Code refers to the capacity of the parties to conclude contracts. In this regard, the rule is the capacity to conclude civil legal acts, the incapacity constituting an exception. The rule is contained implicitly, generally, in Art. 29, par. 1 of the Civil Code, according to which "nobody can be restricted in the capacity of use or deprived, in whole or in part, of the capacity of exercise, except in the cases and under the conditions expressly provided by law."[7]

Art. 1.180 establishes in principle that any person who is not declared incapable by law nor banned to conclude certain contracts may conclude contracts. Rules on the capacity to conclude contracts are regulated mainly in Book I of the Civil Code (Art. 1.181 of the Civil Code).

The loan for consumption, which is an act of transfer of property, was qualified as an act of disposition[8], an act that results in removing a good from the patrimony.

Therefore, considering the effects and the importance of such a contract on the patrimony of the lender, he must have the capacity, respectively to fulfill the conditions required by law regarding the acts of disposition, in principle full legal capacity and be the owner of the good that constitutes the object of the contract[9].

The loan for consumption is a as a gift contract, though it is not a munificence, but it is a simple disinterested act as long as the borrower has the obligation to restitute goods of the same kind, quantity and quality. Hence in this matter are not applicable the special incapacities provided for munificence's [10].

In the legal literature[11] it was also mentioned that the loan for consumption by onerous title is, for the lender, an act of transfer of property and an act of disposition by its content, but an act of administration of the patrimony by its effects. Although initially the lender transfers the ownership of the goods loaned from his patrimony, when the contract terminates the borrower shall restitute to him goods of the same kind, quantity and quality, so that no decrease of the patrimony of the lender is produced, per contra, in the case of the loan with interest, his patrimony shall increase according to the parties agreement.

The borrower must, in turn, have the legal capacity to conclude acts of disposition as long as he assumes an obligation to restitute the goods, which means that on due date he must restitute an equivalent value, being that the borrowed goods were consumed. Moreover, he becomes an owner and thus bears the risk of accidental destruction of the things borrowed[12].

Another argument justifying this requirement for the borrower is the legal equality of the parties in a civil legal act[13], neither party being able to impose its will on the other.

Free will of each party is however a matter of consent and how it is expressed, and the principle of legal equality of the parties when concluding a contract does not automatically imply that the requirements and qualities are identical (for example, in relation to donation, there are some

---

[7] G. Boroi, C. A. Anghelescu, *Curs de Drept Civil. Partea Generală (Course of Civil Law. The Generic Part)* 2nd ed. revised and enlarged, Hamangiu Publishing House, 2012, p. 128-129.

[8] Ghe. Beleiu, *Drept Civil Român, Introducere în Dreptul Civil, Subiectele Dreptului Civil (Romanian Civil Law, Introduction to Civil Law, Civil rights issues)*, "Sansa" Publishing and Press House, Bucharest, 1992, p. 117- 118: "It is an act of transfer that civil legal act which results in transferring a civil subjective right from a patrimony to another patrimony"; "It is an act of disposition that civil legal act which results in removing an asset or a right from the patrimony or in asset encumbrance"; see in this respect G. Boroi, C. A. Anghelescu, *Curs de Drept Civil, Partea Generală*, *(Course of Civil Law. The Generic Part)*, Hamangiu Publishing House, 2011, p. 111, 113.

[9] F. Deak, *Tratat de drept civil. Contracte speciale (Civil Law Treatise. Special Contracts)* Universul Juridic Publishing House, Bucharest, 2001, p. 354, L. Stănciulescu, *op. cit.*, p. 405.

[10] F. Deak, *op. cit.*, p. 354.

[11] Ovidiu-Sorin Nour, *Contractul de împrumut: analiză teoretică si practică (Loan agreement: theoretical and practical analysis),* Universul Juridic Publishing House, 2009, p. 226.

[12] F. Deak, *op. cit.*, p. 355, L. Stănciulescu, *op. cit.*, p. 405.

[13] Ovidiu-Sorin Nour, *op. cit.*, p. 226.

inabilities of disposing or receiving, different for donor and donee, without thereby considering it as violating the principle of equality of parties).

It is necessary that the borrower have the capacity to conclude legal acts of disposition as long as he actually concludes such a contract, which shall produce its specific effects in his patrimony.

Regarding natural persons, the acts of disposition may be concluded by persons with full legal capacity[14]. Full legal capacity begins on the date when the person becomes a major, respectively at the age of 18 (Art. 38 of the Civil Code).

As an exception, the minor who marries acquires from that date full legal capacity (Art. 39 par. 1 of the Civil Code).

We note that, in principle, according to Art. 272, par. 1 of the Civil Code, a marriage may be concluded if the future spouses have reached the age of 18. For solid reasons, however, the minor who has attained the age of 16 may get married on the basis of a medical advisory, with the consent of his parents or tutor and with the guardianship court authorization.

The 16 year old minor has full legal capacity. The basis for this exception is, on the one hand, the purpose of marriage, which is starting a family, so it would be unnatural for the members of a family that could become legal protectors of their own children, to be under parental care. On the other hand, the principle of equality between spouses must be respected, for it may happen that one of them be a major[15].

As a rule, cancellation or nullity of marriage will not produce retroactive result on the legal capacity of the spouses, so that to ensure the security and stability of the legal turnover.

Regarding the future effects, the law makes a distinction between the minor spouse's good or bad faith when concluded the marriage. Article 39 par. 2 of the Civil Code expressly provides, ending a vast polemic arisen in the doctrine under the former Family Code[16], that the minor who acted in good faith when concluded the marriage shall retain full legal capacity.

Per a contrario, the minor who acted in bad faith when concluded the marriage shall lose the full legal capacity in the event that the marriage is annulled, but only if he did not become a major until the date of the annulment, thus obtaining legal capacity under civil law.

Art. 39 par. 2 refers to the marriage "annulled", understanding that the legislator considered the dissolution of marriage for reasons of relative nullity. But since the effects of the two kinds of

---

[14] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 113.

[15] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *Noul Cod civil, Comentariu pe articole art. 1-2664 (The New Civil Code, Comments on Articles art. 1-2664),* C.H.Beck Publishing House, Bucharest, 2012, p. 44.

[16] Putative marriage was defined as the marriage which, although invalid or canceled, nevertheless produces some effects towards the spouse who entered into in good faith (I. P. Filipescu, A. I. Filipescu, *Tratat de dreptul familiei (Family Law Treatise)*, 8th ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2006, p. 223). According to the authors, if the declaration of the invalidity of a marriage occurs before the spouse who acted in good faith has reached the age of 18, he or she retains full legal capacity since this capacity is lost only in the cases and under the conditions stipulated by the law, and the law does not provide anywhere that the minor who acquired legal capacity by marriage and enjoyed it for a while may lose it afterwards. For the spouse who acted in good faith, nullity of marriage does not suppress the effects that marriage has produced in the past; the full legal capacity acquired as a result of a marriage is retained, independent of marriage, and returning to parental care of the respective spouse is out of the question (p. 223-224).

For the contrary opinion it is invoked Art. 23 para. 1 of the Family Code: "The spouse who acted in good faith when entered a marriage declared invalid or canceled shall be deemed to be in a valid marriage until the date when Court decision becomes final. "Conversely, this situation shall not be maintained after the decision of the Court to invalidate the marriage becomes final. The author agrees with *de lege ferenda* opposite thesis, considering that it is necessary to amend the legal provision, in terms of expressly providing that the full legal capacity acquired by marriage shall not be lost" (Gh. Beleiu, *op. cit.*, p. 286-287).

nullity are the same, such a distinction is not justified, the provision being applicable in the event of a marital dissolution, no matter whether this is due to relative or absolute nullity[17].

For the same reasons, the minor who acquired full legal capacity as a result of concluding a marriage shall not lose this capacity in case that the marriage is ended by divorce or upon termination of marriage by the death of the other spouse, if these situations occur before the respective minor has reached the age of 18[18].

A novelty of the present Civil Code is the anticipated legal capacity. Art. 40 establish a second exception to the principle of acquiring the full legal capacity when the minor becomes a major. For solid reasons, after hearing the parents or the tutor and with the accord of the family council (if constituted), the tutorship court may admit the full legal capacity to the minor who has reached the age of 16.

Such a possibility was regulated by the former Civil Code, but the provisions relating to emancipation were repealed by Decree no. 185/1949, the so called "express" emancipation not being recognized afterwards, until the entry into force of the new Civil Code.

Emancipation was a solemn act that had the effect of abolition of the parental authority or of the tutorship, conferring upon the minor the right to run his personal acts and to administer his patrimony within a limited capacity. He acquired the right to do certain acts alone, while for others had to be assisted by his curator, according to the categories of acts, considered more "serious", for which the law required the approval of the tutorship (for example, Art. 429 of the Civil Code of 1864 provided that the emancipated minor could not borrow without the authorization of the family council approved by the tribunal)[19].

The current law provides no limitation, and the text of the Art. 40 refer to acquirement of the full legal capacity. It is true that nowadays young people aged 16 have a high level of knowledge and benefit from facilities that contribute to their precocity, but their experience is still limited and the "temptations" are big, so that a minimum control over their acts was required.

Another deficiency of the regulation is the absence of a procedure for publicity, allowing third parties to take note of the change in the exercise capacity of minors; it is an issue that will create difficulties to third party contractors who will have to request to the minor the evidence of his emancipation and this will not always make them feel safe in this respect[20].

There are categories of people who may conclude acts of disposition only in certain circumstances, the law providing various limitations or restrictions. It is the case of the minor and the judicial ban or of the spouses who conclude acts with third parties. In addition, special rules regulate the acts concluded by legal persons.

a)The situation of the minor and the judicial interdiction

The Civil Code establishes special measures for the protection of minors and those who, though responsible, because of old age, illness or other reasons provided by law are not able to manage their properties and to defend their interests in appropriate conditions, the legislator considering that these persons lack discernment.

Protection of minor is accomplished by parents (common and ordinary way of protection), by establishing a tutorship, by placement commissioning or by other legal measures of social protection,

---

[17] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 45, in the same sense C. T. Ungureanu and others, *Noul Cod civil, Comentarii, doctrină si jurisprudentă (New Civil Code, Comments, doctrine and jurisprudence)*, 1st vol. Art. 1-952, Hamangiu Publishing House, 2012, p. 76 I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 224, C. T. Ungureanu and others, *op. cit.*, p. 76.

[18] I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 224, C. T. Ungureanu and others, *op. cit.*, p. 76.

[19] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op, cit*., p. 435, 443.

[20] C. M. Crăciunescu, D. Lupascu, *Emanciparea minorului în reglementarea noului Cod civil (The Emancipation of a Minor in the regulation of the new Civil Code)* in P.R. nr. 9/2011, p. 29, qtd by C. T. Ungureanu and others, *op. cit.*, p. 77.

such as those provided by Law no. 272/2004[21], special tutorship and judicial interdiction, and the protection of major is done by placing under judicial interdiction or establishing a tutorship (Art. 105-106 of the Civil Code).

Art. 502 of the Civil Code provides that the rights and duties of parents regarding the child's assets have the same legal regime as those of the legal tutor, the provisions regulating the tutorship being applicable accordingly.

The goods of the minor shall be administer in good faith, the tutor acting as

a manager charged with simple administration, with application of the new provisions of the Civil Code relating to the administration of the goods of another person contained in Title V of the Book III, unless otherwise provided by rules concerning the exercise of tutorship over the minor's property.

According to Art. 41 par. 1 of the Civil Code, except other cases provided by the law, have no legal capacity the minor under the age of 14 and the judicial interdiction[22]. For them, the legal acts of disposition shall be concluded on their behalf by their legal representatives, as provided by law[23], respectively with the accord of the family council (for the minor and when this council is established according to Art. 124 of the Civil Code) and with authorization of the tutorship court.

As an exception, the person lacking legal capacity may conclude personally acts provided by the law, acts of conservation and low-value routine acts of disposition that are carried out at the time of their completion. On the other hand, acts that a minor may conclude personally may also be made

[21] Law no. 272/2004 on the protection and promotion of children's rights, published in the Official Gazette of Romania no. 557 of 23rd of June 2004.

[22] Art. 164 Civil Code: „(1) The person without discernment necessary to mind his/her own interests, because of alienation or mental debility, shall be placed under judicial interdiction. (2) Minors with limited exercise capacity can also be placed under judicial interdiction." Art. 171 Civil Code: "The rules on tutorship of a minor who has not reached the age of 14 shall be also applied to the tutorship of a minor placed under judicial interdiction, insofar as the law may otherwise provide."

[23] In this regard, art. 144 of the Civil Code provides: „(1) The tutor may not, on behalf of the minor, make donations or guarantee someone else's obligation. Exception applies to common gifts that are given according to the minor's existing wealth condition. (2) The tutor may not, without family council accord and the tutorship court authorization, alienate, divide, hypothecate or encumbrance the minor's properties, may not renounce the minor's patrimonial rights or validly conclude any other acts beyond his right to administer. (3) Acts done in violation of the provisions of para. (1) and (2) are avoidable. In these cases, action for annulment may be exercised by a tutor, a family council or any member thereof, inclusive of a prosecutor, ex officio or at the request of the tutorship court. (4) However, the tutor can alienate, without the accord of the family council and without the authorization of the tutorship court, those properties subject to destruction, deterioration, alteration or impairment, as well as those that became useless for the minor."

Family Council is regulated by Art. 124-132 of the Civil Code and represents a novelty introduced by the new Civil Code, based on the Civil Code of Québec.

It is a voluntary body with an advisory function, while the tutorship court may constitute it whenever necessary for monitoring the activity of the tutor in exercising his rights and fulfilling his duties.

The tutorship court replaces the tutorship authority and is regulated by Art. 107 of Civil Code: "(1) Procedures provided by the present Code concerning the natural person protection come under the jurisdiction of the tutorship and family court established by law, hereby referred to as the tutorship court. (2) In all cases, the tutorship court shall resolve these requests immediately."

Law no. 134/2010 on the Civil Procedure Code, republished, stipulates in Art. 94 point 1, let. a that courts shall consider in first instance the request of the Civil Code under the jurisdiction of the tutorship and family court, except if expressly provided otherwise by the law.

Territorially, the competence belongs to the court in whose territorial jurisdiction the protected person's domicile or residence is located. In the case of applications for authorization from the tutorship and family court to conclude legal acts, when the legal act for which the authorization is requested refers to a building, it is also competent the court in whose jurisdiction the building is located, in which case a copy of the decision pronounced shall be communicated to the tutorship and family court in whose territorial jurisdiction the protected person's domicile or residence is located (Art. 114).

by his legal representative, unless the law would otherwise provide or the nature of the act would not allow him to do so (Art. 43 par. 3 and 4).

According to Art. 144, par. 4 of the Civil Code, the tutor may alienate, without the accord of the family council and without the authorization of the tutorship court, those properties subject to destruction, deterioration, alteration or impairment, as well as those that have become useless for the minor. The solution, taken from Art. 129 final par. of the Family Code is justified by the fact that although such acts are acts of disposition regarding the respective goods, taking into account the whole patrimony of the incapable one, they represent acts of administration[24].

The text refers specifically to "alienation", which leads to the idea of "selling", but we consider that, depending on the specific circumstances of the situation, a loan agreement for consumption may be concluded, provided that it meet the interests and needs of the one being guarded.

Minor who has reached the age of 14 has limited legal capacity (Art. 41 of the Civil Code). He may conclude legal acts of disposition with the prior approval of the parents or, where applicable, of the tutor and with the authorization of the tutorship court. The consent (which must be in writing according to Art. 146 par. 1 of the Civil Code, and not verbal or implied) or authorization may be given upon conclusion of the act at the latest.

Solutions still available in the application of the new Civil Code have been given under the influence of the Family Code to the issue of the use of monies belonging to the minor or concluding a borrowing agreement on behalf of the minor. It was considered that such acts go beyond the limits of the acts of administration, so that their performance is subject to the approval of the guardianship authority (currently the guardianship court) [25].

The same as the minor lacking legal capacity, the minor with limited exercise capacity may conclude personally acts of conservation, acts of administration which do not prejudice him, and low-value routine acts that are carried out at the time of their completion (Art. 41, par. 3 of the Civil Code).

Although Art. 41, par. 2 refers only to the authorization of the guardianship court, we consider that the text must be correlated with Art. 146 par. 2 of the Civil Code: "In the event that the act which is about to be concluded by the minor who has reached the age of 14 is one of those that the tutor is not allowed to conclude without the authorization of the guardianship court and the accord of the family council, both the respective authorization and the accord of the family council will be necessary" and with Art. 144, par. 2, whose per a contrario interpretation leads to the conclusion that a tutor may not, without the accord of the family council and authorization of the guardianship court, legitimately conclude acts of disposition.

We therefore consider that the minor who has reached the age of 14 may conclude a loan for consumption contract, but only with prior written approval of his legal protector and with the accord of the family council (if it has been established under Art. 124 of the Civil Code[26]) and with authorization of the guardianship court.

Regarding the accord of the family council, it is advisory and is validly taken by the vote of the majority members of the council (Art. 130 of the Civil Code).

With respect to the authorization of the guardianship court, Art. 145 require that it be granted only if the act responds to a need or presents an undoubted advantage for the minor. Authorization

---

[24] See in this respect Gh. Beleiu, *op. cit.*, p. 297.

[25] Al. Bacaci, V.-C. Dumitrache, C.C. Hageanu, *Dreptul familiei (Family Law)*, 6th ed., C.H. Beck Publishing House, Bucharest, 2009, p. 316, qtd by C. T. Ungureanu and others, *op. cit.*, p. 47.

[26] Art. 124 Civil Code: "(1) Family council may be constituted in order to monitor the activity of the tutor in exercising his rights and fulfilling his duties towards the person and the properties of the minor. (2) If the minor is under parental care, in placement commissioning or, as appropriate, protected by other social protection measures provided by the law, the family council shall not be constituted."

will be given for each act individually, establishing, where appropriate, the conditions of concluding the act.

Failure to comply with the legal provisions regarding the legal capacity of the natural persons is punishable by relative nullity of the act, even without proof of damage. It is the sanction expressly provided for in Art. 44 par. 1 (for minors without legal capacity or with limited exercise capacity), Art 144 par. 3 and Art. 146 par. 4 of the Civil Code relating to the guardianship.

The same penalty provided for in Art. 130 par. 4 of the Civil Code is also applied for the lack of advisory notice of the family council, while concluding the act without taking into consideration the advisory opinion attracts the liability of the guardian only.

Thus such acts as the loan for consumption contracts concluded by the person lacking legal capacity, irrespective of whether or not the act prejudices the incapable, shall be annullable; also, the act concluded by his legal representative without the advisory notice of the family council or the authorization of the guardianship court; the contract personally concluded by the minor who has reached the age of 14, without prior approval of the legal protector, without the advisory of the family council and without authorization of the guardianship court; the act concluded by the minor with limited legal capacity with the approval of his legal protector but without the advisory of the family council and/or prior authorization of the guardianship court.

The mere statement made by that one lacking legal capacity, by that one with limited legal capacity and by the judicial interdicted (the new Code extending the solution in the case thereof, unlike the old Civil Code, Art. 1.162), that he/she is capable, does not remove the fact that the act may be annullable (Art. 45 of the Civil Code).

Fraud, however, raises tort liability of the incapable one, an exception to the principle of *quod nullum est nullum producit efectum*. The incapable person that willfully committed fraudulent misrepresentation in order to determine another person to contract with him, misleading that person about his/her legal capacity status, is taken out of the protection of the rules regarding the presumption of his lack of discernment and may not invoke minority as a cause of the annulment of the juridical act concluded in this way[27].

Should fraudulent misrepresentation has been used, at the request of the party mislead the court may keep the contract when they say that this constitutes an appropriate civil penalty.

Nullity may be invoked by action or exception, Art. 44 par. 2 of the Civil Code providing that the person lacking the legal capacity or having limited exercise capacity may invoke personally, in his/her defense, the fact that the act is annullable for his/her incapacity resulting from minority or from placing under judicial interdiction.

Unlike the action for annulment, which is prescriptible, the defense by way of exception is indefeasible, the incapable person who is required to execute the contract being able to oppose at any time the relative nullity of the contract, even after the limitation period of the right to the action for annulment (Art. 1.249, par. 2 of the Civil Code).

Aiming at protecting the interest of the incapable person, notwithstanding the provisions of Art. 1.248 of the Civil Code, the action for annulment may be exercised by the legal representative, by the minor who has reached the age of 14, and by the legal protector, by the prosecutor, ex officio or at the request of the guardianship court, when the act was concluded without the authorization of the guardianship court required by law, or by the family council or by any of its members (Art. 46, par. 2 and 3, Art. 144, par. 3 of the Civil Code).

The person with whom the contract was concluded shall not be entitled to invoke the nullity of the contract on the grounds that the other party is a person lacking legal capacity or having limited capacity, this being banned by the provisions of Art. 46, par. 1 of the Civil Code.

---

[27] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 51.

To the extent that the court will invalidate a contract concluded in violation of the legal requirements regarding the capacity, the incapable person may be compelled to refund only within the limit of the benefit realized, considered at the date of the request for refund.

The burden of proving the enrichment thereof rests with the person who requests the refund, respectively to the lender in the case of a loan for consumption (as in the case that the incapable person acts as a lender, he/she will get full refund from the borrower capable, the rule being a special one and applying only to incapable persons, for their protection).

The incapable person will be held to the full refund when, intentionally or because of gross misconduct, has made the refund impossible (Art. 47 and 1.647, also applying accordingly the provisions of Art. 1.635-1.649 of the Civil Code regarding the refund of the benefits).

As the sanction applied for non-compliance with the legal provisions regarding the legal exercise capacity is the relative nullity, according to the general rule contained in Art. 1.248 par. 4 of the Civil Code, the annullable contract is likely to be confirmed (the conditions and effects being provided in Art. 1.262-1.265 of the Civil Code).

Confirmation may be express or implied, resulting from the voluntary execution of the obligation at the date on which it could be validly confirmed by the interested party, but must be certain and given knowingly. Moreover, confirmation may intervene only after concluding the legal act affected by a relative nullity cause, cannot take the form of a clause inserted in this and it is not possible to waive the right to invoke the relative nullity by even the annullable legal act[28].

Art. 48 of the Civil Code provide that the minor who has become a major may confirm the act concluded during minority, without the representation or assistance required by the law. After discharging the tutor, he may also confirm the act concluded by the tutor without complying with all formalities required for its valid conclusion.

Thesis III of the text refers to the possibility of confirmation of the annullable act during minority as well, but only under the conditions of Art. 1.263-1.264 of the Civil Code. According to Art. 1.263, par. 3, the person called upon by law to approve the minor's acts may, on behalf and for the interest of the minor, request annulment of the contract concluded without his/her consent or confirm the contract when this consent was sufficient to validly conclude it. There are provisions that apply accordingly to any acts concluded without the authorization of the guardianship court.

However, if the minor who became a major may confirm the annullable acts during his minority express or implied, the person called upon by law to approve the minor's acts is not able of doing anything else than express confirmations, as Art. 48, thesis III refers imperatively to the cumulative conditions of Art. 1.263 and 1.264, the latter text regulating the content of the confirming act[29].

In the professional literature[30] it was concluded, from interpretation of all the above mentioned legal provisions that may not be confirmed those acts concluded by the person placed under judicial interdiction.

It is true that both Art. 48 and Art. 1.263 par. 3 of the Civil Code specifically refers to the acts of the minor, but we consider that if the general and common conditions of validation of the legal act by confirmation are met, according to Art. 1263-1265 of the Civil Code, this possibility should be also recognized for acts of the judicial interdicted.

The rule is that an annullable contract is likely to be confirmed (Art. 1248 par. 4 of the Civil Code) without any distinction based on causes of annulment, or failure of confirmation would be an exception that should be expressly provided by law, as long as it cannot be deducted by way of interpretation.

---

[28] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 263.
[29] See in this respect Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 54.
[30] Ibidem.

On the other hand, the guardianship of the person placed under judicial interdiction is governed by the same rules as the guardianship of minors under the age of 14, as far as it is not otherwise provided by law (Art. 171 of the Civil Code), so we see no justification for the exclusion of the confirmation of the acts of the person placed under interdiction, the goods of the two categories of persons being subject to the same legal administration regime.

Moreover, the same as the minor who becomes a major and acquires full legal capacity, the judicial interdicted as well may reacquire full legal capacity by termination of the judicial interdiction, provided that the causes of the interdiction have been stopped (Art. 177). In such a situation, the error which affected the annullable juridical act, respectively the incapacity, could not exist after the termination of incapacity and the former incapable person could confirm the act, provided that the measure responds to his/her needs or interests and at this time all others conditions of validity are met, according to Art. 1.263 par. 1 of the Civil Code.

An additional argument is the fact that the interdicted is judicially without discernment, but in fact he/she can have moments when acting with discernment. This is the reason why Art. 172 of the Civil Code expressly provide that the juridical acts concluded by the interdicted are annullable, even if at the date of their conclusion he/she would have had discernment. The solution is justified; the interdicted being under a particular legal regime where the juridical acts should be subject to unitary rules, being difficult to determine in each case whether or not he/she acted with discernment.

However, if he/she concluded a contract when in fact acted with discernment and draws advantages of such a contract, all the more reason not to eliminate the possibility to renounce, under the law, to the right to invoke the nullity and thus confirming the annullable act.

b) Common-property goods

Property in shares (co-ownership) and condominium are forms of common property according to Art. 632 of the Civil Code.

Co-ownership was defined in the professional literature[31] as that form of joint ownership characterized by the fact that the property, undivided into fractions in its whole entity, belongs simultaneously to several owners, ownership of the property being divided into abstract ideal shares.

Art. 634 par. 1 of the Civil Code provides that each co-owner is the exclusive holder of a share of ownership and may freely dispose of it in the absence of a contrary stipulation. But the co-owner cannot freely dispose of the property in its whole entity.

Any legal acts of disposition regarding the common property (and other acts assimilated by the law due to their effects on the acts of disposition) may not be concluded without the consent of all co-owners (Art. 641 par. 4 of the Civil Code). Law takes into consideration the ”consent” of the co-owners, which can be expressed or implied (aspect resulting from the per à contrario interpretation of Art. 642 par. 1 of the Civil Code), and not the effective participation of all co-owners to the conclusion of such a juridical act[32].

Consequently, as the loan for consumption is considered an act of transfer, being that it transfers a property, concluding of the contract will require the consent of co-owners. No act of material disposition (modification of the property shape, consumption or destruction of the property substance, gathering of products) shall be made without the consent of all co-owners[33].

Regarding the sanction for failure to comply with this requirement, the solutions were different and controversial under the old Civil Code.

---

[31] C. Bârsan, M. Gaită, M. M. Pivniceru, *Drept Civil, Drepturile Reale (Civil Law, Real Rights)* European Institute, 1997, p. 94, I. P. Filipescu, *Drept Civil, Dreptul de proprietate si Alte Drepturi Reale (Ownership and other real rights)*, Proarcadia Publishing House, Bucharest, 1993, p. 146.

[32] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 701.

[33] V. Stoica, *Drept civil. Drepturile reale principale (Civil Law. Principal Real Rights)*, 2nd vol., Humanitas Publishing House, Bucharest, 2006, p. 74, qtd by C. T. Ungureanu and others, *op. cit.*, p. 931.

Most authors[34] and jurisprudence have conditioned the outcome of the contract on the result of the partition. If after the partition the property was assigned to the disposer co-owner, as the partition was declarative and thus produced effects retroactively according to Art. 786 of the former Civil Code, this one was considered retroactive exclusive owner and the contract remained valid. But if the property was assigned to another copartner, the contract was considered terminated retroactively due to the lack of ownership of the person who concluded the contract.

In the event that the parties or at least the co-contractor was in error, considering that the disposer was the owner, it was admitted that the relative nullity for error occurred (vice of consent). If both parties knowingly enter into contracts, being a speculative operation with an illicit cause, the applicable sanction was the absolute nullity under Art. 968 of the Civil Code 1864[35]

From the date of concluding the contract and the partition of the properties, the act was considered valid between the contracting parties, but undemurable to the co-owner who did not consent. It was decided[36] that during this period, co-owners who did not consent have no right of action for annulment or nullity of the contract or of claiming/vindication, their rights could be defended only by an action in partition.

The new Civil Code could not take the solution created by doctrine and jurisprudence under the old Civil Code because, according to the new regulation, the partition is constitutive and therefore produces effects only for future (Art. 680 par. 1 of the Civil Code).

As such, it was imagined the sanction of unopposability: "Legal acts concluded violating the rules provided for in Art. 641 are unopposable to the co-owner who has not consented, expressly or tacitly, to the conclusion of the act."

Unopposability is a sanction different from nullity, which does not question the validity of the title. The effects of the legal act occur towards the parties, but the rights and obligations arising from the respective act cannot be opposed to third parties[37].

The unopposability of the juridical act concluded by a co-owner violating the right of the other co-owners to express their consent means both that it will not create rights and obligations in favor of or for the co-owner who has not consented to the conclusion of the act, according to the general principle of relativity of the juridical act, and that it will be ignored by the co-owner, as a legal fact in restricted sense[38].

Likewise, distinct from the solutions adopted under the old Civil Code, at present Art. 642 par. 2 of the Civil Code admits the injured co-owner the right to exercise, before the partition, possessors actions against the third party contractor who acquired the common good after concluding the act. Possessor action may be introduced within the limitation period of one year from the date of

---

[34] See in this respect F. Deak, *op. cit.*, p. 60, I. P. Filipescu, *op. cit.*, p. 148-149, P. M. Cosmovici, *Drept Civil, Drepturi reale, Obligatii, Legislatie (Civil Law, Real Rights, Obligations, Legislation),* All Publishing House, Bucharest, 1996, p. 47, High Court of Cassation and Justice of Romania – Civil and Intellectual Property Department, Dec. no. 965/2005, in Dreptul no. 4/2006, p. 280.

[35] Some authors (in this respect C. Bârsan, M. Gaită, M. M. Pivniceru, *op. cit.*, p. 101) who have started to resolve the problem from the distinction as the co-contractor had knowledge or not, when concluding the contract, that the disposer was not the exclusive owner of the property.

If the status of a copartner was known, the contract was considered subject to a resolutive condition, so that the property could not fall at partition into the lot of another co-owner. If the property had fallen into the lot of the disposer when making the partition, the contract would have been consolidated retroactively, and if the property was assigned to another co-owner, the contract would have been terminated retroactively, being decided. If the status of a co-owner was not known when concluding the act, the act was revoked. The theory of the act affected by the resolutive condition of including the properties in the lot of the co-owner who has not consented is also sustained by other authors, such as D. Chirică, *Studii de drept privat (Studies of Private Law)*, Universul Juridic Publishing House, Bucharest, 2010, p. 197.

[36] Supreme Court - Civil Department, Dec. no. 2603/1993, in *Jurisprudenta CSJ* , *(Supreme Court Jurisprudence)*, 1993, p. 39-41, qtd by F. Deak, *op. cit.*, p. 61, V. Stoica, *op. cit.*, p. 79.

[37] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 242, Gh. Beleiu, *op. cit.*, p. 177.

[38] V. Stoica, *op. cit.*, p. 78, qtd by C. T. Ungureanu and others, *op. cit.*, p. 933.

dispossession (Art. 951 par. 1 of the Civil Code), after its expiration the action claim being disposable for the co-owner.

Restitution of possession of the property will be made for the benefit of all co-owners, those who participated at the conclusion of the act could be compelled to pay damages if thereby caused injuries to other co-owners.

From the rule of unanimity provided for in art. 641 par. 4 of the Civil Code, exception may be made by a co-ownership administration contract concluded with the consent of all co-owners. In the absence of other definitions specified in Art. 644 par. 1 of the Civil Code, we consider that such an administration contract is subject to the provisions relating to the administration of the properties of another person contained in Title V of Book III of the Civil Code.

The second form of the common property is represented by the condominium. According to the Art. 667 of the Civil Code, there is a condominium property when, by law or on the basis of a juridical act, the ownership belong simultaneously to several persons without any of them to be the holder of a share determined from the property ownership or common goods.

In the doctrine it was specified that in this case the share of each individual owner is not known, the good belonging to the common owners, without shares. Nor the ownership or the good on which bearing are not divided, the shares not being determined [39].

Relating to the juridical regime of the condominium, Art. 668 of the Civil Code provides that, if this arises by operation of law, is subject to the provisions of that law which shall be completed accordingly with the laws on the legal community regime.

Therefore, the legal community regime regulated by the new Civil Code in Art. 339-359 constitutes the common law in the matter of the condominium.

The current regulation establishes a mixed mechanism for the management of common goods: parallel management in case of the most juridical acts that concern the common properties of spouses, tempered by establishing a joint management for the conclusion of juridical acts considered serious for the community and that, in principle, require the consent of both spouses. For personal juridical acts (such as tying, deposits with credit institutions made only one spouse's name, etc..), Becomes operational mechanism exclusive management[40].

Parallel or competing management mechanism is established by Art. 345 par. 1 of the Civil Code and is based on the right of each spouse to manage personally, in principle, the common goods. Each spouse performs acts in relation to the common goods by virtue of his/her own power conferred by law and not as a representative of the other spouse[41], in this manner the new Civil Code abandoning the presumption of the reciprocal tacit mandate established by the former Family Code.

Art. 35 of the Family Code provided that spouses jointly manage and use the common goods and they dispose of them in the same way, any spouse exercising alone such rights being considered to have the consent of the other spouse. Exceptions were those act of disposition (but only of alienation or encumbrance, and not those of acquisition) regarding the real estate for which it was necessary the express consent of both spouses.

As a result, either of the spouses could conclude personally, under the reciprocal tacit mandate, a loan for consumption contract, which could only cover movable, fungible and consumptive goods. In the legal doctrine and judiciary practice[42] it was established that, in relation to community of goods, there are acts of administration and may be concluded by one of the spouses,

---

[39] I. P. Filipescu, *op. cit.*, p. 157, C. Bârsan, M. Gaită, M. M. Pivniceru, *op. cit.*, p. 113, P. M. Cosmovici, *op. cit.*, p. 51.

[40] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 368-369.

[41] M. Avram, C. Nicolescu, *Regimuri matrimoniale (Matrimonial regimes)* Hamangiu Publishing House, Bucharest, 2010, p. 229, qtd by A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 369.

[42] D. Lupulescu, *Dreptul de proprietate comună al sotilor (Common Ownership of Spouses)*, Scientific and Encyclopedic Publishing House, Bucharest, 1987, p. 142, The Supreme Court, Civil Department, Dec. no. 1895 of 30 October 1975, in R.R.D. no. 5/1976, p. 63, qtd by I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 147.

who is presumed to have the consent of the other spouse, the contract by which a spouse grants alone a loan to another person, from the very amount of money that is common property, and the action by which it is required the restitution of the good loaned.

If one of the spouses concluded a loan for consumption contract, as a borrower, the contractual obligation was common if it was assumed to fulfill ordinary needs of the marriage[43].

The presumption of the reciprocal tacit mandate was relative and could be rebutted by evidence to the contrary, respectively the fact that non-contracting spouse did not give a mandate to the other spouse, opposing to the conclusion of the contract. It was estimated in the doctrine and jurisprudence[44] that the opposition could be express or tacit but it did not constitute sufficient grounds for annulment of the act, being necessary to prove that the third party contractor did know or should have known the opposition of the other spouse to the conclusion of the act, thus protecting the bona fide third party.

There were some authors[45] who estimated, we find that not well substantiated (not considering that the distinction between relative nullity and the absolute one emerges from the nature of the interest protected by the violated statutory provision - generally or individually), that if there have been an express opposition of the non-borrower spouse, the loan for consumption contract was absolutely void because, on the one hand, the presumption of the reciprocal tacit mandate of the spouses was only relative and, on the other hand, when it was rebutted, it became an incident the principle established in Art. 35 par. 1 of the Family Code, according to which spouses may use, administer and dispose in common of their properties.

Currently, while Art. 345 establishes the right of each spouse to use the common property without the express consent of the other spouse, to conclude personally acts of conservation, acts of administration and acts of acquisition of common goods, Art. 346 reiterates the joint management mechanism in relation to the acts of alienation and encumbrance of common goods (other than ordinary gifts), these cannot be concluded without the consent of both spouses.

Exceptions are the acts of disposition, by onerous title, concerning movable common goods whose alienation is not subject, according to law, to certain publicity formalities.

As a result, a loan for consumption contract, by onerous title, regarding common goods, will be concluded only with the express consent (as resulting from the corroboration of Art. 346 par. 1 with Art. 347 par. 1 of the Civil Code) of both spouses, as borrowers, while a loan with interest will be possible to be agreed by either spouse, personally.

The sanction for non-compliance with the condition of both spouses' consent, when it is required by law, is the relative nullity of the act (Art. 347 par. 1 of the Civil Code), thus being established expressly the solution promoted by most of doctrine and jurisprudence developed under the former Family Code.

It was also assumed the thesis of protection of the bona fide diligent third party acquirer, in which case the spouse injured by non-expressing the consent can only claim damages from the other spouse.

However, in the doctrine[46] it expressed the opinion (to which we adhere) according to which the text of Art. 347 par. 2 of the Civil Code would concern only the protection of bona fide third parties for legal documents by onerous title. If one of the spouses had disposed of a common good through a gratuitous act, without the consent of the other spouse, the consequences of nullity would have to be borne also by the third party acquirer, even if he/she acted in good faith and gave all necessary diligence, as in this case it should prevail the community interests of the other spouse and

[43] C. Macovei, *Contracte civile (Civil Contracts)*, Hamangiu Publishing House, Bucharest, 2006, p. 272.
[44] I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 149 and next.
[45] See Ovidiu-Sorin Nour, *op. cit.*, p. 227.
[46] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 371.

not the interests of the third party (non-participating spouse to the act seeks to avoid damage – *certat de damno vitando* - while the third party tries to keep hold of the benefit – *certat de lucro captando*).

In the event that one of the spouses concludes a loan for consumption, as a borrower, the contracted obligation shall be shared if it falls within one of the categories expressly and restrictedly provided in Art. 351 of the Civil Code.

III. The loan for consumption contract concluded by legal persons

Having legal personality, according to Art. 193 of the Civil Code, legal entities participate on their own behalf in the civil circulation/registry and are liable for the obligations assumed with their own property, unless the law would otherwise provide.

Legal entities have therefore distinct legal capacity which, like in the case of natural persons, includes the capacity of use and the capacity of exercise.

The content of the capacity of exercise is provided by Art. 206 of the Civil Code, which makes distinction between for-profit legal entities (with patrimonial purpose) and non-profit legal entities (without a patrimonial purpose)

According to par. 1, the legal entity (it results from the correlated interpretation of the first two paragraphs that it refers to the for-profit legal entity) may have any civil rights and obligations, except those which, by their nature or according to the law, belong only to the natural persons.

Non-profit legal entities may only have those civil rights and obligations that are required to fulfill their purpose established by the law, act of establishment or statute (par. 2).

Limited capacity of use of the legal entities established in civil law the specialty principle of the capacity of use, mentioned for the first time in Art. 9 of the Law 21/1924 and generalized in the Art. 34 par. 1 of the Decree no. 31/1954, which stipulated: "the legal entity can only have those rights which correspond to its purpose, established by law, act of establishment or statute"[47].

The current regulation preserves this limitation only for non-profit legal entities, but, as outlined in recent doctrine with regard to companies, though, by vocation, the capacity of use of the company is characterized by generality, it is nevertheless circumscribed to the company's object of activity. The company concludes those legal acts aimed at performing the object of activity established in the act of establishment, limitation reduced by setting a broad object of activity, providing the necessary flexibility to adapt to conjectural changes[48].

In achieving the purpose for which they were established, legal entities are sometimes constrained to conclude legal documents that exceed their object of activity. It was constantly estimated that such occasional transactions, related or adjacent to the object of activity, are valid precisely because what is sought is to achieve the purpose of the legal entity[49].

Regarding the particular situation of a loan for consumption contract, it should be considered that this contract is free by its nature. Exception is the loan of a sum of money presumed to be with onerous title. (Art. 2.159 of the Civil Code).

Virtually, legal entities may conclude such contracts by onerous title, both as a lender or as a borrower, in compliance with the specialty principle of the capacity of use, and according to their object of activity.

---

[47] Gabriel Boroi, *Drept Civil, Partea Generală. Persoanele (Civil Law, The Generic Part. Persons)*, 4th ed. revised and suplemmented, Hamangiu Publishing House, 2010, p. 444.

[48] Stanciu D. Cărpenaru, *Tratat de drept comercial român, conform noului Cod civil (Romanian Commercial Law Treatise, according to the new Civil Code)*, 3rd ed. revised, Universul Juridic Publishing House, Bucharest, 2012, p. 183.

[49] See in this respect Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 195, C. T. Ungureanu and others, *op. cit.*, p. 241.

It is also accepted that gratuitous or occasional contracts may be concluded by legal entities that do not have as their object of activity credit operations, provided that such acts serve to achieve their statutory purpose.

Thus, in a case decision[50], it was recorded: "regarding the nullity of the loan contract between A.C.R. LLC and the debtor being that this would be an interest-free loan, taking into account that the lender is the borrower's shareholder, it cannot be considered that the loan is free of benefits, being a decision of business and opportunity, the company seeking to obtain benefits other than interest.

It is also invoked that the objects of activity of the creditor lacks the lending activity. First court correctly held that there was a sole loan transaction, which does not define a lending activity, and obtaining benefits such as dividends only comes out in support of the above, meaning that the company acted in its interest to achieve the purpose for which it was created".

A particular situation is that of legal entities under public law, respectively the state and territorial-administrative units. Art. 136 par. 4 of the revised Constitution of Romania establishes the inalienability of public property, provision reproduced in Art. 11 par.1 of the Law no. 213/1998.

Art. 861 par. 1 of the Civil Code provides that "public property is inalienable, indefeasible and intangible" while par. 2 stipulates that "ownership of these assets does not cease by non-use and cannot be acquired by third parties by acquisitive prescription, or by the effect of possession in good faith of movable goods".

Inalienability of property that is object of public property thus requires not only the solution of interdiction of their alienation, but also impossibility of their acquisition by third parties by any other mode of acquisition regulated by law[51]. Therefore, businesses that own public assets can not contract a consumer loan, which is a translate contract of ownership.

Interdiction is maintained for so long as the goods are in the public domain. If they are disabled and pass into the private domain of the state or territorial-administrative units, as the regime of the private domain is that of the common law (Art. 553 of the Civil Code) they will be eligible for consumption loans.

Since the loan for consumption is a contract of transfer of property, the lender should have the capacity, respectively to fulfill the conditions required by law regarding the acts of disposition and be the owner of the good that constitutes the object of the contract[52]. Although the last condition is not expressly stated in the legal regulation of the contract, it implicitly results from the real and transfer nature of the loan for consumption.

Actually the new Civil Code admits the possibility of trading the goods of other person, Art. 1.230 providing that "if the law does not provide otherwise, the properties of a third party may be subject of benefits, the debtor being required to purchase and transmit them to the creditor or, where appropriate, to obtain the consent of the third party. In case of default, the debtor is liable for damages."

The loan for consumption, however, being a real contract[53], is validly concluded only at the time of the relegation of the material good, which means that the parties, acting in good faith, cannot borrow another person's properties, such an agreement having a maximum value of a pre-contract, whose culpable non-performance gives rise to damages[54].

---

[50] Bucharest Court of Appeal – Commercial Department no. 5, commercial decision no. 1126/22.06.2011, unpublished.

[51] Corneliu Bârsan, *Drept civil, Drepturile reale principale (Civil Law, Principal Real Rights)*, 3rd ed. revised and supplemented, Hamangiu Publishing House, 2008, p. 98.

[52] Liviu Stănciulescu, *op. cit.*, 2012, p. 405.

[53] Paul-Henri Antonmattei, Jaques Raynard, *Droit civil. Contrats spéciaux*, 6e édition, Litec Lexis Nexis SA, 2008, p. 273.

[54] Dalloz Civil Code, 108 e édition, 2009, p. 2124.

If the lender, although not the owner, loans the movable goods which he holds, the bona fide borrower will be able to defend against the true owner invoking possession in good faith in accordance with Art. 919 par. 3 and Art. 937 of the Civil Code[55].

These provisions correspond to Art. 1909 - 1910 of the former Civil Code, under which the doctrine constantly held that the bona fide borrower is protected against the true owner.

Lending an asset which does not belong to the lender will transfer however the ownership to the borrower, if he/she is acts in good faith and it is about movable assets[56]. Likewise, if the lender was not the owner, but the borrower acts in good faith, he/she can defend against the owner by the way of exception provided by Art. 1909 - 1910 of the former Civil Code[57].

As the previous Civil Code, the new regulation makes a distinction as the true owner relinquished jurisdiction over the good voluntarily or involuntarily.

If the owner has entrusted his movable good to a person and this one, in breach of its obligations, borrows it to a bona fide third party, who was not aware of the lack of ownership of the co-contractor, the action claim shall be rebutted according to Art. 937 par. 1 of the Civil Code.

Art. 938 of the Civil Code provides that "it is deemed as acting in good faith the possessor who was not aware or did not have to, as appropriate, be aware of the lack of ownership of alienator. (2) Good faith must exist at the date of entering into effective possession of the good", in our case at the date of the conclusion of the contract, being irrelevant the fact that the third party finds out afterwards that he/she did not contracted with the real owner.

Another essential condition imposed by Art. 937 par. 1 of the Civil Code is that the act of transfer of ownership completed on the property of another be by onerous title.

If the legal act is gratuitous, there is no more reason to prefer the bona fide third party and to sanction the owner for lack of diligence in choosing the person to whom he entrusted the property. In this case, that should be protected who strives to avoid damage (*certat de damno vitando*) and not the one that seeks to preserve a benefit (*certat de lucro captando*[58]).

On the supposition that the property has been lost or stolen, so the owner involuntarily relinquished jurisdiction, the action claim may be brought successfully even against a bona fide third party, within 3 years from the date on which the owner has lost possession of the object.

The plaintiff owner must prove his right of ownership over the good and over the loss or theft, without the need, in the latter case, of a criminal judgment by which to return to the offense of theft[59]. Moreover, it is not irrelevant whether the property loss was the result of negligence of the owner or of a fortuitous fact.

The term of 3 years is a limitation period, unsusceptible of suspension or interruption, at whose fulfillment the ownership ceases.

Loan contract whose object is the property of another person is hit by a relative nullity, sanction that may be invoked only by the borrower[60].

---

[55] Also see in this respect Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 2141-2142, Dumitru C. Florescu, *op. cit.*, p. 269.

[56] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op, cit*., p. 625.

[57] Francisc Deak, *op. cit.*, 2001, p. 354-355.

[58] Gabriel Boroi, Liviu Stănciulescu, *Institutii de drept civil în reglementarea noului Cod civil (Civil law institutions to regulate the new Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, p. 68.

[59] Also see in this respect A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 977-978. For the contrary opinion see Ovidiu-Sorin Nour, *op. cit.*, p. 224. The condition of a final criminal judgment would be excessive, what concerns in this case is that owner had lost possession of the property irrespective of his will, through a third party illicit deed or by misleading by a third party.

[60] A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 2141, Dumitru C. Florescu, *Drept civil. Contracte speciale, Curs pentru învătământul la distantă (Civil Law. Special Contracts, Distance learning course)*, 2nd vol., Titu Maiorescu University Publishing House, p. 281. For the contrary opinion, according to which the sanction that occurs when lending the asset of another person is the absolute nullity, see Codrin Macovei, *op. cit.*, p. 272.

If after exercising the action claim by the true owner, the borrower was required to return the borrowed goods, he may claim from the lender damages for any damage suffered as the responsibility involved is a tort liability.

But the question arises on what are means of defense that the borrower may use if, although he returned the goods to the real owner, the lender claims him restitution of the goods or payment of interest according to the contract concluded.

There are authors who consider that the borrower may make use of the exception of non-performance[61]. We appreciate this as being inexact as long as exception of non-performance is a mean of defense available to the parties of a mutually binding contract and is founded on the reciprocity and interdependence of obligations, each of the obligations being the legal cause of the other. But the loan for consumption is a unilateral contract[62], the lender having, in principle, no contractual obligation, and as such the exception of non-performance cannot be invoked.

Although the exercise of any civil action is free[63], it requires certain conditions of exercise, respectively the assertion of a right, justification of an interest, legal capacity and quality.

To enjoy legal protection of the action, the asserted right must be recognized and protected by law, so it must not enter into a content of an illicit juridical report, must not contravene public order or morality, and the interest should be legitimate, not coming into conflict with the law.

There are conditions that are not fulfilled by such an action, by which the lender, who loaned a found or stolen good, requests its restitution from the borrower or payment of interest.

If both parties act in bad faith, unlike previous regulation, the new Civil Code establishes the indefeasibility of the movable goods claim action against the possessor in bad faith by the provisions of Art. 563 par. 2. The borrower in bad faith will be required to return the goods to the true owner, and if he/she consumed them, the same quantity of goods of the same kind and quality, the loan for consumption always having as object fungible goods. Only if it is not possible to return such goods, he/she shall be required to pay their value.

Regarding the sanction applicable to the loan contract, we consider that in this case the absolute nullity for illicit cause may occur (Art. 1.236 par. 2 and 1.238 par. 2 of the Civil Code).

References

- M. Avram, C. Nicolescu, *Regimuri matrimoniale (Matrimonial regimes),* Hamangiu Publishing House, Bucharest, 2010.
- Paul-Henri Antonmattei, Jaques Raynard, *Droit civil. Contrats spéciaux*, 6e édition, Litec Lexis Nexis SA, 2008.
- Al. Bacaci, V.-C. Dumitrache, C.C. Hageanu, *Dreptul familiei (Family Law)*, 6th ed., C.H. Beck Publishing House, Bucharest, 2009.
- Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *Noul Cod civil. Comentariu pe articole (The New Civil Code, Comments on Articles art. 1-2664)*, C.H.Beck Publishing House, Bucharest, 2012.
- C. Bârsan, M. Gaită, M. M. Pivniceru, *Drept civil. Drepturi reale (Civil Law, Real Rights)*, European Institute, 1997.
- C. Bârsan, *Drept civil. Drepturi reale principale (Civil Law, Principal Real Rights)*, 3rd ed. revised and supplemented, Hamangiu Publishing House, 2008.

[61] Ovidiu-Sorin Nour, *op. cit.*, p. 225.

[62] French doctrine tendency is to consider that the money loan granted by a professional becomes mutually binding contract, the lender also being under an obligation of good faith (see in this respect Philippe le Tourneau, Jérôme Fischer, Emmanuel Tricoire, *Principaux contrats civil et commerciaux*, Ellipses Edition Marketing SA, Paris, 2005, p. 190). However, in this context it is unlikely that a professional would lend money that does not belong to him.

[63] Viorel Mihai Ciobanu, *Tratat Teoretic si Practic de Procedură Civilă (Theoretical and practical treatise of Civil Procedure)*, 1st vol., General Theory, National Publishing House, Bucharest, 1996, p. 265 and next.

- Ghe. Beleiu, *Drept civil roman. Introducere in dreptul civil. Subiectele dreptului civil (Romanian Civil Law, Introduction to Civil Law, Civil rights issues)*, "Sansa" Publishing and Press House, Bucharest, 1992.
- G. Boroi, C. A. Anghelescu, *Curs de drwpt civil. Partea generala (Course of Civil Law. The Generic Part)* 2nd ed. revised and enlarged, Hamangiu Publishing House, 2012.
- G. Boroi, L. Stănciulescu, *Institutii de drept civil in reglementarea noului cod civil (Civil law institutions to regulate the new Civil Code)*, Hamangiu Publishing House, 2012.
- G. Boroi, Drept *civil. Partea generala. Persoanele (Civil Law, The Generic Part. Persons)*, 4th ed. revised and supplemented, Hamangiu Publishing House, 2010.
- Stanciu D. Cărpenaru, *Tratat de drept comercial roman conform noului cod civil (Romanian Commercial Law Treatise, according to the new Civil Code)*, 3rd ed. revised, Universul Juridic Publishing House, Bucharest, 2012.
- Viorel Mihai Ciobanu, *Tratat teoretic si practic de procedura civila (Theoretical and practical treatise of Civil Procedure)*, 1st vol., General Theory, National Publishing House, Bucharest, 1996.
- D. Chirică, *Studii de drept privat (Studies of Private Law)*, Universul Juridic Publishing House, Bucharest, 2010.
- C. M. Crăciunescu, D. Lupascu, *Emanciparea minorului în reglementarea noului Cod civil (*The Emancipation of a Minor in the regulation of the new Civil Code) in P.R. nr. 9/2011.
- P. M. Cosmovici, *Drept civil. Drepturi reale. Obligatii. Legislatie (Civil Law, Real Rights, Obligations, Legislation)*, All Publishing House, Bucharest, 1996.
- F. Deak, *Tratat de drept civil. Contracte speciale (Civil Law Treatise. Special Contracts)*, Universul Juridic Publishing House, Bucharest, 2001.
- I. P. Filipescu, A. I. Filipescu, *Tratat de dreptul familiei (Family Law Treatise)*, 8th ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2006.
- I. P. Filipescu, *Drept Civil, Dreptul de proprietate si Alte Drepturi Reale (*Ownership and other real rights), Proarcadia Publishing House, Bucharest, 1993.
- Dumitru C. Florescu, *Drept civil. Contracte speciale. Curs de invatare la distanta. (Civil Law. Special Contracts, Distance learning course)*, 2nd vol., Titu Maiorescu University Publishing House.
- Frédéric Leclerc, *Droit des contrats spéciaux*, LGDJ, 2007.
- D. Lupulescu, *Proprietatea comuna a sotilor (Common Ownership of Spouses)*, Scientific and Encyclopedic Publishing House, Bucharest.
- C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român (Romanian Civil Law Treatise)*, 2nd vol.I, Restitutio, All Publishing House, Bucharest, 1997.
- C. Macovei, *Contracte civile (Civil Contracts)*, Hamangiu Publishing House, Bucharest, 2006.
- Ovidiu-Sorin Nour, *Contractul de Imprumut. Analiza teoretica si practica (Loan agreement: theoretical and practical analysis)*, Universul Juridic Publishing House, 2009.
- T. Prescure, A. Ciurea, *Contracte civile (Civil contracts)*, Hamangiu Publishing House, 2007.
- Pascal Puig, *Contrats spéciaux*, 3e édition, Dalloz, 2009.
- L. Stănciulescu, *Curs de Drept Civil, (Civil Law Curse)* Hamangiu Publishing House, Bucharest, 2012.
- Philippe le Tourneau, Jérôme Fischer, Emmanuel Tricoire, *Principaux contrats civil et commerciaux*, Ellipses Edition Marketing SA, Paris, 2005.
- C. T. Ungureanu and others, *Noul cod civil. Comentarii, doctrina si jurisprudenta (New Civil Code, Comments, doctrine and jurisprudence)*, Hamangiu Publishing House, 2012.
- V. Stoica, *Drept civil. Drepturile reale principale (Civil Law. Principal Real Rights)*, Humanitas Publishing House, Bucharest, 2006.

LEGAL ASPECTS OF THE TRANSPOSITION OF DIRECTIVE 2001/23/EC REGARDING THE SAFEGUARDING OF EMPLOYEES' RIGHTS IN THE EVENT OF TRANSFERS IN THE ROMANIAN LAW

FELICIA BEJAN[*]

Abstract
The transfer of undertakings, businesses or parts of undertakings or businesses by legal transfer or merger determine important changes in the structure of the participant entities. The change of their juridical organisation has significant consequences on the employees' rights, reason why, both nationally and internationally, normative acts that would regulate appropriate safeguarding mechanisms have been adopted. The paper aims to analyse the transposition into national law of the communitarian norms in the field. As a result, the legal aspects with regards to which the legislator chose a restrictive transposition, as well as the additional rights established by them in favour of the employees, in comparison to the directive are identified. At the same time, the study emphasizes the aspects with regards to which the Romanian law requires to be changed and therefore makes some proposals de lege ferenda, so that the transposition of the communitarian normative act into national law would be a precise one and consistent to the other dispositions regarding national law.

Keywords: *transfer, employees, labour contract, enterprise, transposition.*

1. Introduction

The objective of the European regulations regarding the employees' protection in the event of transfers is that of offering them a juridical framework that would safeguard them from illegal measures affecting the rights they won, such as the modification of the working conditions, or the individual or collective dismissal.

The consecrated principle is that of the employees' labour contracts continuity, under the same conditions they were concluded, in the event of employer change as a result of a transfer process by legal transfer or merger. **The employees' safeguarding mechanisms in the event of the stock company reorganisation aim at guaranteeing the respect of the employees' rights, those previously gained, within the new juridical structure.** The dispositions regarding the maintenance of the employees' rights in the event of transfers of undertakings, businesses or parts of them by legal transfer or merger have to become legal guaranties for the stability of the labour report and the content of the labour contract between the employees and the employers involved in this kind of operations.

The Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[1] was transposed into national law by Articles 173-174 of the Law 53/2003 of the Labour Code[2] and the Law 67/2006 concerning the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones[3].

---

[*] PhD candidate, Faculty of Political Science, Bucharest, Romania (e-mail: felicia.bejan@fspub.unibuc.ro).

[1] Published in the Official Journal, nº L 82/2001, p. 6-20.

[2] Republished in the Romanian Official Journal, 1st Part, nº 3445, the 18th of May 2011.

[3] Published in the Romanian Official Journal, 1st Part, nº 276, the 28th or March 2006. It entered into force once Romania became a member of the European Union. Previously, the regulation in the field was realised by the dispositions of Articles 169-170 of the Labour Code and the Government Ordinance 48/1997 regarding the establishment of measures of social protection for employees in the event of transfer of shares or social parts of stock companies, repealed by the Law 67/2006.

With regards to the relation between the two articles in the Labour Code and the norms of the Law 67/2006, the doctrine states that these are "general norms, placed at the same legislative level"[4]. The way in which the national framework regarding the employees' safeguarding in the event of transfer of undertakings leads to the same conclusion, being shown that "in accordance with the Directive 2001/23/EC, Articles 173-174 of the Labour Code and the Law 67/2006 concerning the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones[5] have been adopted. As to what we are concerned, we agree with the current opinion and we consider that the provisions of the Labour Code, by their general content, are meant to complete the legal framework regarding the employees' safeguarding regime.

The Law 67/2006 is divided into three chapters, the number of legal norms present in its articles being rather few. Of course, the quantitative criterion cannot be determinant within the qualification of the regulation activity, but it might be an appreciation factor for this one, namely if it applies to a normative act whose role is to introduce into national law communitarian norms and, therefore, it can be the object of a comparative analysis.

The study of the provisions of the Law 67/2006 compared to those provided by the Directive 2001/23/EC emphasizes to which level the transposition into national of the communitarian norms, has a restrictive or an extensive character.

2. Aspects with regards to which the Law 67/2006 is restrictive compared to the Directive 2001/23/EC.

In accordance with the Directive 2001/23/EC that it transposes, the Law 67/2006 has as object of regulation the conditions under which the safeguarding of the employees' rights is accomplished, as provided in their individual labour contracts and in the collective labour agreement, in the event of transfers of undertakings, businesses or parts of these ones towards another employer, as a result of a legal transfer or merger process, according to the law (Article 1). Unlike the Directive, the national regulation is more restrictive under the following aspects:

a) If according to the Directive 2001/23/EC the juridical regime regarding the safeguarding of the employees' rights applies to any transfer of undertakings, businesses or parts of these ones, conforming to the Law 67/2006, the norms regarding the maintenance of the employees' rights are applicable only in case of a transfer resulting in the passage of the transferred unit property right from the cedent to the legal transferor.

It is true that according to Article 1, paragraph (1), letter (a) of the Directive 2001/23/EC, the provisions of the communitarian normative act "apply only in the case of any transfer of undertakings, businesses or parts of undertakings or businesses towards another employer, as a result of a conventional legal transfer or a merger".

---

[4] Uluitu, *Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora*, in Revista Romana de Dreptul Muncii nr. 1(2006),29. The author expressed this opinion in an analysis he wrote regarding a different point of view, contained by the doctrine, concerning the relevant provisions about the safeguarding of employees following the transfer of the undertakings in the former regulation prior to the Law 67/2006. Before, the regulation in the field was realised by the dispositions of Articles 169-170 of the Labour Code and the Government Ordinance 48/1997 regarding the establishment of social protection measures for employees in the event of transfer of the property right on shares or social parts of stock companies. The legal analysis is topical, although meanwhile there have been legislative modifications. The opinion we discussed stated that the juridical situations regulated by the Government Ordinance 48/1997 were different from those considered by the legal norms of the Labour Code, though both normative texts regard the employees' protection. (C.Galca-R*eorganizarea intreprinderilor. Analiza dispozitiilor noului Cod al muncii in raport cu legislatia europeana,* Editura Rosetti Bucuresti, 2005).

[5] I.T. Stefanescu, *Tratat teoretic si practice de drept al muncii*, (Bucharest: Universul Juridic Publishing House, 2012), 467.

Similarly to the Directive, the national law establishes that its provisions apply only in case of a transfer resulted from a legal transfer or a merger process, but, unlike the Directive, in a restrictive way compared to the transposed communitarian act (the above mentioned Directive), it defines in Article 4, letter (d) the notion of "transfer" as "the passage of undertakings, businesses or parts of these ones from the cedent's property to the legal transferor's property".

Such a limitation does not affect the employees' protection if the transfer takes place by a merger process. On the contrary, it can apply in case of an entity's legal transfer that doesn't result in a property transfer.

However, given that the underlying reasoning of the Directive is that the structural reorganisations by legal transfer, involving the employer's change, take place with the safeguarding of the employees' rights, and considering that such a structural modification happens in other juridical situations than those characterised by a property transfer, it is obvious that the Romanian law is contrary to the communitarian normative act.

On the other hand, the jurisprudence of the Court of Justice constantly showed in its decisions that the notion of "legal transfer" has a larger understanding than that of operation meant to ensure the transfer of an entity property right from one employer to another one. Thus, the Court stated that the communitarian directive applies not only when the owner of the enterprise remains the same, as it is the case of a rent contract, a legal transfer contract or a leasing contract. In one of the cases assigned to the Court, it was shown that "the Directive applies once the change of the physical or moral person responsible with the exploitation of the enterprise takes place, and which, under this consideration, assumes the obligations of the employer towards the employees working in the factory, whether the transfer of the enterprise ownership takes place or not[6].

It is true that these opinions of the Court of Justice were formulated with regard to the previous regulation in the matter (Directive 77/187/EEC), but the amendments contained in the Directive 2001/23/EEC do not change at all the given interpretation. Our conclusion is confirmed by the 8th consideration of the current regulation, according to which "Because of security reasons and legal transparency, it was necessary to clarify the notion of transfer, according to the jurisprudence of the Court of Justice. This clarification didn't change the application field of the Directive 77/187/EEC, as interpreted by the Court of Justice".

Thus, due to a deficient transposition activity, in full contradiction with the goal of the Directive and the jurisprudence in the matter of the Court of Justice, the Romanian legislator introduced an unacceptable limitation in the application field of the regulation[7]. The restrictive regulation of the transfer notion allows a limited protection to the employees in all the situations when, despite a transfer of undertakings, it doesn't result in a property transfer.

It is the role of the jurisprudence to provide a larger understanding of the notion of company transfer. The national courts, within their interpretation competency, are the ones responsible to apply the national law according to the text and the finality of the directive.

De lege lata, finding a solution to cases regarding juridical issues related to the application of the Law 67/2006 can be based on the principle of primacy of the European Law on the member states' national law, and on the principle of precise interpretation. Therefore, given the inconsistency of the Romanian law with the communitarian Directive, national instances are obliged to give priority to the latter and to leave the national law unenforceable. Additionally, according to the principle of precise interpretation, they "must do everything related to their competence, while taking into consideration the entire national legislation and applying interpretation methods it knows, in

[6] The *Allen* Decision from the 2nd of December, point nº 8 among the considerations, case C-234/98.

[7] For a more detailed analysis of the regulation regarding the employees' safeguarding according to the Law 67/2006, read O. Tinca, *Observatii critice la Legea nr. 67/2006 privind protectia drepturilor salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora*, in Dreptul nr. 2(2007), 22-27.

order to guarantee the full effectiveness of the concerned directive and to reach to a solution in accordance with the final objective pursued by this one[8].

De lege ferenda, we propose the express abrogation of the provision of Article 4 of the Law 67/2006 stating that „the passage from the cedent's property in the legal transferor's property of undertakings, businesses or parts of these ones"

Of course, there is also the alternative of the quoted text reformulation, meaning that the enumeration of the juridical act or the juridical effects resulting from the transfer should be an illustrative, and not an exhaustive one.

We consider that such a regulation solution is useless and rather formal with regards to the inclusive notion of transfer, as it is provided by the Directive 2001/23/EC. Given the diversity of the juridical acts by means of which the transfer can be realised, and, implicitly, of the juridical effects it can generate, any terminological clarification can lead to a restriction of the application field of the norms concerning the employees. Moreover, the abrogation solution is consistent with the European principle of loyal cooperation.

b) If according to the Directive 2001/23/EEC, it can be considered as transfer of undertakings, businesses or parts of these one, the transfer of "an entity that preserves its identity, understood as organized assembly of means, whose objective is to undertake an economic activity, irrespective if that activity is central or auxiliary" (Article 1, letter (b)), the transposition of the communitarian disposition into the Law 67/2006 provides that the transfer's "aim is the continuation of the main or the secondary activity, regardless of whether it follows or not obtaining a profit" (Article 4, letter e).

The juridical literature expressed the opinion according to which the wording of the Romanian law is also more restrictive compared to that of the communitarian normative act. By defining the transfer, the national law provides that the cessionary's goal has to be that of developing the cedent's main or secondary activity, contrary to the directive which provides that the cessionary's objective has to be the undertaking of an economic activity, regardless if it continues the cedent's previous activity or not.

The faulty transposition of the directive is obvious, given that its dispositions didn't mention as an application condition the maintenance or the remission of the cedent's activity. *De lege ferenda*, the modification of the Article 4, letter (e), in terms of eliminating the condition of the development of the activity contained by the transfer notion, is required.

In our opinion, the interpretation possibility that the formulation of the legal text allows can lead to solutions contrary to the rationale of the regulation. More precisely, from the *per a contrario* interpretation of the transfer definition provided by national law, it appears that the provisions of the Law 67/2006 regarding the employees' protection don't apply if the legal transferor's activity is different, but similar to that of the cedent. The absence of the goal for a main or secondary activity to continue within a transfer realised by legal transfer or merger excludes the operation in question from the application field of the Romanian law. Therefore, the accomplishment of the transfer without any obligation on the cedent or the cessionary regarding the employees is perfectly legal, so it won't lead to any penalty. In other words, the text we analysed allows both the cedent and the cessionary to take unfavourable decisions towards the employees and to avoid therefore the rights protection norms that concern them.

On the other hand, from the legal transferor's perspective, that, by hypothesis, wants to follow exactly the law 67/2006, being part of a transfer procedure implicitly means taking upon itself the obligation of preserving the cedent's activity. Or, certainly, this solution isn't consistent with the communitarian legislator's rationale either.

[8] The *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) Decision from the 4th of July 2006, case C-212/04.

c) The Romanian legislator excluded from the application field of the Law 67/2006 those cases in which the cedent is the subject of a juridical reorganization process or bankruptcy, without any derogation. According to the Romanian law, in such situations, the entire transfer of the cedent's rights and obligations resulting from the individual labour contract and the collective labour agreement at the moment of the transfer aren't applicable. The fact that the cedent's insolvency procedures are or not established in order to liquidate its goods is unimportant for the solution chosen by the Romanian legislator.

From a purely technical point of view, this transposition method is in accordance with the provisions of Article 5 of the Directive, which gives the Member States the freedom to establish by internal dispositions, the juridical regime applicable to those situations when the cedent is the object of a bankruptcy procedure or other similar insolvency processes.

On the other hand, we consider that the transposition is criticisable because paragraph (2) of Article 5 of the Law 67/2006 is not correlated with Article 238 (4) of the Law 31/1990, according to which "The merger or the division, as defined in paragraphs (1) or (2), can be made although dissolved companies are in liquidation, provided that they hadn't started the liquidation process".

Thus, although the Romanian legislator considers as acceptable a transfer by merger if the cedent stock company knows a liquidation process, the same legislator doesn't appreciate as necessary to establish a safeguarding procedure for the employees of that company in terms of obliging the participating parts to the transfer to inform and consult the employees, on the one hand, and of forcing the legal transferor to preserve the employees' rights, on the other hand.

However, the meaning of the directive transposition is precisely that of giving the Member States the possibility to answer to the object of the communitarian normative act, taking into consideration at the same time the particularities of the legal national system regarding the regulated matter. We tend to believe, nevertheless, that this lack of systematization of the Romanian legislator is due to the lacking harmonization experience at that moment, and to the fear of being wrong. We affirm this as from the entire regulation one can observe that the national law avoids to establish any rule for the atypical hypotheses, preferring to keep quiet or to offer a blurry interpretation in such cases.

De lege ferenda, the Romanian legislator has to correct the inconsistency between the two normative acts, so that their law subjects can benefit from a clear and coherent juridical framework.

d) With regards to the juridical responsibility, the Law 67/2006 states that the inobservance by the cedent or the cessionary of the obligations provided by the law represents a contravention and is sanctioned with a fine between 1,500 (RON) and 3,000 (RON).

The competency for the contraventions establishment and the fines impositions belongs to the labour inspectors. We are in presence of a single article that regulates a sanction for the breaking of a law.

It is true that the provisions of the directive regarding the sanctions are, in what they are concerned, generally expressed, the reason why we cannot talk about its improper application.

In the literature the opinion was expressed according to which the text writing requires a high degree of generalisation, which is inadequate for the sanction of some contraventions. On the other hand, we believe that the European legislator's intention was to allow the Member States the possibility of choosing the most suitable sanctions.

It is our belief that beyond the possible justifications concerning the incomplete character of the legislative text, the little quantum of the fine raises big questions with regards to the efficiency of such a sanction. *De lege ferenda,* we consider as necessary a clear description of the circumstances under which sanctions are applicable, a differentiation of the sanctions according to the importance of the contravention and a rise of the fine quantum.

3. Aspects with regards to which the Law 67/2006 is extensive compared to the Directive 2001/23/EC.

In the juridical literature it was considered that "the legislator didn't want to offer additional rights to the employees"[9]. Unlike this viewpoint, we identified some aspects with regards to which the Law 67/2006 offers an additional protection to the employees compared to the Directive 2001/23/EC:

a) The Romanian law does not provide any limitation to the employees' information and consulting obligation that the Directive provides. Under this aspect, the Romanian legislator understood to offer equal protection to all the employees concerned by the transfer.

Article 7, paragraph (5) of the Directive regulates the capacity of the Member States to limit the information and consulting obligations by the enterprises and units that, depending on the number of employees, fulfil the necessary conditions for the election or the establishment of a collegial body that would represent the employees.

Despite the possibility offered by the Directive, but also considering that, according to the Labour Code, in the units with more than 20 employees, workers' representatives can be designated, the Law 67/2006 doesn't introduce any difference regarding the content of the information and consulting obligations, depending on the number of employees. Thus, the information and consulting obligations have to be accomplished without any exception, both in the enterprises with less than 20 employees, and in those with more than 20 employees, and which fulfill therefore, from the point of view of the number of workers, the necessary conditions for the election or the establishment of a representative body.

Moreover, unlike the Directive, which established that in case there is no employees representative, due to causes independent from their will, the information process will be directly addressed to them, the Romanian law regulating the obligation to inform the employees, without making any distinction between the situation when the absence of a representative body is due to independent or dependent reasons from their will. Consequently, including the situations when the lack of a representative body can be attributed to the employees' choice, they have the right to be informed about the transfer process.

According to our national law, the employees' representatives are the representatives of the syndicates or, if there are no syndicates, the people chosen and delegated to represent the workers according to the law (Article 4, letter e) of the Law 67/2006). If the undertakings, the business or parts of these lose their autonomy following a transfer, the transferred employees will be represented, with their expressed agreement, by the representatives from the legal transferor's enterprise, until the establishment or the nomination of new representatives, according to the law (Article 10, paragraph 2 of the Law 67/2006).

b) The Romanian law provides a special term during which the obligation to inform and consult the employees' has to be accomplished by the cedent, respectively by the legal transferor, eliminating therefore the failures possibly generated by the expression "in due time", that the directive contains.

According to the provisions of Article 12 (1), informing the representatives of, or the employees themselves, by the cessionary or the legal transferor has to be performed at least 30 days before the transfer. Beside this certain term, the Romanian legislator expressly demands for a written form of the information to exist. Concerning the content of the information, apart the transfer date, or the date suggested for the transfer, the reasons of the transfer, the juridical, economic and social

[9] A.Uluitu, *Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti al acestora*, in Revista Romana de Dreptul Muncii nr. 1(2006), 35.

consequences of the transfer for the employees, the envisioned measures concerning the employees as provided by the directive, the Law 67/2006 requires that the written form should also contain information regarding work conditions and work qualification.

Finally, according to Article 11 of the Law 67/2006, the same 30-day minimum term has to be respected also with regards to the obligation to consult with the employees' representatives, with the goal of reaching an agreement, whenever the cedent or the legal transferor envisages taking measures with regards to their own employees. In the juridical literature it was shown that the obligation of reaching an agreement is an obligation of means, and not an obligation of result, therefore this will be considered as accomplished irrespective of the conclusion of an agreement between the cedent, respectively the legal transferor, and the employees, agreement whose object should the envisaged measures[10].

c) The Law 67/2006 contains some provisions more favourable to the collective labour contract compared to the Directive.

Just like the directive, national norms regulate the legal transferor's obligation to respect the rights given to the employees through the collective labour contract existing in the moment when the transfer takes place and in force until its call-off or expiration, respectively the application of a new convention as a result of a new negotiation of the contract; a new contract cannot enter into force before a minimum of one year after the transfer, even if the contracting parts agree to renegotiate before the expiration of the one-year term.

In the juridical literature, there is an opinion according to which, as an exception to Article 133, paragraph 2 of the law 62/2011, according to which in every unit only one collective labour contract is to exist, in situations when both the cedent and the legal transferor apply a collective labour contract, " in the same unit will temporarily coexist two collective labour contracts (until the annual renegotiation of one of them)"[11].

Additionally to the directive, the Romanian law establishes rules in the matter in case the transferred entity doesn't preserve its autonomy. Therefore, according to Article 9, paragraph 3, if, as a result of the transfer, the undertakings, the business, the unit or parts of these ones don't keep their autonomy, and the collective labour agreement applicable to the legal transferor's level is more favourable, the transferred employees will benefit from the collective labour agreement that is more favourable to them.

4. Conclusions

The study of the transposition into national law of the communitarian norms regarding the employees' protection in the event of transfers of undertakings, businesses or parts of these ones revealed important disparities between the two normative acts. From this point of view, we consider the opinion expressed in the juridical literature according to which "the Law 67/2006 represents a proof of progress in the field, by catching up with the most important provisions of the Directive 23/2001/EC and having only one default, which is however an important one, that of including within its application sphere only the situations concerning the property transfer"[12], as being wrong

Unlike other harmonization normative acts, Law 67/2006 is rather an unsuccessful experience. If, commonly and naturally, national transposition laws are more practical and more detailed compared to Directives, in this case the contrary is true. For a better understanding of the national law, the prior study of the Directive is necessary; this most certainly is not the way to go for the beneficiary of the law. The Romanian legislator lost sight of the fact that Directives addresses

[10] I.T. Stefanescu, *ibidem,* p 473.

[11] I.T. Stefanescu, *ibidem,* p. 472.

[12] P. A. Levente*, Protecţia angajatilor in cazurile de schimbari intervenite in persoana angajatorilor în UE si in Romania*, in Studia Universitatis Babes-Bolyai nr.1(2007) 10.

Member States, and that every Member State has the obligation to transpose it correctly, clearly in the interest of those benefiting from it. Furthermore, given that a directive's provisions can be invoked directly only in a limited number of situations and conditions, the transposition activity has to be characterized by rigor, and national norms have to be self-assured and efficient.

In our opinion, *de lege lata*, the criticised aspects can lead in practice to inequitable solutions, starting with the narrowing, for various reasons, of the application field of the dispositions contained in the Law 67/2006, up to an inefficient sanctioning when breaking its provisions. As we have shown in our *de lege ferenda* proposals, a future revision of the legislative text requires modifications, as to the purpose of the transposed Directive to be reached no matter the interpretation.

References

- STEFANESCU, I.T., *Tratat teoretic si practice de drept al muncii*, (Bucharest: Universul Juridic Publishing House, 2012).
- STEFANESCU, I.T., „Protectia drepturilor salariatilor in cazul transferului intreprinderii, al unitatii sau al unor parti ale acesteia, in lumina Legii nr.67/2006", in *Dreptul*, nr. 9 (2006).
- TINCA, O., "Observatii critice la Legea nr. 67/2006 privind protectia drepturilor salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora", in *Dreptul* nr. 2(2007).
- ULUITU, A., „Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora", in *Revista Romana de Dreptul Muncii*, nr. 1 (2006).
- VOICULESCU, N., "Legislatie comunitara, nationala si jurisprudenta privind protectia salariatilor in cazul transferului intreprinderii", in *Revista Romana de Dreptul Muncii*, nr. 1(2006).
- PÈTER, Antal Levente, „Protecţia angajatilor in cazurile de schimbari intervenite in persoana angajatorilor în UE si in Romania", în *Studia Universitatis Babes-Bolyai,* nr.1(2007).
- Directive 2001/23/EC on the approximation of the laws of the Member States relating the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (Published in the Official Journal, nº L 82/2001, 6-20).
- Law 53/2003 – The Labour Code (Republished in the Romanian Official Journal, 1st Part, nº 3445, the 18th of May 2011).
- Law 67/2006 concerning the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones(Published in the Romanian Official Journal, 1st Part, nº 276, the 28th or March 2006).

CASES IN WHICH THE PATRIMONIAL LIABILITY OF THE EMPLOYER CAN BE ESTABLISHED

ADRIANA ELENA BELU [*]
ELENA ALEXANDRA ILINCA [**]

Abstract
The employer's patrimonial liability can be triggered if the employee was subject to a moral or material prejudice. Most often, the material damage caused to the employee consists in the denial of material rights, case in which the employer also owes an interest. The moral prejudice represents a harmful consequence, with a non-economic content determined by the violation of the non-patrimonial personal rights, such as: harming the honour, dignity, prestige or reputation. In this context, between the guilty employer and the prejudiced employee there could be an obligational report.

Keywords: *patrimonial liability, the employer, the moral prejudice, the material damage, personal right.*

Preliminary

The situations in which the employee could be prejudiced from the material or moral point of view, from the employer's fault are numerous and this is why just a part of them have express provisions under the norms of the labor legislation. In many cases, the employer's patrimonial liability is triggered based on the interpretation of the existing texts from the normative acts which regulate the social relationships included in the object of the labor law or in the conventional sources (collective labor contracts, internal regulations, organization regulations, etc)

Irrespective of the nature of the provision (express or implicit) which has been ignored in the phases of the execution of the juridical labor report, we believe that the following cases in which the employer's patrimonial liablility can be established could present a theoretical and practical interest:

1.Forcing the employee to perform a certain work under threat

According to art. 4 align. 1 from the Labor Code[1], „The forced labor is forbidden". If the employer imposes an employee to perform an activity in a certain job by using the threat should the employee refuse (for instance, the employee is threatened that they will be fired), the instance may establish the patrimonial liability of the employer and oblige him to indemnify the employee for the material and/or moral prejudice suffered subsequent to the performance of that labor, for which he had not given the agreement. The employer's patrimonial liability is possible if all the below conditions are met:

a. the employee and the employer had conclused a written individual labor contract;

b. the employer asked the employee to perform another work, even in another job than the ones provided in the individual labor contract (according to the clauses „kind of labor" and „job/position");

c. the employee refused the employer's proposal;

d. the employer tried to determine the employee to perfom the work using the threat, even if the employee did not agree;

e. the employee performed a certain labor imposed by the employee for fear that the threat could be applied and have consequences;

---

[*] Senior Lecturer, PhD**,** "Spiru Haret" University, Bucharest (adyelenabelu@yahoo.com).
[**] Senior Lecturer, PhD**,** "Spiru Haret" University, Bucharest (alailinca@yahoo.com).
[1] Law 53/2003, Law 40/2011.

f. the employee suffered a prejudice, either material (for example, his payment was lower than the one negotiated) or moral (for example, he was obliged to perform an activity with an inferior level than his professional training or on a job with dangerous conditions which bring harm to his professional dignity or state of health) when performing a different activity than the one provided in the job description.

2.Establishing the amount of wage in a discriminating way

The employer is obliged, within the work relations, to respect the principle of equal treatment to all the employees, namely not to commit any direct or indirect discrimination in regards to an emloyee, based on gender, sexual orienation, genetical features, age, nationality, race, colour, ethnicity, religion, political opinions, social origin, handicap, familial situation or responsibility, union membership or activity.

In this case, art. 6 align 3 from the Labor code establishes as a necessity: „For equal labor or of equal value it is forbidden any type of discrimination based on gender regarding all the elements and payment conditions". Thus, if an employee received an inferior wage than the one of another employee from the same unit, who performs „equal labor or of equal value" based on gender discrimination, the employee will be patrimonially liable, being obliged to indemnify the employee whose right to equal treatment has been violated, both for the material prejudice and for the moral one. In this case, the material prejudice will be fixed by obliging the employer to pay an indemification equal with the difference between the two salary amounts comparable in the given situation, for the entire period in which the gender discrimination produced effects.

3. Establishing the amount of wage under the minimum level set by normative acts or collective labor contracts

The employer who is a legal entity, natural entity authorized to perform an independent activity, as well as the familial association have the obligation to conclude, in written, the individual labor contract prior to the beginning of the labor relationship. Before concluding the individual labor contract, the employer is obliged to inform the person he selected to hire about the essential clauses which he intends to include in the contract, among which the „basic salary, other elements that constitute the salary".

According to art 11 from the Labor Code, „the clauses of the individual labor contract cannot contain contrary provisions or right under the minimum level set by normative acts or collective labor contracts".

In conclusion, the employer is patrimonially liable if she sets for his employee a salary under the minimum level set by normative acts or, after case, by the collective labor contracts. The material prejudice suffered by the employee consists in the difference between the due salary according to the normative act or collective labor contract and the effective salary paid for the entire period.

The term in which the employee can lawsuit the employer in order to oblige him to pay indemnifications is 3 years from the date when the right to action appeared.

4. The denial of the non-competition monthly allowance

By this specific clause, the employee is obliged that „after ceasing the contract, he would not perform, in his own interest or for a third party, an activity that comes in competition with the one performed by his employer, in exchange of a non-competition monthly allowance paid by the employer during the entire non-competition period.

A specific of the non-competition clause is the fact that it is negotiated and mentioned in the individual labor contract only during the period when the juridical labor report is executed, but the effects of the respective clause take place subsequent to the moment when the individual labor contract ceased. According to the law, the period during which the non-competition clause takes place is of maximum 2 years from the date when the individual labor contract ceased.

5. The denial of the additional benefits established by the mobility clause

Among the specific clauses that the parties can negotiate and mention in the individual labor contract there is also the mobility clause, by which – according to art. 25 from the Labor Code – the parties establish, by taking into account the specific of the labor, that performing the job obligations is not done in a stable work place by the employee. In this case, the employee benefits from additional benefits cash or in kind[2, 3].

In case that the employer does not grant the employee the additional benefits cash or in kind, in the negotiated amount and in the presence of the mobility clase, he is patrimonially liable for the material prejudice he caused, under the provisions of art. 25 and art 253 align. 1 from the Labor Code.

6. The unilateral reduction of the salary amount

The unilateral reduction of the salary provided in the individual labor contract represents an illegal measure which may bring the patrimonially liability of the employer, if all the below conditions are met:

a. the employee benefited from a salary whose amount has been established through negotiation or, as appropriate, by law (if a written individual labor contract has not been concluded, the parties can prove the contract provisions and the labor performed by any way of proof);

b. the employer decided to reduce the salary amount without executing the obligation to inform the employee in written prior to the modification, regarding the intention to reduce the salary;

c. no additional act has been concluded to the individual labor contract within 15 days from the date of the employee's information in written;

d. the reduction of the salary amount does not prove to be possible, from the legal provisions or from the provisions of the applicable labor contract.

e. for the labor he performed in the same job or in another (subsequent to the employer's decision of unilateral modification of this element), the employee received a reduced salary.

If all these conditions are met, the employer will be patrimonially liable to pay the indemnifications equal to the difference between the salary rights established by negotiation or law and the reduced salary he received.

7. The unjustified suspension of the individual labor contract

The employer can be patrimonially liable if he decides the suspension of the employee's individual labor contract and the measure is proven to be unjustified. The employee could suffer a material prejudice in two situations of suspension of the individual labor contract from the employer's initiative:

a) during the prior disciplinary research;

b) in case that

- the employer has filed a criminal complaint against the employee or,

- the employee was sent to the court for criminal deeds incompatible with the position he held, until the juridical court decision.

In this view, art. 52 align 2 from the Labor Code established, by referring to the two situations we presented: „if the one in cause proves to be not guilty, the employee takes back the position and will be payed – under the norms and the principle of the contractual civil liability – an indemnification equal to the salary and the other rights from which he was restrained during the suspension of the contract".

---

[2] Alexandru Ţiclea, *Treaty of Labor Law*, Editura Universul Juridic , Bucureşti, 2008.

[3] Ion Traian Ştefănescu, *Treaty of Labor Law*, vol. II, Editura Lumina Lex, Bucureşti, 2004.

8. The denial of the rights in case the employee is delegated or detached.

The delegation is a measure disposed by the employer, based on which the employee will execute labors or fulfill labor tasks outside the work place provided in the individual labor contract during at most 60 days in 12 months. The duration of the delegation can be prolonged for successive periods of at most 60 days only if the employee agrees with this proposal formulated and argumented by the employer.

The detachment is the measure by which the employer disposes the change of the work place to another employer, for which the employee will perform activities in his interest and suborder.

The duration of the detachment is of at most one year, and it can be prolonged only for objective reasons and only with the agreement of the employee, every 6 months.

According to art 44 align 2 and art. 46 align. 4 from the Labor Code, the employees of the units who were sent in delegation (inside the country or abroad) or in detachment, benefit from the following rights:

a) the reimbursment of the transportation and accomodation expenses, according to the conditions established by the applicable collective labor contracts;

b) delegation or detachment allowance, whose amount is established by negotiation, the minimum level being the one established by the applicable normative acts from the public institutions.

Thus, the employer is obliged to reimburse the transportation and accomodation expenses, according to the employee's act of delegation or detachment, and the denial to execute this obligation triggers patrimonially liability[4].

9. The unjustified and unlawful dismissal

According to the legal definition, "The dismissal is the ceasment of the individual labour contract from the employer's initiative".

If the employer exerts his right to fire the employee and proceeds in an unjustified or unlawful way, the provisions of art. 78 align 1 from the Labor Code become applicable, according to which the instance will dispose the cancellation of the dismissal „and will oblige the employer to pay an indemnification equal to the salaries, raised and updated and with all other rights from which the employee would have benefited".

10. The denial of the rights for the over time and for the hours worked during holidays and free days.

If the employee performed over time, the employer has the following obligations:

- **the main obligation**, to compensate the duration of that respecive labor with free hours, paid in the next 60 days from its occurence (art 122 align 1 from the Labor Code)
- **the subsequent obligation**, in case that the compensation by free paid hours is not possible within the next 60 days, case in which he will pay the employee the over time he performed, by adding an increase to the salary, which is established by negotiation, and it cannot be lower than 75% of the basic salary (art 123 align 2 from the Labor Code)

At the same time, the employees who perform an activity during holidays benefit from compensations: 1st and 2nd of January, the first and second day of Easter, 1st of May, the first and second day of Pentecost, the Assumption, 1st of December, the first and second day of Christmas; 2 days for each of the three annual religious holidays, declared by the legal religions, other than the Christian ones, for the people belonging to them[5].

---

[4] Alexandru Athanasiu, Luminița Dima, *Legal regime regulating labor relations in the new Labour Code* – Partea I – Pandectele Române, nr. 2/2003.

[5] Alexandru Țiclea, *Commented Labor Code, Second edition revised and enlarged,* Editura Universul Juridic, București, 2011, 278 – 283.

In case that, from justified reasons, the employer cannot give the corresponding free time in the next 60 days, the employees will benefit for the work they performed during the holidays, from an increase of 100% from the basic salary (art 142 align 2 from the Labor Code)

11. The denial of the benefit for the night shift

In the Labour Code, we use the wording "night employee" to name (art 125 align 2):

a)the employee who performs the night shift for at least 3 hours from his daily work time or, as appropriate,

b) the employee who performs the night shift for at least 30% of his monthly work time.

The night employee benefits from:

a) either a work schedule reduced with 1h compared to the normal duration of the work day, for the days when he performs at least 3 hours of night shift, without leading to the reduction of the basic salary;

b) or a 25% increase to the basic salary for each night hour he worked.

12. The denial of the salary rights in the amount established by law or by negotiation

According to art 166 align 4 from the Labor Code: „The unjustified delay in paying the salary or the unpaid salary can oblige the employer to pay indemnifications – interests to repair the prejudice produced to the employee". This legal provision establishes a constraint to the employee, with a view to have the salaries paid **on time and fully[6].**

References

- Constantin Belu*, Labor Law*, Editura Universitaria, Craiova, 2011.
- Adriana Belu, *Introduction in the Study of the Juridical Personality*, Editura Reprograph, Craiova, 2007.
- Alexandru Ţiclea, *Treaty of Labor Law*, Editura Universul Juridic , Bucureşti, 2008.
- Ion Traian Ştefănescu, *Treaty of Labor Law*, vol. II, Editura Lumina Lex, Bucureşti, 2004.
- Alexandru Athanasiu, Luminiţa Dima, *Legal regime regulating labor relations in the new Labour Code – Partea I – Pandectele Române, nr. 2/2003.*
- Ion Traian Ştefănescu, *The main theoretical and practical aspects from within Law 40/2011 for amending Law 53/2003 - Labour Code, in the Romanian Labor Law, nr. 3/2011.*
- Alexandru Ţiclea, *Commented Labor Code, Second edition revised and enlarged,* Editura Universul Juridic, Bucureşti, 2011.

[6] Ion Traian Ştefănescu, *The main theoretical and practical aspects from within Law 40/2011 for amending Law 53/2003 - Labour Code, in the Romanian Labor Law, nr. 3/2011.*

A THEORETICAL ANALYSIS OF THE SUBROGATION, AS PER THE AMENDMENTS BROUGHT BY THE CIVIL CODE OF 2009

GABRIEL BOROI[*]
BOGDAN NAZAT[**]

Abstract
Although extensively treated by the Romanian scholars in the past, the provisions of the Civil code of 2009 brought certain amendments with respect to the subrogation in creditor's rights by paying the debt.
Our main purpose is to outline the latest amendments brought to the institution under discussion by the Civil Code of 2009 and, in this respect, we will analyse the subrogation from a theoretical point of view, with some references to the existent Romanian jurisprudence.

Key words: *subrogation, obligation, Civil Code, transfer, creditor.*

I. Introduction

The actual Romanian Civil code[1] in force starting with 1 October 2011 regulates the ways of transferring and transforming the obligations in the same title, i.e. Title VI – *The transferring and transforming the obligations*, where the institution of subrogation is regulated among other important civil institutions, such as assignment of debt, assuming of a debt, novation.

The meaning of this institution arises mainly from its name and it means a replacement of one of the obligational relationship parties with another person.

It is our view that the subject proposed for this paper is important for the Romanian "civil life" due to the fact that, as stated in the doctrine, even if the operation of replacing a subject form an obligational relation can be performed by other civil proceedings (e.g. assignment of debts, assignment of contract), the institution under discussion is about that specific situation when a subject of the obligational relationship is replaced due to the performance of a payment (execution of the obligation)[2]. From the beginning we have to say that, under the Romanian civil legislation, the term "payment" is defined as being the operation of giving an amount of money or, as the case may be, performing a duty, object of the obligation[3]. Therefore, for the purpose of this paper, by using the term "payment" we will have in mind the definition offered by the legislation.

For the avoidance of any doubt, the problem of applicability of the new provisions regarding the subrogation was solved by Law No. 71/2011 for applying the Law No. 287/2009 regarding the Civil Code. Therefore, it was stated in the Article 117 paragraph 1 that the debt transmitted through subrogation after the Civil code entered into force is under the legal regime in force at the time the debt arisen.

In conclusion, by this paper, we will try to offer to the reader a concise and clear overview of the institution, by analysing the legal provisions of the Civil code with some references to the existent legal writings and jurisprudence.

---

[*] Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (gboroi@gmail.com).
[**] Assistant Lecturer, PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (bogdan.nazat@gmail.com).

[1] The Law No. 287/2009 regarding the Civil Code, republished in the Official Gazette of Romania No. 505 of 15 July 2011.

[2] For further details, please refer to L. Pop, I. Popa, S. Vidu, *Elementary civil treaty. The obligations, according to the new Civil code*, Universul Juridic, 2012, page 651-652.

[3] Article 1469 of the Civil Code.

II. Notion. Legal regulation[4]

As previously mentioned, the Civil code regulates the subrogation in its Title VI (*The transfer and transform of the obligations*), Chapter II (*The subrogation*), between Articles 1593 – 1598.

A brief definition of the subrogation is offered by the paragraph 1 of Article 1593 which states that "anybody paying instead of the debtor can be subrogated in creditor's rights, without being able to achieve more rights than the later". Further, paragraph 2 of the same Article establishes that the subrogation can be either conventional (based on an agreement) or legal. Therefore, the subrogation has two forms: conventional subrogation and legal subrogation (both of them will be detailed above).

The legal scholars offered us a more accurate definition than the one provided by the Civil code. Thus, the *subrogation in creditor's rights by paying the debts (also known as personal subrogation) is that way of transferring, either conventional or legal, the outstanding debts, with all its securities and accessories, to a third person who paid the original creditor*[5].

By analysing the two definitions, the one offered by the Civil code and the one offered by the doctrine, we can say that mechanism of the subrogation consists in replacing the creditor from an obligational relation (the original creditor) with another person who, by paying the debt of the debtor, becomes the creditor of the last, acquiring all the rights of the original creditor (also known as *solvens* or *creditor by subrogation*).

From a practical point of view, the subrogation has an important role; thus, there are frequent situations when a third person pays the debt of the debtor without the intention to gratify the debtor, e.g. guarantor, jointly held liable co-debtor. By such payment, the debt towards the original creditor ceases to exist but the debtor will be further held liable towards the payer, who will become the new creditor[6].

As an exception of the above mentioned, Article 1474 paragraph 3 provides that "the payment performed by a third person ceases the obligation if it is performed on behalf of the debtor. In this case, the third person will replace the creditor only when expressly mentioned by the law". Therefore, not any payment performed by a third person made with the intention to cease the debt of the debtor will conduct to a subrogation, but just that payment performed under certain conditions, expressly established by the applicable legislation[7].

III. Conventional subrogation

The conventional subrogation has its bases on the agreement concluded between the third person who pays the debt (the new creditor), on the one hand, and the original creditor or the debtor, on the other hand. Taking into consideration the fact that the conventional subrogation is an agreement, the parties are under the obligation to observe the legal provisions established by the applicable legislation for its validly conclusion.

In order for the conventional subrogation to operate, the Civil code establishes the obligation for the subrogation to be expressly provided in the agreement to be concluded between the *solvens* and original creditor/ debtor. Also, in order for the subrogation to be opposable to third parties, must be done in writing. Even if not expressly provided by the law, it was considered that the deed attesting the performance of the payment needs to bear certain date (*data certa* in Romanian language); contrary the parties will not be able to prove the moment when their agreement was concluded[8].

---

[4] The Civil code of 1864 regulated the subrogation between its articles 1106-1109.

[5] C. Statescu, C. Birsan, *Civil Law. The general theory of obligations. 9th Edition, revised and amended*. Hamangiu, 2008, page 368.

[6] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 652.

[7] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 653.

[8] Alexandru Beloanca in *The New civil code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 966.

According to the provisions of paragraph 3 of Article 1593 of the Civil code, "the conventional subrogation can be agreed by the debtor or the creditor". Therefore, depending whether the agreement is concluded by the payer with the original creditor or the debtor, we can discuss about two types of conventional subrogation (i) subrogation agreed by the creditor or (ii) subrogation agreed by the debtor.

i. Subrogation agreed by the creditor

Pursuant to Article 1594 paragraph 1 of the Civil code, "the subrogation is agreed by the creditor when, by receiving the payment form a third person, assigns to the payer all the rights against the debtor". Further, paragraph 2 of the same Article provides that "the subrogation operates without the consent of the debtor. Any contrary provision is considered as not written".

By analysing the provisions of the aforementioned Article, it can be concluded that, apart the general condition, i.e. to be expressly provided, the subrogation agreed by the creditor must fulfil another condition: to operate simultaneous with the payment. This condition was consecrated in the past by a part the legal scholars; therefore, it was considered that if the replacement of the creditor is performed before the payment, we are not in the situation of a subrogation, but of an assignment of debt[9]. Moreover, it cannot be performed after the payment due to the fact that the debt ceased to exist[10].

This type of conventional subrogation operates exclusively based on the agreement between the *solvens* and the original creditor, the debtor not being involved in the operation. Moreover, any contrary contractual provision is considered not written and can be ignored by the parties.

ii. Subrogation agreed by the debtor

According to Article 1595 paragraph 1 of the Civil code, the subrogation agreed by the debtor represents that operation whereas the debtor borrows in order to pay the debt and, therefore, transmits to the lender the original creditor's rights.

Pursuant to the provisions of paragraph 3 of the same Article, the subrogation agreed by the debtor operates without the consent of the original creditor, if not contrary agreed. Therefore, the law allows to the original creditor to be part to the agreement between the debtor and the payer but only when this was expressly agreed by the original creditor and debtor.

The subrogation agreed by the debtor is valid only if the following conditions are observed:

a)the loan agreement and the acknowledgement of payment have certain date[11];

b) in the loan agreement is mentioned that the amount of money is borrowed for paying the debt; and

c)the acknowledgement of payment mentions that the payment was performed with the money borrowed from the new creditor.

IV. Legal subrogation

The subrogation operates *ex lege* (by law), without the consent of the original creditor or the consent of debtor to be required, in the following situations, expressly provided by Article 1596 of the Civil code:

a) *in the benefit of the creditor, even if it is an unsecured creditor, which pays to a preferential creditor, according to the law*. The doctrine and the jurisprudence stated that this is the case of an unsecured creditor who pays the debt to a secured creditor or the case of an inferior rank mortgagee who pays the debt to a superior rank mortgagee, the result consisting in the first replacing

[9] The assignment of debt is regulated by the Civil code between the Articles 1566-1592.

[10] C. Statescu, C. Birsan, *op. cit.*, page 370. There were also some legal scholars saying that there is no prohibition for the agreement between the payer and the original creditor to be concluded before the payment to be performed due to the fact that only when the payment effectively is performed, the subrogation operates.

[11] Until the Civil code of 2009 to be in force, it was requested for the loan agreement to be concluded in authenticated form.

the later. The first creditor has an interest to pay to the superior rank creditor due to the fact that, by selling the mortgaged asset, the amount obtained will cover only the debt of the superior rank creditor; therefore, by paying the debt, the inferior rank creditor subrogates in the rights of the superior rank creditor and can wait until the selling of the asset will cover both debts, the one paid to the superior rank creditor and its own debt[12].

b) *in the benefit of an acquirer of an asset who pays the creditor having a guarantee over the respective asset.* The interest of the acquirer is to avoid any fore-closure (enforcement) procedure to be commenced against the asset and to keep it in own patrimony.

c) *in the benefit of the person who, being jointly held liable together with or for other persons, has an interest to pay the debt*, such as the co-debtors jointly held liable, co-debtor in an indivisible obligation etc.

d) *in the benefit of the inheritor who pays the debts of the inheritance from his own assets.*

Besides the situations detailed above, there are some situations expressly established by the Civil Code when the subrogation operates by law, such as[13]:

a) Article 352 of the Civil Code states that if one of the husband or wife pays the common debts with his/ her own assets has the right to subrogate in the rights of the creditor for what it was paid from his/ her own assets;

b) Article 2210 of the Civil Code provides that "in the limit of the paid premium, the insurer is subrogated in all rights of the insurant or the beneficiary of the insurance against the person held liable for the damage, except for personal insurances"[14];

c) Article 1342 of the Civil Code provides that in case of a not owed payment when the repayment cannot be disposed, the payer has the right go against the real debtor based on the legal subrogation in the rights of the paid creditor;

d) Article 1813 of the Civil Code provides that "in the situations established by Article 1811[15], the acquirer is subrogated in the rights and obligations of the lessor from the lease agreement".

V. Effects of the subrogation

Due to the fact that the Civil Code does not distinguish between the two types of subrogation, it can be concluded that the effects of the subrogation are the same, irrespective of the type of subrogation (conventional or legal).

The main effect of the subrogation is that the new creditor acquires all the rights of the original creditor, i.e. the debt with all the rights and its accessories[16]. As a consequence, the new creditor will have the action the paid creditor would have had against the debtor in case of non-payment and also the guarantees of the debts, such as mortgage, lien etc[17]. This revealed form the interpretation paragraph 2 of Article 1597 of the Civil Code attesting the fact that "the subrogation produces its effects against the original debtor and those who guaranteed the obligation". Moreover,

---

[12] C. Statescu, C. Birsan, *op. cit.*, page 368.

[13] Alexandru Bleoanca in *The New civil code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 971.

[14] According to a decision of Bucharest Court of Appeal, decision No. 256/2003 (Source: *The New civil code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 972), the insurer subrogated in the rights of the insurant starting with the moment when the premium was paid as a consequence of producing the insured event. From the date of indemnifying the beneficiary of the insurance, the insurer's debt towards the person guilt for the accident became due.

[15] Article 1811 of the Civil code expressly establishes the situations when the lease agreement is opposable also to the acquirer in case the immovable asset object of a lease agreement is object of a sale purchase agreement.

[16] C. Statescu, C. Birsan, *op. cit.*, page 371.

[17] Alexandru Bleoanca in *The New Civil Code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 973.

according to the same paragraph, the original debtor and the guarantors are allowed to defence themselves by using the same proceedings as the ones they would have been entitled to use against the original creditor, e.g. causes for termination or nullity of the debts claimed by the new creditor[18].

Besides the actions of the original creditor, the new creditor has also the right to perform some specific actions against the debtor grounded on legal institutions such as mandate, business management (*gestiune de afaceri* in Romanian language) or causeless enrichment (*imbogatire fara justa cauza* in Romanian language)[19].

As regards the moment the subrogation produces its effects, the Civil Code provides in its Article 1597 paragraph 1 that "the subrogation produces its effects starting with the moment when the third person performs the payment in the benefit of the creditor".

In case of partial subrogation[20], respectively the situation when the new creditor pays only a part of the debt, the subrogation will operate also partially, in the limit of the payment. Thus, the debts and its accessories will be divided between the original creditor and the new creditor accordingly.

As a general rule, in case of partial subrogation, the original debtor and the new creditor are allowed to ask the payment from the debtor proportionally with their rights and no priority being applicable between them. Nevertheless, according to the provisions of Article 1598 of the Civil code ("in case of partial subrogation, the original creditor, beneficiary of a guarantee, […]"), if the original creditor benefits of a guarantee (security) in the moment of the partial payment, than it is preferred to the new creditor. After the unpaid debt is paid by the debtor to the original creditor, the next entitled to receive the payment is the new creditor[21].

Although, this exception is not applicable when the original creditor undertook the obligation to secure the amount for which the subrogation operates, the new creditor having priority in recovering the debt.

VI. Conclusions

By approaching this subject, we intended to offer the reader the possibility to make an opinion of the legal provisions applicable to the institution of the subrogation, as amended by the Civil code of 2009. In this respect, we focused mainly on identifying the legal provisions applicable to this institution and, after, we tried to offer concise explanations by using the different interpretations restrained by doctrine and jurisprudence.

Due to the fact that this institution continuously represents a subject of interest for the legal scholars and practitioners, new interpretations and opinions will be formulated in the future.

References

- The Law No. 287/2009 regarding the Civil Code, republished in the Official Gazette of Romania No. 505 of 15 July 2011.
- L. Pop, I. Popa, S. Vidu, *Elementary Civil Treaty. The Obligations, according to the New Civil Code*, Universul Juridic, 2012.
- Law No. 71/2011 for applying the Law No. 287/2009 regarding the Civil Code.
- C. Statescu, C. Birsan, *Civil Law. The General Theory of Obligations. 9th Edition, revised and amended*. Hamangiu, 2008.
- *The New civil code. Comments, Doctrine and Jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012.
- I. Turcu, *The Republished new Civil Code. Book V. About obligations, articles 1164-1649*, 2nd edition, CH Beck, 2011.

[18] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 657.
[19] For further details, please refer to L. Pop, I. Popa, S. Vidu, *cit. op.*, page 657.
[20] The partial subrogation is expressly provided by Article 1598 of the Civil Code.
[21] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 658.

THE UNDERTAKING CONTRACT AS REGULATED BY THE NEW CIVIL CODE

STANCIU D. CĂRPENARU*

Abstract
The present paper hopes to share a small but comprehensive analysis of the undertaking contract. This type of contract was scarcely regulated by the old Civil Code. Nowadays, the New Civil Code has dedicated a section especially for the undertaking contract.
The importance of this paper resides not only in the theoretical aspects but also in the practical perspective that it is hoped to be laid down. In the continuously developing world, despite the economic difficulties in the last years, enterprises and undertakings have continued to be a part of everyday life, and business still strive to maximize profits from this types of contracts.

Key words: *undertaking, subundertaking, agreement, work, New Civil Code.*

1. Preliminaries. The new civil code has comprehensively regulated the undertaking contract (articles 1851 - 1880).

The regulation includes new general rules of the undertaking contract, and special rules for the undertaking contract regarding construction works.

As conceived by the new civil code, the undertaking contract is a standalone agreement with its own features, and not a variant of the lease agreement as conceived by the regulation in the old civil code[1].

2. The general rules of the undertaking contract. Such rules regard the notion of the undertaking contract, and its delimitation from other agreements; the conditions regarding the capacity of the parties; the subundertaking contract; the workers' direct action; the ending of the agreement.

2.1. The civil code defines the undertaking contract as the agreement by which one party, the contractor, undertakes to, at their own risk, perform a certain work, either material or intellectual, or provide a service for the other party, the employer, in consideration of a price (article 1851 in the Civil Code).

Such legal definition includes the elements of essence of the undertaking contract.

The contractor binds itself to perform a certain work, or to provide a certain service for the employer.

The performance of the work, or the provision of the service, is done at the risk of the contractor. In performing the work, or providing the service, the contractor acts independently, and at their own risk; the employer is only interested in the result, the work or the service provided.

The new regulation expressly provides for that the work representing the object of the agreement may be a material work (constructions, manufactured items, etc.), or an intellectual one (expert examinations, advice, etc.).

For the performance of the work or the provision of the service certain materials are required. As the law conceives it, the same are to be procured by the contractor. The article 1857 in the Civil

* Professor, Ph.D, Law Faculty, "Nicolae Titulescu" University, Bucharest (e-mail: carpenaru_stan@yahoo.com).

[1] As regards the contract agreement as regulated by the old civil code, please refer to Fr. Deak, *Tratat de drept civil. Contracte speciale* (*Civil Law Treaty. Special Agreements*), 6th Edition, updated by L. Mihai and R. Popescu, Ed. Universul juridic, Bucharest, 2006, p. 188 and the following.

Code provides for that, unless it results otherwise from the law or the agreement, the contractor is bound to perform the work with their own materials.

Working with their own materials the contractor is liable for the quality of the same according to the rules of the sale agreement.

The rule established by the article 1857 in the Civil Code regarding the procurement of the materials required for the performance of the work or the provision of the service by the contractor raises the issue of delimiting the undertaking contract from the sale agreement for a future asset.

The New Civil Code, inspired by the doctrinal solutions in the past, establishes the legal criterion for delimiting the undertaking contract from the sale agreement[2]. According to the article 1855 in the Civil Code the agreement is a sale agreement, and not a undertaking contract, when according to the intention of the parties the performance of the work is not the main purpose of the agreement, being also considered the value of the assets supplied.

Therefore, when qualifying the agreement the main purpose considered by the parties upon concluding the agreement takes precedence, as well as the value of the materials procured by the contractor.

The agreement shall be qualified as a undertaking contract when, in the intention of the parties, the performance of the work is the main purpose of the conclusion of the agreement, while the procurement of the materials is an accessory clause of the agreement.

The agreement shall be qualified as a sale agreement when, in the intention of the parties, the main purpose was not the performance of the works, but the material for the performances of the contractor.

Should the employer have procured the materials the contractor is bound to keep and use them according to their intended use, and under the applicable technical rules.

The performance of the work or the provision of the service by the contractor is done in consideration of a price, which consists of an amount of money, or of any other goods or performances (article 1854 in the Civil Code). The price may be an estimated (quotation) price, or a fixed price set depending on the value of the works or of the services.

2.2. The validity requirements for the undertaking contract are those provided for by the article 1179 in the Civil Code for the validity of any agreement: the capacity to contract; the consent of the parties; a determined and licit object; a licit and moral cause.

As regards the requirement for the parties to have the capacity to conclude the undertaking contract the general rules regarding the civil capacity of the individual and of the legal entity should be considered.

The contractor should in all cases have full exercise capacity.

The employer needs to meet the legal capacity requirements depending on the nature of the undertaking contract as a legal instrument, an administrative instrument, or a disposal instrument.

The New Civil Code also establishes certain special rules regarding the capacity of the parties to conclude the undertaking contract. According to the article 1853 in the Civil Code the provisions of the article 1655 paragraph 1 shall be accordingly applicable to the undertaking contract.

The law considers the incapacities to sell regarding the persons that are provided for by the article 1654 in the Civil Code: proxies, for the assets they are authorised to sell; the parents, the guardian, the trustee, the temporary administrator, for the assets of the persons they are representing; the public servants, the receiver judges, the insolvency practitioners, the bailiffs, who could influence upon the conditions of the sale being made by their intermediation, or having for objects the assets they are administering, or the administration of which they are supervising.

---

[2] Please refer to C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *Tratat de drept civil roman* (*Romanian Civil Law Treaty*), tome II, Bucharest, 1929, p. 987, Fr. Deak, the quoted work, p. 192.

Such persons cannot sell their own assets for a price consisting of an amount of money originated in the sale and the operation of the asset or of the patrimony they are administering, or the administration of which they are supervising, as appropriate.

We consider that the applying accordingly to the undertaking contract means that the persons mentioned within the article 1854 in the Civil Code may not conclude the undertaking contract in capacity of contractor[3].

The subject matter of the undertaking contract is represented by the legal operation agreed upon by the parties, i.e. the performance of a work, or the provision of a service (article 1225 in the Civil Code).

Since the undertaking contract is a mutually binding agreement the object of the obligation of the contractor is the performance of the work or the provision of the service, and the object of the obligation of the employer is the payment of the price.

As we stated the new regulation expressly provides for that the work representing the object of the obligation of the contractor, and implicitly of the undertaking contract, may have a material or intellectual nature.

The object of the obligation of the contractor should be determined, or at least determinable and licit (article 1226 paragraph 2 in the Civil Code).

The price, as the object of the obligation of the employer, consists of an amount of money, or of any other goods or performances (article 1854 in the Civil Code). The price should be serious, and determined, or at least determinable.

According to the law the price may be a fixed price set on aggregate as a fixed amount of money, or an estimated (quotation) price considering the costs for the materials and for the performances of the contractor, or a price determined depending on the value of the works or of the services.

Should the agreement do not include clauses regarding the price of the contract the employer shall owe the price determined under the conditions of the article 1854 paragraph 3 in the Civil Code.

2.3. The New Civil Code includes a better regulation, as compared to the old regulation in the Civil Code, of the obligations of the contractor and of the employer.

2.3.1. According to the law the obligations of the contractor in the undertaking contract regard the performance of the work, the notifying of the employer on the issues arising while performing the work, and the warranty for the defects of the work and the absence of the agreed qualities of the same[4].

a) The contractor is bound to perform the work or provide the service that represents the object of the agreement.

Unless it results otherwise from the law or the agreement, the contractor is bound to perform the work with their own materials (article 1857 in the Civil Code). The contractor is liable for the quality of the materials procured by themselves under the conditions provided for by the Civil Code regarding the liability of the seller for the defects of the sold asset.

Under the conditions provided for by the law or agreed upon by the parties the materials required for the performance of the work may be made available for the contractor by the employer. In such event the contractor, in capacity of holder, is bound to keep the materials they received, and use them according to their intended use, under the applicable technical rules. They have to justify

---

[3] As regards the applying of the provisions of the article 1655 paragraph 1 in the Civil Code to the contract agreement please also refer to T. Prescure, *Curs de contracte civile. Conform noului Cod civil* (*Course of Civil Agreements. According to the New Civil Code*), *Ed. Hamangiu, Bucharest, 2012*.

[4] For certain accessory obligations of the contractor please refer to L. Stanciulescu, Curs de drept civil. Contracte. Conform noului Cod civil (*Course of Civil Law. Agreements. Accordng to the New Civil Code*), Ed. Hamangiu, Bucharest, 2012, pp. 344-345.

the way the materials were used, and return to the employer what was not used for the performance of the work (article 1857 paragraph in the Civil Code).

According to the new legal regulation, during the performance of the work, the employer is entitled to, at their own expense, check the works, but without unjustified hindrance to the fulfilment by the contractor of their obligation. The employer is also entitled to notify the contractor on their comments regarding the performance of the work (article 1861 in the Civil Code).

Should the contractor fail to fulfil their obligation regarding the performance of the work or the provision of the service the employer may use the remedies regulated by the article 1516 in the Civil Code.

b) The contractor is bound to notify the employer should the normal performance of the work, its durability, or the usage of the work according to its intended use would be endangered due to the materials procured, or to the other means that under the agreement the employer has made available for the contractor, as well as to the improper directions from the employer. The contractor also has the same obligation to notify the employer in the event of circumstances existing or arising for which the contractor is not held liable (article 1858 in the Civil Code).

The obligation of the contractor to notify should be fulfilled without delay so the employer takes the required action.

Should the employer, having been notified by the contractor on a cause that endangers the work, do not take the required actions within a term to fit the circumstances, the contractor may terminate the undertaking contract, or may continue performing under the agreement at the risk of the employer, after notifying the employer (article 1859 in the Civil Code).

In the event that the work would be of nature to threaten the persons' health or bodily integrity the contractor is bound to ask the agreement to be terminated. Otherwise the contractor shall take over the risk, and shall be liable for the damages caused, including for the damages caused to third parties.

c) The contractor is bound to deliver to the employer the work performed under the conditions set within the undertaking contract.

For the fulfilment of such obligation the contractor has to notify the employer about the completion of the work, requesting them to accept, and when appropriate to take the work.

The civil code regulates the consequences of the work perishing before the acceptance and the delivery of the work (article 1860 in the Civil Code). The law distinguishes as to whether the materials were procured by the contractor, or made available by the employer.

Should the work, before the acceptance, perish or be damaged by causes that cannot be imputed on the employer, the contractor that procured the materials is bound to remake it at their own expense, *(correction in handwriting with the mention 'see overleaf' – translator's note)* account the rules regarding the fortuitous suspension of the performance of the obligation of the contractor, under the conditions of the article 1634 in the Civil Code.

Should the materials have been procured by the employer the expenses for remaking the work shall only be borne by the employer if the *perishing (correction in handwriting – translator's note)* was due to defects of the materials. For the other cases the employer shall be bound to procure the materials again, but only if the perishing or the damaging of the work is not imputable on the contractor.

It must be stated that, should the perishing or the damaging of the work occur after the acceptance of the work, the mentioned consequences shall not be applicable. The contractor shall be liable, if appropriate, based on the obligation to provide warranty against the defects of the work, and for the agreed qualities of the same.

d) The contractor is bound to provide warranty against the defects of the work, and for the agreed qualities of the same (article 1863 in the Civil Code).

The obligation of the contractor to provide warranty against the defects of the work, and for the agreed qualities of the same operates according to the provisions of the Civil Code regarding the

defects of the sold asset, which are applicable accordingly. There are considered the provisions of the articles 1707-1715 in the Civil Code that regulate the obligation of the seller to provide warranty for the defects of the asset and for the absence of the agreed qualities of the sold asset.

2.3.2. According to the law, the obligations of the employer in the undertaking contract regard the acceptance and the receipt of the work, as well as the payment of the price for the work or the service.

a) The employer is obliged to accept and take over the work (article 1862 in the Civil Code).

According to the law, as soon as they received the notice from the contractor by which they are informed that the work was completed, the employer is bound to accept the work, as well as, when appropriate, to take it[5].

The acceptance of the work should be done by the employer within a reasonable term according to the nature of the work and to the usages within the area.

Should the employer, without any reasons, do not appear in order to accept the work, or do not immediately notify the contractor on the result of the checking, the work shall be deemed accepted without reservations. In such event the employer having accepted the work without reservation shall no longer be entitled to complain about the apparent defects of the work, or the absence of the agreed qualities.

As the law provides for, after accepting the work the employer is bound to take, i.e. take-over, the work.

The New Civil Code provides for that, should the contractor have undertaken to perform a work with the material of the employer, or to provide a service on an asset the employer has hand over to them for such purpose, and the employer fails to take the asset, the contractor shall be entitled to sell the asset.

For the exercising by the contractor of such right two requirements need to be met: a) that the employer did not take the asset within 6 months counting since the day agreed upon for the acceptance, or when the work or the service was completed later, since the completion date; b) that the contractor has first notified the employer on the sale of the asset.

In carrying on the operation of selling the asset the contractor acts in capacity of proxy of the employer and should use the diligence of a proxy free of charge.

From the price of the sale of the asset the contractor shall retain the price of the work and the expenses for the sale, and the balance shall be consigned available for the employer.

It has to be stated that, under the law, the contractor may not sell the asset not taken by the employer if the employer has taken action in justice against the contractor by means of a claim based on the failure to perform, or the improper performance of the work (article 1868 in the Civil Code).

As one can notice the law regulates the consequences of the employer failing to take a work that was made with the material of the employer.

For the case where the work not taken by the employer was made with the material procured by the contractor, in absence of a special regulation, there are applicable the provisions of the article 1516 in the Civil Code that regulate the remedies for a failure to observe the contract conditions. We also do not exclude the applying accordingly of the provisions of the article 1726 in the Civil Code regarding the direct enforcement.

b) The employer is bound to pay the price of the work and of the service (article 1864 in the Civil Code).

---

[5] The article 1862 in the Civil Code provides for that the employer has "the obligation to... check it, and should the same meet the requirements set by the agreement, accept it"...

The wording of the text is pleonastic because by the acceptance of a work is understood the operation of taking over a work based on the quantity and quality checking of the same.

It is understood that such checking shall take into account the requirements set within the contract agreement concluded by the parties.

According to the law the employer has the obligation to pay the contractor the price of the work on the date and at the place of the acceptance of the whole work, unless otherwise provided for by the law or by the agreement.

The price to be paid by the employer to the contractor is the one agreed upon by the parties within the agreement.

Should a fixed (aggregate) price have been set within the agreement the employer should pay the price agreed upon (article 1867 in the Civil Code). In such event the employer may not ask the price to be reduced by reason that the work or the service required less working, or involved lower costs than those provided for within the agreement, and the contractor may not claim an increase of the price by reason that the work or the service required more working, or involved higher costs than those agreed upon by the agreement.

According to the law the fixed price set within the agreement remains unchanged even in the event that changes were made as regards the performance conditions originally provided for within the agreement, unless the parties have agreed otherwise.

If the price agreed upon within the agreement was an estimated (quotation) price, i.e. upon the conclusion of the agreement the price was subject to estimation, the contractor may justify any increase of the price (article 1865 in the Civil Code). In such event the employer is only bound to pay the price increase requested by the contractor if the same results from works or services that could not have been foreseen by the contractor upon concluding the undertaking contract.

Should a price set depending on the value of the performed works, of the provided services, or of the supplied goods have been agreed upon within the agreement the contractor is bound to, by request from the employer, account for the stage of the works, the services already provided, and the expenses already made (article 1866 in the Civil Code).

For the case where the undertaking contract does not include clauses regarding the price the employer shall owe the price provided for by the law, or calculated according to the law, or in absence of such legal provisions the price set in relation to the working done and the expenses required in order to perform the work or provide the service in considering the existing usages (article 1854 in the Civil Code).

The New Civil Code secures the right of the contractor to be paid the price of the work by the employer. The contractor enjoys a legal mortgage over the work, established and preserved under the conditions of the law (article 1869 in the Civil Code).

Related to the payment of the price the Civil Code regulates, as the old Civil Code also did, the workers' direct action (article 1856 in the Civil Code).

The law considers the cases where the performance of the work contracted by the contractor with the employer is done by certain persons, generally named workers, based on agreement concluded between such persons and the contractor.

Normally the price for such persons' working should be paid by the contractor, and in the event of a denied payment they have a contract action against the contractor.

In order to protect such persons, although they have no contract relations with the employer, the law acknowledges for such persons a direct action against the employer. According to the law they may claim the payment for their working, within the limits of the amount the employer owes to the contractor at the time the claim is submitted.

2.4. The Civil Code regulates the conditions for the ending of the undertaking contract. There are considered the death of one of the parties to the agreement, as well as the avoidance or the termination of the agreement.

In the event of the death of one of the parties the consequences are different.

The death of the employer only has for result the ending of the agreement if the fulfilment of the agreement becomes impossible or useless (article 1870 in the Civil Code).

In the vent of the death of the contractor, as well as in the case where the same becomes, without their fault, unable to complete the work or to provide the service, the agreement shall only

end if the same was concluded in considering the personal abilities of the contractor (article 1871 in the Civil Code).

Otherwise the employer is bound to accept the portion already performed, if they can use it, and they are bound to pay, in proportion to the price agreed upon, the value of the works performed and of the expenses made in order to complete the work, but only to the extent that such works and expenses are useful for them. Provided that they pay a proper compensation the employer is entitled to ask the materials prepared and the plans going to be acted upon to be handed over to them, in observing the intellectual property rights, under the conditions of the law.

As regards the ending of the undertaking contract by avoidance or termination the law distinguishes as to whether the same is imputable on the contractor, or on the employer.

The employer is entitled to obtain the termination, or as appropriate the avoidance of the agreement in the cases provided for by the article 1872 in the Civil Code (the observance of the term agreed upon for the acceptance of the work has become obviously impossible; the work or the service are not performed as agreed upon, and within a term set by the employer according to the circumstances; the contractor does not repair the shortcomings found, etc.).

The contractor is entitled to obtain the avoidance or the termination of the agreement if they cannot start or continue the fulfilment of the agreement due to an employer failing to fulfil, without justification, their own obligations (article 1873 in the Civil Code).

Apart from the avoidance or the termination of the agreement the contractor is also entitled to interest damages for the damage they suffered.

2.5. The Civil Code also regulates the subundertaking contract, which is sometimes used when performing complex works that represent the object of a undertaking contract (article 1852 in the Civil Code).

The subundertaking contract is the agreement by which the contractor entrusts to one or several subcontractors the performance of portions or elements of the work or of the services that represent the object of the undertaking contract concluded by the contractor with the employer.

The conclusion of the subundertaking contract is forbidden for the contractor in the case where the undertaking contract was concluded in considering the person of the contractor (*intuitu personae*).

By the conclusion of the subundertaking contract legal relations are established between the subcontractor and the contractor.

As a consequence, in relation to the employer, the contractor is liable for the deed of the subcontractor like for their own deed.

The subundertaking contract is subject to the stipulations provided for by the Civil Code for the undertaking contract.

3. Special rules regarding the undertaking contract for construction works. The New Civil Code, as well as the previous one, includes certain special rules regarding the undertaking contract for construction works.

The undertaking contract for construction works is the agreement by which the contractor undertakes to, at their own risk, perform works that according to the law require the issue of the construction authorization for the employer, in consideration of a price.

To the undertaking contract for construction works are accordingly applicable the provisions of the Civil Code regarding the undertaking contract, if compatible with the specific rules provided for in respect of such agreement (article 1851 paragraph 2 in the Civil Code).

As regards the undertaking contract for construction works there are also applicable the provisions of the Law no. 50/1991 regarding the authorizing of construction works[6], and those of the

[6] O.J. no. 163/07.08.1991. The law was modified, and then republished (O.J. no. 933/13.10.2004).

Law no. 10/1995 regarding the quality in constructions[7], the Regulation for the acceptance of construction works and of the installation works related to the same, approved by the G.D. no. 273/2004[8].

3.1. According to the Law no. 50/1991 the performance of civil, industrial, agricultural, or any other construction works is only allowed based on a construction authorization.

The construction authorizations are issued by the chairpersons of the county councils, by the General Mayor of the City of Bucharest, by the mayors of the cities, of the sectors of the City of Bucharest, of the towns and the communes[9].

3.2. In addition to the obligations that are usually on the side of the employer within the undertaking contract the employer within the undertaking contract for construction works also has certain specific obligation (article 1875 in the Civil Code).

Thus, the employer is bound to obtain all the authorizations required by the law for the performance of the work.

In order to meet such obligation the contractor has to cooperate with the employer by providing them with the required information they are holding, or should be holding considering their specialization.

Then, the employer is bound to allow the contractor, to the extent that the same are required for the performance of the work, to use the access ways, their own water supply installations, and other utilities servicing the building.

3.3. Considering the complexity and the specific features of the construction works representing the object of the undertaking contract for construction works the law regulates the right of the employer to check the performance of the work (article 1876 in the Civil Code).

During the fulfilment of the agreement, without hindering the normal activity of the contractor, the employer is entitled to check the performance stage, the quality and the aspect of the works performed and of the materials employed, as well as any other issues regarding the fulfilment by the contractor of the contract obligations.

The employer is entitled to notify the contractor in writing on their findings, as well as on the required directions.

In cases of "hidden works", i.e. of works to be covered by the subsequent performance of other works or by the mounting of construction elements, upon the completion of such works the contractor and the employer are bound to jointly ascertain the existence of the completed portion and the compliance of the same with the legal provisions and the clauses of the agreement.

Should the employer fail to appear for ascertainment on the term set according to the law the contractor may prepare the ascertaining document for the work to be covered by itself.

3.4. Should circumstances arise that would prevent the performance of the works the parties shall act according to the provisions of the article 1877 in the Civil Code.

Should the contractor, during the fulfilment of the agreement, find mistakes or shortcomings on the designing works based on which the undertaking contract was concluded they are bound to immediately notify the employer and the designer about their findings, along with the remediation proposals, of course to the extent that the same fall within the area of their professional education. The contractor should also ask the employer to take the required actions.

Should the employer, having also taken advice from the designer, do not immediately notify about the actions taken in order to remove the reported mistakes or shortcomings, or should the actions be improper, the contractor may suspend the performance of the works.

---

[7] O.J. no. 12/24.01.1995.

[8] O.J. no. 193/28.07.2004.

[9] Please also refer to L. Stanciulescu, the quoted work, pp. 349-351.

3.5. Upon the completion of the work the parties should proceed with the acceptance of the construction under the conditions of the law.

According to the law the acceptance of construction works is done by two phases: provisional acceptance, and final acceptance.

The provisional acceptance is carried on upon the completion of the works. On the date of the acceptance minute the title over the work and the risk are transferred to the employer.

The final acceptance is carried on upon the expiry of the warranty period. According to the law the warranty periods against the defects of the work are those set by the special law.

3.6. The New Civil Code regulates the principles of the liability for the defects of the work (article 1879 in the Civil Code). According to the law the liability for the defects of the work is on the side of the contractor, the designer, and the engineer[10].

The architect or the engineer is exonerated from liability for the defects of the work if they prove that the same do not result from the deficiencies of the expert examinations or the plans they provided, and if appropriate from any lack of diligence in coordinating or supervising the works.

The contractor is exonerated from liability if they prove that the defects result from deficiencies of the expert examinations or of the plans of the architect or of the engineer chosen by the employer.

Should a subcontractor have also participated in the performance of the construction work the same shall be exonerated from liability if they prove that the defects result from the decisions of the contractor, or from the expert examinations or the plans of the architect or of the engineer.

The architect, the engineer or the subcontractor may also be exonerated from liability in the case where they prove that the defects of the work result from the decisions imposed by the employer in choosing the soil or the materials or in choosing the subcontractors, the experts, or the construction methods.

The exoneration from liability in such case does not operate when such defects, although they could have been foreseen during the performance of the work, were not notified to the employer. In such event the provisions of the article 1859 in the Civil Code regarding the consequences of the employer not taking the required actions shall remain applicable.

The term of the statute of limitation for the entailing of the liability for the defects of the work is the general term of the statute of limitation, of 3 years (article 2517 in the Civil Code).

The limitation term for the right to action for the apparent defects of the work starts elapsing since the date of the final acceptance or as appropriate since the date of the expiry of the term granted to the contractor under the final acceptance minute for the removing of the defects found (article 1880 in the Civil Code).

The limitation term for the right to action for the hidden defects of the work starts elapsing since the expiry of 3 years since the date of the final delivery or acceptance of the construction, except for the case where the defects were found before, when the limitation term shall start elapsing since the date of finding the defects (article 2531 paragraph 1 letter b in the Civil Code).

The limitation term for the right to action for the defects of the designing work starts elapsing at the same time as the limitation term of the right to action for the defects of the work performed by the contractor. There is excepted the case where the defects of the designing works were found before, in which event the limitation term shall start elapsing since the date of finding the same.

---

[10] As regards the liability for the defects of the work please also refer to Fl. Motiu, *Contracte speciale in noul Cod civil* (*Special Agreements Within the New Civil Code*), Ed. Wolters Kluwer, Romania, 2010, pp. 212-213.

References

- Fr. Deak, *Tratat de drept civil. Contracte speciale* (*Civil Law Treaty. Special Agreements*), 6th Edition, updated by L. Mihai and R. Popescu, Ed. Universul juridic, Bucharest, 2006, p. 188 and the following.
- C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *Tratat de drept civil roman* (*Romanian Civil Law Treaty*), tome II, Bucharest, 1929, p. 987, Fr. Deak, the quoted work, p. 192.
- T. Prescure, *Curs de contracte civile. Conform noului Cod civil* (*Course of Civil Agreements. According to the New Civil Code*)*, Ed. Hamangiu, Bucharest, 2012*.
- L. Stanciulescu, Curs de drept civil. Contracte. Conform noului Cod civil (*Course of Civil Law. Agreements. According to the New Civil Code*), Ed. Hamangiu, Bucharest, 2012, pp. 344-345.
- Fl. Motiu, *Contracte speciale in noul Cod civil* (*Special Agreements Within the New Civil Code*), Ed. Wolters Kluwer, Romania, 2010, pp. 212-213.
- Law no. 50/1991.
- Law no. 10/1995.
- G.D. no. 273/2004.

USAGES – THE LEGAL REGIME IN NEW CIVIL CODE

EMILIAN CIONGARU[*]

Abstract
In the broad sense, the concept of law is represented by totality of acts that are elaborated by competent state authorities and their purpose is legislating. There are juridical situations are outside the scope of regulation of legal norms and they are stipulated by the New Civil Code, namely the usages: which are defined, in the broad sense, as rules of conduct for a long time, born of social practice. If the law sanctioned any usage, by a rule of reference, giving them, as such obligatory legal power, they are sources of law and the legislator has provided, as is source of civil law, only usages which are in conformity to public order and morality. This problem there was no in the case of legal rules because, they themselves are created with the purpose of to generate the public order and morality. In the situations not covered by law, the usages have a greater force than that of the legal dispositions regarding similar situations, so the broad interpretation of the rules of civil law is made, in the cases which are not covered by the law, only if such an interpretation is not contrary to the usages. An analysis and understanding of the juridical status of usages representing: the customs and the local habits which is accepted by the members of that community as well as the professional uses, as rules of development of professional activities, may result in to perceive the legal force of their but also to reduce, on as much as possible, some potentials confusions of interpretation and application of the law.

Keywords: *legal rules, usages, public order, sources of civil law, legal regime.*

Introduction

Harmonization of the national legislation with European Union legislation is a continuous process and is aimed at ensuring compatibility of national rules with the European Union legal system, by modifying or completing national normative legal acts in accordance with the European norms, in this manner the European legal rules they become component part of national law.

The New Civil Code is the result of significant and profound transformation of Romanian society, in the context of development of the current European realities. In its content it is aimed the protection some the new social values: morals, cultural, scientific and economics and the legal norm of civil law have as its task, in equal measure, to exigencies which resulting from the commitments assumed by Romania as a member state of the European Union. This New civil Code, in its entirety, promotes the monistic conception of regulatory of private law relations in a single legal norm, systematizing and incorporating, in a single legal norm, all regulations relating to persons, family relations and commercial relations as well as international private law provisions, what they did, up to this moment, the subject of a separate legislation. The provisions of this fundamental legal norm of private law contains principles from new and modern regulation, which exists and in other legislations – rules of substantive law – rules and principles that can resist in time and also aspects related to the dynamics of social life, of existing realities and ever changing.

The sources of law that are enshrined in the The New Civil Code, art. 1, par. (1): "Are sources of civil law usages and general principles of law", regulates, for the first time, usages as the source of law. It is noteworthy that usages are not primary sources of law but, secondary sources in the sense that, only in the absence of legal rules, usages along with the principles of law are be taken as a source of law – par. (2). Same article, in par. (5), also provides that, „Interested party, must prove the existence and content of usage. Usages published in collections elaborated by entities or authorized

[*] PhD, Associate researcher, Institute of Legal Research „Acad. Andrei Radulescu" of the Romanian Academy, Bucharest, Romania, tel. +4.0722.98.45.89 (corresponding author: emil_ciongaru@yahoo.com).

bodies in this field is presumed to exist, until proven otherwise." Thus, usages, after the law, can be invoked and called upon to contribute to solving of a state of facts through solving a problem of law.

Paragraph (6), provides that, the „The purposes of this code usage, is the habit (customary law) and professional usages." The risk of this situation consists in that, at this moment, does not exist collections of usages and simple habit, the social behavior that is generated for a short time, to be mistaken for a custom, which represents a legal habit, for the long time and with a high repeatability and stability in time. The New civil Code[1], shaded a bit the rules that are applicable with usages, such as the example provided in article 1272 through which to be provide that a contract obliges not only at what you expressly provides, as well as to all the consequences which the law, custom or equity, to give them to the obligation, after its nature.

Codification of usages, as source of law, can give to litigants the possibility to supplement the arguments in to introduce request for judgment to the court, with the impression that the law gives him more than up to now and, the number of civil legal disputes to be higher. But, the legal regime of usages can be and the primary source of law when there are no legal rules in a particular case, the legislator is the one who give legal effect to usages in this sense.

Content

As a rule, the usages are the unwritten secondary formal sources[2] of the civil law and apply only in the absence of legal texts – the written sources of law, to regulate a specific legal situation. In the situation when exists and the law and the usages in a particular cause of resolved, then will be apply the law and if the text of the law makes reference to the usages, only then usages they become exclusively applicable. Because, the usages are the unwritten sources, they may be the subject of collections elaborated by the authorized institutions or by the entities in a particular geographic area. According to the New civil Code requirements that are necessary for the usages to become sources of civil law, are those that shall conform with public order but and with good morals[3] just like the legal rules.

The interested party in invocation of usages, need to prove their existence having the right to use any mode of prove. The means of administration or of prove of usages, could be: knowledge of usages by the courts, questioning of the involved parties in the cause of resolved, hearing of the witnesses, the expertise.

The legal rules and the usages, established rules of behavior but, the usages have a more limited scope than of the law, on one hand, because usages are concerned of a more restricted field of social relationships, and on the other hand, because just laws limited field of action of usages.

In cases where, a legal rule has its origin in a spontaneous situation, when its occurrence is not linked to a specialized official institution, but clearly originates from the social group, when the legal rule comes from a general and prolonged practice, from a constant habit, which is based on consent of the whole social group, which a considered as complying with the law, the custom or the juridical object is born.[4]

The custom, the oldest source of law, named in the past, *the earth habit*, because was born by repeating of a legal ideas by members of a community, in a significant number of successive individual cases, by creating some precedents[5] that were aimed, meeting the needs of the members and without causing an personal or collective injury.[6]

---

[1] G.Beleiu, *Romanian Civil Law. Introduction to civil law. Subjects of civil law*, eleventh edition, revised and enlarged by M.Nicolae and P.Trusca, (Bucharest: Legal Universe, 2007), 45-46.

[2] N.Popa, *General Theory of Law*, (Bucharest: All Beck, 2005), 168.

[3] C.Munteanu, O.Ungureanu, *Civil Law. General Part*, (Sibiu: University „Lucian Blaga" of Sibiu, 2011), 32.

[4] M.Djuvara, *General theory of law*, (Bucharest: Library Socec@Co.SA, 1930), 423.

[5] *Idem*, p.425.

[6] M.G. Losano, *Majors legal systems*, (Bucharest: All Beck, 2005), 287.

Thus, in order for a particular rule of habit to become customary, it must fulfill the following requirements: to have an uniform character, to be applied over and over again, to have a certain duration. The simple customs is not than a factual element, if they are not recognized to be a real law which can be claimed as a law accompanied by sanctions.

First, the custom, is based on concrete cases that preceded the so called precedents. Such cases have had to be consecrated, namely to be recognize the legal value, just as it it recognize the legal value of a law. In each of these concrete cases, the juridical rationality analyzes complex of juridical relationship which it compose and find that some repeats. In this way, is constitutes a general notion by identifying what is common in some concrete cases this is form, the general rule thus consecrated by the custom.

The customs represent a practice such entrenched so, people consider that by they exerts himself a positive law. In cases where, the custom is not consecrated by the courts but, is finds from repeated actions of public law institutions, the custom constitutes the usages.

Classification of the usages is done according to several criteria but, the most important are: the criterion of the scope into space of usages and the criterion of juridical force.

Classification, according to criterion of juridical force is most important because, the juridical force constitutes the defining element of their. According to this criterion, the usages can be:

- the normative usages (the legal usages, the usages of law), also called customs, in the doctrine of private and public international law;
- the conventional usages, also called interpretatives[7], completives or of fact, that have the value of contract rules.

Normative usages

The normative usages have the first two juridical characters common for all usages, with some particularities of interpretation, but have, as specific element, the character of a source of law. The normative usage (the custom) includes two essential elements[8]:

- an objective element, represented by the behavior which must be followed as a result of the existence of a particular social practices. This objective part of the normative usages – of the custom – is expressed by the formula: *longa, inveterate, diuturna consuetude* – old, continue, evident practice;
- a subjective element, the psychological element, consists in convincing subjects of law that the rule which is prescribed by that usual law (the custom) is obligatory and constitutes the law[9] to be respected (*opinio juris sive necesiitatis*), *opinio,* is belief that the behavior in question is juridical and *necesiitatis* assuming an obligation that derives from an alleged preexisting legal norm, already established.

The existence of the general belief of juridical obligation[10] is a necessary condition, but not sufficient, so that a usage to acquire the character of the legal rules. It is necessary to be fulfilled and a legal requirement, namely that the system of law which constitutes *lex causae,* in this case to recognize the normative force of these usages in sense of the New civil Code art.1, paragraph (2) „In cases not provided for by the law is applied usages and in their absence, the legal provisions regarding to the similar situations, and when there are no such provisions, the general principles of law", in conjunction with para. (3), „In the matters governed by law, the usages shall apply only to the extent that the law refers as expressly to these." The juridical role of normative usages is to determine the rights and obligations of parties, just like the law.

---

[7] *Legal Dictionary of Foreign Trade*, (Bucharest: Scientific and Encyclopedic 1986), 307.
[8] B.Oglinda, *The business law*, (Bucharest: Legal Universe, 2012), 51.
[9] M. Djuvara, *op.cit.*, 423.
[10] G.Del Vecchio, *Lessons of legal philosophy*, trans.I.C. Dragan, (Bucharest: Europa Nova), 226-228.

According to the New civil Code, this role to may manifest in any of the following ways: to regulate relations of law yet unforeseen of law (*consuetudo praeter legem*) of to interpret or supplement the provisions of the law (*consuetudo secundum legem*).

In relation with the contract, considering that the source of authority of normative usages is not the will of the parties, the usages of which reference is made is impose contracting parties, even if were not accepted by they and even if they are not have known. The parties may however, to remove application of normative usages, either by their express will or by only tacitly, through the fact that stipulate in the contract clauses that are contrary to usages.

Some examples from the New Civil Code where the usages are invoked as a source of the law

In the New civil Code, the role of usages in forming of the contract is given by the section what provides the rules for consent, art. 1186, which, with regard to moment and place of conclusion of contract, provided that: paragraph (2) „Also, contract is considered concluded, when the addressee of the offer committeth an act or a conclusively fact, without notice to the offeror, if pursuant to offer, of the practices established between the parties, of the usages or according to nature of the business, the acceptance can be done in this way.

In this way, the legislator establishes an alternative time in which, according to some previous practices that have been settled between the parties or of some other usages exists between these, the acceptance of the contract can be done and in this way.

Another the legal regime of usages is given of art. 1189, with regard to, "The proposal addressed to some determined persons", through which a proposal of to contract is done, usually, to determined persons. There are however, offers which are made and to indeterminate persons – the goods with displayed prices, that are exhibited in the windows of shops. In this sense, the legislator establishes that, in the principle, a such proposal addressed to some undetermined persons, cannot be qualified as an offer but, depending on circumstances, *the request for the offer* or *the intention of negotiating*. Paragraph (2), establishes however that, propose to these undetermined persons have value of offer if „this is apparent from the law, from the usages or in there is no doubt, from the circumstances."

In case of the irrevocable offer, provided by art. 1191, the legislator invokes usages but and practices established between the parties, through paragraph (1), „The offer is irrevocable as soon as its author commits itself to maintain a certain period. The offer is also irrevocable when it can be considered thus under the agreement of the parties, of the practices established between these, of the negotiations, of the content of offer or of the usages.

The offer shall be considered acceptable under the conditions provided in art. 1196, through „silence or inaction of recipient of the offer" in these conditions in which result from provisions of law, from the simple will of the parties but, also and in the conditions in that results from „the practices established between they, from usages or from other circumstances."

Regarding another essential element of the contract, *the consent*, art. 1240, concerning „Forms of consent" provides that, the will may be expressed, verbally or in writing but also and suitable, of practices established between the parties or „of usages, leaves no doubt about the intention to produce corresponding legal effects."

For the purpose of distinguishing of an unmistakable intention of producing specific legal effects of the initial contract, the New Civil Code provides a series of factors of reference: the law, convention of parties, practices established between these, the usages. Listing of these factors of reference, suggest prioritizing, the first priority situating himself the law but, only in absence of the law, the others sources of law.

Article 1272 regarding, „The legal ways to complete of content of the contract", paragraph (1), a first legal way to complete the contract consists in references to practices established between

the parties, the usages, the law or the equity, representing the factors of reference with the various degrees and increasing of generality or objectivity.

- in the first place, are situated the practices established between the parties, representing the particular factor or subjective factor of reference, in order to complete the contract, specific of the parties from the contract, used in their partnership relations;
- secondly, is situated the usages, which represents a factor of reference with a first degree of generality or of objectivity, according to the field of activity in which it activates the parties.

Article 1494, the New civil Code, mentions the following ways for determining of the place of payment which dispose, among other things and that, in the absence of express clause, the place of payment shall be determined in accordance with practices established between parties or of usages to which they have acceded.

Article 1495, the New civil Code, establishes the general provisions pointing methods for determining the date of payment and, in their absence, the suppletive rule of immediate chargeability of obligations. In this sense, the payment must be made at the time when the obligation has matured, that has become exigible.[11] According to para. (1), the chargeability of obligation or the date of payment is, first, established between the parties by indicating of a execution time. In the absence of express clause, the date of payment may result from the interpretation of the contract, and if nor this modality not its proves, to be useful will resort to the practices established between parties, respectively to the usages.

Article 1667, provides measures for „The costs of teaching", in the sense that „In the absence of usages or of contrary stipulation, if the good must be transported from one place to another, the seller has to take care of shipping by the expense of buyer. The seller is released when teaching the goods to the carrier or to the shipper. Cost of transport are the responsibility of the buyer." So, in this article, the usages have the juridical regime of the principal source of the law because, the New civil Code refers explicitly to the usages.

In any contract of sale, the problem is of establishing ways of delivery, the transfer of risks and of distribution between the seller and the buyer of expenditure related of transport of goods (the expenses of the insurance of goods, the value of transportation, etc.).

Is difficult to resolve these formalities every time by inserting in the contract, of the detailed clauses, containing the regulation of all these issues. Therefore, the practice, devised a method to shorten the way up to end of the contract, by resorting to commercial terms what condenses in a form more possible simplified, the most usual situations.

The commercial usages have been originally, own of the maritime sales[12] and their meanings was different depending of the place, of the port (of sea or of river), or of the country. This fact created difficulties in terms of their knowledge of the parties, who did not know exactly extent of their obligations, since the usages knew the varied acceptances depending on port in which were applied. For example, a sale FOB, involves in a port the obligation of the seller to load the goods on board of the ship, while in another port, it was necessary only to bring the goods to the quay, near the ship. Often these differences were uncomfortable and were sources of disagreement between the parties, being extremely difficult to determine, which was the original intention of the parties.

In order to remove these inconveniences, International Chamber of Commerce from Paris, beginning with 1920 year, had the initiative and has undertaken codification of most commonly used commercial terms. The first coding was made in 1936, was revised in 1953, completed in 1967, 1976, 1980 and 1990. The latest version dating from 1999 being published in 2000 under the title of *Incoterms 2000*.

---

[11] C.Statescu, C.Birsan, *Civil Law. The general theory of obligations*, (Bucharest: Hamangiu, 2008), 315.

[12] G. Buta, *New Civil Code and unity of private law*, in the volume of the New civil Code. Comments, Third Edition, revised and enlarged, (Bucharest: Legal Universe, 2011), 65.

Incoterms[13], contain a preamble, showing that the provisions of these rules does not impose to the will of the parties (so, they have not binding), the partners having the freedom to insert in the contents of the special contract, the adopted provisions. The two parties may refer to Incoterms as the basis of their contract but, may provide under the contract, the certain changes or additions depending on nature of the goods. Applying of Incoterms is optional is dependent on the will of the parties.

Adoption, by the parties, of the conditions of delivery, regulated by these usages not requires other formalities or other specifications than the simple registration in the contract of the international sales of the chosen clause, followed by the shortened name of the rule as: FOB[14] - Incoterms 2000; C.I.F.[15] - Incoterms 2000; F.A.S.[16] - Incoterms 1990.

Conventional usages

The conventional usages, have to their turn, the first two basic elements of all usages and constitutes a source of law in the conditions in which fulfill those conditions of repeatability and some older between the business partners.[17]

The legal force of the conventional usages is that of a contractual clause. The pursuant of authority of these usages is the agreement of the will. Applying of these usages shall be placed on the area of the freedom principle of the will of the parties.

The agreement on the application of the conventional usages may be, express or tacit:

- the most frequent situation is that of the express agreement of the parties, expressed by clause of reference provided in the contract. But, there are fewer cases in which by the contractual clause, the parties send to *the current usages* in this field of business. The sending is done, usually, to codified usages, either by neutral organisms or by the one of the parties, through the general conditions, the model contracts, the framework contracts, etc. In these cases, the usages fixed thus, are received contractually, with role of completing the content of contract;
- the usages can be incorporated contractually, applying as a contractual clause, and through tacit or implied will of the parties.

In some cases, the tacit character of manifestation of the will be deducted from some indices, which can be intrinsic or extrinsic of the contract. It is, in this case, of acts or of facts outside of the contract, for example, the reference to an usage in the framework of an additional act, from which is be concluded that the parties wished to implement the usages and to the principal contract. In other cases, the usages that fulfill some conditions are considerate, by the law, as being applicable tacitly in the contract, even in the absence of some indication of will of the parties.[18] The role of conventional usages is to determine specifically the rights and the obligations of the parties.

---

[13] *INCOTERMS* is an acronym for *IN*ternational *CO*mmercial *TERMS* which means *Terms of International Trade.*

[14] *Incoterms 2010, ICC publication 715 – Free On Board* (named port of shipment) – The seller must load the goods on board the vessel nominated by the buyer. Cost and risk are divided when the goods are actually on board of the vessel. The seller must clear the goods for export. The term is applicable for maritime and inland waterway transport only but NOT for multimodal sea transport in containers. The buyer must instruct the seller the details of the vessel and the port where the goods are to be loaded, and there is no reference to, or provision for, the use of a carrier or forwarder. This term has been greatly misused over the last three decades ever since Incoterms 1980 explained that FCA should be used for container shipments.

[15] *Incoterms 2010, ICC publication 715 – Cost, Insurance and Freight* (named port of destination). Exactly the same as CFR except that the seller must in addition procure and pay for the insurance. Maritime transport only.

[16] *Free Alongside Ship* (named port of shipment) The seller must place the goods alongside the ship at the named port. The seller must clear the goods for export. Suitable only for maritime transport but NOT for multimodal sea transport in containers. This term is typically used for heavy-lift or bulk cargo.

[17] D.Mazilu, *International Trade Law, General Part*, Ed. Lumina Lex, Bucharest, 1999, p.133-143.

[18] *The Vienna Convention* of 1980, Article 9, paragraph 2.

Assimilation of the conventional usages, in terms of their legal force, with the contractual clauses, arises a problem to the report of this usages with the law respectively with the contracts. In this respect, it is evident that the parties may exclude application of the conventional usages by their express or tacit will. This solution is explained by the fact that the role of the usages is to interpret and to complete the agreement of the will between the parties.

Professional usages

„The professional usages, are those rules which governing relations between the members of a profession or, where appropriate, between the members and the customers, during exercise of the profession." [19] The professional usages have been introduced, as the sources of civil law, because the New civil Code „it applies to the relationship between the professionals, as well as relations between they and any other issues of the civil law." The professionals are defined as „... all those who operating a company." [20]

Nor the New civil Code, nor the law of its implementing, does not contain a synthetic definition of the professional or the explicit criteria of establishing or of identification of this in relation of other participants to the civil legal relations. From the systematization and the spirit of law resulting, however that, the professional is defined by reference to the activities of operating of a company. The law of implementing of the New civil Code, no. 71/2011, art. 8, lists more categories of the professionals, including on *the trader* who is renamed by art. 6 of same law in *the professional*.

The professionals are usually[21]:

- *the physical persons,* such as: the traders, the authorized physical persons, the family or the individual entrepreneurs and the persons who exercise the liberal or the regulated professions;
- *the legal entities,* such as: the commercial companies, the cooperative organizations, the autonomes regies, the civil societies with legal personality, the groups of economic interests;
- *the public institutions,* who operates a company can be the professionals for the purposes of the New civil Code, regardless of whether obtain or not, the profit.[22] This category includes: the hospitals, the universities, the authorities of regulatory of supervision and of control;
- the holders of a company may be, however, even the entities without legal personality such as the simple societies, the civil societies without legal personality, governed by the special laws (the funds of pensions, the investment funds, the law firms, the notaries, the legal executors or the practitioners of insolvency) and the groups of companies because they too operates a company, and the operation of company can be an exercise of one or of more persons, united or in the associations with legal personality, or in yhe collectivities or the entities without legal personality.

If, the law does not provide, shall apply the usages (the habit or the custom and the professional usage). In their category, the professional usages are priority, especially since they are usually „coded" ie, united in the collections elaborated of the ability organizations, the reason for which they are presumed to exist, while the customs must proved by the party who them invokes.

Conclusions

In conclusion, moment of formation of a usage is found even in the agreement of the will of partners who have imagined that solution. Retrieving of this solution and of other partners and its observance by them in conducting of the legal relationship resulted to formation in time of a practice

---

[19] G.Boroi and C.A.Adreescu, *Course of civil law. General part - according to the New civil Code*, (Bucharest: Hamangiu, 2011), 8.

[20] Art. 3, *The New civil Code*.

[21] C.Florescu, *Romanian Pandectes nr.10/2011, Concepts and trends in relation with the company law*, (Bucharest: Wolters Kluwer, 2011).

[22] S.D.Carpenaru, *Commercial law under the conditions of the New Civil Code*, in the Judicial Courier nr.10/2010, (Bucharest, Judicial Courier, 2010), 543-546.

in this sense and the constancy with which that practice was followed by the participants from the locality or the geographical area where it was formed had as a result transformation of the initial solution in the rule of conduct which by compliance and enforcement repeated in the practice came into consciousness of the traders and has become by virtue of the tradition of the respect for all participants to the trade. By their character of generality and of impersonality, the usages approaches of the legal norm but in contrast to this which is generated and ensured by the state, the usages are the realization of the participants themselves to the specific legal relations. The usages, representing the most direct expression of the activity of the participants in the national and the international business, have a great capacity to adapt to the new circumstances arising in the different areas of the business, their role is just that, of to complete the eventually legislative and contractual gaps.

Identification, inventorying and codification of the usages, will be a challenge for all business partners but also and for the adepts of the science of the law, fair in order to the equitable realization of a justice of high quality, capable of to defend the legal order, the part of the social order.

References

- Nicolae Popa, *General Theory of Law*, (Bucharest: All Beck, 2005).
- Gheorghe Beleiu, *Romanian Civil Law. Introduction to civil law. Subjects of civil law*, eleventh edition, revised and enlarged by M.Nicolae and P.Trusca, (Bucharest: Legal Universe, 2007).
- Cornelia Munteanu, Ovidiu Ungureanu, *Civil Law. General Part*, (Sibiu: University "Lucian Blaga" of Sibiu, 2011).
- Mircea Djuvara, *General theory of law*, (Bucharest: Library Socec@Co.SA, 1930).
- Mario G. Losano, *Majors legal systems*, (Bucharest: All Beck, 2005).
- Bazil Oglinda, *The business law*, (Bucharest: Legal Universe, 2012).
- Georgio Del Vecchio, *Lessons of legal philosophy*, trans.I.C. Dragan, (Bucharest: Europa Nova).
- Constantin Statescu, Corneliu Birsan, *Civil Law. The general theory of obligations*, (Bucharest: Hamangiu, 2008).
- Gheorghe Buta, *New Civil Code and unity of private law*, in the volume of the New civil Code. Comments, Third Edition, revised and enlarged, (Bucharest: Legal Universe, 2011).
- Dumitru Mazilu, *International Trade Law, General Part*, Ed. Lumina Lex, Bucharest, 1999.
- Gabriel Boroi and Carla Alexandra Andreescu, *Course of civil law. General part - according to the New civil Code*, (Bucharest: Hamangiu, 2011).
- Cristina Florescu, *Romanian Pandectes nr.10/2011, Concepts and trends in relation with the company law*, (Bucharest: Wolters Kluwer, 2011).
- Stanciu D. Carpenaru, *Commercial law under the conditions of the New Civil Code*, in the Judicial Courier nr.10/2010, (Bucharest, Judicial Courier, 2010).
- Dumitru A.P. Florescu and Liviu-Narcis Pirvu, *Contracts of International trade*. Second Edition, (Bucharest: Legal Universe, 2007).
- Dragos Alexandru Sitaru, *International Law, General Part*, (Bucharest: Legal Universe, 2008).
- *Legal Dictionary of Foreign Trade*, (Bucharest: Scientific and Encyclopedic 1986).
- International Chamber of Commerce from Paris, *Incoterms 2010,* ICC Publication, No.715, Edition 2010.
- *The New civil Code* of 2012 year.
- *The Vienna Convention* of 1980 year.

"AGREEMENTS", "DECISIONS" AND "CONCERTED PRACTICES": KEY CONCEPTS IN THE ANALYSIS OF ANTICOMPETITIVE AGREEMENTS

CRISTINA CUCU*

Abstract

In their economic activity, undertakings conclude many agreements between them. But agreements between undertakings which can distort the competition -anticompetitive agreements- are prohibited. The Romanian and EU law prohibit "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition". However, the terms "agreements", "decisions" or "concerted practices" are nowhere defined in the EU Treaties or in the Romanian law. These terms are key concepts in the analysis of anticompetitive agreements which can distort the competition. In the lack of a legal definition, these concepts have generated a complex body of jurisprudence, which has to be identified. The analysis of these key concepts necessarily entails the conceptual delimitation of the notions. On this purpose, the relevant legal provisions will be identified in the Romanian and EU law, as well as the decisions of the European Court of Justice in this matter. The present paper intends to present the conceptual evolution of the analysed notions, paying special attention to concerted practices and to parallel behaviour in price fixing on the market.

Keywords*: anticompetitive agreements, agreements between undertakings, decisions by associations of undertakings, concerted practices, parallel behaviour.*

Introduction

The purpose of this paper is the analysis of the notions "agreements", "decisions" and "concerted practices", which represent key concepts in the analysis of the anti-competitive agreements which can distort the competition. The desire to maintain themselves on a particular market, at a higher level of profitability or at a reasonable level at least, can lead the undertakings to adopt an anticompetitive behaviour more easily. This may result from the existence of anticompetitive agreements and concerted practices, especially in light of recent economic crises. Agreements between undertakings which can distort the competition -anticompetitive agreements- are prohibited. The analysis of any anticompetitive practice begins necessarily with the identification of the conduct of undertaking and the verification whether or not the conduct at hand represents an "anticompetitive agreement" to which the competition rules address.

The Romanian and EU law prohibit all "agreements between undertakings", "decisions by associations of undertakings" and "concerted practice" which have as their object or effect the prevention, restriction or distortion of competition. The study of these notions is important because they are key concept in the analysis of anticompetitive agreements which restrict natural competition. Also, these notions are nowhere defined in the EU Treaties or in the Romanian law; as such, the concepts has generated a complex body of jurisprudence, which has to be identified.

With the purpose of determining the meaning of anticompetitive agreements, we will analyse the special significance of each of these three notions, "agreements", "decisions by associations of undertakings" and "concerted practices" in the context of competition law, we will identify and analyse the main normative dispositions with regard to these aspects, both at national and European levels, and we will present many jurisprudential solutions of the European Law Court, from which

* Ph.D. candidate, Law Faculty, "Nicolae Titulescu" University, Bucharest (e-mail: cristinaeremia@yahoo.com).

are resulted the criteria that have to be taken into consideration for the identification of anticompetitive agreements.

In comparison with other already existent specialty literature on competition law, the present paper intends to present the conceptual evolution of the analysed notions, paying special attention to concerted practices and to parallel behaviour in price fixing on the market.

Content

1. The notion of "anticompetitive agreements".

The existence of a competitive and undistorted milieu is a fundamental condition for the existence of a functional market economy. Thus, it is necessary to protect the market against acts or facts that could lead to the prevention, restriction or distortion of competition. Among these, the anticompetitive practices of undertakings are especially harmful, irrespective of the way in which they take place: anticompetitive agreements or the abuse of dominant position on a certain market.

There are two main types of anticompetitive practices: the anticompetitive agreements concluded between two or more undertakings in order to coordinate their market behaviour and the undertaking's abuse of dominant position on a certain relevant market. The object of the present analysis is represented by the anticompetitive agreements within the activity of undertakings as the main form of anticompetitive practice. In their economic activities, undertakings conclude naturally a large number of agreements between them, without becoming illicit in this manner. However, those anticompetitive agreements within the activity of undertakings whose object or effect is the prevention, restriction or distortion of competition are prohibited. In these circumstances, it is necessary to analyze the notion of "anticompetitive agreement" in order to determine whether or not the agreements concluded in the activity of undertakings become illicit from a competitive point of view. In order to become competitively illicit, the agreements between undertakings must regard a coordination of the undertaking's behaviour on the market, to the detriment of free competition.

In the European Union Law, The Treaty on the Functioning of the European Union (EU Treaties/TFEU)[1], contains the primary legal regulation with regard to competition, which applies to undertakings and associations of undertakings. According to article 101 TFEU, "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market".

Similarly, in the Romanian Law, the Competition Law no. 21/1996[2] prohibits "any agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it".

As a result of the abovementioned regulatory provisions, the European and national legislation prohibit, without expressly defining: agreements between undertakings, decisions of associations of undertakings and concerted practices. These are forms in which one can express the anticompetitive behaviour of undertakings prohibited by art. 101 paragraph 1 TFEU and art. 5 alignment (1) of Law no. 21/1996 which we will designate in a general concept of *anticompetitive agreement* that includes any and all forms of expression, whether it is an agreement/understanding between undertakings, a decision of the association of undertakings or a concerted practice of two or more undertakings.

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/1, 30.3.2010. *Brevitas causa*, throughout the present study, it will be indicate by the abbreviation TFEU.

[2] Official Gazette no. 88/30.04.1996.

Moreover, from the same regulatory provisions revealed we may conclude that an anticompetitive agreement is prohibited if the following conditions are met: i) the existence of an anticompetitive agreement between undertakings, whether it is an "agreement between undertakings", a "decision of an association of undertakings" or a "concerted practice"; ii) the anticompetitive agreement brings prejudice to the competition: through its object or its effect, the anticompetitive agreement hinders, restricts or distorts the competition; iii) if the anticompetitive agreement reached distorts the competition in the internal market thus affecting trade between Member States, the provisions of the TFEU become applicable.

Concluding, the **anticompetitive agreements** are *any agreements between two or more undertakings, regardless of their form of expression, concluded in order to coordinate their market behaviour and having as their object or effect the prevention, restriction or distortion of competition*.

2. Forms of expression of anticompetitive agreements.

The anticompetitive agreements may take various forms:

a) Depending on the undertakings' market level, whether or not they are competing with each other, we distinguish between: horizontal anticompetitive agreements and vertical anticompetitive agreements.

The *horizontal anticompetitive agreements* are agreements concluded between undertakings that operate on the same market level and compete with each other, for example the agreements between two manufacturers or two distributors.

The *vertical anticompetitive agreements* are agreements concluded between undertakings that operate on different levels of the manufacture - distribution chain and do not compete with each other.

b) Depending on the materialization of the agreement of the involved undertakings, we distinguish between express anticompetitive agreements and tacit anticompetitive agreements.

The *express anticompetitive agreements* are proper agreements concluded between undertakings for the purpose of meeting their expression of will, irrespective of their way to externalize the expression of will (it is irrelevant whether or not the expression of will is materialized through a document *ad probationem*).

The *tacit anticompetitive agreements* represent a coordination of the prohibited behaviour, concluded between two or more undertakings, such practice being initiated by an undertaking and subsequently followed precisely by another undertaking.

c) Other forms of expression of anticompetitive agreements.

No matter if they are express/tacit or horizontal/vertical anticompetitive agreements, the anticompetitive agreements may be represented in 3 main forms of expression: *proper agreements between undertakings, decisions of associations of undertakings or concerted practices.* Since they are fundamental concepts in the analysis of anticompetitive agreements, they will be specifically described below.

3. Conceptual distinctions between the forms of expression of the anticompetitive agreement.

The analysis of any anticompetitive practices begins necessarily with the identification of the conduct of undertaking and the verification whether or not the conduct at hand represents an "anticompetitive agreement" to which the competition rules address.

Both the European and the national legislators govern three main forms of expression of an anticompetitive agreement – "agreements between undertakings", "decisions of associations of undertakings" and "concerted practice of undertakings" – without, however, defining them. An extensive jurisprudence of the European Courts allows, however, the observation of the main definitive notes of these concepts and thus the determination of the scope of the interdiction governed by art. 101 paragraph 1 TFEU and art. 5 of Law no. 21/1996.

According to a general principle formulated in the jurisprudence of the European Courts, any undertaking must determine autonomously the behaviour it intends to adopt on the market[3]. Given this fact, the European Courts have defined the "agreements", "decisions" and "concerted practices" as European law concepts which allow a differentiation between the unilateral behaviour of an undertaking and the coordination of behaviours or the collusions between undertakings[4]. The unilateral behaviour falls under article 102 TFEU and art. 6 of Law no. 21/1996 on the abuse of dominant position.

The type of coordination of behaviours or collusion between undertakings that falls under article 101/1 TFEU consists in the situation in which at least one undertaking binds itself in relation with another undertaking to adopt a certain behaviour on the market or in which, following the relations between the undertakings, any uncertainty concerning their market behaviour is removed or at least significantly reduced[5]. The coordination does not have to be necessarily express but it may also be tacit. In order to be able to consider that an understanding has been concluded by tacit consent, an undertaking must expressly or tacitly invite another undertaking to achieve a common goal[6].

The forms of manifestation of an anticompetitive agreement can be extremely diverse. As suggestively underlined in the doctrine, the only important question is whether or not more undertakings had a common will to behave in a manner that would bring prejudice to competition[7]. In this context, we distinguish the main forms of expression of an anticompetitive agreement:

3.1. "Agreement between undertakings".

The concept of "agreement between undertakings" is not legally defined in the European law. In the Romanian law, article 5 of Law no. 21/1996 only prohibits it, however without defining it by correlation with article 49 of the same Law[8]. It appears that it regards "any commitments, conventions or contractual clauses that relate to an anticompetitive practice".

The European case law interprets extensively the analyzed concept. Thus, it includes any type of agreement, written or oral, conditional or gentlemen's agreement, the concept of understanding being centered around the existence of an expression of will between at least two parties, whereas the form in which it manifests itself is not important[9].

Considering the multitude of ways of expression of an agreement between undertakings, in the analysis performed on this concept we distinguish between:

3.1.1. Proper agreements.

An initial definition must be made in the analysis performed: any way to express an agreement between undertakings must be analyzed only if it has an anticompetitive object or effect. In this sense, the doctrine rightfully noted that the term of agreement between undertakings "involves in the competition law a more accurate content than the one in the common law (that includes any

[3] As an example, we will cite the Anic Partecipazioni Case, C-49/92, consideration 116; The Suiker Unie joined cases, C- 40- 48/73, consideration 173. This case, like the other to which we refer throughout this paperwork is published on the website of the European Union Court of Justice, *www.curia.eu.int*.

[4] Consideration 108 of the decision of Anic Partecipazioni, cited in the above note and Sandoz Prodotti Case, C-277/87.

[5] Cimenteries joined cases CBR, T-25/95, considerations 1849 and 1852; British Sugar joined cases et al., T-202/98, considerations 58 – 60.

[6] Bundesverband der Arzneimittel-Importeure joined cases, C-2/01 and C-3/01, consideration 102.

[7] André Decocq, Georges Decocq, *Droit de la concurrence*, 4th edition, L.G.D.J., 2010, p. 305.

[8] According to art. 49 of Law no. 21/1996, "Any agreements or decisions prohibited by articles 5 and 6 herein, as well as by articles 101 and 102 in the Treaty on the Functioning of the European Union are null and void, i.e. any agreements, conventions or contract provisions concerning anticompetitive practices, as well as any acts which violate the provisions under article 9 herein".

[9] Bayer vs. Commission Case, T-41/1996.

agreement regardless of its purpose) and can only regard the agreements whose object or effect would be anticompetitive"[10] and that "therefore are kept in view the condemnable agreements that affect the freedom of the relevant market[11].

As regards the proper agreements, the Court of Justice of the European Union[12] set out a general formula, stating that "in order for art. 101/1 TFEU to be effective, it is sufficient for the agreement to be the parties' expression of will, without the need for it to constitute a valid and binding contract according to the national law"[13] and then underlined that "in order to have an agreement, it is sufficient for undertakings to have expressed their joint will to behave in a certain determined way on the market"[14]. The contract must not necessarily be concluded in writing[15].

Therefore we may conclude that a *proper agreement* represents a *contract* in the meaning of the Civil Code[16], materialized or not ad probationem in a document, in whole or in part (one or more contractual clauses) through which undertakings coordinate their behaviour on the market so as to restrict the competition.

Regardless of the form. The agreements concluded may be bi/multilateral and may be in any *form*: sale-purchase, rent, concession, memorandum of association, etc. Their common denominator is the monopolistic purpose pursued by the concerned undertakings[17].

Regardless of the nature of the contract in which the agreement is stated. Pragmatism - the essence of competition law – implies that the *apparent nature* of the contract must not be taken into account. Can therefore be qualified as proper agreements the statute of a company[18], the shareholders' pacts[19], an agreement on intellectual property rights[20].

The apparent nature of the contract does not matter. Thus, the convention on fixing the port services rates in the port of Constanţa, sanctioned by the Competition Council (vertical and horizontal agreements had been concluded between several manufacturers of chemical fertilizers and several service providers), was called "negotiation protocol"[21].

The Court of Justice held that an anticompetitive agreement can be inserted in a transaction, stating that "prohibiting the agreements between undertakings, the Treaty makes no distinction between agreements whose object is to end a dispute and agreements aimed at other purposes"[22].

Regardless of the validity of the agreement. Regarding the validity of the agreement between undertakings (of course, apart from its incompatibility with the competition rules), the Court underlined that it is not necessary for the parties' expression of will to represent a valid contract according to the national law[23]. In this respect, also the European Commission explained that "in a

---

[10] Azema, Jacques, *Le droit francais de la concurrence*, Paris, 1989, p. 304.

[11] Căpăţînă, Octavian, *Commercial Competition Law. Pathological Competition. Monopolism*, Lumina Lex Publishing House, Bucharest, 1993, p. 41.

[12] *Brevitas causa*, throughout the present study, The Court of Justice of the European Union will be named *The Court* or indicated by the abbreviation *CJEU*.

[13] Sandoz Case, C-277/87.

[14] Petrofina vs. Commission Case, T-2/89; BASF vs. Commission Case, T-4/89; Hüls vs. Commission Case, T-9/89.

[15] The Decision of the Commission of 9 December 1998 on the Greek Ferries, OJ no. L. 109 of 27.05.1999.

[16] According to art. 1166 of the Civil Code, the contract is an agreement of wills between two or more persons with the intent to establish, modify or extinguish a legal relationship.

[17] O. Căpăţînă, *op.cit.*, p. 41.

[18] Hendrik Evert Dijkstra vs. Friesland Cooperation Case, C-319/93.

[19] The Decision of the Commission in the Cegetel 4 Case, 20 May 1999, JOCE L 218 of 18 August 1999.

[20] The Telecom Development Decision, 27 July 1999, JOCE L 218, 18 August 1999.

[21] The Decision of the Competition Council no. 24 of 5 May 1998, in the *Competition Council Report 1998*, p. 89-93.

[22] Bayer vs. Société de constructions mecaniques Rennecke Case, C-65/86.

[23] Sandoz Case, C-277/87.

secret agreement, the parties do not expect their collusive arrangement to have contractual force and no enforcement procedure is required, as a civil contract would have"[24].

3.1.2. Apparently unilateral agreements

The general framework of the business relationships between two or more undertakings may confer to a unilateral document, by its content and form, the features of a bi/multilateral agreement. This is the case of an apparently unilateral decision of an undertaking to which another undertaking (generally, part of the distribution network of the first) shall conform its behaviour. Since the conditions set by the issuing undertaking are accepted, usually in a tacit manner (however being put into practice) by the recipient undertakings, we may speak about an expression of will of the parties, so that in reality, there is a genuine anticompetitive agreement, subjected to the provisions of art. 101 TFEU and art. 5 of Law no. 21/1996. The distinction between agreements and unilateral behaviours is important to be made, because agreements fall under art. 101 TFEU, while unilateral behaviours are regulated by art. 102 TFEU.

The more common examples of apparently unilateral agreements met in practice are the documents (letters, circulars, invoices, invitations, etc.) addressed by a manufacturer to its distributors, containing various "directions" concerning the market behaviour, often tacitly accepted by its recipients and which were classified as agreements in the sense of art. 101 TFEU, such as: a circular addressed by Ford - Germany to its resellers, by which it informed them to no longer accept orders for right hand drive vehicles (to be sold in the United Kingdom)[25]; an invoice addressed by Sandoz to its distributors which had printed overleaf the annotation "prohibited for export"[26]; the "invitation" addressed by BMW to its distributors to stop delivering vehicles to independent leasing companies[27].

We may therefore conclude, based on a constant European case-law[28], that if we can demonstrate the express or tacit acceptance by the other parties of the measures adopted or imposed in an apparently unilateral way by an undertaking, an apparently unilateral behaviour of an undertaking in the contractual relations with its distributors can form the basis of an agreement between undertakings within the meaning of art. 101/1 TFEU. It is however essential to demonstrate the express or tacit accord of the addressee undertakings regarding the behaviour proposed by the issuing undertaking[29].

3.1.3. Informal agreements; gentlemen's agreements.

In order to have an anticompetitive agreement, it is not necessary for it to be legally binding under the applicable rules of the national civil law. What matters is that the agreement represents the parties' expression of will, under which they held themselves responsible. Consequently, simple moral commitments, promises, simple mission statements can therefore be regarded as agreements.

Both the doctrine[30] and the jurisprudence[31] acknowledged to the commitments of honour, *the gentlemen's agreements*, the features of anticompetitive agreements.

---

[24] The Decision in the PVC Agreements Case din 21 December 1988, JOCE no. L 74 of 17 March 1989.

[25] Ford AG vs. Commission Cases, C- 25-26/84, Decision of 17 September 1985.

[26] Sandoz Case, C-277/87, Decision of 11.01.1990.

[27] VW vs. Commission Case, C-62/98.

[28] Cases 32/78, 36/78 - 82/78 BMW Belgium et al. vs. Commission par. 28 - 30; Ford and Ford Europe, par. 21; Case 75/84 Metro vs. Commission (Metro II), par. 72 and 73; Case C-277/87 Sandoz vs. Commission, par. 7 - 12; Case C-70/93 BMW vs. ALD, par. 16 and 17.

[29] Bayer vs. Commission Case, T-41/96, par.71

[30] Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, ed. 6, Litec, Paris, 2010, p. 311; A. Decocq, G. Decocq, *op,cit.,* p. 306.

[31] The Quinine Cartel Case, C- 41, 44 and 45/69.

The term *gentlemen's agreements* (Anglo-Saxon specific term) designates an informal agreement, whether or not materialized in a document, between two or more parties, whose essence is that the fulfillment of the obligations assumed is based on the honour of the parties and not on the coercive force of the law.

The integration of the agreements of honour in the concept of anticompetitive agreement was justified in doctrine by the fact that every legal system governing the anticompetitive activity must have provisions to sanction the less formal types of agreements. If competition rules would work only when an express, official agreement is concluded then they would have little practical utility, since the undertakings will try to achieve their anticompetitive goals through less formal means[32].

A typical example of sanctionable agreement of honour was illustrated in the Quinine Cartel Case. A Dutch company manufacturing chemical, pharmaceutical and related products signed with other European manufacturers of such products an export arrangement on the price fixing and market allocation, which affected the trade with non-member states. They also concluded a gentlemen's agreement which extended the arrangement to sales within the European internal market and the parties agreed that the breach of the agreement represents, ipso facto, a breach of the export arrangement. The Court held the violation of the competition rules by the gentlemen's agreement concluded according to which the manufacturers were protecting their own national market and were restricting the competition within the internal market. The assertion that, in fact, the gentlemen's agreement ceased has been removed, because the analysis of the parties' behaviour demonstrated that they have complied with their agreement (even if it was informal)[33].

Consequently, informal agreements can be sanctioned under art. 101 TFEU and the mere fact that the parties claim to have abolished them will not be considered determinant. It is necessary to carefully analyze the facts in order to establish if it was plausible, in economic terms, for the market behaviour to be achieved in the absence of the secret agreement.

To the same effect, it was decided that informal agreements can be classified as anticompetitive agreements even if they are not compulsory by their nature and the absence of formal measures to monitor the implementation does not necessarily affect the gravity of the violation[34].

Concluding, we can remark that an "agreement between undertakings" means the joint expression of will between two or more undertakings through which they coordinate their market behaviour to the detriment of competition, regardless of the form of the joint expression of will, the nature of the contract in which the joint expression of will is included or the validity of the contract.

3.2. "Decision by association of undertakings".

The association of undertakings is a group carried into effect on professional criteria, of more undertakings that operate on the same relevant market, while its members keep their behavioural autonomy. The European case law held that a professional group will represent an association of undertakings if it adopts rules that are the expression of will of the representatives of members of a profession and that aim to obtain a specific behaviour from the members of the said profession within their business activity[35].

Bringing together undertakings under an associative form in itself is not prohibited by law. However, when, through the decisions adopted by the association of undertakings, the same restricts the competition, this behaviour falls under the rules of competition and is prohibited.

"The decision by association of undertakings" is one of the forms of expression of an anticompetitive agreement. As ensued from the provisions of art. 101 TFEU and art. 5 of Law no.

---

[32] Craig, Paul; Grainne de Burca, *EU Law*, 4th edition, Hamangiu Publishing House, Bucharest, 2009, p. 1190.

[33] The Quinine Cartel Case, C- 41, 44 and 45/69.

[34] Henbach vs. Commission Case, T-64/02.

[35] Wouters Case (J.C.J. Wouters, J. W. Savelbergh and PRICE Waterhouse), C- 309/99, the Decision of the Court of 19.02.2001regarding the Netherlands Bar Association, par. 64.

21/1996, *the decision by association of undertakings represents* any decision of the governing body of an association of undertakings whose object or effect is the restriction of competition. In order to have this object or effect, the said decision should have the power to impose certain behaviours to the association members in their economic activity on the market. The way in which the said decision is formally presented has no relevance and the title or apparent nature of the document is also irrelevant.

If the decision of the association is meant to impose upon its members a certain economic behaviour on the market, it represents a decision prohibited by the rules of competition law, even if formally it takes the form of a simple recommendation, with non-binding features[36]. The decisions of the association should guide the behaviours of its members as an understanding between undertakings[37].

The decisions by associations of undertakings may take various *forms*, such as directives, internal regulations, circulars, etc., which the adherent undertakings apply effectively, complying with the provision sent from the center[38]. Since such decisions (regardless of their name: decisions, protocols, minutes, etc.) of the governing body are mandatory for all the association members, we are virtually reaching a similar result to that generated by a proper agreement. The anticompetitive threat is equally serious, which explains the legal assimilation of decisions with the monopolistic agreements[39].

The foreign doctrine stated that the decision by association of undertakings may be also represented by the association's *articles of incorporation*[40]. The Romanian literature held to the contrary, that the monopolistic decision adopted by the governing body of an association of undertakings must be adopted during its activity, and not before its coming into existence; the decision is issued during the activity of the association of undertakings and should not be confused with the articles of incorporation itself, because if the articles of incorporation would have monopolistic features, it would represent a proper agreement[41].

In my opinion, the articles of incorporation of an association of undertakings may represent both a proper agreement (in the relationships between the undertakings that form the association) and a decision by association of undertakings (towards third party undertakings wishing to subsequently join the association).

In the European Union case-law, the concept of *decision by associations of undertakings* has been broadly interpreted.

A *regulation* such as the one adopted by the Netherlands Bar Association concerning the collaboration between lawyers and other liberal professions was regarded as representing a decision by an association of undertakings[42].

The *resolutions* adopted at a meeting of the association or the *recommendations* of an association may constitute decisions of the association of undertakings when they indicate the decision of the said association to coordinate the behaviour of its members[43]. An act qualified as recommendation can be regarded as violating the provisions of art. 101 of the Treaty, whatever the

---

[36] The Commission, 13 Apr 1994, *Stichting Certificatie Kraaverhuurbedrijf*, JOCE, L. 117, 7 May 1994. To the same purpose: Case C-45/85, Verband der Sachversicherer, Decision of 27 January 1987.

[37] Augustin Fuerea, *Business European Union Law*, Universul Juridic Publishing House, Bucharest, 2006, p. 218.

[38] O. Căpăţână, *op.cit.,* p. 44.

[39] Căpăţînă, Octavian, *The New Antimonopoly Regulation in Competition Law*, in Dreptul no. 7/1996.

[40] Wish, Richard, *Competition Law*, 4th edition, Butterworths Publishing House, London, 2001, p. 82; Jones, Alison; Sufrin, Brenda*, EC Competition Law, Text, Cases & Materials***,** 3rd edition, Oxford University Press, 2008, p. 173.

[41] Căpăţînă, Octavian, *The New Antimonopoly Regulation in Competition Law, op.cit.*

[42] Wouters Case, C-309/99

[43] IAZ International Belgium NV vs. Commission Case, C-96/82.

legal status of this act, if it constitutes the expression of will of the association of economic agents to coordinate its members' behaviour on the market[44].

The *binding* decisions or resolutions of the Board of Directors, of the association or the rules belonging to the association's President that limit to a certain extent the commercial freedom of the members represent decisions by an association in the meaning of the competition law.

Moreover, a *recommendation* of an association of undertakings may constitute a decision of the association when, regardless of its legal status, it is an expression of its policy to coordinate the behaviour of its members[45]. Even if the *recommendation is not binding or it has not been fully applied*, it may constitute a decision of an association and will be prohibited if, in fact, its purpose was to determine, or was able to have the effect of determining the behaviour of its members. The non-binding recommendation represents a decision in the meaning under review, if it is implemented by the members of the association[46].

The European courts have ruled that a recommendation of the association of water suppliers addressed to its members, by which they should not have connected "unauthorized" applications (without a conformity tag provided by another association) to the main system, represents a decision capable to restrict competition[47].

In another case[48], the Commission found that the practice of the association to prepare and forward recommended rates to its members falls under the Treaty. Thus, while it is normal for an association/organization to offer assistance to its members, it must not exert any direct or indirect influence over the competition between members, particularly by sending rates applicable to all undertakings, regardless of the cost structure of each of them. An association's communication of recommended rates is a practice likely to determine the involved undertakings to align their own rates, regardless of their costs. Such method determines the undertakings that obtain reduced costs to drop the prices, thus creating an artificial advantage for those undertakings that do not have control over production costs. According to the decision of the European Commission in this case, a recommendation of an association on the application by its members of certain rates is anticompetitive if the following conditions are met: the association members have a common interest in influencing the market by increasing the prices; the nature of the recommendation, which, although described as non-binding, highlights, in binding terms, a collective increase of the rates; the association's statute allows it to coordinate the activity of its members.

Nationally, the Competition Council assessed that the decision of the Board of Directors of the Romanian Grain Storage Merchants Association represents a decision by an association of undertakings, having the object to influence the competitive behaviour of its members and to restrict the competition on the grain storage market in the South - South-East and West of Romania, by communicating certain rates to be applied by its members[49].

Furthermore, a decision adopted by the Board of Directors of the Dental Technicians National Association establishing certain reference rates for dental prosthetic works and their publication in the Association's journal, was regarded as representing a decision by an association of undertakings. It was noted that the recommended rates, even if classified by the association as reference rates, had as an object the coordination within the relevant market of the economic behaviour of dental technicians. And the publication of reference rates is likely to affect the competition on the dental

---

[44] Verband der Sachversicherer e.V. vs. Commission Case, C-45/85, Decision CEJ of 27 January 1987; The Decision of the European Commission in the FENEX Case, par. 41 and 42.

[45] Verband der Sachversicherer e.V. vs. Commission Case, *above cited*, note 2.

[46] van Landewyck Case, C-218/78.

[47] IAZ International Belgium NV vs. Commission Case, C-96/82.

[48] The Decision of the Commission published in OJ no. L 181/28 of 1996.

[49] The Decision of the Competition Council no. 63 of 7 December 2009.

prosthetics market because it allows the players of this market to anticipate with a high degree of certainty the pricing strategy of their competitors[50].

Likewise, it was determined that the decision of the management and governing executives of the Body of Expert and Licensed Accountants of Romania (CECCAR) to adopt a Regulation setting out in mandatory terms virtually all the professional fees and its publication in the Body's journals and, starting with 2009 in the Official Gazette of Romania, part I, reflects their decision to coordinate the behaviour of CECCAR members in conformity with the provisions of the Regulation and represents a decision by association of undertakings within the meaning of art. 5 alignment (1) of the Law and art. 101 of the Treaty. It was held that, although CECCAR argues that the decision to adopt this Regulation represents a punctual work required by its members as a direction in order not to deviate from the quality standards and to protect on these lines the customers, in reality the Regulation represents more than a guiding methodology for setting the fees, its adoption decision being taken with the purpose of influencing the commercial behaviour of its members and thus falling under art. 5 alignment (1) and art. 101 of the Treaty[51].

Concluding, the "decision by association of undertakings" means any decision: i) originating from the governing body of the association and having an anticompetitive object or effect; ii) regardless of the form it takes and the apparent nature of the act (it may be a regulation, circular, directive, recommendation, protocol, minute, etc.); iii) which is intended to require from its members a certain market economic behaviour; iv) if it is not binding and if it does not have as object the restriction of the competition, it is reprehensible if actually implemented by the associated undertakings because only this way will be fulfilled the requirement that the decision of the association of undertakings must have the effect of restricting competition.

3.3. "Concerted practice"

3.3.1. Concept. The concept of "concerted practice" has its origins in the American antitrust law, section 1 of Sheman Act using the concept of "conspiracy", the name being afterwards widespread as "concerted actions". The concept was taken over by the European legislation and thus is also found in the Romanian law. The term "arrangements", with a similar meaning, is also found in the English law, in the UK Restrictive Trade Practice Act.

Neither the Treaty on the Functioning of the European Union nor Law no. 21/1996 defines the concept of concerted practice. Strictly etymologically, the concerted practice suggests a conscious and deliberate alignment of undertakings to a certain market behaviour.

The scope of the concept has been established in the European Union case-law. The analysis of the concept has its onset in two famous cases, called the "dyestuffs matter" and "European sugar industry", an interpretation that settled and was afterwards constant in the subsequent decisions.

In the Dyestuffs matter case[52], the Court defined the concerted practice as representing *a form of coordination between undertakings that, without reaching the level at which a proper agreement would have been concluded, knowingly substitutes the practical cooperation to the risks of competition*.

In the European sugar industry case[53], the CJEU defined the concerted practice in the same way and concurrently stressed the main principle of the European competition concept: any undertaking must determine autonomously its policy on the market, including the choice of addressees of its own offers and sales. In these circumstances, the Court concluded that that mentioned principle rigorously opposes any direct or indirect contact between undertakings, having

[50] The Decision of the Competition Council no. 19 of 26 March 2008.
[51] The Decision of the Competition Council no. 47 of 2 November 2010.
[52] Joined cases C- 48-49 and 57/69 I.C.I. vs. Commission (Dyestuffs), Decision CJCE of 14 July 1972.
[53] Suiker Unie Case, C-40-48, Decision of 16 February 1975.

as its object or effect either to influence the market behaviour of an actual and potential competitor or to disclose to the competitor its own market behaviour, as such established or only projected.

From the case-law highlighted defining notes, we can conclude that the *concerted practice is a form of coordination between undertakings of their economic behaviour in a certain market which, without reaching the stage of achieving a proper agreement, leads to the disappearance or reduction of the competition uncertainties that would have existed if undertakings would have established autonomously their market behaviour*.

The doctrine[54] emphasized that the concerted practice requires the gathering of objective and subjective elements, both with a negative condition. The objective element is given by the existence, at a certain time, of a similar and parallel behaviour of the undertakings concerned. Moreover, there must be also a subjective element: the parallel behaviour must be consciously adopted by each undertaking, in exchange for achieving a common goal; the intentions must be convergent and lead to an effective cooperation. The alignment to the common behaviour is usually achieved through the exchange of relevant information between undertakings. The negative condition implies, by assumption, the exclusion of the proper anticompetitive agreement as the basis of the similar behaviour, because otherwise we would return to the first assumption, the proper agreement.

3.3.2. Ways of achievement. The concerted practice results from the knowledge of the economical policy of the opponents and is usually achieved by organizing often secret meetings/*gatherings*, as it happened in the Polypropylene Case[55], or through the *exchange of information* accomplished in any way (through discussions between representatives, by telephone, by fax, by e-mail, even by professional press etc.)[56], without the necessity for the volume and quality of the information provided to be mutually equal[57].

It is however necessary for the exchange of information to be mutual (even if the information exchanged are not of equal value), because only this way we may hold the fraudulent "common arrangement", which, by definition, assumes the participation/involvement of all the undertakings concerned (any anticompetitive agreement, including any concerted behaviour, assumes by definition at least two undertakings), which by the mutual exchange of information on their future economic actions eliminate the risk of competition (when an undertaking knows the future strategy of the competitor, any competition risk is removed because it can "adjust" its behaviour by reference to the one expected by the adversary).

In the European case-law it was noted that the participation at meetings related to price fixing and sales volume level setting, during which information was exchanged between competitors regarding the prices they intended to charge, their profitability thresholds or sales figures constitute a concerted practice. This is because the participating undertakings were unable to disregard such information disclosed in determining their future market behaviour[58]. Furthermore, it was decided that the exchange of information between competitor undertakings regarding their deliveries represents a concerted practice[59].

---

[54] O. Căpăţînă, *Commercial Competition Law. Pathological Competition. Monopolism*, *op.cit.,* p. 45.

[55] The Commission, 23 April 1986, The Polypropylene Case; The Commission, 21 February 1994, *AIE*, JOCE, L. 68 of 11 March 1994, for the exchange of information between the members (oil companies) of an association (The International Association for Energy).

[56] Mihai, Emilia, *Competition Law*, All Beck Publishing House, Bucharest, 2004, p. 73. The author cites a case in which the Romanian Competition Council assessed as "concerted behaviour" the exchange of information between two companies, in order to falsify an auction (Decision no. 66 of 28 Oct. 1998).

[57] Both the participation at meetings and the exchange of information between parties regarding the industrial sugar price were held by the Commission as forms of concerted practice in the sugar case (*above cited*), even if the effects of such anticompetitive behaviours could not be accurately quantified.

[58] Shell International Chemical Company Ltd. Vs. Commission Case, T-11/89.

[59] Trefilunion SA vs. Commission Case, T-148/89.

In the event that an undertaking participates in a concerted practice but, once informed about the future actions of its competitors, decides not to follow the agreed behaviour, the question arises whether it can be sanctioned for being a concertist? The answer is yes, because the concerted practice has removed for the said undertaking the uncertainty that it would have been given by the existence of normal competition.

If an undertaking is present at a meeting where the parties agree on a particular market behaviour, it may be guilty of violating the competition rules even if its own market behaviour does not correspond to the type of behaviour to which the agreement referred to[60]. The European case-law states that "the fact that an undertaking does not follow the decisions taken in meetings with a clear anticompetitive purpose is not of a nature to relieve it of full responsibility for the participation in the cartel, if it has not publicly distanced itself from the object of the agreement". Such delimitation should take the form of a withdrawal from the agreement and public distance from what has been established in the agreement so that the other participants can unequivocally understand the gesture of leaving the cartel[61].

3.3.3. Behavioural parallelism in price fixing – evidence of concerted practice?

As already shown, the concerted practice essentially involves a coordination of the undertakings' behaviours, a form of coordination which does not reach the level of a proper anticompetitive agreement. Therefore, even if we cannot hold the existence of a proper anticompetitive agreement, undertakings are punished for concerting their behaviours. One of the most dangerous anticompetitive agreements is the one whose object is price fixing, because it has particularly important harmful effects on the free competition, to the detriment of the final consumer. Repressed by the European Union legislation and condemned by any national legislation, such anticompetitive practice is generally hidden by its authors.

In this context, since the proper anticompetitive agreement cannot be demonstrated and *idem est non esse et non probari*, obviously, undertakings cannot be sanctioned for concluding a proper anticompetitive agreement on price fixing. Therefore, often, in order to sanction them, must be held the existence of a concerted practice, thus assessing that the fixing of an identical price or the simultaneous increase with the same percentage and in the same periods of time of the prices used by the competitor undertakings demonstrate a concerted practice.

In this sense, the doctrine[62] pointed out that undertakings can be sufficiently astute as to destroy the written evidence or to rely only on verbal agreements; the secret agreement remains however real and the construction of the concerted practice term must be flexible enough to include this fact of the economic life; on the other hand, it was also emphasized the danger of including the parallel price fixing in the concept of concerted practice, which does not operate in oligopoly.

If the price uniformity represents the result of the logical action within an oligopoly and there is no secret agreement, then sanctioning the undertakings is neither rational nor fair. The issue is no longer behavioural in the sense that the parties engage in a behaviour different from that which would exist under normal conditions within the same type of market, but the issue is structural, meaning that this type of market normally generates this type of response[63].

The theory of oligopolistic interdependence has generated criticism. Among the most vehement is the one arguing that the mentioned theory does not explain satisfactorily its essential affirmation, meaning that the members of an oligopoly can get supracompetitive profits without concluding an agreement. The assertion that it is being developed a price leading pattern by which an undertaking increases the price and this fact acts as a signal for the others to follow, is not a very

[60] Sarrio vs. Commission Case, T-334/94, par. 118.
[61] ADM Case, T-329/01, par.246, Westfalen Gassen vs. Commission Case, T-303/02, par. 77, 84 and 124
[62] Craig, Paul; Grainne de Burca, *EU Law*, *op.cit.,* p. 1194.
[63] Craig, Paul; Grainne de Burca, *EU Law*, *op.cit*, p. 1194

convincing answer that prices remain thus parallel without a conspiracy between the members of the oligopoly[64].

In my opinion, the existence of a parallel behaviour of the competitor undertakings as regards price fixing cannot by itself, *de plano*, demonstrate the concerted practice.

Thus, when in a certain market there is a behavioural parallelism of undertakings in price fixing, there are two possibilities: i) this parallelism is a collusive alignment and if the collusion is demonstrated, we may hold the existence of a concerted practice; ii) it is only the expression of a conscious, intelligent and quick reaction of an undertaking to the challenge of its competitor, without becoming competitively illicit.

The second possibility may exist in several assumptions, such as:

- on a relevant market activates a powerful undertaking that practices a certain price and without any concerting, the other undertakings will practice a similar price, whether they follow the pattern of the first as it turned profitable or they will not be able to charge a price higher than the one of the first undertaking because it will not be paid by the consumers;

- on transparent markets where each undertaking knows the price of the competitors, prices will be equal or roughly similar, without the existence of concerting. The CJEU ruled in this respect in a case where market transparency was determined by the existence of a patent license[65].

- in the case of oligopoly. An oligopolistic competition market is characterized by the existence of a small number of competitors that hold close market shares, without being able to speak about a considerable force of one of them in relation to the others. In such market conditions (for example, the mobile operators market) there is a close link between the competitors behaviour, the action of one of them is followed by a corresponding response from the others and each change of strategy is achieved by taking into account the probable response of the competitors. Consequently, the specific features of the oligopolistic market *can* determine the price alignment (therefore without a concerted practice between competitors).

Especially in cases of oligopoly, it is difficult to determine if the price alignment is a natural result of the oligopolistic market or it represents a concerted practice. This difficulty can be also noticed in the analysis of the Court's decisions.

In the Dyestuffs case[66], it was noted that in the dyestuffs industry there were successive price increases, almost simultaneously, with identical percentages, without having occurred an agreement between the manufacturers. They defended themselves claiming that the price increase was due to the oligopolistic structure of the market in terms of dyestuffs. The CJEU rejected the argument, holding the following: "the successive increases in prices and the conditions under which they were made cannot be explained only by the oligopolistic structure of the market, but are the result of a concerted practice. It is not credible that, without a prior thorough concerting, the major manufacturers supplying the European common market would have increased several times, with identical percentages, the price of the same series of products, at about the same time and in many countries in which the conditions of the dyestuffs market are different:"

In the Wood-Pulp case, the Commission held that a large number of pulp manufacturers imposed similar prices and similarly and uniformly changed them, which proved the concerting and did not hold the argument that the price was given by the oligopolistic market on which they operated. The Court removed a significant part of the Commission's conclusions and judged[67] that the behavioural parallelism can be regarded as proof of concerting only if the concerting is the only plausible explanation for that behaviour. Noting that undertakings have the possibility to intelligently adapt their behaviour to the one of their competitors, furthermore the Court held that prices

[64] R. Wish, *op.cit.,* p. 511.
[65] Ahlstrom Osakevhtio Case, no. C-89/85.
[66] ICI Case, Decision of 14 July 1972, *above cited.*
[67] Decision 85/202, OJ no. L 85 of 1985.

parallelism and their evolution could be explained accordingly by the oligopolistic market trends. It emphasized that a rigorous economic analysis is necessary in order to determine if there is another plausible explanation for the parties' behaviour.

In conclusion, in the absence of concerting evidence, the simple behavioural parallelism in price fixing cannot be regarded as a concerted practice. The existence of a concerted practice could be held only when the analysis performed will reveal that there is no other plausible explanation for the behavioural similarity visible on the market, as it is impossible to determine, depending on the context, a reason other than concerting.

3.3.4. The concerted practice. The need to implement it on the market

The Romanian doctrine stated that it is not necessary for the illicit joint action envisaged by the concerted practice to be implemented[68]. As far as we are concerned, we believe that, given that the concerted practice is by definition a *behavioural* coordination, it can be observed only in the existence of a certain market behaviour of the undertakings, which implies the need for its implementation. The same conclusion results from the case-law of the Court, which indicated that the concept of concerted practice implies, besides undertakings concerting together, a market behaviour subsequent to this concerting and a cause-effect link between these two elements[69].

Conclusions

The anticompetitive agreements, namely those which have as their object or effect the prevention, restriction or distortion of competition, are prohibited. Therefore to become competitively illicit, the agreements between undertakings must regard, to the detriment of free competition, a coordination of the market behaviour of undertakings.

The European and national legislation, without expressly defining, prohibit: agreements/arrangements between undertakings, decisions by associations of undertakings and concerted practices. These are the forms of expression of the anticompetitive behaviour of undertakings prohibited by art. 101 paragraph 1 TFEU and art. 5 alignment (1) of Law no. 21/1996, which we describe by a general concept of anticompetitive agreement that includes any form of expression, whether it is an agreement/arrangement between undertakings, a decision by association of undertakings or a concerted practice of two or more undertakings.

The "anticompetitive agreements" are any agreements between two or more undertakings, regardless of their form of expression, concluded to coordinate their market behaviour and having as their object or effect the prevention, restriction or distortion of competition.

The forms of manifestation of an anticompetitive agreement can be extremely different, the main forms of expression of an anticompetitive agreement being: "agreement between undertakings", "decisions by associations of undertakings' or "concerted practice".

An "agreement between undertakings" means the joint expression of will between two or more undertakings through which they coordinate their market behaviour to the detriment of competition, regardless of the form of the arrangement, the nature of the contract in which the joint expression of will is included or the validity of the contract.

The "decision by association of undertakings" means any decision of the governing body of an association of undertakings which has as its object or effect the restriction of competition. In order to have this object or effect, the said decision should have the power to impose a certain behaviour to the association members in their economic activity on the market. It is not relevant how the said decision is presented in formal terms and the title or apparent nature of the act is unimportant.

The "concerted practice" is a form of coordination between undertakings of their economic behaviour on a certain market which, without reaching the stage of achieving a proper understanding,

[68] A. Fuerea, *op.cit.,* p. 220.
[69] Huls AG vs. Commission Case (Polypropylene), C-199/92.

leads to the disappearance or reduction of the competition uncertainties that would have existed if the undertakings would have established autonomously their market behaviour.

Future research would involve: identifying difficulties in establishing the autonomous behaviour on the market; determining the attribute of undertaking of certain entities that do not have autonomy of decision and act within groups of companies resorting to anticompetitive agreements, in order to establish who is to be applied the sanction; the analysis of the exchange of information as a possible concerted practice.

References

- André Decocq, Georges Decocq, *Droit de la concurrence*, ediţia a 4-a, L.G.D.J., 2010.
- Jacques Azema, *Le droit francais de la concurrence*, Paris, 1989.
- Octavian Căpăţînă, *Dreptul concurentei comerciale. Concurenţa patologică. Monopolismul*, Ed. Lumina Lex, Bucuresti, 1993.
- Octavian Căpăţînă, *Noua reglementare antimonopolistă în dreptul concurenţei*, în Dreptul nr. 7/1996.
- Christian Gavalda, Gilbert Parleani, *Droit des affaires de l'Union Européenne*, ed. 6, Litec, Paris, 2010.
- Paul Craig, Grainne de Burca, *EU Law*, ed. 4, Ed. Hamangiu, Bucureşti, 2009.
- Augustin Fuerea, *Drept comunitar al afacerilor*, Ed. Universul Juridic, Bucureşti, 2006.
- Richard Wish, *Competition Law*, ed. 4, Ed. Butterworths, London, 2001.
- Alison Jones, Brenda Sufrin, *EC Competition Law, Text, Cases & Materials***,** ed. 3, Oxford University Press, 2008.
- Emilia Mihai, *Dreptul concurenţei*, Ed. All Beck, Bucureşti, 2004.
- Decisions of the European Court of Justice, www.curia.eu.int.
- Decisions of the Competition Council, www.competition.ro.

CENTRE OF THE MAIN INTERESTS

DIANA DELEANU[*]

Abstract
The centre of the main interests of the debtor is a legal tool meant to settle conflicts that can arise between jurisdictions in cross-border insolvencies, based on the principles of mutual recognition and co-operation.

***Key words**: insolvency, COMI, bankruptcy, debtor, creditor.*

Introductory considerations

Considering the increasingly cross-border nature of trade relations and their increasing complexity, a large number of insolvency proceedings include a cross-border element.

The international legal practice has recently recorded several cases of high legal, economic, social and political impact, which started from the collapse of certain multinational companies.

Hence a substantial number of cases on cross-border insolvency whose main focus was the identification of the debtor‘s centre of main interests (COMI). This will be the criteria which this study aims to review through an initial theoretical comment followed by a brief study of the case law of the Court of Justice of the European Union.

Regarding the international law, the main regulatory acts governing the conflict of jurisdictions in cross-border insolvency matters are the nr. 1346/2000 EU Council Regulation, UNCITRAL Regulation and Chapter 15 of the United States' Insolvency Code.

The EU Council Regulation No. 1346/2000 aims at harmonizing the practice in the area of conflict of jurisdictions, establishing thus the nationality of the competent court to open the main procedure depending on the location of the debtor's centre of main interests (COMI). However, the identification of the debtor‘s centre of main interests proves to be an increasingly difficult matter.

The practical consequences of determining the debtor's centre of the main interests in one jurisdiction or another may be particularly significant, such choice being sometimes the key to success or failure of the restructuring procedure.

Considering this, there have been quite a few cases in which, sensing a decline in business, the managers decided to move the centre of main interests from one state to another, precisely because, in the event of the opening the insolvency proceedings, the company would benefit from more favourable treatment.

Such measures taken in a time of economic recession are, however, inefficient as shown by the recent case law, namely PIN Group AG (Germany), their aim to avoid the competent jurisdiction being much too obvious.

In most situations, however, considering also the relatively short periods of appeal in insolvency matters, determining the centre of main interests is an already accomplished fact for the less diligent creditors.

This study aims to review the most important reference points of the recent legislation and case law on conflict of jurisdictions in the cross-border insolvency proceedings, with a focus on the matter of identifying the debtor's centre of main interests.

In addition to the conflict of jurisdictions, the referred to laws also establish the rules which will govern the transactions conducted by the insolvent debtor with its contractual partners located on

[*] Lecturer, PhD candidate, "Nicolae Titulescu" University of Bucharest (Dianadel@univnt.ro).

the territory of another member state, as well as the rules for recovering the assets of the insolvent debtor, should they be within the territory of another state than the state on which it operates.

Analyzing this problem from the macroeconomic perspective, the development of multinational companies, transnational companies, of groups of interests on the emerging European market, with business centres within the territory of two or more member states, necessarily required the creation of a collective instrument of standardization of insolvency-related proceedings.

The economic situation in this time of crisis made the managers of multinational companies create so-called "tax vehicles", to be able to report to the shareholders on the application of the controversial concept of tax optimization which is often on the limits of legislation.

Content

The notion is an EU law one and the legal framework is EU Regulation on insolvency proceedings No. 1346/2000 which became effective on May the 31st, 2002. As a rule, it should be applied automatically, prevailing over the national legislation, in case of conflict.

Its main purpose is to codify the manner in which a member state decides whether it has territorial competence to commence the insolvency proceedings and to avoid the so-called "COMI migration" or "forum shopping".

It is also aimed at unifying the way the applicable legislation is selected and the automatic recognition of the insolvency proceedings initiated in an EU member state, although, in practice, this recognition is not automatic and does require a substantial commitment of the insolvency practitioner.

Legal framework:

1. UNCITRAL Regulation
2. EU Council Regulation No. 1346/2000 of May the 29th, 2000 on insolvency proceedings; effective from May the 31st, 2002
3. Romanian laws on insolvency proceedings consists mainly of:

- 85/2006 law (as further amended and supplemented) on insolvency proceedings,
- 637/2002 law on the regulation of private international law on insolvency and
- Government's Emergency Ordinance (OUG) no. 86/2006 (as further amended and supplemented) which regulates the activity of insolvency practitioners;

According to art. 3 of no. 637/2002 law, foreign proceedings are the collective, judicial or administrative proceedings which are conducted according to the insolvency law of a foreign state, including interim procedure, in which the assets and business of the debtor are subject to control or supervision by a foreign court, for the purpose of restructuring or liquidation of the debtor's business.

The foreign main procedure is the foreign insolvency proceedings conducted in the state in which the centre of main interests of the debtor is located, whereas, according to the same article of law, the foreign secondary procedure is the foreign insolvency procedure, other than the main procedure, which is conducted in the state in which the debtor has an establishment.

According to art. 26, para. 1 of 637/2002 law, the Romanian courts will cooperate with the foreign courts and representatives in a more extensive manner, and the cooperation may be achieved directly or through the Romanian representative. Likewise, the courts are able to communicate or request information or assistance directly from the foreign courts or representatives.

Regarding the presumption of insolvency based on the recognition of the foreign main proceedings, article 32, para. 1 of the above-mentioned law states that the recognition of foreign main proceedings is, until proven otherwise, a presumption of the state of insolvency of the debtor, based on which the insolvency proceedings may be opened. These provisions do not apply if the recognized foreign proceedings is secondary.

The purposes of the regulation are:

1. achievement of a general satisfaction of the creditors' claims and/or a viable, effective recovery/restructuring

2. unitary recovery of the assets of the insolvent debtor, with the avoidance of territorial enforcements, detrimental to the maximization of the list of creditors

3. avoiding of "forum-shopping"

4. should not be taken as an attempt to unify the national legislations on matters of insolvency, but only as a legal outline of instruments likely to make the application of the basic institutions easier.

The main rules are:

1. The single state principle of the main proceedings: the main proceedings may be initiated only on the territory of the member state where the centre of main interests of the debtor is located.

2.The principle of automatic recognition: recognition and automatic application of the judgment opening the main procedure in all member states.

3.The subsidiarity principle.

4.The single law principle: the law of the member state where the main proceedings was initiated applies to the entire insolvency proceedings, with certain exceptions.

5.The cooperation principle: the designated office-holder in the main proceedings actively cooperates with the office-holder of the secondary proceedings.

A possible issue of the regulation might consist of the fact that this centre of main interests of the debtor does not treat the debtor as a corporate group, but as an independent legal entity, that is the legal entity identified as such by its own elements.

The competence field of the 1346/2000 EU Council Regulation is:

1. The centre of main interests of the debtor in the European Union, including the companies which were incorporated outside the European Union, but whose centre of main interests of the debtor is in an EU member state.

2. applies to collective insolvency proceedings, such as listed in Appendix A and B of the regulation

3. applies to various entities – but mostly trade companies

4. does not apply to credit institutions, banks, insurance companies or investment funds. These are regulated by two other separate laws.

TYPES OF PROCEEDINGS:

1. Main proceedings - definition
2. Secondary proceedings
3. Territorial proceedings

Concerning the coordination of several foreign procedures, art. 31 of 637/2002 law states that: "should several foreign proceedings be initiated for the same debtor, the court will take the cooperation and coordination measures, as stated in art. 26-28, with regard to the aspects mentioned in art. 2, and shall proceed as follows:

a) any measure with temporary execution approved based on art. 20 or 22 to the representative of foreign secondary proceedings, subsequent to the recognition of foreign main insolvency procedure, must be compatible with the development of the foreign main proceedings;

b) when the request for the recognition of the foreign secondary proceedings is admitted or only filed prior to the recognition of the foreign main proceeding, any measure with temporary execution admitted under art. 20 or 22 will be reviewed by the court, which will order the amendment or termination thereof, to the extent that it is incompatible with the development of the foreign main proceedings;

c) should there be several foreign secondary proceedings recognized successively, the court will approve, amend or order the termination of the measures with temporary execution in a manner which would enable the coordination of the respective proceedings."

The notion of European insolvency procedure is regulated by art. 3 para. g of 637/2002 law of 07/12/2002 concerning the regulation of private international law on insolvency as being "the collective procedure determined by the insolvency of the debtor, which is initiated in a member state of the European Union, consequently removing the administration rights completely or partially from the debtor and the appointment of a European insolvency practitioner."

The law does not indicate an exact definition of the notion of centre of main interests of the debtor (COMI), but also outlines a few hints to guide the practitioner in identifying the centre of main interests of the debtor:

- "the centre of main interests of the debtor will correspond to the location in which the debtor currently runs its business and for that reason it is recognized as such" (Paragraph 13 of the preamble); and
- "In case of a legal entity, the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary". (Article 3(1)).

Considering the absence of guidance in support of the interpretation, there have been various practical solutions, leaving room for interpretation to the national courts.

In the absence of a clear definition of the centre of main interests of the debtor (COMI) the following factors are to be considered (but not limited to):

- the main registered office of the legal entity;
- the headquarters of the individual carrying out a business or an independent profession;
- internal accounting functions;
- business relations with clients;
- the law governing its main contracts;
- creditors;
- strategic control functions;
- IT systems;
- tax domicile and the domicile of its directors;
- board meetings;
- general supervision.

Three significant aspects are to be considered in this case, such as:

- administration of the interests of the debtor;
- consistency;
- opposability/recognition by third parties.

The attraction to a particular jurisdiction may be that it:

- has a good track record and is considered to be more transparent, sophisticated, efficient and flexible in the way it handles proceedings. New insolvency legislation in certain jurisdictions such as Spain and Germany which is geared towards addressing the current financial crisis may make those jurisdictions more attractive; however, new legislation will often be untested and its benefits may be outweighed by the perceived uncertainty over its interpretation and implementation;

-is more familiar to stakeholders;

- allows the debtor to impose a cram-down on dissenting secured or unsecured creditors;

- allows more pre-planning (in the UK, for example, the use of the Administration procedure allows sufficient pre-planning to permit an immediate sale of businesses or assets on terms negotiated by the insolvency practitioner before his appointment as administrator - a "pre-pack administration");

- allows the stakeholder(s) to choose who is appointed as officeholder, rather than an appointed by the relevant Courts;

- requires less court involvement;
- provides an opportunity to take advantage of DIP funding available to insolvent entities (for example, debtor-in-possession financing in Sweden and the US or Insolvenzgeld in Germany and Austria);
- avoids the application of employees' rights on a transfer of an undertaking[1].

Criteria for Identifying the COMI as Outlined in the Case Law of The Court of Justice of the European Union

The relevant factors in determining the nationality of the centre of main interests of the debtor are:

- The location in which the day-to-day management takes place and the management strategies are developed.
- The location in which the marketing and branding strategies & the defining the identity of the relevant entity are developed.
- Citizenship and residence of the directors and the location in which the meetings of the board of directors are held.
- Time spent by the employees of other entities (from other jurisdictions) in the management of the company.
- In case of entities holding ownership of (immovable) assets, the jurisdiction of the place in which they are managed is important rather than their location.
- Location in which the significant financial operations are carried out.

According to the Romanian legislation, art. 3, para. q of 637/2002 law, the state in which an asset is located is:

- for tangible property – the state within the territory of which the property is situated;
- for property and rights ownership of or entitlement to which must be registered – the state under the authority of which the register is kept;
- for claims – the state within the territory of which is situated the centre of main interests of the debtor of the claim;

Appealing to the Court of Justice of the European Union

The first significant request was made in the case Eurofood IFSC Ltd (Case C-341/04), a company incorporated in Ireland, a member of Parmalat SPA Group – Italy.

Two courts in two different jurisdictions claimed their competence, stating that the centre of main interests of the debtor would be in its own jurisdiction, thus leading to a positive conflict.

The Irish court justified its position based on the following elements:

• Eurofood IFSC Ltd. was registered in Ireland and was an Irish tax payer;
• The day-to-day management was carried out in Ireland, and the accounts of the company were also there;
• The meetings of the board of directors were held in Ireland;
• The presumption of the creditors was that the centre of main interests of the debtor was in Ireland.

The Italian court, on the other hand, claimed that the centre of main interests of the debtor was in Italy, arguing that:

• The company only applied the financial policy imposed by the parent company from Italy;
• The business of the company had as a sole reference the Italian company;
• The operational offices were in Italy;
• The central management was carried out in Italy.

Now, the certainty in relation to establishing the territorial competence is given only by the appeal to the Court of Justice of the EU. However, this takes a lot of time and is a somewhat expensive process.

[1] "Restructuring and Insolvency Briefing"- Macfarlanes.

Following the requests received to solve the conflicts of competence like the above-mentioned one, Court of Justice of the EU had the opportunity to give a few directions to guide the insolvency practitioners and the national courts, thus clarifying the issue.

We further summarized a few cases supporting the above-mentioned opinions.

Reference Cases in the EU Jurisprudence

Case no. 1: ENRON Directo Sociedad Limitada

- The company was incorporated in Spain under the name "Enron Directo Sociedad Limitada"
- Certificate of incorporation subject to the Spanish law, any disputes between partners are referred to the Spanish court for competent settlement
- Carries out operations, in particular tax operations, in Spain
- It cannot be clearly determined where the creditors presume that the centre of main interests of the debtor is located
- The head office was in the UK, directors of British nationality, management and leadership in London
- There was a relative presumption, determined by the provisions of art. 3.1, in the meaning that the registered office was the centre of main interests of the debtor.

Case no. 2: DAISYTEK (British approach)

In the Daisytek case there were several companies registered in France, UK and Germany, as subsidiaries of Daisytek multinational company, incorporated in US.

The parent company creates a holding-type entity, situated in the UK, which controls the activities of all the companies operating in the EU.

At the same time, an action is filed in the UK to initiate the insolvency procedure for all companies, even if four of them were not registered in the UK.

Separately, the court initiated the main proceedings in Germany in relation to the German subsidiary company. In the appeal, the German procedure was closed after finding out that the manager of the German company authorized the British procedure.

In France the court ruled that the centre of main interests of the French company was located in France, but the appeal did not confirm this ruling.

The question is whether the proceedings may be opened in the UK for legally independent companies, but which are economically dependent on a company incorporated in the UK.

Another question would be: where could we locate, on a scale of the main interests of the debtor, the criterion of legal independence from another company, on which it is dependent on in terms of decision-making and organization, and, respectively, if an extension of competence of the British judge can be accepted, meaning that (s)he could issue restructuring rulings, based on a plan, for companies not incorporated in the UK.

Case no. 3: EUROFOOD IFSC Ltd.

Eurofood is a company registered in Ireland, 100% owned by Parmalat SPA, an Italian company.

On January the 27th, 2004 Bank of America applied for commencing the insolvency proceedings concerning Eurofood at the High Court in Ireland. On the same day, the court appointed an insolvency practitioner as judicial administrator.

On February the 9th, 2004 the Italian government wanted to place Eurofood under extraordinary administration procedure and appointed an Italian insolvency practitioner (subsequently confirmed by the Italian court on February the 20th, same year).

In March 2004 the Irish court ruled that the Italian one was not competent and COMI was in Ireland because the company was registered there and the creditors were also convinced that the centre of Eurofood's interests was also located there.

The decision was challenged and two issues were submitted for settlement to the Court of Justice of the European Union:

a. If it was the Italian court or the Irish one which opened the main proceedings;

b. If the Irish court was entitled to claim the provisions of art. 26 of the Regulation.[3]

The question is to determine which of the two proceedings can be considered the main one and if the judge in the member state who opened the proceedings subsequently, may refuse the recognition and enforcement of the judgment ruled in the other member state on the grounds that the centre of main interests of the debtor is located in its jurisdiction.

It is also important to note whether a judge from a member state may decide to commence the main proceedings on the grounds that the centre of main interests of the debtor is located in their jurisdiction.

An important argument is the criterion of ownership of the company shares as being the most important in identifying the centre of main interests of the debtor.

It is considered preferable that, once the proceedings have been initiated, even if it is proven that the centre of main interests of the debtor is, in fact, situated within the territory of a member state other than the initiating one, the original proceedings should be continued as the main one.

It is debatable which is the better solution in the strictly chronological application of the criterion of the main procedure versus the secondary procedure, assuming that the national legislation gives retroactive effect to the proceedings initiation ruling, not from the time when it was adopted, but from the time when the petition was filed.

Case no. 4: PARMALAT

The Parmalat Group started from an Italian company with headquarters in Collecchio, engaged in food manufacturing (dairy) and which had an intensive acquisition policy for twenty years.

In December 2003 it was discovered that Parmalat Spa had a huge financial problem (of approximately $ 7 billion).

Parmalat Finance Corporation -owned by a group of companies from the Netherlands and Luxembourg- carried out commercial transactions with other companies in the Netherlands and had Dutch creditors who were aware of each other's claims.

Parmalat Finance Corporation is owned by the same group of companies which own Parmalat SPA, has issued bonds in the Netherlands, having intense relations with Dutch banks to guarantee new loans and other financial operations.

Parmalat SPA was placed under special administration procedure by the 347 Decree Law from December the 23rd, 2003.

Parmalat Finance Corporation filed for insolvency in Parma, Italy.

There is the opinion according to which it would be accurate to note that the centre of main interests of the debtor is in the Netherlands, considering there are certain creditors (banks and financiers) which granted loans regulated by the Dutch law and there is a scale of the most important creditors, whose positive presumption may become important in determining the location of the centre of main interests of the debtor.

In case that there is the assumption that the destination of the loans, in their various forms, was to support the Parmalat shareholders, it is claimed that it is correct to establish the location of the centre of main interests of the debtor in Parma, Italy.

One issue under discussion is the assumption that we consider the tax maximization policy as a relevant proof in rebutting the relative presumption that the centre of main interests of the debtor is in the member state where the registered office of the debtor is situated.

It is argued that the determination of the centre of main interests of the debtor depends (to a great extent) on the relationship between the parent company and its subsidiary.

Case no. 5: MG Rover Group Limited

- MG Rover Group Limited is a trade company incorporated in the United Kingdom of Great Britain and Northern Ireland;
- SAS Rover France is a company registered in France, wholly owned by MG Rover Group Limited. The French company has significant staff with employment relations with the French employer.
- The Birmingham High Court ruled in favour of the extension of the insolvency proceedings to the French company, acknowledging the fact that the centre of main interests of the debtor is in the UK.
- The Chief Prosecutor of France promoted the legal remedies to establish that the ruling of the British judge cannot be recognized in France, since it violates the French public order, using in the argument of placing the French employees in a less favourable position, since they have to participate in collective insolvency proceedings which take place in the UK.

The argument used is the amount of employees from another member state as a single criterion in the identifying the centre of main interests of the debtor. The same argument is also used for refusing the recognition of the main proceedings initiated in another member state.

When determining whether a ruling identifying the centre of main interests of the debtor observes or not the national public order, the degree and rapidity of satisfaction of the employees' claims are to be considered.

Conclusions

The purpose of this work was not to offer clear cut solutions in such a controversial area, but rather to bring arguments in favour of the flexibility which the national courts should show in determining the identification criterion of the territorial competence.

The centre of main interests of the debtor is one of the best examples of concepts clarified by the practice of the Court of Justice of the European Union.

This topic will surely stir many other debates in the international legal academic environment, taking into consideration the current economic context.

However, this is an issue where we might consider that the economic and social aspects prevail over the judiciary.

Determining the centre of main interests of the debtor becomes a matter of interdisciplinarity.

References

- In Romanian:
- Avram, Aurica - "Insolvency Proceedings", Hamangiu Publishing House, Bucharest, 2008.
- Grosaru, Mircea –"The Sindic Judge", Bucharest, 2013.
- Piperea, Gheorghe – „Insolvency. Area and purpose of the proceedings", an article published on www.Juridice.ro in 2008.

- Piperea, Gheorghe – „Insolvency. Introduction", an article published on www.Juridice.ro in 2008.
- Turcu, Ion -"Insolvency", C.H. Beck Publishing House, Bucharest, 2007.

- In English:
- "Commencement of Insolvency Proceedings", Oxford University Press, New York, 2012.
- "Eurofenix" magazine – published by INSOL EUROPE – the European Insolvency Association, several issues.
- "Restructuring and Insolvency Briefing"- Macfarlanes, www.macfarlanes.com .
- Tung, Frederick -„Hastings Law Journal" – „After Orange County: Reforming California Municipal Bankruptcy Law", USA, 2002.
- www.europa.eu.
- www.insol-europe.org.

- Foreign Case Law:
- US case law in municipal insolvency (e.g.: the case of the city of Vallejo in 2009).

- Romanian legislation:
- 637/2002 law.
- 85/2006 law.

- Foreign legislation:
- The UNCITRAL Regulation.
- EU Council Regulation No. 1346/2000 of May the 29th, 2000 on insolvency procedure; effective from May the 31st, 2002.

INSOLVENCY VERSUS BANKRUPTCY: ADVANTAGES AND DISADVANTAGES OF THE PROCEDURE

PAULINA DINA*

Abstract

The analysis of the development of the phenomenon in Romania has the role to highlight the trend that has been followed by the number of organisational entities that have been affected by the insolvency phenomenon in Romania, the distribution by counties and regions of the number of insolvency cases as well as the activity sectors that have been most affected by this phenomenon. At the same time, in order to provide an overall picture regarding the size of the insolvency phenomenon in Romania, organisational entities with extremely high turnovers have been given as examples, (legal entities) entities which, since 2008 up to the present moment, have been crossing one of the stages of the insolvency procedure. Some of them have been applied the simplified insolvency procedure, since they didn't have the possibility to reorganise, and others, fewer in number, have used insolvency as a „rescue boat", following the general insolvency procedure and entering a reorganisation process, in the attempt to avoid bankruptcy.

Key Words: *Insolvency, bankruptcy, debtor, creditor, collective insolvency procedure, judicial reorganisation.*

Introduction

From a legal point of view, insolvency is regulated by the Law no. 85/2006 – the law regarding insolvency and bankruptcy, consolidated in 2010. This law replaces Law no. 64/1995 regarding the procedure for judicial reorganisation and bankruptcy and it represented the introduction of a unitary regulation in this matter. At the same time, the close-out operations of enterprises are also included by the Law no. 31/1990[1] regarding trading companies, with subsequent modifications and amendments. The insolvency procedure is also applied in an appropriate manner to the economical groups of interest (EGIs) as associative forms with legal personality and patrimonial purpose, regardless of whether they do or do not have the quality of merchant[2].

Content

The insolvency procedure represents the collective procedure aiming at the "forced" recovery of debts from a debtor which is in the position of not being able to handle his debts, under the supervision of a syndic judge. Insolvency has become, especially since the economic and financial crisis has taken over the world, a phenomenon which affected a lot of companies, both outside the Romanian borders as well as within the country. Insolvency can be viewed from two angles, with both a positive as well as a negative side. The advantages that the use of this debt recovery method might have are emphasized on the one hand, both for the debtor as well as for the creditors, and the relevant negative aspects, through the abuses that might derive once this procedure has been commenced, on the other hand.

Art.2 of the law[3] stipulates that "the purpose of this law is the setting up of a collective procedure for the covering of the liabilities of the debtor which is in insolvency. The collective

* Lecturer, PhD, Faculty of Tourism and Commercial Management, "Dimitrie Cantemir" Christian University, Constanta (email: pauladina2004@yahoo.com).

[1] Art. 252-272 of Law no. 31/1990 regarding trading companies, republished with subsequent modifications and amendments – Law no. 76/2012.

[2] *The Manual of Good Practice in Insolvency*, „Support for the improvement and implementation of the legislation and jurisprudence in terms of bankruptcy", Consortium managed by PricewaterhouseCoopers, under the coordination of Prof. dr. Turcu Ioan.

[3] Law no.85/2006 - Law regarding the insolvency procedure, amended in 2010.

procedure is defined by the law[4], as being "the procedure through which the known creditors participate together at the monitoring and recovery of their debts, in compliance with the modalities stipulated by the legislation in force". The purpose of the procedure does not have the same significance for all those involved. The purpose of the debtor is reached when the latter has managed to redress and continue its normal activity. The interest of creditors is to maintain a business partnership with the debtor.[5]

The difference between the two notions, bankruptcy and insolvency, which are often presented as synonyms, is given by the fact that a debtor which is in insolvency has the possibility, if certain conditions, which are expressly stipulated by the law, are met, to enter an activity reorganisation phase, based on a reorganisation plan[6] approved by creditors and confirmed by the syndic judge.

If so reorganized business is profitable and allows payment of all claims, according to the terms and conditions set forth in the plan, the debtor gets out of insolvency, keeps its legal status and its activity is to continue without intervention of the judicial administrator or bankruptcy judge. If the reorganized activity does not comply with the plan, the debtor is out of the reorganization phase and gets into bankruptcy status. Bankruptcy, in the classical meaning of the word, had two precise purposes, complementary and tightly related to one another; an immediate purpose – constant in ensuring the payment of the creditors and the punishment of the bankrupt debtor, as well as a mediate one – which had as a purpose the reclamation of the commercial environments.[7]

At this point the debtor business goes under the judicial liquidator's command that will do the property assessment and recovery following to pay debts from the amounts so collected. After completion of the sale of goods, the debtor will be removed from the register where it's registered and therefore will cease to exist.

Among the advantages that entails entering insolvency proceedings and which must be known, here are some of them:

- Continue to work even if the payment due dates of some debts were exceeded;
- Application of simplification measures related to the reverse charge in terms of value added tax ;
- Stopping the flow effect of any interest, penalties or pecuniary damages for delay in performance of obligations to unsecured debts, meaning that the debts of the company freeze since the moment when insolvency id declared;
- Termination of any foreclosure proceedings since declaring insolvency, that any action of a creditor within the meaning of the debtor foreclosure is suspended;
- Recovery of any claims of the debtor against third parties is done without payment of duty stamp.
- Existence of these benefits involves also the possibility of abuses in the procedure application:
- The possibility of requesting the opening of proceedings to be filed not only by creditors but also by the debtor can lead to abuses such as, outsourcing a large chunk of assets under property, in order to avoid payment, this being done in bad faith by the debtor.

With all these advantages for the debtor which result from application of the insolvency procedure in accordance with regulations in force, Romanian companies (as borrowers) are sceptical

[4] Law no.85/2006 - Law regarding the insolvency procedure, amended in 2010, art.3. par. 3.

[5] Turcu Ion, *Tratat de insolventa*, Ed. C.H.Beck, 2006, pg.294.

[6] The article "Will the Law no. 85/2006 regarding the insolvency procedure manage to provide the appropriate framework for the efficient reorganisation of companies in difficulty?", Eng. Speranţa Munteanu, UNPRL member, lawyer Nicoleta Mihai, UNPRL member, published in the PHOENIX insolvency magazine, no. 16-17, April - September 2006.

[7] Birchall Ana, *Procedura insolventei- Reorganizarea judiciara si procedura falimentului- Note de curs*, Ed. Universul Juridic, 2007, pg. 27.

when requesting the insolvency procedure as a saving solution in difficult situations caused by lack of liquidity (cash)

Although they have liquidity problems, the main reasons that make companies not to declare their insolvency are:

- the shareholders of the company (as debtor) are those who lose money when it become insolvent because there is no profit and no dividend receipts, and if they decide to sell the company assets, they are sold under market price;
- experience shows that in Romania a very small percentage of firms that become insolvent managed to avoid bankruptcy eventually.

It is believed that entry into insolvency is a fact that affects the company's image, especially if it has a certain position in the market. Actual or potential customers can be influenced in a negative way, meaning that they reduce their expressions of interest for the products / services of the company. Therefore, it appears that insolvency is an area of which should have knowledge about not only the stakeholders (companies administrators, managers, insolvency practitioners, other stakeholders), but the general public in their capacity as clients (actual / potential) or employees, etc.

The legislation regarding bankruptcy, whose purpose is to regulate the condition of certain individual companies, cannot act in an efficient manner when a large part of the economy is facing major financial difficulties. For this reason, a distinction is made between the individual bankruptcy and the systemic bankruptcy. When a single company goes bankrupt, it is presumed that the company in question has committed a mistake (excessive debts, scarce management etc.) which has not been committed by other companies. In exchange, when there are several companies that cannot pay their debts, the mistake is no longer an individual one, but it is related to the system. The moment that a single company goes bankrupt, there is a wide range of offers for other management teams, but when a large part of the companies which are on the brink of going bankrupt, it is practically impossible to replace all the management teams. In addition, when there is a financial and economical crisis within the system, it is very difficult to establish what is the net value of a company, as well as to assess many of the financial outstanding debts, because some of the assets of the company which is basically going bankrupt, can be debts towards other companies which have also stated that they are about to go bankrupt or find themselves in the position of not being able to repay the debts in question. The macroeconomic effects of the systemic bankruptcy are extremely notable: mass unemployment, problems related to financial flows for the banking system, creating a vicious circle that also incorporates the limitation of production and eventually the decrease in economic growth and the acceleration of recession, respectively. As far as the size of the insolvency phenomenon is concerned within the Romanian organizational entities, it has known a consistent increase starting with the year 2008, which is a year that also marks the beginning of the manifestation of the effects of the financial and economical crisis, both at world as well as at national level.

This article aims to highlight both aspects regarding the insolvency procedure. One is related to the reorganization of organizational entities and one to their bankruptcy. Until 2006, when it was introduced Law 85/2006 related to insolvency and bankruptcy proceedings in Romania, the provisions of Law 64/1995 on the judicial reorganization and bankruptcy have applied. This law, according to several authors, insolvency practitioners (lawyers, engineers, and economists) had many shortcomings, which led to inconsistent enforcement of laws because allowed many interpretations. The tendency, at a European level as well as at an international level is to modify the legislation regarding the bankruptcy and insolvency procedure, in the sense of encouraging the judicial reorganisation process[8]. This was happening also in the other European countries and therefore the European Union asked to introduce a material to be applied uniform in this area. As a result, during

[8] Birchall Ana, *Procedura insolventei - Reorganizarea judiciara si procedura falimentului - Note de curs*, Ed. Universul Juridic 2007, pg. 190.

July 2004-April 2006 in Romania was developed the PHARE project, Support for improvement and implementation of legislation and case law regarding bankruptcy", involving the Ministry of Justice consultant experts who met within a consortium led by PricewaterhouseCoopers Management Consultants Ltd, which has led to appearance of Law 85/2006 on insolvency, having the role to improve the legal and institutional framework of the material.

Thus, the main conclusions that can be drawn may relate, on one hand to the changes in law made by the new law of insolvency, which were highlighted in the hereby paper, and on the other hand was considered presentation of the insolvency proceedings stages, especially by highlighting the possibility offered by law regarding reorganization.

In this paper we have shown that, legally, Law 85/2006 introduces several novelties in terms of:

- Introduction of a simplified procedure applicable only for certain categories of subjects ;
- Redefining the role of the bankruptcy judge, meaning that he only deals with the legality of acts and operations and doesn't question their opportunity;
- Increasing the role of the meeting of creditors and the creditors' committee;
- Increasing the responsibilities of judicial administrator / liquidator;
- Reducing the time to perform procedural acts, simplifying the procedures for citation, communication, notification by launching the Insolvency Bulletin[9];
- Strengthening the efficiency of reorganization procedure.

If the entry of companies on the market is made increasingly easier, taking measures to simplify their access, at least in terms of bureaucracy, of how to proceed, the law on bankruptcy responds to the need of companies to exit as rapid as possible out of the market. However, it is noted that the market exit of a company is not an easy process; it takes from a few months (or a year) to several years. The streamlining of the insolvency procedure is conditioned by the quickness of the procedural stages. The duration between the registration of the introductive request and the decision regarding the initiation of the procedure, gets out of control and its unjustified extension can provide the opportunity to elude the creditors' rights through deeds of the debtor, which could actually be irreversible.[10] However, in light of the new regulations, it is highlighted more and more the possibility of reorganizing those companies struggling with payment of due debts from funds available on the due date. In Romania, according to statistics, successful reorganizations have a very low percentage, most of open plan ending in failure or bankruptcy proceedings.

In the old legislation the reorganization costs were high and involved execution over long periods of time; for example, from the appeal action until the opening of insolvency proceedings had to undergo a period of 6 months, while the current legislation stipulates that immediately after opening procedure one will know whether it will enter the general procedure or the simplified procedure. Insolvency procedure involves also some accounting transactions made under Law 82/1991 on accounting.

During the procedure, business liquidation is performed based on the ongoing activity principle, the entire period of liquidation being considered as a financial year, as witnessed by the fact that both financial statements are prepared to initiate the procedure, which take data from the last financial statements prepared and submitted by the debtor, and final situations are prepared, for closing. So, insolvency is the procedure to discover another „World" different from the ordinary, in the sense that the concepts involved are not known, in most cases, but only by qualified persons trained in the field.

---

[9] Publication edited by the National Trade Register Office, which has as a purpose "the publishing of subpoenas, summons, notifications and communication notification of procedural documents performed by the courts of law, the judicial administrator and the liquidator„ - Art. 29 of Law 85/2006 regarding the insolvency procedure.

[10] Turcu Ion, *Tratat de insolventa*, Ed. C.H.Beck, 2006, pg. 299.

Insolvency proceedings may be used as a lifeline if the debtor denounces insolvency himself, in order to "freeze" time and do so that creditors will not to exert pressure on recovering their payments. This paper has offered an overview of the insolvencies situation in Romania, since the economic and financial crisis broke-up until 2011, statistics pointing the upward trend of the number of cases that were affected by the insolvency, the boom being recorded starting with 2008 and 2009, but also the sectors (fields of activity) most affected by this phenomenon. Also, it was found in statistics on firms with high business turnover in Romania that they are also the entities with most chances to avoid bankruptcy, as stage of insolvency proceeding.

They have goods in company assets and have a real opportunity to reorganize by restructuring the business or by selling some assets, based on a reorganization plan phased over several years (maximum three years as per insolvency law). For the business environment the purpose is achieved if the judicial procedure is transparent and predictable.[11]

As practice has shown, most reorganization plans fail, especially for small and medium businesses from the level of development activity point of view, and creditors, for the duration of the procedure, cannot recover claims. In these cases, insolvency is a method to save only the debtor, the creditor paying, in exchange, the price of the fact that he gave what is natural and necessary in any business, namely trade credit. From this perspective, there is attempt to find a way that insolvency to become a real escape way from the bankruptcy and not just a way to delay the proceedings, which can affect even the creditors who because they have accounts receivable may lack cash and, in their turn, can be threatened into insolvency by their business partners who can no longer collect money owed for the work done. We can say that insolvency and bankruptcy are two distinct notions which have a common goal: performance of the payment, meaning the execution of the obligations which have been assumed by means of a contract. That being in difficulty affects all contractual relationships in which it is involved together with its creditors, so that the legislator comes to its aid and does not consider it to be a "*fallitus ergo fraudator".* Therefore, it can be said that the objective of this law is to set up concrete criteria for operation and treatment towards the insolvent debtor. The general dispositions of this law regulate the effects of the economic phenomenon, regulations belonging to the laws regarding trading companies, labour legislation, taxation etc.

Conclusions

In this paper, I approached insolvency and bankruptcy viewed from two angles, with positive and negative parts.

On the one hand, it highlights the advantages it has appealing this debts recovery procedure for both the debtor and creditors, and on the other hand it highlights the negative aspects highlighted by the abuse that may arise with the opening of proceedings. In conclusion it can be said that the difficulties that a company may encounter can be a serious threat, which can be completed either by recovery of the company (the recovery term is found in the French law of 1985 as well as the Romanian law 503/2004 regarding recovery and bankruptcy of insurance companies)[12] or its bankruptcy and therefore exit from the market.

But these difficulties can disrupt and other economic actors and can get into a vicious circle, therefore it was necessary to improve legislation to shorten development time and reduce costs of the procedure. For the purposes of effective exercise of pleadings, based on the principle of celerity enunciated by the law, it is especially recommended, the high qualification of persons involved in the procedure and of organs applying the procedure.

I also believe that in business, as in life, we need to show fair play, to consider „ the rules of the game "and recognize what we did wrong in order not to affect other people, being allowed to do

[11] Turcu Ion, *Tratat de insolventa*, Ed. C.H.Beck, 2006, pg.294.
[12] Turcu Ion, *Tratat de insolventa*, Ed. C.H.Beck, 2006, pg 295.

anything concerning ourselves, because each answers for the deeds done, good or bad, but without prejudice to other.

References

- Birchall Ana, Procedura insolventei – Reorganizarea judiciara si procedura falimentului, *note de curs, 2nd Edition, Editura Universul Juridic, Bucharest 2007.*
- Cărpenaru D. St., Nemeş V., Hotca A. M., The new insolvency law – Law no.85/2006, Hamangiu Publishing House, Bucharest, 2008.
- Turcu Ion, Insolvency Treaty, C. H. Beck Publishing House, Bucharest, 2006.
- ***Law 85/2006 regarding the insolvency procedure, with subsequent amendments and additions.
- ***Law 31/1990 regarding commercial legal entities, with subsequent amendments and additions.
- ***The Phoenix magazine no. 16-17 (April - September 2006), Will the Law 85/2006 regarding the insolvency procedure succeed to provide the appropriate framework for efficient reorganisation of companies in distress? - Eng. Munteanu Speranţa, Lawyer Mihai Nicoleta.
- ***The Phoenix magazine no.16-17 (April - September) - The insolvency procedure, Lawyer Miloş Simona Maria.
- *** Manual for good practices in insolvency, drafted by a consortium managed my PricewaterhouseCoopers, in the context of the PHARE 2002 program titled „Support for the improvement and implementation of the legislation on bankruptcy" (electronic file).
- *** Economics notions applied to the insolvency procedure, drafted by a consortium managed my PricewaterhouseCoopers, in the context of the PHARE 2002 program titled „Support for the improvement and implementation of the legislation on bankruptcy" (electronic file).
- www.liquidation.ro – The web page of the National Union of Insolvency Practitioners of Romania.
- www.buletinul insolventei.ro.
- Portal.just.ro – The Ministry of Justice Portal.

LEASEHOLDS – AN ALTERNATIVE TO REGULAR OWNERSHIP TITLES

ELENA-RALUCA DINU*

Abstract

For property law, the system of estates represents the most obvious of many links between past and present. The very word "estate", drawn from and implying status, signifies the feudal origins of the system. So does the distinction, still current, between freehold and nonfreehold estates- the first referring to normal tenures of feudal times, the second to mere leases.

Leaseholds – or nonfreeholds or tenancies- are a part of the larger estates system. Like the freehold estates, leaseholds have roots that run deep into feudal times (hence the notion of a tenant who holds under a landlord). And again like freeholds, leaseholds have been fairly static over the years in term of their formal characteristics. In terms of relations between landlord and tenant, however, there have been regular and significant developments. The most important of these, together with the body of conventional American law in the background, make up the bulk of this paperwork. The article considers the incidents of leaseholds and then concludes with a selective look at the persistent problem of affordable rental housing.

Key words: *leaseholds, landlords, rent control, rental housing, government-assisted housing programs*

Introduction

Finding affordable housing of decent quality is a challenge to many Americans, not just, but obviously especially for the poor. The implied warranty of habitability and allied reforms are aimed to improve the situation. But wouldn't landlords in response to the higher costs imposed on them by such measures simply increase the rents they charge, such that housing might be more decent but even less affordable? Could rent control help allay this problem? What about government assisted housing programs? These are large and contentious questions of which the following debates are just a surface scratching.

Leaseholds – an alternative to regular ownership titles

In 1986 the Chicago City Council enacted a Residential Landlord and Tenant Ordinance which was not a rent control measure, rather it essentially codified the implied warranty of habitability and, beyond that, established new landlord responsibilities and tenant rights in respects described below.

A group of property owners challenged the constitutionality of the ordinance, but the district court denied a motion for a preliminary injunction, concluding that the plaintiff property owners did not have a reasonable likelihood of prevailing on the merits, thus the plaintiffs appealed. The court of appeals affirmed in an opinion by Cudahy J., holding, among other things, that the ordinance was sufficiently specific and, giving due deference to the legislative judgment, sufficiently reasonable in light of its stated purpose to promote public health, safety and welfare. Of interest to us is not the constitutional analysis in Judge Cudahy's opinion but the policy analysis in a separate opinion filed in the case, an opinion has moved Judge Cudahy to say "the economic critique of the Ordinance contained in the separate opinion has not been litigated here and is, at best, superfluous."[1]

---

* Ph.D. candidate of Doctoral Law School, "Nicolae Titulescu" University, Bucharest (dr_dinu_raluca@yahoo.com).

[1] Chicago Board of Realtors Inc. v. City of Chicago, United States Court of Appeals, Seventh Circuit, 1987, 819 F.2d at 737 n.2.

Posner J. with whom Easterbrook J. joins: "We agree with Judge Cudahy's opinion as far as it goes, and we therefore join it, but in our opinion it does not go far enough because it makes the rejection of the appeal seem easier than it is, by refusing to acknowledge the strong case that can be made for the unreasonableness of the ordinance. So we are led to write separately, and since this separate opinion commands the support of two members of the panel, it is also a majority opinion."[2]

The new ordinance rewrites present and future leases of apartments in Chicago to give tenants more rights than they would have without the ordinance. It requires the payment of interest on security deposits , it requires that those deposits be held in Illinois banks, it allows with some limitations a tenant to withhold rent in an amount reflecting the cost to him of the landlord's violating of term in the lease, it allows a tenant to make minor repairs and substract the reasonable cost of the repair from his rent, it forbids a landlord to charge a tenant more than 10 dollars a month for late payment of rent regardless of how much is owing and creates a presumption that a landlord who seeks to evict a tenant after the tenant has exercised rights conferred by the ordinance is retailing against the tenant for the exercise of those rights.

The stated purpose of the ordinance is to promote public health, safety and the quality of housing in Chicago, It is unlikely that this is the real purpose and it is not the likely effect. Forbidding landlords to charge interest at market rates on the late payment of the rent could hardly be thought calculated to improve the health, safety and welfare of Chicagoans or to improve the quality of the housing stock, but it may have the opposite effect. The initial consequence of the rule will be to reduce the resources of the landlords devote to improve the quality of housing, by making the provision of rental housing more costly. Landlords will try to offset the high cost, in terms of time value of money, less predictable cash flow and probably higher rate of default by raising rents. To the extent they succeed, the tenants will be worse off or at best no better off. Landlords will also creen tenants more carefully because the cost of renting to a deadbeat will be higher, so marginal tenants will find it harder to persuade landlords to rent to them. Those who do find apartments but then are slow to pay will be subsidized by responsible tenants who will be paying higher rents, assuming that the landlord cannot determine in advance who is likely to pay rent on time. Insofar as these efforts to offset the ordinance fail, the cost of rental housing will be higher to landlords and therefore less will be supplied, more of the existing stock than would otherwise be the case will be converted to condominia and cooperatives and less rental houses will be built.

The provisions of the ordinance requiring that the interest on security deposits be paid and that deposits be kept in Illinois banks are as remote as the provisions on late payment from any concern with the health or safety of Chicagoans, the quality of housing in Chicago or the welfare of Chicago as a whole. Their only apparent rationale is to transfer wealth from landlords and out-of-state banks to tenants and local banks making it an unedifying example of class legislation an economic protectionism rolled into one. However, to the extent the ordinance seeks to transfer wealth from landlords to tenants it could readily be undone by a rent increase, the ordinance puts no cap on rents[3].

The provisions that authorize rent withholding, whether directly or by subtracting repair costs, may seem more closely related to the stated objectives of the ordinance, but the relation is tenuous. The right to withhold rent is not limited to cases of hazardous or unhealthy conditions and any benefits in safer or healthier housing from exercise of right are likely to be offset by the higher costs to landlords, resulting in higher rents and less rental housing.

The ordinance in not in the interest of poor people. As is frequently the case with legislation ostensibly designed to promote the welfare of the poor, the principal beneficiaries will be middle-class people. They will be people who buy rather than rent housing (the conversion of rental to owner

[2] Chicago Board of Realtors Inc. v. City of Chicago, United States Court of Appeals, Seventh Circuit, 1987, 819 F.2d at 737 n.2.

[3] Coase, The Problem of Social Cost, 3 J. Law & Economy 1, 1960.

housing will reduce the price of the latter by increasing its supply), people willing to pay a higher rental for better-quality housing and a largely overlapping group more affluent tenants who will become more attractive to landlords because such tenants are less likely to be late with the rent or to abuse the right of withholding rent. The losers from the ordinance will be some landlords, some out-of-state banks , the poorest class of tenants and future tenants. The tenants are few in number, the out-of-staters can't vote in Chicago elections, poor people in society don't vote as often as the affluent[4] and future tenants are a diffuse and largely unknown class. In contrast, the beneficiaries of the ordinance are the most influential group in the city's population so the politics of the ordinance are plain enough and they have nothing to do with either improving the allocation of resources to housing or bringing about a more equal distribution of income and wealth[5].

A growing body of empirical literature dealt with the effects of governmental regulation of the market for rental housing. The regulations that have been studied such as rent control in New York City and Los Angeles are not identical to the new Chicago ordinance, though some regulations which require that rental housing be habitable are close. The significance of this literature is not in proving that the Chicago ordinance was unsound, but in showing that the market for rental housing behaves as economic theory predicts: if the price is artificially depressed or the costs of landlords artificially increased supply falls and many tenants, usually the poor and the newer tenants are hurt[6]. The single proposition in economics from which there is the least dissent among American economists was that "a ceiling on rents reduces the quality and quantity of housing available"[7].

Posner and Easterbrook pretty much capture the case against rent controls. Virtually all economists, as they point out right at the end of their analysis, regard them as counterproductive. All American economists, that is fewer than 2 percent of them dissented from the proposition stated by Posner and Easterbrook, but almost 44 percent of French economists did, along with almost 20 percent of Swiss economists and 11 percent of Austrian economists, down to 6 percent of German economists.

Defenders of rent control respond to such conclusions in two different ways, arguing either that they are unreliable or largely irrelevant. Finding "little research that systematically examines the differences between restrictive, moderate and strong rent controls in cities across the United States", the authors undertook a "comprehensive review of studies by economists, political scientists, planners and sociologists. Such a review suggests that neither moderate nor strong forms of control have caused a decline in either the quality or supply of rental stock. Although such findings do not, of course, prove that rent controls are without deleterious effect, they provide n warrant for drawing the conventional conclusions"[8]. They add: "Rent control has not, however, brought average rents down to affordable levels"[9]. On the other hand they wonder whether economists have overlooked important non-utilitarian considerations that might trump the conventional analysis and insist on the idea that existing tenants are usually the primary beneficiaries of the most rent controls, but perhaps that's the whole point: "rent controls make it possible for existing tenants to stay where they are, with roughly the same proposition of their income going to rent as they have become used to, a result that might be

---

[4] Filer, An Economic Theory of Voter Turnout (Ph. D. Thesis Dept. of Economy, University of Chicago, dec. 1977), page 81; Statistical Abstract of the U.S. 1982-1983, pages 492-493.

[5] DeCanio, Rent Control Voting Patterns, Popular Views and Group Interests in Revolving the Housing Crisis 301, Johnson ed. 1982, pages 311-312.

[6] Olsen, An Econometric Analysis in Rent Control, J. Pol. Econ. 1081, 1972, page 80; Rydell et al., The Impact of Rent Control on the Los Angeles Housing Market, ch. 6, Rand Corp. N-1747-LA, 1981; Hirsch, Habitability Laws and the Welfare of indigent Tenants, 61 Rev. Econ. & Stat, 1981, page 263.

[7] Frey et al., Consensus and Dissension Among Economists: An Empirical Inquiry, 74 Am. Econ. Rev., 1984, pages 986, 991.

[8] John I. Gilderbloom & Richard P. Applebaum, Rethinking Rental Housing, 1988.

[9] Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market, 101 Harv. L. Review, 1988, page 1835.

justified in some circumstances than in others. From a moral point of view, then, judgments about rent controls must turn very much on context"[10]. They might be justified in the easy case where a landlord is earning monopoly rents, for example, but not where the landlord lives on the premises and rents a proportion to commercial tenants or transients who are not maintaining a home[11].

In respect of government-assisted housing programs, whatever the merits of the debates sketched above, it might be that decent housing is simply beyond the reach of the poor, absent government financial support, but this aid can take a number of forms: project subsidies tied to specific dwellings, in other words, traditional public housing and if the recipient leaves the dwelling, the subsidy is forgone; housing allowances distributed according to need and to be spent for housing only, the money is not tied to dwellings but to recipients which may take the subsidy with them where they move; income maintenance programs involving unrestricted cash payments to needy recipients who may spend the money as they wish. The following paragraphs consider American low-income housing policy in term of alternatives.

There has been a series questionmarkes raised[12]. If, as most analyses agree, the major housing facing low income households today is one of affordability, why do public policymakers treat the difficulties by low income renters as housing problems rather than as problems of income distribution? If the problems faced by these households could be solved by increased income, why not provide low income households with unrestricted income supplements rather than subsidies earmarket for housing expenditure? If the market for housing were free of market imperfections, and the only housing problem of low income households was affordability, elementary welfare economics would indicate that an unrestricted income supplement such as negative income tax would be the most efficient policy. Earmarket subsidies and in-kind redistribution are generally considered to be inefficient, since many households would not, if left to their own choice, spend each additional dollar of income on a dollar's worth of housing consumption. Instead, household would typically choose to spend only a portion of the increased income on housing and the remainder on other consumption items such as food and clothing. By providing low income households with in-kind assistance, the public sector's expenditure presumably results in less overall utility than would an unrestricted transfer payment.

The housing market, however, is not free from market imperfections and artificial constraints on supply. Tying public subsidies to housing is justified in circumstances where they can be utilized efficiently to overcome these market failures and constraints. Although most economists believe that housing markets are generally competitive with a large number of actual and potential consumers and sellers, absent government intervention, the housing market may fail to generate an optimal amount of housing. The supply of housing, although quite elastic in the long run, is relatively inelastic in the short run because of the length of time required for site selection, financing and construction. In addition, government regulation impedes the supply of housing, especially for low income households. Zoning and land use regulations, health and safety ordinances, as well as rent control and security of tenure laws, may restrict the supply of housing. Furthermore, discrimination against minorities in the housing market might limit their ability to purchase housing in certain neighborhoods.

Public intervention in the housing market may also be justified by the problem of substandard housing. Deteriorated housing sometimes poses an externally problem. The existence of dilapidated structures may reduce the value of neighboring homes and may lead to disinvestment in the

[10] Margaret J. Radin, Residential Rent Control, 15 Phil. & Pub Affaires, 1986, pages 350-353.

[11] Mark Kelman, On Democracy-Bashing: A skeptical Look at the Theoretical and Empirical Practice of the Public Choice Movement, 74 Va. L. Rev. 1988, pages 199, 271-273; William H. Simon, Social-Republican Property, 38 UCLA L. Rev, 1991, pages 1355, 1361.

[12] Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, 75 Cornell L. Rev. 1990, pages 878, 890-900, 948.

neighborhood. Because the owner of the deteriorated structures does not have to bear all the costs generated by his or her property, public intervention such as slum clearance or renovation assistance might be appropriate. In much the same way that a deteriorated building might be considered a negative externality, a high quality building might be a positive externality or public good. The existence of such a structure might increase values and confidence in the community. Private entrepreneurs might avoid making the investment since they would receive only a portion of its benefits, with nearby owners free-riding on the remainder.

Another justification for government intervention in the housing market, as opposed to pure income assistance, is based on noneconomic factors. Although Americans typically accept inequality in most aspects of life, there is a rough consensus that "certain specific scarce commodities should be distributed less unequally than the ability to pay for them."[13] Society may be justified in preferring a minimum entitlement to housing, despite the desires of the recipient, for several reasons. People who prefer other goods and services to a minimum level of shelter may lack sufficient information or be unable to assess rationally the true worth of decent housing, thereby justifying social paternalism. Furthermore, in light of the increasing children born to unmarried, teenage parents, efforts to provide a minimum level of housing consumption may be justified as necessary to protect those who do not themselves have the power to make expenditure decisions. In addition, the knowledge that people are not living in desperately deteriorated and unhealthful accommodations may itself bring taxpayers positive utility and therefore serve as a consumption item for the donors rather the donnes.

The argument that government programs to provide housing assistance to low income households are justified on market failure, supply constraints or societal consensus does not lead to a simple answer to the question of how that assistance should be designed. Typically, housing policies are characterized as either supply or demand oriented. Programs in which the government supports the construction of new dwellings, either by building it itself or by subsidizing developers, are enacted to directly increase the supply of housing. Programs that provide the recipients of assistance with the funds to purchase housing services increase the demand for housing, and indirectly, its supply.

In the following paragraphs it will be dealt with a comparison between public housing, a supply oriented program, and houses certificates and allowances, a demand orientated subsidy.

Since the mid-1930s, the federal government has funded the construction of housing for low-income households. New Deal agencies such as Public Works Administration bought land, cleared slums and built almost 22.000 housing units. Direct federal provisions of housing was initially dealt a blow in 1935 when a federal appeals court upheld a lower court ruling that the federal government could not use its power of eminent domain to condemn sites for housing projects because housing was not a public purpose. In 1937, however, Congress passed the Wagner-Steagall Housing Act, establishing the public housing program. Under the Act, public housing would be built by local public housing authorities rather than by the federal government. In addition to the concern of comity, the program utilized public housing authorities because several state courts had held that cities and states had the power to condemn property for housing. Under the program, a public housing authority and the federal government excite an annual contribution contract which sets forth the parties' rights and obligations. The public housing authority funds the purchase of land and construction of housing by issuing long term bonds, typically with a forty year maturity. The federal government undertakes an obligation to make all debt service payments on bonds, effectively subsidizing all capital costs. The public housing authority, in turn, obligates itself to operate the public housing in a manner consistent with federal statutes and regulations during the term of the annual contributions contract. The municipality in which the project is located is required to grant an exemption from real property taxes for housing development. Unlike housing built by Public Works

[13] James Tobin, On Limiting the Domain of Inequality, 13 J.L. & Econ., 1970, pages 263-264.

Administration, public housing was, from the start, limited to low income households. Due to the onset of World War II, only a modest number of units were built under the 1937 Housing act. In 1949, however, Congress passed another housing act which provided federal subsidies for slum clearance and urban redevelopment. As part of the act, Congress authorized the construction of an additional 810.000 public housing units and established the national housing policy of a decent home and a suitable living environment for every American family. It was not until 1972 that all the housing units authorized by the 1949 Act were actually completed. Today, approximately 1.3 million units of public housing exist in the United States.

From its inception, public housing was controversial. In the 1930s, the private real estate lobby alleged that the program was socialistic and wasteful. Projects were frequently segregated by race and built in less desirable neighborhoods where their presence would not be offensive to community residents. Public housing was originally created for temporary occupancy by the submerged middle class. As soon as residents could get themselves on their feet, they were expected to move elsewhere. During the 1950s, however, the socioeconomic character of public housing changed. Federal government policies and programs such as mortgage insurance, tax preferences for homeownership and highway construction subsidized the movement of middle and moderate income households out of the city to the suburbs. At roughly the same time, black migration from the south to northern cities accelerated. As manufacturing jobs followed the migration of household to suburban locations, central cities increasingly became home to low income and black households. Public housing no longer served as a temporary haven for upwardly mobile households, but instead became a permanent home to very poor and disproportionately nonwhite population.

As the income of public housing residents plummeted and the age of public housing projects increased, the rents charged by the public housing authorities to cover operating expenses became increasingly burdensome. In 1969, Congress's action to assist tenants by limiting maximum rents chargeable further added to public housing authorities burdens. The federal government enacted subsidy programs to help the authorities pay for operating and modernization expenses. Neither of these subsidies, however, was fully funded, and many public housing authorities further cut back on maintenance which led to structural deterioration and, in some extreme cases, the demolition of uninhabitable buildings.

Public housing is only one of the several housing programs enacted by the federal government to assist low income households. Since the 1970s the government has increasingly relied on the private sector to deliver housing assistance. Although future federal housing assistance for low income households should rely to a greater extent on the private sector for delivery of services, that does not mean that the federal government should cut back its role in financing such assistance or abandon its already sizable investment in public housing. To the contrary, there remains a need for the public sector to assist low income households in obtaining adequate and affordable housing. By using the private sector to deliver these housing services, it is likely that the greatest number of households can be assisted for a given level of federal expenditure. There will remain for the foreseeable future, however, a role in American housing policy for publicity owned rental housing, especially in those circumstances where artificial constraints on supply or housing discrimination exist.

Conclusions

As a general rule, residential rent regulation makes economic sense if, and only if, two conditions occur simultaneously in the market and are both expected to last for some time. Demand for rental units must rise shapely at the same time that new construction of such units has been legally restricted in order to conserve resources. In the absence of these conditions, rent controls are neither an appropriate nor an effective response to perceived housing shortages, on the contrary they generally exacerbate such shortages.

As a general rule, the more an ordinance intrudes upon the market conditions that would otherwise prevail, the more likely it is to cause dislocations in a housing market. Controversially, less intrusive rent regulations appear to cause less severe dislocations.

Much evidence indicates that all rent controls, even temperate controls, transfer income from owners to tenants or between various classes of tenants. In addition, many of the short-term benefits of rent controls as affluent rather than poor households and some of the costs must be borne by very poor households. Where rent is eliminated as a basis for distinguishing among potential tenants, owners often use other factors such as credit-worthiness, race, sex or ethnicity in allocating scarce rental units, even though most such discrimination is illegal.

On the other hand, the defenders of rent control argue that the conclusions of the economists about rent controls have little application to gentrifying markets and that they will not lead to abandonment, conversion, inadequate maintenance or a decrease in future construction, but will reduce the social costs of poverty by increasing the supply of low-income housing.

I contend that in the future, the public sector should primarily subsidize demand, leaving the construction of additional housing to the private sector. Nevertheless, construction of public housing may be desirable under certain market conditions, including those markets subject to artificial entry barriers and discrimination.

Since many Romanians are in the same boat as the Americans and plead a saving policy to make their lives and their children's future more hospitable, this case study's purpose was to underline the rollercoaster of economic effects that the Romanian housing market would undergo and that we should learn from other's mistakes, having in mind that our economic treasurery doesn't even compare to that of the American people, and even so the aid program that they developed wasn't crowned with all that much glory as it was expected, so the Romanian experts should find a way to overcome the necessities of the poor population that cannot rent of the free market, but it should be one that wouldn't kick us, the others, out of house and home, due to the fact that we would have to support the subsidies that the poor would receive.

In the end, the remaining question is if the Constitution should be read or amended to guarantee each individual a right to some minimum level of housing. This is for us to determine and for our children to implement.

References

- William H. Simon, *Social-Republican Property* (38 UCLA L. Rev, 1991), 1355, 1361.
- Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing* (75 Cornell L. Rev. 1990), 878, 890-900, 948.
- Mark Kelman, *On Democracy-Bashing: A skeptical Look at the Theoretical and Empirical Practice of the Public Choice Movement* (74 Va. L. Rev. 1988), 199, 271-273.
- John I. Gilderbloom & Richard P. Applebaum, *Rethinking Rental Housing* (1988) .
- *"Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market"*, 101 Harv. L. Review, 1988, *page 1835.*
- Chicago Board of Realtors Inc. v. City of Chicago, United States Court of Appeals, Seventh Circuit, 1987.
- Margaret J. Radin, *Residential Rent Control* (15 Phil. & Pub Affaires, 1986), 350-353.
- Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry* (74 Am. Econ. Rev., 1984), 986, 991.
- Statistical Abstract of the U.S. 1982-1983.
- DeCanio, *Rent Control Voting Patterns, Popular Views and Group Interests in Revolving the Housing Crisis* (Johnson ed. 1982), 311-312.

- Rydell et al., *The Impact of Rent Control on the Los Angeles Housing Market* (Rand Corp. N-1747-LA, 1981).
- Hirsch, *Habitability Laws and the Welfare of indigent Tenants* (61 Rev. Econ. & Stat., 1981), 263.
- Filer, *An Economic Theory of Voter Turnout* (Ph. D. Thesis Dept. of Economy, University of Chicago, dec. 1977), 81.
- Olsen, *An Econometric Analysis in Rent Control* (80 J. Pol. Econ., 1972), 80 .
- James Tobin, *On Limiting the Domain of Inequality* (13 J.L. & Econ., 1970), 263-264.
- Coase, *The Problem of Social Cost* (3 J. Law & Economy, 1960).

AMENDING REGULATION (EC) NO.1346/2000 ON INSOLVENCY PROCEEDINGS - SOLVING DEFICIENCIES OR ATTEMPT TO RESCUE COMPANIES IN DIFFICULTY?

GABRIELA FIERBINŢEANU *

Abstract
EC Insolvency Regulation claims, after more than 10 years, several changes imposed by some of the issues raised by the practice of its application but also by the need to promote economic recovery for enterprises in difficulty in the current economic crisis.
This paper analyzes the major segments of change and aims to determine whether these segments provide a coherent answer for the practical difficulties faced by the EC Regulation and whether extending its scope by revising the definition of insolvency proceedings may offer better chances of recovery for the enterprises in difficulty.

Keywords: *scope, insolvency proceedings, COMI, procedures publication, groups of companies.*

Introduction

Regulation no.1346/2000 on insolvency proceedings is no longer a subject of curiosity or debate. It has passed this phase long ago during the years of application. The problems raised by the practice during those years are not some abstract scientific notes but real questions having roots in the economic reality.

The actual need to rescue enterprises during the current economic crisis claimed a new approach of the Regulation and for this purpose, all existing debates generated mature ideas for changing the face of the Regulation. As professor Bob Wessels observed in his article "Revision of the EU Insolvency Regulation: What type of facelift?"[1], "The regulation has laid a basis for cross-border insolvency solutions. Some parts in the basis should be renewed, other parts should be added to create a European house in which one can live with some comfort".

This paper analyses the major segments of change by comparison with initial recitals and aims to determine whether these segments provide a coherent answer for the practical difficulties faced by the EC Regulation and whether extending its scope by revising the definition of insolvency proceedings may offer better chances of recovery for the enterprises in difficulty.

The offer of the Regulation no 1346/2000 on insolvency proceedings

The Insolvency Regulation is the product of a hard and long negotiation process having in mind that a body of substantive insolvency Law at EU level is not possible to achieve because of so many disparities between national insolvency laws. This reality was acknowledged also in the eleven Recital of the Regulation, being also the reason for not forcing the obvious truth by trying to introduce insolvency proceedings with universal scope in the entire Community.

Objectives that justified an action at EU level establishing a procedure applicable directly in Member States were also described in the Recitals of the Regulation and can be resumed in three ideas:

---

* PhD candidate, research assistant, Faculty of Law, "Nicolae Titulescu" University, Bucharest; Chief of Insolvency Service, Trade Register Office Bucharest (gabriela.fierbinteanu@gmail.com).

[1] Wessels Bob, "Revision of the EU Insolvency Regulation : What type of facelift?", article presented at the Conference "The future of the European Insolvency Regulation", 28 April 2011, Amsterdam, available at www.eir-reform.eu.

- proper functioning of the internal market requires efficient and effective proceedings
- the measures taken over insolvent debtor's assets must be coordinated
- forum shopping is to be avoided

We will summarize the content of the Regulation according to this ideas so that the next section of the paper regarding the changes to be made in the Regulation will be easier to follow.

The Regulation scope is to apply to collective insolvency proceedings involving the divestment of the debtor and the appointment of a liquidator(all the collective proceedings referred to are listed in Annex A of the Regulation). The international jurisdiction, as article 3 provides, can be divided in primary and secondary jurisdiction[2].According to article 3(1), "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary" and article 3(2) "Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State".

Clarifying the scope of the proceedings, article 3(3) and article 3(4) qualified as secondary proceedings the proceedings opened subsequently under paragraph 2 of article 3, when insolvency proceedings have been opened under paragraph 1 of article 3(as winding-up proceedings) and as territorial insolvency proceedings the proceedings referred to in paragraph 2 of the article 3 that are opened prior to the opening of main insolvency proceedings only "where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated"(article 4a) or "where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment"(article 4b)

The Regulation stated the need to coordinate parallel proceedings so the realization of assets and a fair distribution to creditors can be offered. Recital 12, 16, 17, 19 provide proofs of the intention to protect diversity of interests - the courts are enable to order protective measures form the time of the request to open proceedings, preservation measures taken prior and after the commencement of the insolvency proceedings, protection of local interest, opening of secondary proceedings when the efficient administration of the estate requires in cases when the debtor's estate is complex.

Duty to cooperate and communicate information is a special but poor section in the Regulation(article 31) representing a transcription of common ideas about what cooperation is meant to do(liquidators in the main and secondary proceedings need to cooperate with each other, communicating information relevant to the other proceedings).

In the matter of forum shopping, the problems are strongly related with the concept of "center of main interests"(COMI), referred at in Recital 13 and in article 3 "In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary". This concept must be interpreted according to Recital 13 as "the place where de debtor conducts the administration of his interests on regular basis", being "therefore ascertainable by the third parties". As explained in Report on the Convention on Insolvency Proceedings by Miguel Virgos and Etienne Schmit in 1996, by using the term "interests" the intention was to cover all general economic activities not only commercial, industrial

[2] Omar, Paul J., The European insolvency regulation 2000 - A Paradigm of International Insolvency Cooperation,Bond Law Review, Vol15, Iss.1, Article 10, available at http://epublications.bond.edu.au/blr/vol15/iss1/100.

and professional activities so that the provisions could be applied also to the activities of private individuals and as a criterion for the cases where the interests include different types of activities run from different centers was used the term "main''.

Time and reason for changes

In 2009, an estimated 1.7 million jobs were lost because of business failures, according to Creditreform Economic Research Unit. In 2010, some 600 companies in Europe went into liquidation every day, pointed EU Justice Commissioner in Dublin, September 2012. According to the data published by the Insolvency Proceedings Bulletin, in Romania, in the first 8 months of the year 2012, the insolvency procedure began for a number of 16.481 companies, 7,59% more than in the same period in 2011, concluded Coface Romania. This are only numbers but all are reflecting the same idea - difficult economic times. The reform of the Regulation must be accommodated not only to concepts but also to practical needs. Article 46 stipulates that no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation.

On the 23.03.2011, the Legal Affairs Committee held a workshop on "Harmonisation of insolvency proceedings at EU level" trying to identify the areas eligible for harmonization in national insolvency laws. The debated issues were structured in 4 categories to be considered in future legislative initiatives:

- harmonization where possible in the maters of opening insolvency proceedings, filling of claims, avoidance actions, liquidators, restructuring plan
- revision of the Insolvency Regulation regarding COMI, definition of the establishment, duty of cooperation for liquidators and for courts
- insolvency of groups of companies
- creation of an EU Registry in order to find information about the opening of insolvency proceedings and the deadlines and the form requested to fill in the claims.

In one of the papers[3] issued by the Directorate General for Internal Policies after the workshop, we can find also the practitioners point of view(INSOL Europe working Group) about the improvements needed to be made. In brief, the document added to the 4 presented categories some practical problems as follows: extension of the scope of the Regulation (including reorganization proceedings); recognition of the proceedings opened in the case when COMI is situated in a non EU country; the different treatment for pledged assets, having in mind article 5(1) regulating third parties right in rem; difficulty to challenge detrimental acts (article 13) by selecting the law applicable to the contract; effects of insolvency proceedings on lawsuits pending(coordination of article 4(2)f and article 15);the treatment of secured and non-secured claims in different insolvency proceedings regarding the same debtor; different contract approach when a territorial proceeding is opened, by contrast with the law of the Member State where the main proceedings are opened.

At this point is interesting to mention some of the suggestion made by the Committee on Employment and social Affairs to be incorporated by the Legal Affairs Committee in the motion for resolution - greater harmonization of insolvency proceedings will promote equality and may have a positive impact on Member State's competitiveness and also on potential employment opportunities; in the context of economic crisis, the issue of insolvency must be considered also from an employment-law perspective; considers necessary to be increased the priority of employees' claims relative to other creditors' claims; underlines the need for the timeframes for main and secondary proceedings to be harmonized and shortened in order to offer legal certainty to paid employees.

The European Parliament Resolution of 15 November 2011, having regard to the Report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary

[3] "The revision of the EU insolvency regulation", Directorate General for Internal Policies, Policy Department C:Citizens"Rights and Constitutional Affairs, 2011, available at http://www.europarl.europa.eu/studies.

Affairs and the Committee on Employment and Social Affairs, requested the Commission on insolvency proceedings in the context of EU company law to submit one or more proposals relating to an EU corporate insolvency framework. The detailed recommendations as to the content of the proposals requested was structured in 4 parts[4], as follows (we will insist only on some content of the recommendation).

1. *Harmonization of specific aspects of insolvency law and company law*

Opening of insolvency proceedings - insolvency proceedings can be brought against natural persons, legal entities or associations or can concern assets of entities without legal personality(European Economic Interest Grouping);proceedings are opened if the debtor is insolvent or if the request is made by the debtor if debtor's insolvency is imminent; the Member States must regulate the situations when the debtor is liable in the event of non-filing or improper filing.

Recommendation on the harmonization of certain aspects of the fillings of claims - creditors file in written form within a certain period of time and Member States are required to regulate this period of time within one to three months from the date of publication of the bankruptcy decision; the creditor must disclosure the documentation in support of the claim; after this period filings imply if verified but additional costs for the creditor .

Harmonization of avoidance actions

Harmonization in the field of qualification of liquidator

Harmonization of restructuring plans – "unimpaired creditors, or parties that are not affected by the plan, should not be entitled to vote on the plan or, at least, should not be able to impede it"; the plan must be approved before the relevant court.

2. *Revision of Council Regulation (EC) No 1346/2000* - scope of the Insolvency Regulation should be extended to insolvency proceedings in which the debtor remains in possession ; a clear definition of COMI must be included as to prevent forum-shopping; the Insolvency Regulation should include also a definition of 'establishment' as "any place of operations where the debtor carries on a non-transitory economic activity"; the Insolvency Regulation should provide for an unequivocal duty of communication and cooperation between liquidators and between courts; timeframes should be shortened ;"the review of the avoidance action rules should take into account that due to avoidance actions some healthy subsidiaries of a company are driven into insolvency".

3. *Insolvency of groups of companies* –The Member State where the operational headquarters of the group is situated must open the insolvency proceedings and an unique insolvency practitioner must be appointed; when ancillary proceedings are opened a committee should be formed to defend the interests of local creditors and employees; establishing rules to facilitate the use of the forms of cooperation between courts and insolvency practitioners to coordinate the insolvency proceedings.

4.*The creation of an EU insolvency register* - In the context of the European e-Justice Portal was proposed an EU Insolvency Register containing the relevant court orders and judgments, the appointment of the liquidator, the contact details and the deadlines for filling claims.

At the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, Vice-President of the European Commission, EU Justice Commissioner, Viviane Reding affirmed, mentioning that the Regulation does not accommodate the concepts of rehabilitation and reorganization, the need for a fresh start that must allow the surviving of honest enterprises during the difficult economic conditions "We must now focus on the fresh start that allows good honest businesses the chance to survive these difficult economic times. The Insolvency Regulation has proved to be very useful over the years, but it now needs a face-lift. First, we have to assess the efficiency of the current Regulation. To what extent has the initial objective been achieved, "to avoid forum shopping"? Second, we must ensure that the Regulation is consistent with other EU policies and legislation – I would mention developments in banking law, company law, and the rights of

[4] "Motion for a European Parliament Resolution" and "Annex to the Motion for a Resolution :Detailed Recommendations as to the content of the proposal requested",2011, http://www.europarl.europa.eu.

employees as well as entrepreneurs. Furthermore, we want to bring EU insolvency legislation in line with national best practices and the UNCITRAL Model Law on cross-border insolvencies. Third, the Regulation should enter into the internet era. With e-Justice, any court in the EU will have access to insolvency registers in other Member States. The Commission is supporting a pilot project with 9 Member States for the interconnection of these registers. Beyond that, the e-filing of claims would present advantages to liquidators and foreign creditors"[5].

The proposal amending Council Regulation (EC) No.1346/2000 on insolvency proceedings - is the future brighter?

At 12 December 2012 in Strasbourg, the European Parliament and the Council of the European Union adopted the proposal for a Regulation amending Council Regulation (EC) No.1346/2000 on insolvency proceedings. As seen from the brief presentation of the Regulation and from the detailed recommendations, there were identified some main shortcomings - the scope of Regulation does not cover pre-insolvency proceedings or the hybrid proceedings which leave the existing management in place ; determining the competent Member State to open the proceedings is difficult because of the problems raised in applying COMI concept in practice; opening of the secondary proceedings that moreover is a winding-up procedure is an obstacle in restructuring of the debtor's activities; the rules on publicity of insolvency proceedings and on cooperation between courts or insolvency practicioners are not mandatory ;lack of provisions for group insolvency.

In the next steps, we will try to follow the amendments in the new Regulation having in mind the presented shortcomings.

The *scope* of the Regulation was extended. Article 1 states now that the Regulation applies to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation, the debtor is totally/partially divested of his assets and a liquidator is appointed or the assets of the debtor are subject to court control(the initial content provided that the Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator).

COMI concept was also clarified and through this the jurisdiction of the competent court. The Recital 13 from the Regulation was deleted and new Recitals, 13a and 13b are inserted. The Recital 13 a states that " The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties."[6].The new introduced Recital 12 a gives the court the possibility to examine ex officio whether the debtor's centre of main interests or establishment is located within its jurisdiction and also the possibility to require additional evidence or give the debtor's creditors the opportunity to present their views(proofs) on the question of jurisdiction.

In the matter of *secondary proceedings*, that may damage sometimes the efficient administration of the estate, new Recital 19a introduces provision according to which the court

[5] Taking Insolvency Law into the 21 st Century to Ensure Justice for Growth, speech of Vice-President of the European Commission, EU Justice Commissioner Viviane Reding at the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, http://europa.eu/rapid/press-release.

[6] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation(EC)No.1346/2000 on insolvency proceedings, http://ec.europa.eu.

opening secondary proceedings is able, to postpone or to refuse the opening if it is not necessary for protection of the interests of local creditors(but only on liquidator's request).Another different approach can be found in the new recital 20 that brings on strongly the idea of coordinated concurrent proceedings pending that can conduct to a effective realization of the assets and also gives the liquidator in the main proceedings a dominant role through several possibilities for intervening in the secondary insolvency proceedings proposing a restructuring plan or a suspension of the relaxation of the assets.

Cooperation and coordination seemed improved in the new Regulation by the provisions of new article 31 – "Cooperation and communication between liquidators" extended with the help of two new articles - 31a, "Cooperation and communication between courts" and 31b – "Cooperation and communication between liquidators and courts". For business consideration, the main content of the decision opening the proceedings should be published at the request of the liquidator and if there is an establishment in the Member State concerned, the publication should be mandatory until is established a system of interconnection of insolvency registers, composed of the insolvency registers and the European e-Justice Portal which shall serve as central public electronic access point to information from the system.

A new chapter - IVA – "Insolvency of Members of a Group of Companies" was introduced as a response to the need of coordination of the insolvency proceedings concerning different members of the same group of companies. The new Regulation defines in Article 2 the concept *group of companies* as a "number of companies consisting of parent and subsidiary companies" and parent company as a company which has a majority of the shareholders' or members' voting rights in another company (a "subsidiary company") or is a shareholder or member of the subsidiary company and has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary or exercise a dominant influence over the subsidiary company. Referring at the opening of the procedure for several companies belonging to a group Principle 20b stipulates though that the "introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of these companies is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same liquidator in all proceedings concerned".

Conclusions

Premises are good and as we can see, the aim of the proposal is not only to solve the problems but also to modernise the provisions of the insolvency Regulation no.1346/2000 but the truth is that only the economic crisis opened the eyes. Many solved problems are old facts spoken about since Virgo-Schmit report in 1996. The idea to help continuation of business through pre-insolvency and hybrid proceedings although for a long time "many policies have focused on the necessity to "produce" more entrepreneurs and not so much on the necessity to preserve the stock of entrepreneurs"[7], is not a new born, it represents a change made in French law since last century. Cases as Rechtsbank's Gravenhage, when the court decision determined Dutch entrepreneur to apply for insolvency and have his business liquidated because the debt reorganisation procedure was not covered by the EIR[8] or the apparition of the risk in the matter of mutual trust between courts, as we can follow in the ruling of CJEU in the Eurofood case(Case C-341/04, Eurofood IFSC Ltd) are not abstract elements but realities. Also, postponing the creation of a set of rules for groups of

[7] Report of the expert Group, "A second chance for entrepreneurs- Prevention of bankruptcy, simplification of bankruptcy procedures and support for a fresh start", 2011, European Commission, Enterprise and Industry Directorate - General, http://www. ec.europa.eu.

[8] Rechtsbank's Gravenhage, First instance court, Netherlands, judgment of 10 June 2010, www.insolvencycases.eu.

companies, for different political or practical reasons, was not a very good answer to the business evolution as professor Bob Wessels showed[9] "The lack of provisions concerning multinational groups of companies has been classified as an omission. However, not all critics take into account the fact that cross-border insolvency within Europe was discussed for over forty years before the Regulation finally enacted. The discussions concerned complex problems. At the time, the decision to postpone "group insolvencies" to a later date may have been considered both politically and practically prudent. Furthermore, the Regulation reflects thinking of the 1980s and 1990s, when the phenomenon of groups of companies was not as current as in the first decade of the 21st century and, moreover, in European domestic insolvency laws reorganisation or rescue of companies was not the prevailing option.". The notice that "technological issues, procedural issues and substantive issues of the Regulation are mutually dependent"[10] has a correspondent in the operational objectives of the amendments as are presented in the Commission Staff working Document, Impact assessment, accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012[11]: regulate pre-insolvency and hybrid proceedings and clarify the rules relating to jurisdiction for opening insolvency proceedings without prejudice of the freedom of establishment in the European Union; reduce the number of cases in which determining the jurisdiction raised problems and also ensuring the possibility for judicial review in this cases; reduce the number of secondary proceedings; improved coordination between courts and practitioners; introducing mandatory publication of relevant decisions in each Member State so that transparency is increased; improved access to justice for SMEs through measures that facilitate the lodging of claims; introducing a legal framework for group insolvency.

Until the Regulation shall apply we can only trust the desire of improvement and continue to analyse in details in further materials each proposed action generally introduced in this paper.

Reference

- Wessels, Bob, "Revision of the EU Insolvency Regulation : What type of facelift?", presented at the Conference "The Future of the Insolvency Regulation", Amsterdam, 2011, available at www.eir-reform.eu.
- Wessels, Bob, "Multinational Groups of Companies under the EC Insolvency Regulation: Where Do We Stand?", 2009, available at www.bobwessels.nl.
- Omar, Paul J., "The European insolvency regulation 2000 - A Paradigm of International Insolvency Cooperation",Bond Law Review, Vol15, Iss.1, Article 10, available at http://epublications.bond.edu.au/blr/vol15/iss1/100.
- Stomel, Alan.J, "Answering the Call of the European Court of Justice in Eurofoods a Proposed Package of Due Process Rights with a View Toward the 2012 Revision of the European Insolvency Regulation", 2011, available at http://www.ies.be.
- Report of the expert Group, "A second chance for entrepreneurs- Prevention of bankruptcy, simplification of bankruptcy procedures and support for a fresh start", European Commission, Enterprise and Industry Directorate - General, 2011, available at http://ec.europa.eu.
- EC Regulation No.1346/2000 on insolvency proceedings, Official Journal of the European Communities, L160/1, 30.06.2000, available at http://eur-lex.europa.eu.
- Proposal for Regulation amending Council Regulation (EC) No.1346/2000 on insolvency proceedings, available at http://ec.europa.eu.

[9] Wessels Bob, Multinational Groups of Companies under the EC Insolvency Regulation: Where Do We Stand? 2009; www.bobwessels.nl.

[10] Stomel, Alan.J, Answering the Call of the European Court of Justice in Eurofoods a Proposed Package of Due Process Rights with a View Toward the 2012 Revision of the European Insolvency Regulation, 2011, available at http://www.ies.be.

[11] Commision Staff working document, IMPACT ASSESMENT, Accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings, 2012, available at http://register.consilium.europa.eu.

- Rechtsbank's Gravenhage, First instance court, Netherlands, judgment of 10 June 2010, www.insolvencycases.eu.
- Commision Staff working document, IMPACT ASSESMENT, Accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings, 2012, http://register.consilium.europa.eu.
- Taking Insolvency Law into the 21 st Century to Ensure Justice for Growth, speech of Vice-President of the European Commission, EU Justice Commissioner Viviane Reding at the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, http://europa.eu/rapid/press-release.
- Motion for a European Parliament Resolution and Annex to the Motion for a Resolution :Detailed Recommendations as to the content of the proposal requested ,2011, http://www.europarl.europa.eu.
- The revision of the EU insolvency regulation, Directorate General for Internal Policies, Policy Department C:Citizens Rights and Constitutional Affairs, 2011, available at http://www.europarl.europa.eu/studies.

PUBLICATION PROCEDURES AND COMMUNICATION MADE BY COMMERCIAL REGISTERS IN CROSS-BORDER COMMERCIAL ACTIVITIES

GABRIELA FIERBINŢEANU[*]

Abstract
Expanding companies' activities beyond state borders brings into existence the need to be established permanent cross-border access to specific legal regulations and formalities applicable to the performed operations .
Interconnection of companies registers and facilitation of the access to information from a national commercial register for any interested person, irrespective of its geographical location should represent an impossible to ignore objective at EU level and beyond, not only in considering a stable legal environment but also in considering the possibility of carrying out the activity in states other than their own.
In this paper we propose to capture the steps taken to this end in the European Union, pointing undesirable economic impact of the lack of such measures.

Key words
Commercial registers, Directive 2012/17/EU, Directive 2006/123/EC, internal market, cross-border commercial activities

Introduction

"What is needed above all is a clear-headed appreciation of how different institutions work, along with an understanding of how a variety of organizations – from the market to the institutions of state – can together contribute to producing a more decent economic world"[1]

We all think, in a simple manner of speaking, that doing business should lead to economic development and maybe we all believe that this can be reflected for every individual in a process that can be defined (as the title of a famous movie "Eat, Pray, Love") in three words - think, pray, work - but the truth is that complicated legal frameworks and sophisticated explanations are sometimes a burden for enthusiastic private enterprises and also for the public.

Businesses registration must be focused not only on the formal registration procedure but also on providing clear and trustworthy information for the business partners and for the third parties, creating a safe and user - friendly environment. Some keys for the business register reform process presented by the World Bank Group as recommendations can be: trust between representatives of the business sector and from the authority's with a role in business registration, clearly defined roles and responsibilities in business registration, an information strategy needed for building awareness, funding the reforms by the country governments.[2]

Returning to the process of doing business recently was shown in another World Bank Group material:" A number of recent studies have found that simpler registration processes translate into advantages for workers and employers, including greater employment opportunities, more productive jobs, and higher total factor productivity. In addition, society as a whole benefits from registration reform, which requires that businesses pay taxes, play by the rules, and provide productive, decent employment"[3] .

---

[*] PhD candidate, research assistant, Faculty of Law, "Nicolae Titulescu" University, Bucharest; Chief of Insolvency Service, Trade Register Office Bucharest (gabriela.fierbinteanu@gmail.com).

[1] Amartya Sen, "Adam Smith's Market Never Stood Alone," Financial Times, March 11, 2009, http://www.ft.

[2] Innovative Solutions for Business Entry Reforms - A Global Analysis, July, 2012, Investment Climate Advisory Services of the World Bank Group, https://www.wbginvestmentclimate.org.

[3] Reforming Business Registration, A Toolkit for the Practitioners, January, 2013, Investment Climate, World Bank Group, https://www.wbginvestmentclimate.org.

After this short introduction about the process of business registration and the differences between what it is and what it should be, we will try to focus on the efforts made et EU level in the matter of publicity and cooperation in exchanging information through business registers.

1.EU legal framework in the field of publicity and cooperation between business registers

As the Article 2 from the consolidated version of the Treaty on European Union underlines[4] the Union has set itself as an objective, to promote economic progress through the creation of an area without internal frontiers promoting strengthening economic and social cohesion. "Trans-nationalization of companies"[5] increases competition between enterprises and that process has as a result higher performances, cooperation between firms, quality best practices and also a good dissemination of corporate information. In this part, a historical evolution of legal framework in EU legislation will be made.

First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC) (Official Journal L065, 14.03.1968 P.0008-0012)

The First Council Directive was a first step in the process of co-ordination of national provisions concerning especially limited liability companies and companies limited by shares, in consideration of the extended cross border activities of such companies. The Directive 68/151/EEC was structured in four sections regulating types of documents for which must be ensured compulsory disclosure, regime of the acts done by the representatives of the company before the companies acquire legal personality, the grounds for the nullity of companies and of course general provisions for Member States regarding amendments of the national laws. Was this the beginning of the globalization at this level as an "inexorable trend"[6]?

Since the activities of companies were extending beyond national territories there was the need, as provided in the body of the act, to coordinate the national provisions concerning nullity and basic documents of a company that should be disclosed in order for third parties to have their interests and assets protected and to ascertain the content of basic company documents, especially the persons who are authorized to bind the company .For this scope, the act stipulates in Article 3 that in each Member State shall be opened a file in a central register, commercial register or companies register for each of the companies registered therein, regulating also that disclosure of the documents shall be effected by publication in the national gazette appointed for that purpose by the Member State.

According to Article 1, compulsory disclosure regards the instrument of constitution and the amendments made, the persons or the body authorized to represent the company , information about the subscribed capital, the balance sheet, the transfer of the seat of the company, any measures related to a winding up procedure, appointment of liquidators and the striking off from the register.

In regard with nullity of companies, Article 11 captures 6 grounds providing this sanction, in a restrictive manner, specifying that ordering of nullity is the attribute for courts of law : the legal formalities were not complied properly, the company object are contrary to public policy or not

[4] Treaty on European Union, Consolidated version, eur-lex.europa.eu.

[5] Maresceau Kristof, Tison Michel, Cross-border business in the European Union and statutory disclosure requirements - using IT as a a catalyst for further market integration, November, 2007, Financial Law Institute, University of Ghent, papers.ssrn.com.

[6] Guillen, Mauro F, Corporate Governance and Globalization: Arguments and Evidence against Convergence, 1999, http://knowledge.wharton.upenn.edu/papers/839.pdf.

according to the law, the statutes does not contain compulsory elements(name of the company, total amount of capital, duration), the minimum amount of capital was not paid according to national law, founder members are incapable or the number of founder members is less than two, contrary to the national law.

Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal L 026 , 31/01/1977 P. 0001 - 0013)

As a next step in the coordination process provided for in Article 54(3) of the Treaty establishing the European Economic Community, whereas in order to ensure protection for shareholders and creditors of public limited liability companies and to make possible for any interested person to be acquainted with particulars of the company, including capital and the increase and reduction of the capital, the Directive, applicable to public companies limited by shares (die Aktiengesellschaft), prescribes in details the information that must appear in the instrument of incorporation or a separate document to be published according to a procedure laid down in the national laws-the registered office; the company name; the nominal value of the shares subscribed and conditions limiting the transfer of shares or governing the reducing or increasing of the capital; condition regarding assets acquisitions; rules for appointing the members which are responsible for de administration of the company; any special advantage granted during the time of the formation of the company, to anyone who has taken part in the formation and more important stipulates that minimum capital, "25 000 European units of account" must be subscribed in order to incorporate this type of company.

The two Directives were subject of debate at the Conference on Company Law and the Single Market held in Brussels on 15 and 16 December 1997, as a result of the consultation launched by a Commission's questionnaire in February 1997, having as the main goal the plan to design a path ahead in achieving the consensus in EU countries in the matter of the changes imposed by practice in company law area. As observed in the analysis of the received responses on the questionnaire, contained in the material presented at the Conference by Blanquet Francoise, "Analysis of the Responses received on the Questionnaire" the respondents felt that the provisions on disclosure contained by 68/151/EEC Directive need a facelift according to modern communication tendencies and also argued that a number of provisions in Directive 77/91/EEC must not be so rigid, because large contractual freedom should be allowed to businesses. The importance of modern internet technology allowing retrieving data's at any time and simple disclosure of the papers containing valuable information about companies(balance sheet, meetings and decisions of shareholders), enterprises publicity ensuring the transparency of company movements and the protection of possible partners and third parties, the need to establish if the publicity set off by the first Directive is constitutive or declaratory, development of the European Business Register Project[7], cross-border validity of statutory company information were only some of the topics at the Conference.

The first council Directive was repealed by the Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such

[7] The European Commission initiated in 1992 the European Business Register (EBR) project as part of the European Nervous System (ENS) Program, within the 3rd Framework Program of Research and Technological Development (DGXIII).

safeguards equivalent(JO L 258/11, from 01.10.2009).The 2009/101/EC Directive contains provisions clearly drowned regarding some of the topics presented at the Brussels Conference in 1997 - compulsory disclosure by companies of specific documents, ensuring the filing of documents by companies or other bodies by electronic means, possibility to replace the publication in a national gazette with other effective means, the treatment of the acts done by the organs of the company that exceed the powers that the law offers, provisions concerning nullity.

The Second Council Directive was amended by Directive 92/101/EEC(OJ L347/28.11.1992) (discussions about the dominant influence of a public limited liability company in another company in which holds the majority of the voting rights), Directive 2006/68/EC(OJ L264/25.09.2006) (the right for the creditors who had claims antedate the publication of the reduction of the capital decision to obtain adequate safeguards, the permission for the company to acquire its own shares, re-evaluation of the assets under the supervision of the management body), Directive 2009/109/EC(OJ L259. 02.10.2009)(establishing alternative publication through company websites regarding mergers/divisions) and **finally repealed by Directive 2012/30/EU** of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.(OJ L315/74 from 14.11.2012).

As some basic steps were made, the following acts of the Council were taken in the direction of coordination the provisions in case of mergers of public limited liability companies, Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (Official Journal L 295 , 20/10/1978 P. 0036 - 0043), Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, (OJ L 222, 14.8.1978), Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies(Official Journal L 310 , 25/11/2005 P. 0001 - 0009) introducing the obligation for the registry for the registration of the company resulting from the cross-border merger to notify the registry in which each of the companies filed the documents that the cross- border merger has taken effect so that deletion of the old registration is made.

Interesting problems were raised in the attempts to regulate the transfer of a registered office from one Member State to another and in the creation of the European Private Company. In the first matter, in 2007 the European Commission announced that the "14th Company Law Directive „is on hold. Different approaches of the Member states in the subject - principle of the place of incorporation and principle of the real seat - generated two ways to treat the transfer - moving the head office to another Member State without dissolution and without change of the legal regime governing the company is valid for the countries applying incorporation principle; the transfer of registered office under the real seat principle is not allowed unless the head office is also transferred. It was also suggested that a new construction can improve companies' mobility - European Private Company, legal form facilitating the operation of business in several Member States of small and medium enterprises.[8].As other voices noticed[9], the Commission's argument that there is no economic case for a Directive on cross - border transfer of the registered office having in mind the possibilities

[8] Impact assessment on the Directive on the cross-border transfer of registered office, Commission Staff Working Document, 2007, ec.europa.eu.

[9] Vossestein, Gert-Jan, Transfer of the registered office. The European Commission's decision not to submit a proposal for a Directive, Utrecht Law Review, 2008, http://www.utrechtlawreview.org.

are already offered through SE or cross- border mergers are not so strong, thinking that under a new Directive this transfer can be realized at lower costs and in a clearer manner. A new consultation on the cross-border transfers of registered offices of companies was launched by EU, Internal Market and Services DG, for a period from 14.01.2013 to 16.04.2013 having the purpose to get more in-depth information on the costs currently faced by the companies transferring their registered offices abroad[10].

2."The relationship between companies and society has become unbalanced in favour of the former. But companies need to serve society, rather than society serving the shareholders"[11].

In this section we will present two important EU regulations which try to cover simplification of procedures and to establish new horizons in the cooperation between business registers at this level.

Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (L376/36, Official Journal of the European Union, 27.12.2006)

In the context of this regulation there are few aspects to describe in connection with the paper:

● Simplification of the procedures - Member States must examine the procedures and formalities applicable to a service activity and examine the possibility to simplify them if the case

● points of single contact - Member States shall ensure for providers to complete some procedures and formalities through points of single contacts .The procedures regard ' declarations, notifications or applications necessary for authorization from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association' (Article 6)

● right to information - the Directive completes the picture specifying also the categories of information accessible through the points of single contacts (Article 7)

"(a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;

(b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities;

(c) the means of, and conditions for, accessing public registers and databases on providers and services;

(d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;

(e) the contact details of the associations or organizations, other than the competent authorities, from which providers or recipients may obtain practical assistance."

Directive 2012/17/EU of the European Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers(L156/1 Official Journal of the European Union, 16.06.2012)

Issues around the interconnection of business registers can be resumed in three categories[12]: failure in updating business information in the register of foreign branches, difficult cooperation

[10] "Consultation on the cross-border transfers of registered offices of companies – Consultation by DG MARKT", ec.europa.eu/internal market/consultations/2013/seat-transfer.

[11] Resolution - The Future of European Company Law, adopted at the Executive Committee of the European Trade Union Confederation, 6-7 March, 2012, www.etuc.org.

between registers in cross-border merger procedures and difficult cross-border access to business information.

Responding to the three segments the new adopted Directive establishes:

►A unique identifier for branches allowing them to be identified in a simple manner in communication between registers(the identifier shall comprise elements making possible to be identified the Member State, the domestic register of origin and the branch number in that register)(new paragraph added in Article 1 of the Directive 89/666/EC)

►The register for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect and the deletion of the old registration shall be effected only on receipt of that notification (new Article 13 in Directive 2006/56/EC)

►The register of the company shall make available information on the opening and termination of any winding-up or insolvency proceedings of the company and on the striking-off of the company from the register, if this entails legal consequences in the Member State of the register of the company (Article 5a inserted in Directive 89/666/EC).

The new Directive aims to facilitate cross-border access to official information defining a set of dates about companies available to third parties in all EU languages; to develop a framework for cooperation between EU business registers; to ensure the up-date regarding branches is respected and completed in time; to develop an easier way of tracking legal entities introducing the unique company identifier composed of the national registration number and an international prefix; to introduce reasonable time frames for communication.

The interconnection represents a proposal included in the Commission's Communication on the Single Market Act, in the effort to create a business-friendly legal environment and also is in strong connection with the European e-Justice Portal which serves as the single access point for legal information in the EU, and will include also databases and information regarding commercial registers.

Continuing the innovation brought by Directive 2006/123/EC**,** the European Commission launched in May 2009 a pilot project, SPOCS - Simple Procedures Online for Cross- border Services - aiming to build the next generation of online portals Point of Single Contact. SPOCS develops an interoperability layer meant to foster the services economy in EU by facilitating the Service Providers to apply using Point of Single Contacts for businesses in the Member States[13].

Another interesting project[14], developed with the financial support from the Prevention of and Fight against Crime Program Directorate General Home Affairs European Commission, must be mentioned in sustaining the idea that cooperation between business registers is more than a simple dissemination of information, implications being larger than that. The project BOWNET (identifying the Beneficial Owner of legal entities in the fight against money laundering Networks) is a feasibility study having the role to determine what information can be used and must be developed to obtain a support system which can be used in the fight against money laundering and when investigating beneficial owners of suspicious corporate entities.

Conclusions

Facilitating access to information about companies for third parties, including public authorities or enterprises from different Member States was one of the goals of the Directive

[12] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, http:// eur-lex.europa.eu.

[13] Simple Procedures Online for Cross- border Services project, http:// www.eu-spocs.eu.

[14] Beneficial Owner of legal entities in the fight against money laundering NETworks project, http:// www.bownet.eu.

68/151/EEC and since 1968 evolution of the EU legal framework determined constant improvement in the field of publicity and cooperation. Amendments in 2003 of the Directive 68/151/EEC stipulating the existence of the electronic business registers, cross- border mergers Directive 2005/56/EC or Directive 2012/17/EU of the European Parliament and of the Council are only few of the proofs of the fact that economic reality imposes cross-border procedures and transparency as a necessity. As the Internal Market and Services Commissioner Charlie McCreevy said when the public consultation on identifying better ways to cooperate between business registers was released by the European Commission: "The current financial crisis highlighted once again the importance of transparency across the financial markets. Improving access to up-to-date and official information on companies for creditors, business partners and consumers could serve a means to restore confidence in the markets. Business registers play an important role in ensuring transparency and legal certainty in Europe."[15] .Having in mind also the EUR 69 million savings brought by the Directive 2012/17/EU we can only trust, but it will be subject of analyses, that finally, administrative costs, waiting time and unreliable information on companies are history and all the money saved will go into economic growth.

References

- Amartya Sen, "Adam Smith's Market Never Stood Alone," Financial Times, March 11, 2009, http://www.ft..
- Innovative Solutions for Business Entry Reforms - A Global Analysis, July, 2012, Investment Climate Advisory Services of the World Bank Group, https://www.wbginvestmentclimate.org.
- Reforming Business Registration, A Toolkit for the Practitioners, January, 2013, Investment Climate, World Bank Group, https://www.wbginvestmentclimate.org.
- Maresceau Kristof, Tison Michel, Cross-border business in the European Union and statutory disclosure requirements - using IT as a a catalyst for further market integration, November, 2007, Financial Law Institute, University of Ghent, papers.ssrn.com.
- Guillen, Mauro F, Corporate Governance and Globalization : Arguments and Evidence against Convergence, 1999, http://knowledge.wharton.upenn.edu/papers/839.pdf.
- Treaty on European Union, Consolidated version, http://eur-lex.europa.eu.
- Impact assessment on the Directive on the cross-border transfer of registered office, Commission Staff Working Document, 2007, http://ec.europa.eu.
- Vossestein, Gert-Jan, Transfer of the registered office. The European Commission's decision not to submit a proposal for a Directive, Utrecht Law Review, 2008, http://www.utrechtlawreview.org.
- Consultation on the cross-border transfers of registered offices of companies – Consultation by DG MARKT, http://ec.europa.eu/internal_market/consultations/2013/seat-transfer.
- Resolution - The Future of European Company Law, adopted at the Executive Committee of the European Trade Union Confederation, 6-7 March, 2012, www.etuc.org.
- Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, http://eur-lex.europa.eu.
- Directive 2012/17/EU of the European Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers(L156/1 Official Journal of the European Union).
- First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC)(Official Journal L065).

[15] Getting better access to company information: Commission consults on the interconnection of business registers, http://europa.eu/rapid/press-release.

- Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal L 026).
- Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market(L376/36, Official Journal of the European Union, 27.12.2006).
- Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.(L315/74, Official Journal of the European Union, 14.11.2012).
- Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent(JO L 258/11, from 01.10.2009).

CONSUMER'S RIGHT TO WITHDRAW

ANCA NICOLETA GHEORGHE[*]
CAMELIA SPASICI[**]

Abstract
The right of withdrawal (of a contract) belongs to the consumer, and is an essential means for the improvement of regulations that protect the consumer.. Right of withdrawal is not a recent creation and is not even specific to the consumer field. He was previously recognized in civil and commercial law (without special regulation).
The right to withdraw may even have as ground the parties will. Thus, based on the contractual freedom, the parties may agree that one of them has the right to terminate the contract unilaterally
The possibility of unilateral denunciation of the contract, gives the consumer, added protection by being able to reflect the decision and to check how the trader fulfil its obligations.
In this context, through its effects, the right of denunciation, forces the professional parties to conduct themselves as fair as possible to the consumer and to execute the contract properly. In the study of the consumer protection, the time of conclusion is essential because in this stage is manifested, the inequality between the consumer and professional.
Thus, the lack of information, the major of products and activities, commercial practices, influence the formation of consumer will, preventing the expression of a freely and knowingly consent.

Key words*: contract, consumer, unilateral denunciation, contractual freedom, obligations.*

Introduction

The regulations in the field of consumers law, have determined the occurrence of new ways of concluding the contracts between professionals and consumers. Thus, it has been settled the legal regime of distance and off-premises contracts[1]. The field concerning the effects of distance and off-premises contracts was seriously affected, inter alia, by a new institution, particular for consumptions law, the right to withdraw of the consumer. The most important regulations containing provisions concerning the right to withdraw are:

- O.G. no.106/1999 on contracts concluded off-premises;
- O.G. no. 130/2000 concerning the consumer protection in the conclusion and implementation of distance contracts;
- Law no. 296/2004 (Consumer Code);
- O.G. no. 85/2004 concerning the consumer protection, in the conclusion and implementation of distance contracts that provide financial services.

The right to withdraw – the concept

The right to withdraw (a contract) that belongs to the consumer is an essential means for the improvement of regulations that protect the consumer. Under this right, the consumer has the responsibility to decide on the existence and effects of the contract without being required, the consent of the contracting partner. The right to withdraw is not, however, a recent creation and is not even specific for consumer protection field. He was previously recognized in civil and commercial law (without a special regulation).

[*] Lecturer, PhD; Faculty of Law, "Nicolae Titulescu" University of Bucharest (av.ancagheorghe@yahoo.com).
[**] Lecturer, PhD, University of Bucharest, Faculty of Social and Administrative Science (av_cameliastanciulescu@yahoo.com).

For example, the Civil Code has express provisions regarding the existence of this right in the regulation of certain contracts. Thus, according to art. 1816 part. (1) NCC, if the rental was concluded without determining the duration, either party may terminate the contract by notice.

The doctrine qualifies the right of withdraw (provided by common law) as an exception from the irrevocability of the contract[2].Right to withdraw may even has as ground the parties. Will. Thus, based on contractual freedom, the parties may agree that one of them has the right to terminate the contract unilaterally[3].The possibility of unilateral denouncement of the contract, gives the consumer extra protection by being able to reflect the decision and to check how the trader fulfils its obligations. In this context, through its effects, the right of denunciation forces the professional to have a fair conduct as possible to the consumer and to execute the contract properly.

Legal nature of the consumer's right to withdraw In doctrine, the right to withdraw of the consumer was established by law and remains a subject of dispute. The main issue is related to this special institutions harmonization, to the general theory of contracts. In terms of its legal nature, the consumer's right to "withdraw" raises two issues:

a) the consumer's right to withdraw is related to the formation of the contract or its termination phase?

b) if the consumer's right to withdraw is related to the conclusion, then: What validity condition is affected (consent, capacity or cause)?.

Trying to answer the above questions we do brief clarification. The effects of the legal act are ordered by following three rules (with rank of principles): the principle of compulsory force, irrevocability principle and the principle of relativity. Based on the principle of compulsory force (*pacta sunt servanda*) the contracts legally concluded have legal effects (mandatory) for the contracting parties. According to the principle of irrevocability contract cannot be denounced unilaterally. Thus as a rule, once the subjects gave their consent and the contract was legally concluded, the parties cannot unilaterally return to the existence of the contract, being obliged to execute the contract terms. It follows that the right of withdraw constitutes an exception from the above rule (except as may be imposed by law or contract, through the will of parties).

In particular through acquis provisions, in order to protect consumers' interests, the right to withdraw of the buyer, was governed mainly for distance contracts, which provided products and services.

Thus, according to art. 82 of Law no. 296/2004 (Consumer Code) contract for purchasing products and services should require a specific clause about the consumer's right to withdraw the contract. Consumer's right to withdraw "cannot be cancelled by any contractual provision or agreement between the parties, in cases provided by law, it is considered null and void." In this case, the rights of the parties on a fair compensation will not be affected by the withdraw (art. 84 C. consumption).We mention, that right to withdraw, belonging to the consumer, received several qualifications in literature.

The French doctrine[4], has been argued that the signing of the contract by the customer is only a stage in the gradual formation of his will.

Thus, consumer will, is not final, because he, it is able to reflect in the period that time of denunciation offers him (hence, the right of denunciation does not affect the binding force of the contract, the exercise of the right being placed at a time when the contract is not finally completed[5]).In another opinion (this time given by the national doctrine), it was considered that we

[2] See G. Boroi, op. cit, (2008), p 211 (which makes direct reference to the termination of the rent agreement for an indefinite period).

[3] Obviously, in this case, we are in the presence of exceptions from the the binding force of the contract, but an expression of free will.

[4] See J. Goicovici, Progressive formation of the contract, Wolters Kluwer Publishing, Bucharest, 2009, p 29.

[5] The consumer's right to withdraw is not an issue of revocation of the contract, see G. Boroi, op. cit, (2008), p 208..

are in the presence of a faculty granted (*ad legem*) to the "purchaser" to "withdraw from the contract signing", which translates legal to the possibility of deny (return) the consent given in the concluding the contract[6]. In the above conditions, denunciation is not a way to terminate the contract, but a "withdrawal of consent". Therefore, in substance, the faculty given to the consumer translates into his right to return the consent previously given at conclusion of the contract. Please note that French law is also established a "time of reflection". Thus, it is compulsory; the contract may not be concluded only after the expiry of that period.

Although it is only right to withdraw regulated belonging consumer and professional it is possible that enjoy a similar right. Worth mentioning that the exercise of the right to withdraw can be made without the obligation of the consumer to justify his option . The right to withdraw is not susceptible of abuse of law and cannot be censored by the county court.

The judicial control can be exercised over compliance with the formal requirements, for example, deadline set by the law, the manner of communication the will of the consumer to the trader .The right to withdraw is a potestative right[7] .

Exercising the right of denunciation draws the retroactive abolition of the contract, with the consequent of the refund of benefits. Although the right of denunciation constitutes a better alternative for the consumer, it may resort to other means made available either by common law or by specific regulations in this area in order to protect their interests. Thus, it may request cancellation of contract for fraud of consent or the annulment of a clause as being abusive. Finally, we consider that in the study of consumer protection, the time of conclusion is essential because at this stage is manifested the inequality between consumer and professional. Thus, the lack of information, the improvement of products and activities, the commercial practices influence the formation of consumer will, hindering the expression of a freely and knowingly consent.

The withdraw in distance contracts

The main regulations on the right of withdraw of contracts are included in O. G No. 130/2000 on consumer protection in distance contracts the conclusion and implementation. The contract concluded in distance is a contract for the supply of goods or services concluded between a professional and a consumer, under an organized system by the trader who uses exclusively, before and at the conclusion of this contract, one or more away communication techniques [art. 2 par. (1). a) of the ordinance][8]. According to art. 7. (1) of the ordinance, in the distance contract, the term to withdraw the contract by the consumer is 10 working days.

We specify that it does not support penalties for late withdraw and does not require "invoking any reason". An only cost that may involve to the consumer is the direct cost of returning the goods.

The 10 days specified for the exercise of this right shall run differently in relation with the object of the contract:

- For products it begins from the date of receipt by the consumer;
- For services, from the day or after the conclusion of the contract or agreement, on condition that the delay does not exceed 90 days. The flowing of the term of withdraw is conditioned by providing the information's required by law to consumers.

---

[6] The period of reflection (of withdrawal, the penalty, etc.) should not be confused with the term of reflection (granted to the consumer ,prior to the conclusion of the contract, for example, for the purchase of a real estate) or grace period (granted by the court to the debtor for payment of the debt), see G. Boroi, L. Staniciulescu, Civil institutions, Hamangiu Publishing, Bucharest, 2012, p 398.

[7] Potestative rights assigns to the owner , the power to interfere unilaterally in existing legal situations to amend them, extinguish or create new situations, see I. Reghini Considerations on potestative rights in D.R.C. No. 4/2003, p 236.

[8] Remote communication technique can be "any means that can be used for the conclusion of a contract between the trader and the consumer and does not require the simultaneous physical presence of both parties" [Art. 2 par. (1). d) of the ordinance].

According to art. 3 of the ordinance before the end of the contract, in due time, accurate and complete, the professional must inform the consumer about :

- Identity of the trader, address and how to contact him, phone / fax, e-mail and the unique registration code;
- Essential characteristics of the product or service;
- The price of goods or services charges, all taxes included;
- The costs of delivery, if any;
- Arrangements for payment, delivery or performance;
- The right to withdraw the contract, except as provided in the present ordinance;
- The cost of the use of remote communications technology, where it is calculated other than the basic rate;
- The validity of the offer or the price;
- Duration of the contract, for contracts providing current or periodic supply of a product or service;

The deadline for execution of the obligations under the contract.

The above information's must be communicated in a clear, easily understood by the consumer, by any means adapted to the technique of distance communication used, taking into account the principles of good practice in commercial transactions and the principles governing the protection of minors and other persons without legal capacity, and the principles of good morals [art. 3. (2) of the ordinance][9].

According to art. 4. (1) of the ordinance, the consumer must receive, in writing or on another durable medium available and accessible to him in due time, during the execution of the contract and no later than the time of delivery, the following:

- the confirmation of the information's (if they have not been submitted prior to the conclusion of the contract) in that cases where goods are not for delivery to third parties;
- the conditions and procedures for exercising the right of withdraw. Contract clause to exercise the right of denunciation shall have the following formulation, drafted in bold type :

"*Consumers have the right to notify in writing the trader, the denunciation of the purchase without penalty and without giving any reason, within 10 working days of the receipt of the product or in the case of the services, of the conclusion of the contract*"

In case of omission of the unilateral denunciation clause , the product or service is considered delivered without request control from the consumer [art. 4. (1). b)].

Other professional data, to be transmitted to the consumer (during execution of the contract) are: address, telephone, e-mail, information on after-sales service and guarantees, conditions for withdraw the contract (if it lasts indefinitely or the period exceeds one year).

In the case of exercising the right of withdraw the contract by the consumer, the professional has the obligation to repay the amounts paid by the consumer, free of charge from the repayment of amounts. Reimbursement will be made within 30 days from the date of denunciation of the contract by the consumer (art. 8 of the ordinance). If case that for the product or service, subject of the contract, the professional credits the consumer, directly or under a merchant agreement with a third party ,with the right of withdraw the contract the credit contract will be ceased without penalty for the consumer. (art. 9 of the Ordinance).

According to art. 10 of the Ordinance, the consumer may denounce the following types of contracts, unless the parties have agreed otherwise:

a) contracts for the supply of services whose performance has begun, with the consumer's agreement, before the expiry of 10 working days;

[9] The above provisions do not apply to services which are performed by means of distance communication techniques, if these services are provided once and their billing is handled by the communication provider.

b) contracts for the supply of goods or services whose price depends on fluctuations in the financial market which cannot be controlled by the trader;

c) contracts for the supply of goods made to the consumer's specifications or clearly personalized products and those which, by their nature cannot be returned or are liable to deteriorate or expire rapidly;

d) contracts for the supply of audio or video recordings or computer software if they have been unsealed by the consumer;

e) contracts for the supply of newspapers, periodicals and magazines;

f) contracts for gaming and lottery services.

In case of dissolution of the contract, both contracting parties must repay benefits received. Because the contract is abolished retroactively, the retention of benefits is not possible (being concerned). Thus, the professional must return the amount received, within 30 days from the date of denunciation of the contract, and the consumer will have to return the product supplied to him and also to bear the costs of that refund. We specify that the law does not contain provisions on the state in which the good can be returned. In this case we consider that the good is returned in the state it is at the time of denunciation of the contract[10].

For services, the refund of benefits is not possible, however, the amounts paid by the consumer must be returned (in this case, the common law principles concerning the unjust enrichment cannot be applied because it would lead to the removal of the protection established by imperative rules for the benefit of the consumer.).

Cancellation of the contract takes effect also on the credit contract. Thus, the credit agreement by which the professional credits the consumer directly or under a merchant agreement with a third party, along with the unilateral denunciation, the distance contract shall automatically be terminated without penalty for the consumer (art. 9 of the ordinance).

The withdraw under the conditions of O.G. no. 85/2004

O.G. no. 85/2004 is governing the protection of consumers on the conclusion and implementation of distance contracts for financial services. It follows that, purpose of the regulation through the legal ordinance is the financial services that occur between financial services providers and consumers. The consumer has the right to withdraw the distance contract, within 14 calendar days without penalty and without any reason necessary. As an exception, in the case of distance contracts whose object are life insurance and pension contracts relating to individual transactions, the period during which the consumer may exercise right to withdraw is 30 days (art. 9 of the ordinance).

According to art. 10 of the ordinance, the period of 14 days (or 30 days) begins:
- from the day of the conclusion of the contract, unless the contract relating to life insurance covers, for which it will begin to run from the date when the consumer is informed that the contract is concluded;

- from the day the consumer receives the contractual terms, conditions and information's provided by law. According to art. 7. (1) of the ordinance, the supplier must inform the consumer, entirely, about his contractual terms, conditions and information's provided by law, in writing, on paper or on a durable medium available and accessible to the consumer, in due time before it can be bound arising from the signing of a distance contract or acceptance of an offer of such financial service remotely[11].

[10] Between the conclusion of the contract and its denunciation, the consumer can use the property, but to the legal provisions, the trader is obliged to receive it without charged and deducted from the price that must repay in full to the consumer.

[11] Before concluding a distance contract or at the time of the offer, the supplier is required to inform the consumer in the due time, accurate and complete on the following elements related to his identification ,concerning at

We mention that the failure to execute the prior information obligation has as result the delay of the denunciation term (and not its extension, as it appears under the regulation of the Government Ordinance no. 130/2000).According to art. 11 para. (1) of the ordinance, the right to withdraw the contract does not apply to financial services whose price depends on fluctuations in the financial market which cannot be influenced by the supplier, that may arise during withdraw the contract. Thus, are exempted from the reglementations of O.G. no. 185/2004: foreign exchange transactions, money market instruments, including government securities with maturity less than one year certificate of deposit, securities, units in collective investment, financial futures, including equivalent cash-settled final funds, forward rate agreements; interest rate swaps, currency and shares, options on any instruments, including equivalent cash-settled instruments (this category includes options on currency and interest rate).

According to art. 11 para. (2) of the ordinance, the right to withdraw the contract does not apply to:

- travel insurance policies for baggage or other short-term insurance policy with a maximum period of one calendar month;
- contracts fully executed by both parties at the express request of the consumer, brought before it to exercise the right to withdraw the contract;

Likewise, the right of denunciation does not apply to credit agreements bearing on acquiring a timeshare right of real estate [Art. 11 para. (1) of the ordinance].To exercise the right of withdraw, the consumer is bound by the arrangements that have been established and communicated by the supplier. Instead, the methods used by the supplier must give the consumer the opportunity to prove his right by any means, before the expiry of 14 days. In the situation that, to a contract for financial services joined another distance contract for services provided by the supplier, exercising the right to withdraw will cause additional the cancellation of the contract [art. 12. (2) of the ordinance].When exercising the right to withdraw the contract, the consumer may be required (by the provider) to pay, without undue delay, expenses related to the service already provided in accordance with the contract, without additional costs. In this case, the performance of the contract may only begin after the consumer has given his consent (article 13 of the ordinance).

Consumers have the right to request cancellation of the contract if the supplier does not communicate contractual terms, the conditions and the information's provided by law (without penalty and without charge - art. 20 of the ordinance).

Since cancellation is a penalty of the non-culpable contractual terms, it should be noted that under art. 20, cancellation occurs also for failure to fulfil pre obligations imposed by law.

Since the special law, does not specify a period within which the consumer may request cancellation, we consider that the incident in question is the 3 year period provided in art. 2517 of the Civil Code. We appreciate that cancellation of the contract may be requested by the consumer, even if he has not exercised his right to withdraw.

Given the above conditions, cancellation can occur because of the lack of information and also in the situation of fulfilling this obligation after the time established by binding law. Similarly, cancellation may be required if the provider has not complied with the practical arrangements for information, according to art. 7. (1) of O.G. no. 85/2004.

We conclude our concise doctrinal and legislative exposure about the right to withdraw of a contract by mentioning, that this right cannot be cancelled by any contractual provision or agreement between the parties. Any clause to the contrary, is considered null and void (art. 17 of ordinance no. 106/1999).

---

least: the name of the provider, representative or intermediary characteristics of the service provided, price, etc.. (art. 4 of the ordinance). The information's concerning contractual obligations must be provided to the consumer in the pre-contractual stage. The information's must be in accordance with contractual obligation resulting from the law applicable to the distance contract if it is concluded (art. 6 of the ordinance).

Conclusions

Through the present study, we aimed to tackle a topical issue for national practice and doctrine. Although it is regulated only as a right of the consumer, is not excluded that the professional benefit as well of a right of withdraw a professional and as a . The right of the consumer, to withdraw his consent, established by the Consumer Code and also by special laws is a legal right and free of charge way to withdraw the consent.

References

- G. Boroi, L. Staniciulescu, Civil Institutions, Hamangiu Publishing, Bucharest, 2012.
- Boroi, G. Civil. The general part. People, Third edition, revised and enlarged, Hamangiu House, Bucharest, 2008.
- J. Goicovici, Progressive formation of the contract, Wolters Kluwer Publishing, Bucharest, 2009.
- Reghini, Considerations on potestative rights in D.R.C. No. 4/2003.
- O.G. no.106/1999 on contracts concluded off-premises.
- O.G. no. 130/2000 concerning the consumer protection in the conclusion and implementation of distance contracts.
- Law no. 296/2004 (Consumer Code).
- O.G. no. 85/2004 concerning the consumer protection, in the conclusion and implementation of distance contracts that provide financial services.
- Civil Code.

CONSIDERATIONS ON GOOD ADMINISTRATION

ANA-MARIA GHERGHINA[*]
ISABELA STANCEA[**]

Abstract
The concept of good administration has a double meaning, concerning on one hand the means of providing services by the public authorities, and on the other hand, measures concerning the relation between the public authorities and the citizens. We believe that good administration considers the manner in which the State structures holding powers in matters of administration acts within the limits of the law and using the social power entrusted on them, in order to carry out these tasks in the most reliable, ideal and flawless manner.
The principle of legitimacy is set out in the preamble of the European Convention on Human Rights under the words "rule of law", which, in public administration, means that the organization and activity of public authorities should be made on the basis of law and within the limits set by law

Keywords: *good administration, public authorities, citizens, Human Rights*

1. The concept of good administration

The concept of good administration has a double meaning, concerning on one hand the means of providing services by the public authorities, and on the other hand, measures concerning the relation between the public authorities and the citizens. In this sense, the right to good administration includes not only the right of the citizen so that the authorities observe a number of standing orders, but also the right to make sure that they generate the best results.[1]

Another opinion states that good administration has been defined as a fundamental principle of the Administration, which presumes the objective assignment of power at each level, with the well-defined specification of the manner of operating at these levels, an important role in its accomplishment being held by the involvement of the civil society in the act of government and making the society accountable for it[2].

Concerning the legal nature of the right to good administration in the doctrine, it has been shown that it represents a complex institution and has the legal nature of a fundamental right, with a wide-ranging content that includes a multitude of attributes relating to the organization and functioning of the Administration, acknowledged as independent rights[3].

---

[*] Assistant Lecturer, PhD candidate, "Constantin Brâncoveanu" University of Piteşti, Faculty of Law (gherghina_anny@yahoo.com).
[**] Assistant Lecturer, PhD candidate, "Constantin Brâncoveanu" University of Piteşti, Faculty of Law (stanceaiza@yahoo.com).

[1] Naomi Reniuţ-Ursoiu, "Dimension of a good administration from the perspective of the Convention for the Protection of Human Rights and Fundamental Freedoms" (Dimensiunea bunei administrări din perspectiva Convenţiei pentru Apărarea Drepturilor Omului şi a Libertăţilor Fundamentale), in the revue "Good administration, from vision to action" (Buna administrare de la viziune la acţiune), Comunicare.ro Publication, Bucharest, 2011, p. 257.

[2] Ion Popescu-Slăniceanu, Diana Marilena Petrovszki, Cosmin Ionuţ Enescu, "A better conduct of the public officers for a better administration" (O mai bună conduit a funcţionarilor publici pentru o mai bună administrare), in the revue "Good administration, from vision to action" (Buna administrare de la viziune la acţiune), Comunicare.ro Publication, Bucharest, 2011, p. 180.

[3] Emanuel Albu, "Percepts of the right to good administration under the authority of the European Court of Human Rights" (Principiile dreptului la o bună administrare în jurisprudenţa Curţii Europene a Drepturilor Omului), in E. Bălan, C. Iftene, G. Varia, M. Văcărelu, "The executive contemporary right-towards an unitary notion of the Romanian doctrine and practice" (Dreptul administrativ contemporan-spre o concepţie unitară în doctrina şi practica românească), Comunicare.ro Publication, Bucharest, 2008, p. 128.

The right to good administration should be understood as a particularly complex legal institution that seizes the legal nature of a fundamental right which includes in its contents a series of aspects on the organization and functioning of the Administration; however, this right must be regarded also in the terms of the requirements the State has to organize and to guide as efficiently as possible the public administration and to guarantee the effectiveness of and compliance with the law of the whole activity of public authorities and institutions.

We believe that good administration considers the manner in which the State structures holding powers in matters of administration acts within the limits of the law and using the social power entrusted on them, in order to carry out these tasks in the most reliable, ideal and flawless manner. Only if these authorities fulfil properly their duties we can speak of a good administration. Beyond these limits, we refer only to a citizen's right in its relation to the public administration authorities.

2. The evolution of the concept of good administration in national legislation

Living in a given community requires knowing and keeping its fundamental values. It is also necessary the observance and enforcement of the rules of conduct imposed by the judicial norms accustoming to good discipline the human behaviour in social relationships formed in that community to create and protect these values[4].

The principles standing at the foundation of the relations between the administration and the administered ones are determined by a social communication style. The communication with the citizens is examined by reference to a bureaucratic administration, seen as an authentic caste, separated from the rest of the society and which, due to the prerogatives it disposes of, inflicts itself to the administration[5].

The Constitution of 1965 regulates very briefly, having rather a deductive character, in Article 34, the right of the citizens to good administration "right to petition is guaranteed. State agencies are required to resolve citizens' complaints concerning personal or public rights and interests", and in Article 35 "those injured in a right or a wrongful act of a state agency may request the competent bodies, in accordance with the law, the annulment of the act and the restitution".

Therefore, under the Communist rule, one could not speak objectively about good administration; all governments that have succeeded at the head of the Romanian State accused the disastrous legacy left by the previous government to justify the failure of a fair and consistent administration. The worse is that this administration crisis that has been perpetuated from a political stage to another had a very negative impact on the citizens and taxpayers who, ill-informed or, above all, for lack of other opportunities, chose those who were part of the public administration leadership.

Following 1989, a first regulation that could address citizens' right to good administration emerges from Article 51 of the revised Constitution which states that: "Citizens have the right to address public authorities by petitions formulated only in the names of the signatories. Legally established organizations have the right to forward petitions, exclusively on behalf of the bodies they represent. The public authorities are bound to respond to petitions within terms and conditions established by law".

We think that this statement is not comprehensive enough to entitle us to conclude that it would represent the right to *good administration*; we can say that this article only covers certain

[4] Alina Nicu, "The European Code of Good Administrative Behavior and the Romanian administrative phenomenon" (Codul european de bună conduită administrativă şi fenomenul administrativ românesc), University of Craiova, p.108.

[5] Dana Georgeta Alexandru, "Evaluating the right to a good administration in the context of the strategies concerning the implementation of the Charter of the Fundamental Rights" (Evaluarea dreptului la o bună administrare în contextual strategiilor privind implementarea Cartei Drepturilor Fundamentale), in the revue "The consolidation of the administrative capacity in the context of good administration" (Consolidarea capacităţii administrative în contextul bunei administrări), Comunicare.ro Publication, Bucharest, 2011, p. 275.

rights the citizen acquires in his/her relation with the government, as well as certain correlative obligations incumbent upon public authorities in regard to the citizens.

Moreover, the Basic Law states in Article 52 that "the person injured in his/her right or a legitimate interest, by a public authority, through an administrative act or an outstanding application in legal terms, is entitled to acknowledgment of those rights or the legitimate interest, the annulment of the act and the restitution".

In the same register, the Constitution stipulates in Article 54: "Citizens holding public offices, as well as officers are responsible to faithfully fulfil their obligations and, to this end, shall take the statutory oath".

In our opinion, these constitutional provisions are not such as to justify but the need to observe certain basic and fundamental rights of the citizen in his/her relation with public administration authorities, rights emerging from the purpose of establishing these authorities and not a right to good administration. Beyond these regulations - to be able to speak about the right to good administration - it is necessary that public administration authorities' powers of organization and of the practical implementation and enforcement of the law be self-fulfilled, without the intervention of the State's coercive force, without other forms of interference.

Following 1989, Romania has known a series of laws that regulate broadly or narrowly the activity of the public administration authorities in its relation with the citizens, but none of them define the concept of *good administration*. These laws can include:

- Law no. 188/1999, on the Statute of Public Servants, republished, amended and updated[6];
- Law no. 7/2004, on the Code of Conduct for public servants[7];
- Law no. 477/2004, on the Code of Conduct of the contractual staff of public authorities and institutions[8];
- Law no. 52/2003, on decisional transparency in public administration[9];
- Law no. 571/2004, on the protection of personnel in public authorities, public institutions and other units reporting violations of law[10];
- Law no. 161/2003, on a series of measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and punishing corruption[11].

Law no. 188/1999 on the Statute of Public Servants counts as stated aims "to ensure, in accordance with the legal provisions, a secure, professional, transparent, efficient and impartial public service, in the interests of citizens, but also of the public authorities and institutions in central and local public administration"[12], which presumes providing a basic right of citizens and we can not speak about a definition of the concept of good administration.

Law no. 477/2004 on the Code of Conduct of contractual staff of public authorities and institutions, in Article 2, similarly to Law no. 7/2004, sets as main objective "improving the quality of public service, a good administration in achieving the public interest, as well as eradication of bureaucracy and of corruption in public administration". Therefore, without defining the concept of good administration, this Law establishes as objective the performance of good administration.

Law no. 52/2003 on decisional transparency in public administration is limited to determining the minimal procedural rules applicable to ensure the decisional transparency within public administration authorities.

---

[6] Law no.188/1999 has been republished in the Official Gazette of Romania, Part I, no. 251/March the 22nd, 2004 subsequently amended by Law no. 344/2004, Government Emergency Ordinance no. 92/2004, Law no. 511/2004, Law no. 512/2004, Law no. 76/2005, G.E.O. no. 39/2005.

[7] Published in the Official Gazette of Romania, Part I, no. 157/February the 23rd, 2004.

[8] Published in the Official Gazette of Romania, Part I, no. 1105/November the 26th, 2004.

[9] Published in the Official Gazette of Romania, Part I, no. 70/February the 3rd, 2003.

[10] Published in the Official Gazette of Romania, no. 1214/December the 17th, 2004.

[11] Published in the Official Gazette of Romania, no. 279/April the 21st, 2003.

[12] Article 1, align. (2) of Law no.188/1999.

Law no. 571/2004 on the protection of personnel in public authorities, public institutions and other units reporting violations of Law is to regulate measures concerning the protection of citizens having noticed violations of Law by public authorities and institutions.

Law 161/2003 establishes measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and punishing corruption.

Therefore, not even the legislation that followed Law no. 188/1999 has defined the concept of good administration, limiting itself to only list the objectives that formed the basis of these regulations. These objectives, almost common to these laws, consider regulating the professional conduct rules of public servants in order to achieve social and professional relationships able to maintain to the highest level the reputation of the civil service institution, the knowledge of professional conduct that citizens are entitled to expect from public officials in the exercise of public functions and, not least, the establishment of a climate of trust and mutual respect between citizens and institutions or public administration authorities.

We appreciate that these laws issued separately have not fulfilled their designation to create a coherent reform in public administration and did nothing but to resume, to repeat the already existing resolutions without bringing an addition of quality in the administrative work and their accumulation in a single act (perhaps having the dimensions of a code) would be an ideal solution.

As noted, even after 1989, so much the less before that time, the concept of good administration has not been defined by a coherent law, even the constitutional legislator regulating only provisions concerning the rights and obligations that public administration has in relation with the citizens.

However, in Europe, the concept of good administration is shaped indirectly in Article 41 of the Charter of Fundamental Rights of the European Union, which, without defining it, states that this right includes:

- "The right of every person to be heard, before taking any individual measure which would affect him;
- The right of every person to have access to his file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- The liability of the Administration to give reasons for their decisions"

As a result of Romania's accession to the European Union, it has been imposed the need to observe the rules of European institutions for the purposes of adapting national legislation to the EU. This activity of transposition in the national legislation concerning all areas, of the Community documents with provisions on the contrary, has generated the need for radical reforms in public administration and, naturally, a number of shortcomings, in the sense that the difficulty level of the tasks for staff in public administration has increased.

Therefore, as a result of these obligations established by the European community for Romania, but also for the necessity to create a document encompassing and ensuring the implementation of the principles underlying the exercise of a public function, the Code of Conduct for public servants was adopted pursuant to Law no. 7/2004. This code was created after developing the European Code of Good Administrative Behaviour based on the idea of MEP Roy Perry, idea stated in 1998.

On September the 6th, 2001, the European Parliament adopted a resolution on a Code of Good Administrative Behaviour which would be met by the staff in the EU institutions, in order to strengthen the relations between the EU and its citizens. Clear, short and concise drafting of the rules of this Code stands out. After the scope of the regulation is set out in Articles 1 and 2, one moves on to present the principles of good administrative behaviour in a direct manner, naming each article with the title of the regulated principle, the regulation itself containing no more than four paragraphs[13].

[13] Alina Livia Nicu, "The European Code of Good Administrative Behavior and the Romanian administrative phenomenon" (Codul European de bună conduită administrativă şi fenomenul administrativ românesc), paper published

This Code of Conduct is based on the following principles:

- The Constitution and the rule of law. This principle should underpin any non-legal document, as its establishment mainly ensures that the Basic Law is particularly observed. This principle appears as a normal aspect, well known, undisputed in the legal literature; the rule of the Constitution reveals its unique quality to base at the top of the hierarchy of the legal system in any state law. Consequently, in the given circumstances, by ruling one must understand the subordination of public authorities, public servants, to the Constitution, which gives it more efficiency, necessary to guarantee the fundamental rights and freedoms of citizens.

The principle of legitimacy is set out in the preamble of the European Convention on Human Rights under the words "rule of law", which, in public administration, means that the organization and activity of public authorities should be made on the basis of law and within the limits set by law[14].

- The principle of priority of public interest, whereby any public servant has the duty to place the public interest above the personal one while performing job duties;

- The principle of equal treatment of citizens before the public institutions and authorities;

- The principle of professionalism requires that the public servant performs his duties with responsibility, competence, promptness, reliability and efficiency, the public servant being responsible to thus fulfilling his work tasks, both in regard to his superiors, and to the public authority they represent.

- The principle of impartiality and independence states that public servants are required to show an impartial attitude towards any kind of interests in exercising their duties. The independence principle recurs in numerous regulations on the organization and functioning of national and European institutions, and its observance does not rule out the items of the relation of authority the public servant finds himself in regard to the institution or the authority he works for.

- The principle of moral integrity requires that public servants are prohibited to ask or to receive, directly or indirectly, for themselves or a third party, any material or moral advantage due to their exercise. According to the Explanatory Dictionary of Romanian Language, integrity includes the quality of being honest, fair and incorruptible. The concept of integrity is based on a solid set of principles which require that, in exercising their work, public servants must be fair, honest, just, act according to reality, treat people on an equal basis, without prejudice, consider the public interest and comply with the law in all his undertakings. In the case of civil servants, integrity should encompass a set of values necessary for him to be able to perform all duties he was vested with and to achieve the ultimate goal, which is to protect the fundamental rights and freedoms of citizens.

- The principle of freedom of thought and expression is to be respected also by those holding public office. According to this constitutional principle, public servants are entitled to express their opinions freely and this freedom cannot be achieved without observing moral norms, rules and laws of common sense. As shown, freedom is a fundamental right every man is born with and whose regulation should be reflected in the Basic Law of each democratic state, as well as in international and local documents. Analysed in the given circumstances, freedom is not physical, but spiritual, concerning thought and free speech.

Considering, however, the freedom of thought (inserted in numerous international legal or non-legal documents, including the Charter of Fundamental Rights, Article 10) as a whole, one finds that, as it is a specific human emotion so deep and personal, it could not be censored or restricted by

---

in the volume "European Integration-facts and perspective" (Integrarea europeană-realităţi şi perspectivă), Didactical and Educational Publishing, Bucharest, 2006, p.112.

[14] Emanoil Albu, Percepts of the right to good administration under the authority of the European Court of Human Rights (Principiile dreptului la o bună administrare în jurisprudenţa Curţii Europene a Drepturilor Omului), in the revue "The executive contemporary right-towards an unitary notion of the Romanian doctrine and practice" (Dreptul administrativ contemporan spre o concepţie unitară în doctrina şi practica românească), Comunicare.ro Publishing, Bucharest, 2008, p.130.

any means. Prohibiting someone's freedom of thought means to deny the existence of the main feature of man: thinking. Therefore, any man is free and cannot be prevented from thinking and believing anything, and this faculty is not to be stopped by any law; only the free expression of his thoughts can/cannot be restricted or censored; in the case of the public servant, this expression must be done in compliance with the rule of law and morals.

Therefore, we consider that the principle of freedom of thought and expression should be rephrased as such – the principle of free speech or, as governed by the Constitution of Romania – of freedom of expression of thoughts.

On the other hand, the requirement to respect citizens' opinions is set up for the officials, even to promote a dialogue with the citizens, without letting be influenced by considerations of personal nature or by popularity.

- Honesty and fairness. This principle, implying that public servants must exercise their duties in good faith, seems to duplicate the requirements already outlined for the principle of moral integrity. Honesty and fairness are attributes that should be imposed on exercising any function or profession, not only the public one, but especially public servants are required to perform their tasks in good faith, with honesty and fairness, as, by the nature of their duties, they come in direct contact with citizens;

- The principle of openness and transparency means that "the activities of civil servants acting in their function are public and can be monitored by the citizens"[15].

The principle of transparency is that principle to be observed in applying of Law 544/2001 through which public institutions and authorities are required to operate in an open manner towards the public, where the free and unhindered access to public interest information is to be the rule, and limiting the access to information is to be an exception in the law[16].

Knowing from the experience of the years of communism that politicization of public administration is an obstacle to reform this area, as well as a means to politically violate the human rights, the Code of Conduct regulates that the public servants are not allowed to participate to collecting funds in order to support political parties or to work, even outside employment relationships, with people making donations or sponsoring political parties. This prohibition appears as necessary in order to keep the impartiality and independence principle, as well as the moral integrity requiring public servants an impartial behaviour concerning any political or other interest.

Precisely in view of the public positions they hold, public officials are not allowed to use their own image or name for advertising or elections. This prohibition completes the public servant's obligation not to become politically involved in any way and we appreciate that the rule should be implemented to other professionals, given the fact that the last parliamentary elections allowed the names of famous artists with good moral and professional conduct to be associated with logos of political parties, precisely in order to promote the interests of these parties and to win the sympathy of the voters.

Article 14 of the Code of Conduct for Public Servants regards directly matters concerning corruption in public administration; therefore, under the law, public servants are not allowed to accept gifts, services, favours, invitations or other advantages, for themselves or for their families or friends, which can influence their impartiality in carrying out tasks they hold or could become a reward for service already rendered.

This prohibition re-emerges an issue always hot - corruption in public administration. Starting from the expression "small attention", "gift", the issue took the dimensions of a phenomenon, a scourge that hinders the development of a people and puts a stigma on a nation.

As shown, although present even before 1989, this phenomenon did not have the same shapes and intensity, expanding and becoming more violent after 1990. For this reason, the Romanian

[15] Law no. 7/2004 on the Code of Conduct of Public Servants, Article 3, letter i).
[16] Article 2, letter a – The methodological norm of applying Law 544/2001.

legislation was not ready in this respect; only after 1996 the government began to turn their attention, virtually through political statements, to fighting corruption.

At that time, the Romanian Parliament considered that the Government, in carrying out its role and functions, must act more forcefully, with greater commitment and efficiency to fight corruption phenomena, consistently pursuing the State's laws in all cases, regardless of the function and social position of the persons involved in corruption. Moreover, The Court of Auditors, the Financial Guard, the Police, the Public Ministry and other agencies authorized by law to exercise control functions and prosecution were required to make full duty, in the spirit of Constitution and laws, and to increase efficiency in finding and investigating corruption, in researching, to the end, those among them who had great resonance in public opinion, to apply the legal sanctions to be taken[17].

As it can be seen, although there is a legislative abundance in corruption, no visible progresses appeared in stopping and controlling this phenomenon.

After integration into the European family, corruption in Romania seems unstoppable; if until this event it had lighter "forms", after that date it took the form of "attentions" for winning licenses, facilitating customs procedures, gaining priority in provisioning of government services, of public procurement contracts, diverting public funds for private use of these public servants, often seniors.

The even worse fact is that corruption has taken alarming forms also in the medical and legal domains, spheres of general interest to citizens and that can have major negative consequences, often irreversible, over the destiny of those involved.

Hence, we are talking about corruption whenever a holder of power, a public servant or any occupant of a public office is determined by financial or other rewards, such as the promise of a promotion, that are not required by law, to take actions that favour the one that offers rewards, thereby causing harm to the public and its interests[18].

To summarize, but keeping constant elements, in our opinion, corruption in public administration is an act, attitude or behaviour of a person who has acquired a dose of power in certain spheres of social life, political, economic, legal etc., or certain professional fields in which he meets/does not meet certain tasks and aims to obtain goods, benefits, services for himself or for his family. Thus, corruption is an example of maladministration and is directly related to holding power in a particular area.

We notice that corruption is a threat to democracy, rule of law, social justice and the judiciary, undermining the principles of an effective administration, disrupting the market economy and jeopardizing the stability of state institutions[19].

It is known that corruption is most commonly found in acts involving the misuse of public power, and to prevent or limit this phenomenon it is required a series of reform measures at the legislative and institutional level, higher living standards, higher wages in the public sector and observance of social principles and moral values.

Therefore, it is important to understand that the official-citizen relationship is not a relationship of subordination, but only of collaboration, thus the citizen has also a civic obligation to take appropriate and decent conduct when applying for a civil service, to suppress the temptation to facilitate that service by "small gifts", knowing that corruption cannot be eradicated unless the corrupted and the person that corrupts both discourage such acts.

---

[17] Anca Daniela Giurgiu, Adrian Baboi Stroe, Simona Luca, "Corruption in local public administration", the Publishing of the Establishment for the Development of Civil Society (Corupţia în administraţia publică locală, Editura Fundaţiei pentru Dezvoltarea Societăţii Civile), Bucharest, 2002, p. 6.

[18] Friedrich, C.J., "Corruption Cases in Historical Perspective", in Heidenheimer, A.J., Johnston, M. and LeVine, V.T. (editors), Political Corruption. A Handbook, New Brunswick, NJ: Transaction Publishers, 1999, p. 15.

[19] Dorin Ciuncan, "Study concerning the causes that generate and the conditions that favor corruption" (Studiu privind cauzele care generează şi condiţiile care favorizează corupţia), in Documentary Bulletin („Buletin documentar") no. 4/2003, p. 3.

Conclusions

Although good administration is a concept more and more used in the administration and beyond, representing one of the fundamental principles of the European Union, its definition is coherently elaborated neither at a national lever, nor at a European level, being considered only as an indicator of performance in the public administration.

So, if at a national level, the right to good administration includes improving the quality of public service, cutting bureaucracy and corruption from the Charter, apparently, the right to good administration is limited to these two rights of the person, together with government obligation to give reasons, and beyond these elements one can not speak of a good or a bad administration.

In our opinion, the right to good administration should be subject to uniform regulations both at national and European level and should include in its content overall activity of public authorities and institutions, regulations and administrative actions within their competence, explaining all rights a citizen holds in his relation with public authorities and its correlative obligations as echo of the citizens' problems. All these aspects should be accompanied by specific penalties applicable to infringements in one form or another of the right to good administration.

The lack of a generally accepted definition of the concept of good administration, both at national and European level, is matched with the regulation of a set of general and specific principles detailing the composing parts of this right.

As noted in the scientific endeavour, in our opinion, the right to good administration is not objectively set forth in special national legal documents, the revised Constitution of Romania limiting itself to delegate to the legislative power the prerogative to regulate the conditions under which individuals can exercise certain rights in relation to public institutions and claim compensation due to damages caused by illegal acts by public administration authorities.

We deem as necessary to implement a coherent and consistent framework, but also a consistency of the public function, of diversification and deepening of the stages of training public servants so as to modernize and emancipate strategies in the domain of public administration.

Thus, in order to improve the services provided by public institutions and authorities, training of public servants should be continuous, thorough, at all levels, but especially at the top, should cover the use of advanced technology, knowledge of law, languages, as well as extensive knowledge specific to the domain the respective officials are operating in.

Especially to ensure a more effective protection and promotion of a citizen's right to good administration, it is necessary to intervene more forcefully also concerning the corruption. One notices that the corruption phenomenon is found in all spheres of social life but it is stronger, larger and more dangerous in the public sector.

The Code of Conduct for Public Servants bases its objectives precisely on increasing the quality of public services by cutting bureaucracy and corruption. The principles governing the rules of conduct stated in the Code should be placed in the Rules of Procedure of any public authority and institution and, in specific terms, it should also include penalties for violations.

The principle of the freedom of thought and expression should be rephrased as provided in the Constitution: "the principle of free speech". This would take place in the context in which thinking is a human cognitive function that cannot be controlled, restricted or punished; that which can be controlled or restricted is the result of thought - expressed opinions, with regard to which man is responsible.

References

- Emanuel Albu, "Percepts of the right to good administration under the authority of the European Court of Human Rights, in E. Bălan, C. Iftene, G. Varia, M. Văcărelu, "The executive contemporary right-towards an unitary notion of the Romanian doctrine and practice", Comunicare.ro Publication, Bucharest, 2008.

- Dana Georgeta Alexandru, "Evaluating the right to a good administration in the context of the strategies concerning the implementation of the Charter of the Fundamental Rights", in the revue "The consolidation of the administrative capacity in the context of good administration" , Comunicare.ro Publication, Bucharest, 2011.
- Dorin Ciuncan, "Study concerning the causes that generate and the conditions that favor corruption" , in Documentary Bulletin no. 4/2003.
- Friedrich, C.J., "Corruption Cases in Historical Perspective", in Heidenheimer, A.J., Johnston, M. and LeVine, V.T. (editors), Political Corruption. A Handbook, New Brunswick, NJ: Transaction Publishers, 1999.
- Anca Daniela Giurgiu, Adrian Baboi Stroe, Simona Luca, "Corruption in local public administration", the Publishing of the Establishment for the Development of Civil Society, Bucharest, 2002.
- Alina Livia Nicu, "The European Code of Good Administrative Behavior and the Romanian administrative phenomenon", paper published in the volume "European Integration-facts and perspective", Didactical and Educational Publishing, Bucharest, 2006.
- Ion Popescu-Slăniceanu, Diana Marilena Petrovszki, Cosmin Ionuţ Enescu, "A better conduct of the public officers for a better administration", in the revue "Good administration, from vision to action", Comunicare.ro Publication, Bucharest, 2011.
- Naomi Reniuţ-Ursoiu, "Dimension of a good administration from the perspective of the Convention for the Protection of Human Rights and Fundamental Freedoms"), in the revue "Good administration, from vision to action", Comunicare.ro Publication, Bucharest, 2011.

- **Normative acts**

- Law no. 188/1999, on the Statute of Public Servants, republished, amended and updated.
- Law no. 7/2004, on the Code of Conduct for public servants published in the Official Gazette of Romania, Part I, no. 157/February the 23rd, 2004.
- Law no. 477/2004, on the Code of Conduct of the contractual staff of public authorities and institutions published in the Official Gazette of Romania, Part I, no. 1105/November the 26th, 2004.
- Law no. 52/2003, on decisional transparency in public administration Published in the Official Gazette of Romania, Part I, no. 70/February the 3rd, 2003.
- Law no. 571/2004, on the protection of personnel in public authorities, public institutions and other units reporting violations of law published in the Official Gazette of Romania, no. 1214/December the 17th, 2004.
- Law no. 161/2003, on a series of measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and punishing corruption published in the Official Gazette of Romania, no. 279/April the 21st, 2003.
- Law no. 344/2004, Government Emergency Ordinance no. 92/2004.
- Law no. 511/2004, Law no. 512/2004, Law no. 76/2005, G.E.O. no. 39/2005.
- The methodological norm of applying Law 544/2001.
- Law no. 161/2003, on a series of measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and punishing corruption.

ROMANIAN "FIDUCIA" AND GEORGIAN "TRUST" (MAJOR TERMINOLOGICAL SIMILARITIES AND DIFFERENCES)

IRINA GVELESIANI*

Abstract

Globalization - a complex system of innovation, internationalization and rapidly growing interdependence – plays the greatest role in the formation of today's world. It enters different spheres of human life and stipulates the uniformity of economy, law, business and even, political life. In the framework of global processes, a lot of changes can be seen in the legal systems of European countries.

The given paper discusses the formation of the Romanian "fiducia" and the Georgian "საკუთრების მინდობა" (sakutrebis mindoba – means "trust") under the influence of Anglo-American "trust". The term "trust" generally nominates an institution of Anglo-American law, which is irreplaceable in the cases when the real owner of the property must be substituted by the nominal one (trustee) for carrying out civil relationships. This concept originated in the English Common law, but has been constantly rejected by the European continental legal systems (Civil law). The main obstacle laid in the fact, that Anglo-American legal system was based on the duality of ownership, which was almost unacceptable for the continental law-governed countries. However, in the recent years, the growing importance of the American capital markets popularized the utilization of "trust" and stipulated its insertion in some "rigid" European jurisdictions. Moreover, some world countries have already indirectly allowed mechanisms similar to the "trust". Among them are Romania and Georgia.

The given research is dedicated to the precise description of the Romanian and Georgian "trust instruments". It singles out major terminological units and underlines the fact that newly-established mechanisms have to undergo several stages for turning into faithful reflections of the original model of "trust".

Keywords: *globalization, fiducia, Georgian, Romanian, trust.*

Introduction

The concept "globalization" has rapidly crept into the consciousness of contemporary society and has acquired different interpretations. According to Merriam-Webster dictionary: globalization means the development of an increasingly integrated global economy marked especially by free trade, free flow of capital, and the tapping of cheaper foreign labor markets[1]. It is an inevitable phenomenon in human history that's been bringing the world closer through the exchange of goods and products, information, knowledge and culture[2]. Globalization refers both to the compression of the world and the intensification of consciousness of the world as a whole[3]. The existence of competing definitions of global processes indicates to the complexity of the given phenomenon. Some scholars speak about globalization of economy and culture, while others indicate to the law or politics. However, according to the existed data, globalization can be regarded as a complex system of innovation, internationalization and rapidly growing interdependence, which plays the greatest role in the formation of today's world. It comprises almost all spheres of life and aims at the creation of the "boundless" globe.

* Associate Professor, *Ivane Javakhishvili* Tbilisi State University (e-mail: irina.gvelesiani@tsu.ge).

[1] Merriam-Webster dictionary. Accessed January 2, 2013, http://www.merriam-webster.com/dictionary/globalization.

[2] Globalization. Accessed January 3, 2013, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:23272496~pagePK:51123644~piPK:329829~theSitePK:29708,00.html.

[3] Malcolm Waters, Globalization, accessed January 12, 2013, books.google.ge/books?isbn=0415238544.

The given paper discusses globalization as an ongoing process, which changes the contours of law and creates new global legal mechanisms. One of them is the "trust" – a unique institution characterizing Anglo-American law, which occurred in response to the need to find solutions and to protect promises which had no binding affect, but which should have been compiled according to the equity principles: a good-faith and respecting one's word[4]. The concept of "trust" originated in English Common law during the Middle Ages. It was defined as a fiduciary relationship in which a person, called a "trustee", held title to the property for the benefit of another person. The agreement that established a "trust" consisted of three main elements: a "**grantor**" (also called a "**creator**", a "**donor**" or a "**settler**"), a "**trustee**" and a **"beneficiary**".

In the beginning of the 19th century, "trust" was established in the American business sphere. It acquired great significance, especially, through mutual and pension funds. The growing importance of its utilization in the American business law has influenced some European countries. However, the unique institution of "trust" has been constantly rejected by the continental legal systems (civil law). The main obstacle laid in the fact, that Anglo-American law was based on the duality of ownership, which was almost unacceptable for the continental law-governed countries.

The given research tries to answer the demands of the modern epoch. It describes the appearance of the European modifications of "trust", singles out major concepts presented in the Romanian and Georgian "trust mechanisms" and underlines their importance in today's globalized world. The given research is a presentation of the new outlook via relying on already existed small number of works, which are dedicated to the development of "trust-like" mechanisms of the world.

ROMANIAN "FIDUCIA" AND GEORGIAN "TRUST" – NEWLY ESTABLISHED MODIFICATIONS OF ANGLO-AMERICAN "TRUST"

The establishment of modifications of Anglo-American "trust" – this is a major challenge of today's Europe. Many European countries are trying to answer the demands of modern epoch via establishing "trust-like" mechanisms in their legal systems and business spheres.

It's worth mentioning, that the relationships similar to "trust" appeared in Roman law in the 1st-3rd centuries A.D. Under a fiduciary contract: one person (principle) transferred property to another (fiduciary) on the basis of a certain condition (fidei fiduciae causa), which obliged him (her) to use the property in accordance with the terms of the contract and to return it immediately after the emergence of the conditions specified in the contract[5].

However, according to the historical data, the original form of trust appeared in the English Common law in the Middle Ages. This irreplaceable institution derived from a system employed in that era known as "use of land" or "uses". The history of the emergence of "trust" states, that during knights' lengthy absence, their estates needed protection and preservation. For that reason, each knight transferred his legal ownership to a third party (a close friend) under a special agreement – the estate ought to be transferred back upon the knight's return. This transfer empowered the transferee to manage the "acquired" ownership and to enforce the rights of the estate against all parties while the owner was away. The given transference procedure preceded and at the same time, stipulated the emergence of today's institution of "trust", which is based on the duality of ownership (the property resulting from the legal estate is divided into the property of a trustee and the equitable interest – the property of a beneficiary). A "trust instrument" (a trust contract) is usually created inter vivos or on death at the direction of an individual (such type of a trust is called a "testamentary trust"). He (she) obligates certain persons to use and to protect entrusted property for the benefit of others. Therefore, an ordinary Anglo-American "trust" consists of three main elements:

[4] Luminița Tuleașcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journl/ SU11/ REBE-SU11-A13.pdf.

[5] Tariel Zambakhidze, "Trust (Historical Review)", Samartali (2000): 59.

- A "***trustor***" - a person who creates the "trust" (also called a "creator", a "grantor", a "donor" or a "settler").
- A "***trustee***" - a person or a legal entity which holds legal title to the trust property. Trustees have many rights and responsibilities. They vary from trust to trust depending on their type;
- A "***beneficiary***" – a beneficial (or equitable) owner of the property. It's worth mentioning, that a "grantor" can be even a "beneficiary". In this case, the "trust" involves a simple delegation of responsibilities.

Trusts are usually created orally or in a written form. An "oral trust" (a "parol trust") presents the grantor's spoken statement. It is an agreement formed between a grantor and a trustee without the usage of a written instrument. Generally, trusts of real property require a written form, while the trusts of personal property can be created orally[6]. In order to be valid, each trust has to meet three major certainties (the given requirement goes back to some words of Lord Langdale (1840)[7]):

1.The certainty of intention;

2. The certainty of subject-matter, which can be subdivided into:

a) The certainty of what property is to be held upon trust;

b) The certainty of the extent of the beneficial interest of each beneficiary;

3.The certainty of beneficiaries (in case of private trusts) or of objects (in case of non-charitable "purpose" trusts without human beneficiaries - i.e. trusts of imperfect obligation). This requirement does not apply to charitable trusts if there is a general charitable intention[8].

Since the beginning of the 19th century the institution of trust has become popular in the American business sphere. It has offered several economic and legal advantages, especially, through mutual and pension funds. At the end of the 20th century, the process of globalization stipulated the "internationalization" of trust mechanism. The starting step of this process was the conclusion of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1 July, 1985) and its ratification by 12 countries (March, 2011). The evolution of regulations of trust at the European level directly pointed to the tendencies of the inclusion of this institution into the national laws of the EU member states. Moreover, the adoption of the Hague Convention was an obvious starting point of the unification of the laws of the European countries. However, the implementation of the given institution into the civil law jurisdictions has met several obstacles, namely:

- The continental law countries have been characterized by the lack of the concept of the duality of ownership i.e. by the absence of the concept of property division in ownership by law (right enjoyed by the trustee) and ownership in equity (right enjoyed by the beneficiary) and, therefore, by the existence of the principle according to which there must be only one owner at the time[9];
- The continental law countries have been characterized by the singleness of a person's patrimony: 1. each person has a patrimony; 2. each patrimony belongs to someone; 3. one person has only one patrimony[10].

Despite such obstacles, legal systems of some European countries underwent the process of modernization, which stipulated the creation of several modifications of trust, for instance, the institution of "fiducia" appeared in the newly created Civil Code of Romania, which entered into force on 1 October 2011.

---

[6] Oral trust law and legal definition. Accessed January 4, 2013, http://definitions.uslegal.com/o/oral-trust/.

[7] The three certainties, Wiley Online Library. Accessed January 5, 2013, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1940.tb02728.x/pdf.

[8] The three certainties, Wiley Online Library. Accessed January 5, 2013, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1940.tb02728.x/pdf.

[9] Luminiţa Tuleaşcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journl/ SU11/ REBE-SU11-A13.pdf.

[10] Valerio Forti, "Comparing American Trust and French Fiducie", The Columbia Journal of European Law Online (2011), accessed January 10, 2013, http://www.cjel.net/online/17_2-forti/.

According to Article 773 of the New Civil Code, "fiducia" is the legal operation whereby one or more grantors (in Romanian *constituitori*) transfer(s) various patrimonial rights or a group of such patrimonial rights, present or future, to one or more trustees (in Romanian *fiduciari*), who administer those with a given purpose, to the benefit of one or more beneficiaries (in Romanian *beneficiari*). These rights constitute an autonomous patrimony, separate from the other rights and obligations in the fiduciary's own patrimony[11]. Therefore, fiducia is a legal relationship oriented on the transference of present and future rights. It consists of three major elements:

- A "***constituitori***" - a person or a legal entity which creates "fiducia";
- A "***fiduciari***" - a person or a legal entity which holds legal title to the trust property. A "fiduciari" can be represented only by credit institutions, investment companies, insurance and reinsurance companies, investment management companies, public notaries and attorneys at law;
- A "***beneficiari***" – a beneficial owner of the property.

"Fiducia" must be expressly established by law or by authenticated contract. The contracting parties - a constituitori, a fiduciari and a beneficiari – make an agreement, which connects them by a common economic purpose. A "fiducia" is usually registered at the Electronic Archive of Security Interests in Personal Property. In order to be valid, it must explicitly state the following elements:

- the rights subject to transfer;
- the duration of transfer (not to exceed 33 years);
- the identity of the grantor, trustee and beneficiary;
- the purpose of the fiducia;
- and the extent of the trustee's management and disposal powers[12].

Therefore, a study of the New Romanian Law reveals the similarities and differences of the Romanian "fiducia" and Anglo-American "trust". Major differences between these legal institutions can be listed in the following way:

1.the "trust" divides trustor's ownership into the property of a trustee and the property of a beneficiary – an equitable interest, while "fiducia" divides and at the same time, separates the trust property from a trustee's individual property. Therefore, the Romanian law discusses a trust property and a trustee's individual property as two separate units;

2.the creation of a "trust" requires a trustor's intent presented orally or in a written form. For the creation of a "fiducia", a ***constituitori*** enters into a written and notarized contract with a ***fiduciary;***

3.the "trust" can be subject to a mortis causa deed, while "fiducia" is never subject to it. Therefore, the Romanian legal system is not familiar with the concept of a "testamentary trust".

It's worth mentioning, that during the end of the 20th century and in the beginning of the 21st century, the modifications of the institution of "trust" appeared not only in the Romanian law, but in other civil law jurisdictions. Among them is the Republic of Georgia. At the end of the 20th century Georgia adopted a new civil code, which significantly differed from the Soviet legislation (for several decades Georgia had been governed by the Soviet law). The newly established civil code was enriched with new concepts and terminological units indicating to the modernization of Georgia's legislation. One of the newly appeared Georgian institutions was "საკუთრების მინდობა" (sakutrebis mindoba), which has been regarded as a modification of Anglo-American "trust". However, a precise study of the Georgian "საკუთრების მინდობა" reveals major differences from its Common Law "predecessor".

[11] Luminiţa Tuleaşcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journl/ SU11/ REBE-SU11-A13.pdf.

[12] Trusts under Romania's new civil code, fiducia. Accessed January 10, 2013, http://www.hr.ro/digest/201203/digest.htm#contents0 .

Articles 724-729 of "The Civil Code of Georgia" present the essence of "trust" and the parties participating in trust relationships: a "trustor" (საკუთრების მიმნდობი /sakutrebis mimndobi) and a "trustee" (მინდობილი მესაკუთრე / mindobili mesakutre):

- ***"საკუთრების მიმნდობი"*** is a person or a legal entity which creates a "trust". At the same time, it is a person or a legal entity which is a beneficial owner of the property;
- ***"მინდობილი მესაკუთრე"*** is a person or a legal entity which holds legal title to the trust property.

Trust relationships take a form of a "trust contract" (საკუთრების მინდობის ხელშეკრულება / sakutrebis mindobis khelshekruleba). Under this contract: the principle (trustor) transfers the property to the trustee, who accepts and manages it in compliance with the principle's interests[13]. The specificity of the Georgian "საკუთრების მინდობა" presents the right of ownership in a "split" form: some rights of the owner – the management and the disposition of the property – belong to one person (trustee), while other rights – receiving income and profit from the exploitation of the property - belong to another (trustor)[14]. The motive of a "trust contract" can be the owner's wish to delegate the authorities of management ("to get rid of " the load of management) in order to profit from the exploitation of the property. In any case, the ownership must be entrusted in accordance with the trustor's interest. This interest may imply making profit, increasing the property, managing and maintaining the ownership, etc.

A precise study of the Georgian Civil Code reveals, that a trust contract must be created only in a written form. Oral trusts are unacceptable. The ownership is usually managed by the trustee at the risk and expense of the "trustor". In terms with third persons a trustee enjoys the owner's rights:

1.The trustee is bound to manage the property held in trust in his own name, but at the expense and risk of the trustor;

2.The trustee enjoys the owner's entitlement in relations with third persons. If the trustee, contrary to the interests of the trustor, is not acting in the same good faith as in managing his own affairs, he (she) will be obligated to compensate the damage thereby arisen[15].

A transferee is even entitled to make any kind of deal. However, he (she) has no legal rights to sell the property unless the agreement between the parties provides otherwise.

Therefore, a study of the new Civil Code of Georgia reveals the similarities and differences of the Georgian "საკუთრების მინდობა" and Anglo-American "trust". The major differences between these legal institutions can be presented in the following way:

1.the creation of a "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "საკუთრების მინდობა", a trustor ("საკუთრების მიმნდობი") enters into a written and notarized contract with a trustee ("მინდობილი მესაკუთრე");

2.the Anglo-American "trust" can be subject to a mortis causa deed, while the Georgian "საკუთრების მინდობა" is never subject to it. Moreover, the Georgian legal system is not familiar with the concept of a "testamentary trust";

3.the "trust" nominates beneficial owners of the property ("beneficiaries") or simply implies the delegation of authorities in behalf of the "trustor" himself (herself). "საკუთრების მინდობა" considers only a simple delegation of authorities of management in behalf of "საკუთრების მიმნდობი" and underlines the fact, that the Georgian legal system identifies the concept of "trustor" with the concept of "beneficiary". Moreover, the term "beneficiary" has no Georgian equivalents.

[13] The Civil Code of Georgia (Tbilisi: Bona Causa, 2002), 180.
[14] The Commentary of the Civil Code of Georgia (Tbilisi: Samartali, 2001), 416-417.
[15] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 180.

Conclusions

All the above mentioned enables us to conclude, that today's global processes stipulate closer contacts of human societies and combine modes of living of their representatives. Globalization enters into different spheres of life: politics, economy, business, etc. It even changes the contours of law and creates new global legal institutions and norms. The given paper presented a study of Anglo-American "trust" and its European modifications – the Romanian "fiducia" and the Georgian "საკუთრების მინდობა". A comparative analysis of these institutions revealed the following:

- the Anglo-American "trust" and the Romanian "fiducia" consist of three major elements: the owner of the property ("trustor"; "constituitori"), the transferee ("trustee"; "fiduciari") and the beneficial owner of the property ("beneficiary"; "beneficiari"). The Georgian legal system identifies the concept of "trustor" with the concept of "beneficiary". Therefore, the term "beneficiary" has no Georgian equivalents;
- The creation of "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "fiducia" and "საკუთრების მინდობა", a trustor enters into a written and notarized contract with a trustee ("მინდობილი მესაკუთრე");
- The Anglo-American "trust" can be subject to a mortis causa deed, while the Romanian "fiducia" and the Georgian "საკუთრების მინდობა" are never subject to it. Moreover, the Romanian and Georgian legal systems are not familiar with the concept of a "testamentary trust".

Therefore, the Romanian and Georgian laws have already indirectly allowed mechanisms similar to the Anglo-American "trust". However, it's obvious, that the resulting instruments do not present a faithful reflection of the original model. Further researches in the field of the development of "trust-like" mechanisms throughout Europe will fulfill the picture of the expansion of the utilization of "trust" and vividly depict the impact of globalization on the legal spheres of different countries. Therefore, the given study may play an important role in the solution of one of the urgent problems of today's world.

References

- Globalization. Accessed January 3, 2013, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:23272496~pagePK:51123644~piPK:329829~theSitePK:29708,00.html.
- Luminiţa Tuleaşcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journl/ SU11/ REBE-SU11-A13.pdf.
- Malcolm Waters, Globalization. Accessed January 12, 2013, books.google.ge/books?isbn=0415238544
- Merriam-Webster dictionary. Accessed January 2, 2013.
- http://www.merriam-webster.com/dictionary/globalization.
- Oral trust law and legal definition. Accessed January 4, 2013, http://definitions.uslegal.com/o/oral-trust/.
- Tariel Zambakhidze, "Trust (Historical Review)", Samartali (2000): 57-66.
- The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 180.
- The Commentary of the Civil Code of Georgia (Tbilisi: Samartali, 2001), 416-417.
- The three certainties, Wiley Online Library. Accessed January 5, 2013, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1940.tb02728.x/pdf.
- Trusts under Romania's new civil code, fiducia. Accessed January 10, 2013, http://www.hr.ro/digest/201203/digest.htm#contents0.
- Valerio Forti, "Comparing American Trust and French Fiducie", The Columbia Journal of European Law Online (2011). Accessed January 10, 2013, http://www.cjel.net/online/17_2-forti/.

THE CONCEPT OF "TESTATE SUCCESSION" IN THE ROMANIAN AND GEORGIAN LEGAL SYSTEMS (TERMINOLOGICAL SIMILARITIES AND DIFFERENCES)

IRINA GVELESIANI[*]

Abstract

The death of an individual never causes an automatic termination of his (her) rights and obligations. They are transferred to his (her) descendants. The permanent connection of generations has inspired the world civilizations to create rules of succession for establishing people's obedience to them.

In the old times, the transmission of property of the Romanian people was governed by the legislation, which had been created under the influence of the Roman law. According to the conception of this legislation, a deceased person's property had to stay with his blood relatives i.e. within the same family. On the background of these circumstances, a surviving spouse suffered disadvantages. A widow's rights were limited in accordance with the old Georgian legislation too – the hereditary property was mainly divided between the male issue, while females owned only wedding gifts (dowry).

However, the area of family law has suffered crucial changes throughout the centuries. Nowadays, during the times of globalization, these changes are directed towards the internationalization of legal systems of the world. Juridical differences are becoming irrelevant and females' rights are equalized with the males' ones.

The given paper is dedicated to the precise study of the Romanian and Georgian "testate successions". It singles out major terminological units and discusses women's rights vis-à-vis men's ones.

Keywords: *Georgian, law, Romanian, testate succession, testator.*

Introduction

Throughout the centuries human societies of the world have progressively established closer contacts. However, the pace has significantly increased during the last decades. The "all-embracing" process of globalization has stipulated an international integration arising from the interchange of the experiences depicted in different areas of life. The latest advances in communication and transportation technologies have given capital, goods and services unprecedented mobility. The world has been gradually becoming a boundless space connected with the exchange of ideas, world views and advances. Besides offering significant innovations, the process of globalization has even changed the contours of law and has created new global legal institutions and norms.

The given paper is dedicated to the problems associated with the transference of a deceased person's property. This process acquires a pressing urgency in today's world. Special attention is paid to the countries, which undergo a transitional period from socialism to capitalism. All-embracing globalization with the accompanying historical processes changes the contours of their laws. The contemporary legal literature tries to depict the development of legal processes. However, it's obvious, that still a lot must be done in this direction.

The given paper makes an attempt to answer the demands of the modern epoch via comparing the Romanian and Georgian legal systems. The greatest emphasis is put on the major concepts and their nomination, which somehow reveals the impact of the contemporary globalizing processes.

[*] Associate Professor, *Ivane Javakhishvili* Tbilisi State University (e-mail: irina.gvelesiani@tsu.ge).

"TESTATE SUCCESSION" IN THE ROMANIAN AND GEORGIAN LEGAL SYSTEMS

Inheritance law – sometimes called wills and probate – is concerned with the distribution of a person's property after his (her) death. This may occur either in accordance with the provisions of a will which that person has made, or under the applicable rules relating to intestacy[1] - if a person dies without having made a will. Almost all civil law jurisdictions of the world distinguish two major types of succession: intestate succession (i.e. the legal inheritance) and testate succession (i.e. the inheritance established through the last will or testament).

The Romanian inheritance law has a long history of development. In the old law, the transmission of a deceased person's property was governed by the legislation, which was under the influence of Roman law based on the principle of blood relation to the defunct. In the conception of this legislation, the defunct's patrimony had to stay with his blood relatives, which means that it had to be preserved in the same family. The thorough application of the above mentioned principle and the fear of transmitting a family patrimony to the surviving spouse was an obstacle to the recognition of the direct succession right for a long time[2]. Therefore, in contrast to blood relatives, a surviving spouse faced disadvantages throughout the centuries - when the spouses had no children, a surviving spouse received only one sixth of the inheritance, while in cases of surviving children, a widow inherited only the right of usufruct over a portion of the inheritance equal to the child's portion. However, the adoption of the Romanian Civil Code of 1864, inspired by the French Civil Code of Napoleon of 1804, provided that the surviving spouse acquired the inheritance only after the last blood relative of the 12th degree defunct[3]. Later, under the law of 1944, the rights of a widower (widow) expanded. Therefore, he (she) acquired: a general inheritance right, a temporary right of the occupancy of the house and a special right over wedding gifts and movables of household.

Nowadays, according to the contemporary Romanian law, during an intestate succession, a spouse is regarded as one of the legal inheritors of a deceased person and has the right to at least ¼ of the inheritance. Moreover:

- In addition to the fraction of the inheritance established by law, the surviving spouse has a special inheritance right to furniture, domestic objects and wedding gifts;
- If the surviving spouse is not the owner of the house where he/she has lived for at least one year since the death of the deceased spouse, then he/she has a right of habitation to that house…;
- In the event of no inheritors, the surviving spouse inherits everything[4] .

Despite having the above mentioned inheritance rights, a surviving spouse is regarded as a "separate inheritor" in the contemporary Romanian Civil Code. He (she) stands separately and is not included in the major four classes of heirs nominated during the intestate succession. Therefore, a deceased parson's intestate estate is distributed in the following way:

1. The first class of inheritors – the deceased's descendants: children, grandchildren;
2. The second class of inheritors – the deceased person's privileged ascendants and collaterals: parents, brothers and sisters and their descendants until the fourth degree;
3. The third class of inheritors – the deceased person's ordinary ascendants: grandparents, parents of grandparents, etc.;

---

[1] Rupert Haigh, Oxford handbook of legal correspondence (Oxford University Press, 2006), 154.

[2] Ilie Urs, "The inheritance rights of the surviving spouse provided by the Romanian law". Accessed January 2, 2013, http://pdfsb.com/readonline/5a56424566774639586e78374158316855513d3d-4365471.

[3] Ilie Urs, "The inheritance rights of the surviving spouse provided by the Romanian law". Accessed January 2, 2013, http://pdfsb.com/readonline/5a56424566774639586e78374158316855513d3d-4365471.

[4] What inheritance laws apply in Romania? Accessed January 5, 2013, http://www.globalpropertyguide.com/Europe/Romania/Inheritance.

4. The fourth class of inheritors – the deceased person's ordinary collaterals – relatives until the fourth degree, for instance: uncles, aunts, primary cousins, brothers and sisters of the grandparents.

During the intestate succession, the existence of more preferable classes of successors excludes the less preferable ones. However, in contrast to the testate succession, legal inheritance is less popular nowadays. Testate succession i.e. the inheritance established through the last will or testament is usually regarded as a distribution of the estate of a deceased in accordance with his or her will[5]. It comprises three major elements:

- ***Testator*** – a person who creates a will;
- ***Legatar –*** a person or an entity to receive property from the estate of a deceased, through a will or the operation of laws governing intestacy[6];
- ***Testament*** – a document created by the testator.

In cases of the testate succession, the distribution of the property depends on the testator, who makes a valid will. The Romanian Civil Code differentiates two major types of wills: *authentic* and *holographic*. "*Authentic wills*" are drawn up by the civil law notaries. They are usually recorded in the register, while "*holographic wills*" are written, dated and signed by the testator himself (herself). Both types of wills are kept by the civil law notaries. However, the existence of the testate succession does not mean the total freedom of a testator's wish. The concept of a "*reserved portion*" restricts the testator's rights of disposition. The given portion is transferred to the surviving spouse, the privileged ascendants and the descendants of the deceased. Moreover:

- The portion of the estate reserved for descendants varies depending on their number;
- The portion of the estate reserved for privileged ascendants is ½ - when the deceased leaves 2 or more parents (or ¼ - when only one parent survives the deceased);
- The reserved portion of the surviving spouse varies depending on the inheritance class he/she comes up against. If against the descendants, the reserved portion is 1/8. If against the privileged ascendants and collaterals of the deceased together, the reserved portion is 1/6. If against only the privileged ascendants or collaterals the reserved portion is ¼. If against the ordinary ascendants and collaterals the reserved portion is 3/8. If against any other inheritors, other that the legal ones, the reserved portion of the surviving spouse is ½ [7].

After the transference of all reserved portions, the remained part of the testator's property is called a *residue of the estate.* It can be freely transferred to anyone. However, sometimes certain restrictions regarding the ownership of the land by foreigners or non-residents of Romania occur.

Like other civil law jurisdictions, the Constitution of Georgia nominates the right of inheritance as one of the major rights of an individual. The legal mechanism of its practical realization is guaranteed by the law of succession, which is usually regarded as a complex of rules regulating a legal fate of a deceased person's ownership. The death of an individual has never caused an automatic termination of his (her) rights of property. They have been transmitted to his (her) descendants. However, like the Romanian women, the Georgian widows suffered hereditary disadvantages.

---

[5] Business dictionary. Accessed January 12, 2013, http://www.businessdictionary.com/definition/testate-succession.html.

[6] Business dictionary. Accessed January 12, 2013, http://www.businessdictionary.com/definition/testate-succession.html.

[7] What inheritance laws apply in Romania? Accessed January 4, 2013, http://www.globalpropertyguide.com/Europe/Romania/Inheritance.

According to the old Georgian legal codex "Dzeglis Deba" (created during the reign of George V of Georgia (1286/1289 - 1346)), a surviving spouse inherited only a portion for her subsistence - the so-called "sasapkro". Another legal monument of the 11th-14th centuries - "The Law of Beka and Aghbuga" - stated, that a childless spouse inherited only a dowry. However, if there were children, a deceased person's armour was transferred to the children, while a wife inherited only sasakonlo[8]. In the old Georgian language, the term "sasakonlo" denoted inanimate movable property. Therefore, in contrast to the blood relatives, the widows suffered disadvantages during the 11th -14th centuries. They inherited only a portion for subsistence or an inanimate movable property. The childless widows were entitled to their dowry. The tendency of preserving a deceased person's ownership within the same family has existed throughout the centuries. However, the widow's legal rights have gradually changed.

Nowadays, according to the contemporary Georgian law, a spouse is nominated as the first order successor. She is a rightful and a privileged member of a five-storeyed hierarchy of intestate successors. The given hierarchy can be presented in the following way:

1. **First order successors** – a deceased person's child, spouse and parents. Grandchildren are considered as intestate successors if by the time of the opening of an estate their parent is not alive. They succeed in equal shares that portion of the estate to which their deceased parent would have the right.
2. **Second order successors** – a decedent's sisters and brothers (their descendants).
3. **Third order successors** – a decedent's grandfather, grandmother and their parents. The parents are considered as intestate successors if by the time of the opening of the estate grandparents are not alive.
4. **Fourth order successors** – a decedent's uncles and aunts.
5. **Fifth order successors** – a decedent's cousins.

The existence of at least one successor of the previous order excludes the succession of the following order. Moreover, an estate is distributed equally between the representatives of the inheriting order.

In contrast to the legal inheritance, a testate type of succession becomes more and more popular in today's Georgia. It is generally regarded as a distribution of the defunct's estate in accordance with the will and comprises three major elements:

- ***moanderZe (moanderdze)–*** a person who creates a will;
- ***anderZismieri memkvidre (anderdzismieri memkvidre)*** – a person or an entity, which receives property from the estate of a deceased through a valid will;
- ***anderZi (anderdzi)***– a document created by the testator.

In cases of a testate succession, the distribution of the property depends on the testator, who makes a valid will: a natural person may leave his (her) estate or its part by the will in the event of his (her) death to one or several persons from the circle of successors or outside it[9]. A person making a will must be a capable adult, who wisely justifies his (her) actions and clearly expresses desires during the process of the creation of the document. The Georgian wills are created according to the proper format. They must be in writing. A written will may be in a notarial form (the so-called *sanotaro anderZi* (sanotaro anderdzi) - a "notarized will") or without it.

A notarial form requires a will to be prepared and signed by the testator and attested by a notary, but if a notary is not available, the above mentioned function is executed by a local self-government body[10]. Generally, wills are prepared by testators, but in certain cases, it is permitted, that a will in words of the testator be written down by a notary in the presence of two witnesses. The

[8] Iv. Javakhishvili, Works in 12 volumes (Tbilisi: Metsniereba, 1982), 418.
[9] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 294.
[10] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 297.

usage of generally accepted technical means while writing down the given document is also permitted. A will written by a notary in words of the testator will be read by the testator and signed by him (her) in the presence of a notary and a witness[11]. "Notarized wills" (official wills) differ from unofficial or holographic wills (the so-called *xelnaweri anderZi* (khelnatseri anderdzi)).

"Holographic wills" or handwritten wills are made personally by the testator. The creation of a will through a representative is not permitted. The category of handwritten wills consists of a "domestic will" (the so-called *Sinauruli anderZi* **(**shinauruli anderdzi**))** and a "closed will" (the so-called *daxuruli anderZi* (dakhuruli anderdzi)). "Domestic wills" are made in the testator's handwriting and signed by him (her). In cases of a "closed will": at the request of a testator, witnesses will confirm the will so that they do not know its content (closed will). In this case, the witnesses should be present during the signing of the will. During the confirmation of a closed will, the witnesses have to indicate that it was made personally by the testator and that they did not become aware of the content of the will[12].

A will is usually executed by one person. However, the Civil Code of Georgia permits a joint creation of a will by two or more individuals. In such cases, only spouses are allowed to make a reciprocal will on joint legacy, which may be revoked by one of the spouses, but still during the lifetime of both of them. This type of a will is called a "joint will" (the so-called *saerTo anderZi* (saerto anderdzi)).

Like the Romanian legal system, the Civil Code of Georgia often faces the problem of the freedom of the disposition by will. Testators' wishes are usually restricted by the existence of the so-called "reserved portion" (*savaldebulo wili* (savaldebulo tsili)). According to Article 1371 of the Civil Code of Georgia: despite the contents of a will, a deceased person's children, parents and spouse are entitled to a reserved portion, which is equal to the half of the share transmitted to them in case of an intestate succession[13].

Conclusions

All the above mentioned enables us to conclude, that "all-embracing" process of globalization has stipulated an international integration arising from the interchange of the experiences depicted in different areas of life. Drastic changes have been seen in the laws of the countries of the former USSR. The given paper has presented a comparative analysis of the Romanian law and the Georgian legislation, which was formed on the basis of the legal system of the USSR. The major emphasis has been put on the concept of "testate succession" and terms related to it. The greatest attention has been paid to the Georgian and Romanian women's rights presented in the historical and contemporary legal monuments. On the basis of the carried out research we can single out the following outcomes:

1. The contemporary laws of Georgia and Romania make distinction between testate and intestate successions. The legal systems of both countries single out three major elements of testate succession: a testator *(the Romanian - testator; the Georgian - moanderZe),* an heir *(the Romanian - Legatar; the Georgian - anderZismieri memkvidre)* and a will *(the Romanian - testament; the Georgian – anderZi).*

2. The contemporary laws of Georgia and Romania nominate a "will" as the most commonly used legal instrument by which a testator regulates the rights of others over his (her) property after his (her) death. The legal systems of both countries differentiate official ("notarized will") and unofficial ("holographic will") types of wills. However, the major difference lies in the fact, that the Civil Code of Georgia recognizes domestic (*Sinauruli anderZi)*, closed (*daxuruli anderZi*) and joint (*saerTo anderZi)* wills, while the corresponding legal terms are not found in the Romanian law.

[11] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 297.
[12] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 299.
[13] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 300.

3. The contemporary Romanian legal system singles out the concept of *a residue of the estate,* which is not especially distinguished in the Georgian law.

4. In the old Georgian and Romanian laws "non-blood relatives" - widows - faced significant disadvantages. In Romania childless spouses received only one sixth of the inheritance, while in Georgia they were entitled to the dowry. In cases of surviving children, widows had more hereditary rights. They inherited only the right of usufruct (in Romania), a portion for subsistence or an inanimate movable property (in Georgia of the 11^{th} -14^{th} centuries). The hereditary rights of widows have changed throughout the centuries. Nowadays, the existence of the concept of a testate succession enables a surviving spouse to inherit a deceased person's property according to his last will and testament. Therefore, a widow's hereditary portion may comprise the whole estate minus reserved portions of "obligatory heirs". In cases of disinheritance by the former spouse, a widow may receive a reserved portion, which varies depending on the inheritance class she comes up against (in Romania) or is directly equalized to the half of an intestate share (in Georgia) received by her in case of intestacy;

Finally, it's worth mentioning, that the comparative analysis of the Georgian and Romanian legal systems revealed their major differences and similarities. Obviously, the existed terminological and conceptual gaps will be filled during the flow of time via the influence of all-embracing globalization. The given study may play an important role in this process. However, the further investigation of the legal systems of other countries will fulfill the picture of the development of the European legal area.

References

- Business dictionary. Accessed January 12, 2013, http://www.businessdictionary.com/ definition/testate-succession.html.
- Ilie Urs, "The inheritance rights of the surviving spouse provided by the Romanian law". Accessed January 2, 2013, http://pdfsb.com/readonline/5a56424566774639586e78374158316855513d3d-4365471.
- Iv. Javakhishvili, Works in 12 volumes, Tbilisi: Metsniereba, 1982.
- Rupert Haigh, Oxford handbook of legal correspondence, Oxford University Press, 2006.
- The Civil Code of Georgia, Tbilisi: Bona Causa, 2012.
- What inheritance laws apply in Romania? Accessed January 4, 2013, http://www.globalpropertyguide .com/Europe/Romania/Inheritance.

THE PRINCIPLES OF CONTRACTUAL FREEDOM AND GOOD FAITH IN JURIDICAL CONTRACTS

MIHAELA IRINA IONESCU*

Abstract
The contract is the very heart of the Civil Code, and it is in fact also the cornerstone of any society, as without it relations and rapport amongst citizens could not occur nor unfold, and as such it is presently considered an effective legal instrument for organizing the behavior of all members of society.
The importance of contracts, the extent of contractual freedoms, the rapports that contracts entertain with laws, norms and other regulations and the means to properly frame and limit the State's intervention in the economy all hinge on the evolution of society and it's general ideological proclivity. The contract acts as the mirror of all this and it comes as no surprise that a society that has shortly left an organization based on the tenants of communism still bears the full weight of this ideology when it comes to contracts.
In the framework of the New Civil Code, the contract is viewed as based on a series of principles which are carefully drawn and well established in the general consciousness. As such, altering these principles would naturally cause important concern and uncertainty between the Parties to the Contract. Therefore, when times require repealing from a principle, this should be implemented with the greatest prudence by the legislature.
This paper contains a summary of the guiding principles of contracts from the provisions of the New Civil Code. For the first time in our legal history, these provisions regulate the two most fundamental principles of contracts; contractual freedom and good faith, which is why the author chose to insist on these new regulations

Key words: *Contract, contractual freedom, Civil Code, principles, good faith*

Introduction

There is no doubt that even since it's dawning the Civil Code has been „a mirror to any society as its norms have answered concrete needs and it constituted a modeling force for human relations and rapports, offering to the individual in relation to himself as well as others, principles by which to lead one's life, in all of its aspects, be it spiritual, material, biological, and particularly, social"

In the Romanian legal system, the Civil Code was drafted (in 1864) and entered into force (1865) under the reign of Alexandru Ioan Cuza. Hence, it has suffered numerous modifications both before and after 1947, in most part due to the changes of social relations.

The importance of the Civil Code, in a society, especially the Romanian one is unquestionable, as „all human life, flowing from birth or tied thereto and unto death or with regard thereto, as linked to succession and legacy, is governed by the tenants of Civil Law."

Institutions belonging to this this branch of law play an important part in regulating the life of legal entities, from their founding or tied thereto and until they cease to exist by reorganization or dissolution, and even unto the consequences following from these measures.

Based on these considerations we may say that it is important that in the norms of the Civil code the needs of society, in its current state, should be reflected, and this makes it necessary that the norms adapt themselves to new realities and new demands of the individuals that make up society.

The importance of contracts, the extent of contractual freedoms, the rapports that contracts entertain with laws, norms and other regulations and the means to properly frame and limit the State's intervention in the economy all hinge on the evolution of society and it's general ideological proclivity. The contract acts as the mirror of all this and it comes as no surprise that a society that has

* Assistant Lecturer, Department of Private Law, "Nicolae Titulescu" University (irina.cazimir@gmail.com).

shortly left an organization based on the tenants of communism still bears the full weight of this ideology when it comes to contracts

Thus, the emergence of the New Civil Code unfolded in response to a major Romanian legal necessity as naturally, the needs of 1864 no longer match the needs of today's society.

The contract stands as the very heart of the Civil Code, and it is in fact also the cornerstone of any society, as without it relations and rapport amongst citizens could not occur nor unfold, and as such it is presently considered an effective legal instrument for organizing the behaviour of all members of society.

More than any institution belonging to the Civil Code, the contract must be the best at adapting itself to the times it crosses.

Contract, as it is known is based on a series of carefully drawn and well established principles in all conscience and modification of these principles would create as natural uncertainty in relations between the Contracting Parties. Therefore, when the times require derogation from a principle, it should be implemented very carefully, very carefully by the legislator.

This is also the scope and object of this paper that holds a summary of the guiding principles pertaining to contracts, based on the regulations of the New Civil Code.

Content

For the first time in our legal history, the New Civil Code regulates the principle of contractual freedom as well as that of good faith.

In the system of the New Civil Code, the contract stands out as the main source of obligations, alongside other juridical documents[1], juridical acts in the narrow sense[2] and events[3]. Thus, as per art. 1.165 of the New civil code, obligations flow from contracts, unilateral acts, managing businesses, enrichment without just cause, payments undue, illicit actions, as well as any other act or fact to which the law ties the birth of an obligation.

Following the model of the French "Code Civile", the Romanian civil Code founds the institution of contracts on the principle of the autonomy of juridical will. This is the result of a concept of juridical philosophy that states that the contractual obligation originates exclusively from the will of the parties. Thus, the Contract is the agreement of wills between two or more persons with the intent to build, modify or extinguish a juridical rapport (art. 1166 of new Civil Code).

From the legal definition it therefore also results that the essence of the contract is the agreement of wills. No contract may be formed so long as the wills that concur to its creation have not found an agreement.

From the same legal definition, it results that the contract may be a bilateral or multilateral juridical act.

Juridical acts that necessitate the agreement of wills from two parties to be formed are bilateral; those requiring agreement of will from three or more parties are considered multilateral.

Thus the contract once completed implies the agreement of the parties and cannot be modified or cease without their consent (mutuus consensus mutuus disensus). The irrevocable nature sheds light – a contrario – that the will of a single party –unilateral will- cannot modify or terminate the contract except in circumstances specifically provided for by law or the contract itself. It then stands that, in principle, consent is the only means of resolution or termination of a contract.

[1] Defined in the doctrine as those manifestations of will in the sense of producing juridical effects consisting in the birth, modification or termination of civil juridical reports.

[2] Defined as those manifestations of will without intent to produce legal effects, effects which are produced under the law.

[3] Defined as those manifestations of will without intent to produce legal effects, effects which are produced under the law.

The history of contractual will is, at the same time, the history of the concepts regarding contractual freedom, in other words, it is the history of the principle of contractual freedom.

As we have mentioned, the forming of the contract requires manifesting an agreement of will between at least to participants whom, according to contractual freedom, must be able to choose each other and once the contract is completed, contractual freedoms is continued in determining the terms of the contract and its execution. The essence of contractual freedom with regards to determining the contents of the contract and its effects consists of that, abiding by the limitations set forth in the Civil Code, upholding public order, good morals, restrictions on the object and cause, the parties may set the terms of the contract in accordance to the interests they pursue, thereby binding it entirely.

Therefore we may conclude that, by its nature, the contract is the sum of the wills and interests of the parties, although in the doctrine not all authors consider it to be rigorously exact to speak of contract as agreement of will, as the contract embodies not only the will but also the interest (Ghe. Piperea). Thereby even the expression "agreement of wills" is not rigorously exact as the will of the parties are in most cases contrary one another, or at least substantially different from one another, and always remain theoretically independent "wills" and as such we cannot speak of a unique or even unitary contractual "will". The parties may pursue a common interest or goal, especially in multilateral contracts, but they will never make-up a unique or common will.

The wills of the parties concur in a single point: when the parties agree to generate a juridical rapport, which is to say rights and obligation, as by the contract all parties aim to achieve a result.

In the opinion of the same author (Ghe. Piperea), the contract, in a more holistic approach, built upon the wills and interests of the parties, is upheld by three pillars: contractual freedom, binding force, and relativity of effects. However, the contract cannot function correctly and justly unless these building elements are modeled to the principle of contractual solidarism, when upon, a contract is a conciliation of the interests of the parties and a partnership in which each of the parties is bound to realize their purpose, underlining the fact that a contract is not merely made for oneself but to materialize goals.

Insisting upon the fact that the juridical trajectory of a contract is governed by:

1.The principle of contractual freedom;

2.The principle of good faith

Detailing the contents thereof is in order.

1.The principle of contractual freedom

The parties are free to enter into any contracts and determine the contents thereof within the bounds imposed by the law, public order, and good morals (art. 1169 New civil code). As such, contractual freedom can only be brought to bear in a legal framework, and by respecting reasonable limits imposed for the safeguarding of legitimate public and private interests; if exercised outside this frame, with no bounds any freedom loses its legitimacy and tends to turn to anarchy. In other words, "Nothing imposes so many obligations on the individual as freedom" (Viekoslav Kaleb).

Therefore, the parties are free to choose the person with which they will enter into agreement and to set the content of the contract place of execution, currency of payment…etc. In older civil law doctrine this principle was thus synthesized[4] : "As a matter of principle, the parties are free to enter or to abstain from entering into juridical acts, they may choose their counterparties freely, may by mutual agreement determine the object of the contact and the terms and effects thereof, they may modify them or terminate them, may adopt or reject in full or in part the patterns set forth by law (so called named acts), they may merge elements of these typical documents or create new acts unforeseen by the law, they may express their consent in the form of their own choosing, the juridical will having the same effectiveness whether openly or silently expressed, as sometimes silence itself may cause juridical effects".

[4] D. Cosma, (Theory of contract)"Teoria generală a actului juridic civil", Ed. Ştiinţifică, Bucureşti, 1969, p. 63.

The principle of contractual freedom also induces the freedom to negotiate and absence of liability in the event of not completing the contract. The omnipotence of contractual freedom explains – and justifies – that the parties undergo a series of "saccades" in the process of forming the contract. If they are free to bind themselves to the terms of the final agreement, the parties are just as free to set forth, in the contract, the means to "sever" the legal bond that blossoms between them[5].

Of course, this principle has its own limitations. Thus, the dispositions that make up the "economic public order" affect the freedom to contract in varied way such as: by forbidding any contracts pertaining to a determined object that is thus removed from trade; forbidding the use of terms deemed abusive; imposing on one of the parties obligations to complete certain formalities before treating with its partners; making it mandatory to agree to contracts with any and all who manifest a will towards such; by modulating the content of the contract by either determining the duration in authoritarian fashion or setting limits that one cannot exceed…etc.[6]

Other restraints are brought to the parties' freedom in establishing the contents of the contracts or choosing the form for its validity. This is the case with contracts of adhesion, that have a pre-established content and are encountered more and more in our lives (i.e. in insurance, transport relations, retail telephone services, banking, etc). The content of these contracts is the exclusive work of one of the parties, the stronger party, which thereby effectively imposes its terms.

Gh. Piperea:

"Considering that the freedom to contract was never accepted by the lawmaker as being absolute and observing that those pressed by needs are forced to want what the strong of the economy are free to impose upon them, we can firmly state that the autonomy of will is but a legal fiction, further removing itself from the contemporary reality. In a modern, globalized world there are contracts in which the will of a party is missing, is altered, or limited to the option of signing the contract or not. Such a contract is guided, almost in its entirety, by the interest to sign the contract. Yet this does not mean we live an age of twilight of contracts as the instrument of human options."

In theory, the parties to a contract are free to contract, but also to set the terms of the contract themselves. Synthetically, contractual freedom means freedom to contract, to not contract, to choose the contractual partner and to set or negotiate the contents of the contract.

2.Principle of good faith

Good faith is first and foremost a fundamental principle of civil law and art. 1170 of the new Civil Code brings this solution home to the realm of contracts by targeting the pre-contractual period in which negotiations occur (this idea is expanded in art. 1183 of NCC) as well as the mechanism for completing and executing the contract.

Good faith in negotiations

Art. 1183 NCC

"1- The parties are free to initiate, conduct and break negotiations and cannot be held liable for their failure

2- The party that enters into a negotiation is held to uphold the demands of good faith. The parties cannot agree to limit or exclude this obligation

3- Amongst other things, the conduct of a party entering negotiations or continuing negotiations without intent to complete a contract is deemed contrary to the demands of good faith.

4- The party that initiates, continues or breaks negotiations contrary to good faith is liable for the damages caused to other parties. To account for such damage, the costs incurred by the negotiations will be held under advisement as well as other offers the parties may have waived due to such or any other similar circumstance.

---

[5] J. Goicovici, (The formation of contracts)"Formarea progresivă a contractelor", Ed. Wolters Kluwer, Bucureşti, 2008, p. 16

[6] See G. Farjat, "L'ordre public économique", Dalloz, Paris, 1965, p. 52 and foll. & p. 399 and foll.

Therefore, the New civil code regulates the negotiations phase, an exceptionally important step in the forming of a contract, during which the offer to contract is constructed and the potential agreement thereto as well. Indeed, in contemporary law, the actual closing of the agreement is sometimes especially complex and necessitates talks and discussions which serve to the final agreement of wills and outline the pre-contractual period (see. L. Pop, "Obligatiile", vol II, p. 203)

From the body of regulations of the new civil code derives the idea that, in the lawmakers' opinion, negotiations can be pre-contractual or post-contractual. As a general rule, negotiations imply certain actions unfolding to the point of determining the content of a contract, however, based on art. 1182 par. 2 of NCC, the contract can be completed only by establishing the key elements, which implies that for secondary matters the parties may continue negotiations. In such a scenario, the parties will still be in the process of defining the contents of the contract although it was already created and attributed binding force, it is then a post-contractual negotiation. In other words, post-contractual negotiation implies negotiating secondary elements regarding a contract that has been agreed upon and does not refer to designing futures contracts (even when these are but modified variants of an existing contract), in which case we are still face with pre-contractual negotiations.

The obligation to act in good faith implies that the parties take up a loyal behavior, and art. 1183, par. 3 of NCC holds a non-limited example as to what constitutes contrary behavior: the case in which a party initiates or continues negotiations with no intent of actually having a contract as a result. To the extent that there is a will to have a contract, but other aspects imposed by good faith regarding initiating, continuing or breaking negotiations are infringed upon, the infringing party will be faced with tort liability for the damage caused, based on art 1183, sec. 4 of NCC. For instance, breaking negotiations already in an advanced state, absent legitimate reason in a brutal manner by one of the parties can be considered to be an act of bad faith (see L. Pop, Obligatiile, Vol II, p. 208). Similarly, the holding of a partner in an extended state of uncertainty through long negotiations without a real and serious reason can also be thus considered (see Fr. Terre s.a., Les Obligations, p. 191)

Article 12, par. 2 of NCC establishes that good faith is presumed until proven otherwise, which imposes to prove behavior contrary thereto.

The lawmaker indicates some elements useful in determining the damages caused by initiating, continuing or breaking negotiations contrary to good faith. Costs incurred for the unfolding of the negotiations will be held under advisement as well as other offers from third parties the harmed party (/ies) may have waived due to such or any other similar circumstance.

Good faith when concluding the contract

Good faith is the expression of the general duty of loyal behavior and consists for each of the parties in not betraying the trust awarded by the other party or parties. Rightly, it was noted that this predictability is at the heart of the contract, and good faith represents and extension of binding force capable of upholding the contract to its full effectiveness.

Loyalty in concluding a contract imposes on the parties the duty to inform each other, which is to say to present all data and elements needed for the contract to be formed under good conditions. The duty to inform falls upon all parties to the contract with regards to both the rights and obligations borne by entering into it and their extent as well as any other facts that may be relevant for a party to know so as to act accordingly.

Good faith in the unfolding of the contract

The parties to the contract must fulfill the obligations undertaken, in spite of any difficulties that may arise in the unfolding of the legal relationship. While executing the contract, the imperative of good faith imposes a duty to initiative, cooperation and collaboration with the goal of efficiently executing the contract, and the party I denied behaviors which could bring harm to these aspects. In spite of this, the duty of good faith does not force to protect another's interests over one's own.

The parties cannot remove or otherwise exempt themselves from the duty to act in good faith, which implies the idea that good faith is imposed by public order, the sanction for infringing thereon being that the clause be considered null and void.

The absence of good faith

It was noted in the doctrine that the temptation may arise for a judge or arbitrator to take advantage of the elasticity of this concept of good faith to exert an uncontrolled and moderating power, and that to prevent such consequences limiting the application of the concept to the prerogatives accessory to the right to claim of the creditor (i.e. the right to Resolution). In any case, we must note the there is no sanction *per se* when good faith is absent from the negotiation, conclusion or execution of the contract. The form and extent of the liability is to be outlined based on the elements of the specific characteristics juridical situation in which good faith was breached; for instance, presence of dol can incur tort liability, while non-compliance in bad faith with a contractual obligation may lead to the Resolution of the contract – art. 1549 NCC "the right to Resolution or termination.

1- If enforcement of contractual obligations is not demanded, the creditor is entitled to the Resolution or, as the case may be, termination of the contract, as well as any liquidated damages due to him.

2- Resolution can occur for a part of a contract only when its execution is severable. Likewise, in the case of a plurilateral contract, the non-fulfillment by one of the parties will not incur Resolution towards the other parties, except when the non-fulfilled performance is deemed essential under the circumstances."

Conclusions

From the major importance that the Civil Code has in regulating the reports amongst members of society flows the necessity for such a juridical too reflect as well and accurately as possible the needs of society.

With the emergence of the new Civil Code, for the first time in Romanian legal history, the fundamental principles of contractual freedom and good faith have been introduced, reason for having to set very clear limits (imposed by law for reasons pertaining to safeguarding legitimate public and private interests) to which parties may conclude contracts, determine the contents thereof, negotiate, choose their partners, the object of the contract, means of its unfolding, etc. Furthermore the means by which the principle of good faith -fundamental to Romanian civil law- is applied to the matter of contracts for each stage in particular from pre-contract, negotiation, conclusion and execution must also be clearly stated in detail.

In this paper, we have set forth a summary of these notions striving to emphasize the practical implications thereof.

References

- Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei – "Noul Cod Civil", Ed. C.H. Beck, Bucuresti 2012.
- Ghe. Piperea, (Introduction in professional contracts law)"Introducere in Dreptul contractelor profesionale", Ed. C.H. Beck, Bucuresti 2011.
- D. Cosma, (Theory of contract)"Teoria generală a actului juridic civil", Ed. Ştiinţifică, Bucureşti, 1969, p. 63.
- J. Goicovici, (The formation of contracts)"Formarea progresivă a contractelor", Ed. Wolters Kluwer, Bucureşti, 2008, p. 16.
- G. Farjat, "L'ordre public économique", Dalloz, Paris 1965.
- L. Pop, (Obligations)„Obligatiile", Vol II, Ed Universul Juridic, 2009.

MATRIMONIAL CONVENTION

DAN LUPAŞCU[*]

Abstract
The matrimonial regime is ruled by two perspectives, the Roman law and the German one. The Romanian concepts were taken from the French law. The new Romanian Civil Code is characterized by the special attention it pays to the regulation of spouses' patrimonial relationships, ant it therefore abandons the exclusivist conception and enacts several matrimonial regimes, namely: a) the regime of legal community; b) the regime of separation of assets; c) the regime of separation of assets with participation to acquisitions; d) the regime of conventional community.
The matrimonial convention represents the legal document by which future spouses, or, as the case may be, current spouses, resorting to the liberty they have been conferred by the legislator, determine their own matrimonial regime or, as the case may be, modify their applicable matrimonial regime.

Key words: *matrimony, prenuptial agreement, preciput clause, spouses, under/over aged persons.*

1. Preliminary views

In time, the matrimonial regime has been subject to the influence of two dominant conceptions[1]. The first one was the conception of the Roman law conception, which consecrated marriage "*cum manu*", the wife being placed under the power of her husband, so that her fortune was also transferred into the patrimony of the latter. The normative evolution gradually leads to the separation of the wife's fortune from the husband's fortune, the latter being however in charge with the management of the assets that the dowry consisted of. The second conception, which is specific to the German law and which may be found in several western legal systems, maintained that the marriage conclusion resulted into a community of the assets belonging to the two spouses, community which may be modelled by the spouses convention and which is subject to the administration of the husband, acting as "leader of the marital partnership"[2]. In the absence of a convention, this community of assets represented the legal regime applicable to patrimonial relationships between spouses.

In the Romanian law, the regulations regarding the matrimonial conventions were taken over from the French Civil Code adopted during the reign of Napoleon Bonaparte, being introduced first of all in the old laws (in the Calimach Code, for instance), then in the Civil code adopted in 1864[3]. However, we must mention that the latter of the normative documents referred to in the previous sentence, although it regulated the dowry regime, the existence of this regime was subject to the condition that a dowry should be expressly constituted[4]; if this condition was not met, the wife's assets had no dowry character and were not subject to the husband's administration.

The convention (also referred to as "prenuptial agreement", "matrimonial agreement", "dowry deed", "dowry allocation", "marriage agreement") was mainly used by "blue-blooded persons", who

---

[*] Professor, PhD, Faculty of Law, "Nicolae Titulescu" University; Judge and President of the Bucharest Court of Appeal (dan.lupascu@just.ro).

[1] See: Matei B. Cantacuzino, Elementele dreptului civil. Restitutio. All Publishing House, Bucharest, 1998, edition supervised by Gabriela Bucur and Marian Florescu, p. 697 and 698.

[2] Idem, p. 698.

[3] 3 In the sense that by the adoption of the new Civil code, "it is for the first time that matrimonial conventions are acknowledged the Romanian law system", see: A.F. Dobre - Convenţiile şi regimurile matrimoniale sub imperiul noului Cod civil, "Dreptul", magazine, No. 3/2010, p. 13.

[4] 4 See: art. 1227 of the 1864 Civil Code.

manifested a substantial concern for the material aspects of marital life and for the determination of convenient solutions in case of divorce.

After the communists seized power in Romania, a new outlook on the matter was gradually adopted, namely the idea that the conclusion of a marital convention is an immoral and degrading act, in contradiction with the goals of the state, which assumed, among other matters, exclusivity in the regulation of family relationships. Under these circumstances, when the Family Code[5] came into force, the possibility to settle the spouses' patrimonial relationships by means of a convention was eliminated, the only applicable matrimonial regime being the legal community one.

The new Romanian Civil Code is characterized by the special attention it pays to the regulation of spouses' patrimonial relationships, ant it therefore abandons the exclusivist conception and enacts several matrimonial regimes, namely: a) the regime of legal community; b) the regime of separation of assets; c) the regime of separation of assets with participation to acquisitions; d) the regime of conventional community.

The new legal provisions give one the possibility to choose from the variants set down in the preceding paragraph, and the choice thus made must be mentioned in the marriage statement. [6]

The parties' right to make a choice does not entitle them to combine the matrimonial regimes or to benefit from any derogation from the imperative rules of any of the said regimes, except for the cases when the law permits such an exception.[7]

To the extent that the parties choose a matrimonial regime different from the legal community one, they have the obligation to conclude a matrimonial convention.[8]

However, we do not exclude the possibility for a matrimonial convention to be concluded even when the option chosen is that of the legal community regime but the parties wish to include a *preciput* clause thereto or the convention contains other legal deeds as well.

This assertion is based, on the one hand, on the fact that the law does not deny such a solution. On the other hand, the opposite solution would create discrimination depending on the applicable matrimonial regime.

2. The notion of matrimonial convention

Since the legislator showed no concern in the sense of defining the matrimonial Convention, in the dedicated literature, under the effect of the 1864 Civil Code provisions, this convention was defined, for instance, as being "the convention through which the future spouses determine the matrimonial regime, in other words the condition of their current and future assets, in the pecuniary relationships arising from their marriage".[9]

In the recent legal doctrine, the matrimonial convention has been referred to, among other definitions, as being : "(...) the convention by which future spouses agree upon the matrimonial regime they shall be subject to"[10], "the legal document by which the parties regulate the essential

[5] That is on January 31st, 1954, when it was published in the Official Gazette of Romania, Part I, No. 9/31 January 1954, Decree No. 3271954 for the enactment of the Family code and of the Decree regarding individuals and legal entities.

[6] See: art. 281, paragraph (1) final thesis in the Civil Code.

[7] According to art. 332, paragraph (1) of the Civil Code: "No derogation is allowed by the matrimonial convention, subject to the sanction of absolute nullity, from the legal provisions regarding the chosen matrimonial regime, except for the cases expressly provided by law", in the sense that the parties have, in principle, a total liberty to determine the contents of their matrimonial convention, and they may combine alternative regimes or even create a new regime, different from the legal variants proposed: See: M. Revenco - Conventia matrimonialS in sistemul de drept continental si common law, Revista Romana de Drept Privat, No. 5/2009, p. 84.

[8] According to art. 329 of the Civil Code: "The choice of a matrimonial regime different from the legal community one shall be made by concluding a matrimonial convention".

[9] See: C Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu - Tratat de drept civil roman, vol. Ill, republished All Beck Publishing House, Bucharest, 1998, p. 4.

[10] See: I.P. Filipescu - Tratat de dreptul familiei, All Beck Publishing House, Bucharest, 2000, p. 42.

patrimonial relationships existing between them during their marriage"[11], "a conventional, public and solemn legal document by which future spouses regulate, before the conclusion of their marriage, the essential patrimonial relationships existing between them during their marriage or the convention concluded during the parties' marriage and by which the spouses decide to substitute the current matrimonial regime by another type of matrimonial regime acknowledged by law",[12] or "the solemn legal act by which future spouses or current spouses, within the limits of the law regarding public order and morality, mutually agree to submit their patrimonial relationships to the conventional community regime or to the separation of assets regime and to objectify their patrimonial obligations during their marriage".[13]

In our opinion, the matrimonial convention represents the legal document by which future spouses, or, as the case may be, current spouses, resorting to the liberty they have been conferred by the legislator, determine their own matrimonial regime or, as the case may be, modify their applicable matrimonial regime.[14]

As to the clearness of the provisions of art. 330 paragraphs (2) and (3) of the Civil code, we do not share the opinion according to which the matrimonial convention is only "the one concluded in consideration of the marriage conclusion", the one concluded during marriage representing only "a convention of administration, preservation and partition of assets, applicable in the event of marriage dissolution"[15]

To sweep away the controversial issues regarding mainly the nature, the parties thereto or the contents of the matrimonial convention, we find it useful to provide a legal definition thereof.

3. The legal nature of the matrimonial convention

In our legal doctrine, starting from the interpretation of art. 1101 of the French Civil Code, a distinction is sometimes made between the term "agreement" (which may create or transmit rights and obligations) and the term "convention" (which may create transmit or terminate rights and obligations).[16]

Consequently, the convention represents the general and the agreement is the particular.

This opinion was justly criticized, considering that the two terms, although they have different roots, they express the same idea.[17]

Qualifying the matrimonial convention, we appreciate that we are in the presence of a legal document placed within the scope of family law, which beside the parties' agreement and the patrimonial relationships between the parties may also include other legal documents, such as donations made by other persons to spouses or only to one of them or acknowledgement of a child's parentage.

It was then absolutely righteous for specialists to assert that we have to do with a veritable "family covenant"[18], an act having a specific legal cause (*affectio conjugalis*).[19]

---

[11] See: P. Vasilescu - Regimuri matrimoniale, 2nd editions, revised, Universul Juridic Publishing House, Bucharest, 2009, p. 203.

[12] See: A.F. Dobre, op. cit, p. 13 and 14.

[13] See: T. Bodoasca - Regimul separatiei de bunuri in reglementarea noului Cod civil roman, "Dreptu!" magazine, No. 11/2010, p. 57 and 58.

[14] See: D. Lupascu, CM. Craciunescu - Dreptul familiei, 2nd edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2012, p. 139 and 140; CM. Craciunescu - Regimuri matrimoniale, All Beck Publishing House, Bucharest, 2000, p. 11.

[15] See: I. Niculescu - Despre conventiile matrimoniale, www.iuridice.ro, June 29th, 2011.

[16] See: T.R.Popescu, A. Anca - Teoria general a obligatiilor, Ed. StiintificS, Bucharest, 1968, p. 21.

[17] See: T. Bodoasca - Regimul separatiei de bunuri In reglementarea noului Cod civil romSn, op. Cit., p. 57, note 7.

[18] See: C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, op. cit., p. 23.

[19] See: C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, op. cit., p. 221; M. Avram, C. Nicolescu - Regimuri matrimoniale, Hamangiu Publishing House, Bucharest, 2010, p. 69 ; CM. Craciunescu, op. cit., p. 12.

4. Legal characteristics of the matrimonial convention

The matrimonial convention has the following legal characteristics[20]:

a) It is fundamentally a bilateral legal deed[21], entered by and between future spouses or current spouse, as the case may be; this does not exclude the participation of third parties (as in case of donations, for instance);

b) It is a complex legal deed, which may include several legal deeds[22], each of them preserving its identity;

c) It is a solemn legal deed, in the sense that the law imposes a certain form for its conclusion;

d) It is a synallagmatic legal deed;

e) It is a legal deed accessory to the marriage, which means that it produces its effects only during the term of the marriage;

f) It is a legal deed subject to publicity formalities;

5

g) It is a legal deed which is incompatible, in principle, with the modalities of the common law. As an exception, the parties may stipulate, for example, that after a certain term they change, under the provisions of the law, the matrimonial regime or terminate the matrimonial regime they have chosen;

h) It is an *intuitu personae* legal instrument.

5. Terms of validity of the matrimonial convention

The validity of the matrimonial convention is subject to the condition that all the substantive and formal requirements prescribed by law should be met.

The first category refers to capacity, consent, object and cause.

The parties' capacity to conclude a matrimonial convention is subject to the "*habilis ad nuptial, habilis ad pacta nuptialia*" principle, which means that a person that is in a position to get married may conclude a matrimonial convention.[23] Consequently and as a rule, a person who has turned 18, may also conclude a matrimonial convention. At the same time, the underage person who has acquired with anticipation full capacity of exercise may conclude this convention without any restriction. An underage person who has acquired full capacity of exercise pursuant to a prior marriage is in a similar situation, to the extent that such person still enjoys full capacity of exercise.

As an exception, a minor who has not turned 16 yet may conclude a matrimonial convention provided he meets the following requirements: a) his legal tutor has consented thereto; b) he has the permission of the tutelary court of law.

We do not share the opinion that an underage person who wants to conclude or modify a matrimonial convention needs a double approval respectively "a medical favourable opinion and the parents; consent"[24], the only requirements imposed by the law being the ones stipulated hereinabove.

An underage person who has not turned 16 yet may not conclude a matrimonial convention and neither may a person placed under judicial interdiction. In this latter hypothesis, if one or both spouses has/have been placed under judicial interdiction, the conclusion or amendment of the

---

[20] " In the sense that the matrimonial convention is an agreement defined, by onerous title, *intuitu personae*, with immediate enforcement, see: I. Niculescu, op. cit., www.juridice.ro, 2009.

[21] In the sense that a matrimonial convention may not be entered between more than two parties, see; A.F. Dobre, op. cit., p. 14.

[22] See: CM. Craciunescu, M.G. Berindei - Conventia matrimoniala, Consideratii critice. Noul Cod civil. Comentarii. Academia Roma'na', Institutul de CercetSri Juridice, coordinator M. Uliescu, Universul Juuridic Publishing House, Bucharest, 2010, p. 350.

[23] See: M. Avram, C. Nicolescu - Regimuri matrimoniale, Hamangiu Publishing House, Bucharest, 2010, p. 81; P. Vasilescu - Regimuri matrimoniale, 2nd edition, revised, Universul Juridic Publishing House, Bucharest. 2009, p. 325.

[24] See in this respect: A.F. Dobre, op. cit., p. 15.

matrimonial convention shall be achieved through the intermediary of the legal representative (tutor or curator, as the case may be).

Future spouses' or current spouses' consent to the conclusion of the marriage convention follows the general rules observed in the matter of legal documents.[25] It may be vitiated by error, fraud or violence, and note must be made that the said vices are not to be confused for the vices of consent upon marriage conclusion.

The object of the matrimonial convention aims at organizing the patrimonial relationships between spouses and respectively between them and third parties, by choosing or modifying the matrimonial regime applicable to the respective marriage.[26]

The parties may also introduce a preciput clause into their matrimonial convention.

This clause represents the wilful agreement of future spouses or of current spouses, as the case may be, reached and concluded under the terms of the law and incorporated in the matrimonial convention, by virtue of which the surviving spouse is entitled to take over, without paying any consideration, before the partition of the estate, one or more common assets held in joint indivisible ownership or in co-ownership.[27] This obviously refers to assets regarded as ut singuli and not to a universality of assets, which strongly requires that such assets be individualized or a presentation of criteria by which such assets may be identified, specifications that must be included in the matrimonial convention.[28]

Under the provisions of art. 367, paragraph d) of the Civil Code, the preciput may also make the exclusive object of the matrimonial convention.

The preciput clause generates the right to preciput, which is a contingent right subject to the suspensive condition of the beneficiary's survival. The stipulated beneficiary of such clause may be either one of the spouses or both of them.

Although the operation of coming in possession of certain assets takes place without payment of any consideration, we believe that this clause may be assimilated neither to a donation, nor to a testament or to clause of unequal partition of the spouses' common assets, having a configuration of its own and constituting a distinctive matrimonial advantage.[29]

In the absence of any restriction provided by law, any of the common assets, owned either in joint indivisible ownership or in co-ownership may form the object of the preciput clause.

The right of preciput is different from the special right to inheritance of the surviving spouse acknowledged by art. 974 of the Civil Code, as the furniture and the household appliances/objects meant for the common use of the spouses are due to the surviving spouse by effect of the law (in addition to the inheritance she/he is entitled to) and not by effect of the parties' convention.[30]

As regards the moment when the asset is taken over by the surviving spouse, the law stipulates only that it occurs before partition of the succession, without any reference to the partition of the common assets. De *lege ferenda*, we believe it is necessary to mention that the takeover of the

---

[25] See: art. 1204 of the Civil code, according to which: "The parties' consent must be serious, free and expressed in full awareness of the matter".

[26] See: D. Lupascu, CM. Craciunescu - Dreptul familiei, op. Cit, p, 143 and 144.

[27] See: CM. Craciunescu, D. Lupascu - Reglementarea clauzei de preciput in noul Cod civil roman, astfel cum a fost modificat prin Legea nr. 71/2011, „Pandectele Romane" magazine No, 8/2011, p. 39 and the subseq. For other detailed analyses regarding the preciput clause, see for exampie: I. Popa - Clauza de preciput in reglementarea noului Cod civil Abordare comparative. Revista Romana de Drept Privat, No. 6/2011, p. 137-164.

[28] In the same respect, see: CM, Nicolescu - Regimurile matrimoniale conventionale reglementate de noul Cod civil roman, Abordare comparative, Revista Romana de Drept Privat, nr, 4/2009, p, 112-179.

[29] See: D. Lupascu, CM. Craciunescu - Dreptul familiei, op, cit., p, 149-151.

[30] In the sense that "the assets of the household are not included in the consideration of the aggregate estate, while the assets making the object of the preciput clause, in the absence of the preciput clause, would be considered in the calculation of the aggregate estate", see: A.F. Dobre, op. Cit., p. 20.

assets also takes place before the common assets are subject to partition or, by the French model, "before any partition"[31].

If it is no longer possible for the respective asset to be taken over in kind, the preciput clause may be also applied by equivalent, from the value of the net asset of the community, an aspect with respect to which our Civil Code needs additional clarifications.[32]

The preciput is subject to reduction, which is made before donations, together with the legacies and commensurately.

As regards the deadline by which one may exercise his right of preciput, our law is "silent", and therefore the general term of prescription shall be applied, meaning a 3-year term as of the date of the other spouse's death.

This solution drives towards the partition of the common assets, even if the beneficiary of the preciput right does not want that.

Being a component of the matrimonial convention, the fate of the preciput clause depends on the fate of the main convention.

However, there is nothing to prevent the parties from stipulating in their matrimonial convention a term within which the preciput right may be exercised. [33]

The clause becomes null upon termination of the community during the spouses' lives, in case the beneficiary spouse died before the assigning spouse, when the spouses died at the same time as well as in case the assets that made the object of the said clause have been sold pursuant to common creditors' request[34].

The stipulation of this clause does not affect common creditors' right to claim the respective assets, even before the community comes to an end.

The matrimonial convention may also include other deeds, such as acknowledgement of a child or donations made to future spouses in consideration of the marriage to be concluded.[35]

The parties' free will is limited from a double point of view. First of all, the imperative provisions of the law and the morality, that is the "general limits", may not be disregarded.[3636] Secondly, under the title of "special limits", the Civil Code institutes the interdiction to violate the legal provisions regarding the chosen matrimonial regime and the interdiction to prejudice the spouses' equality, the parental authority and the legal devolution of the estate.[37] For instance, the matrimonial convention may not limit the right of either spouse to exercise freely his profession, it may not determine which of the parents the child will remain with in case of marriage dissolution, it may not institute incapacities for either spouse, it may not prejudice the legal provisions of the succession law, etc.

The cause of the matrimonial convention (*affectio conjugalis*) implies the will of the future spouses to get married or, as the case may be, the current spouses' will to amend the applicable matrimonial regime.

From a formal point of view, *ad validitatem,* the law[38] imposes the existence of a deed authenticated by a notary public.

Criticisms were made for good reason against the limitation of matrimonial convention authentication only by the notary public in case of people getting married abroad at Romania's

---

[31] See: art. 1515 of the French Civil Code.

[32] See: D. Lupascu, CM. Craciunescu - Dreptul familiei, op. cit., p. 153-154

[33] OJ In the same respect, see: CM. Nicolescu - Regimurile matrimoniale conventionale reglementate de noul Cod civil roman, Abordare comparativa, op. cit., p. 135.

[34] See: art. 333, paragraph (4) of the Civil Code.

[35] See: M. Avram, C. Nicolescu, op. cit., p. 70.

[36] Idem, p. 84 and the suseq.

[37] Regarding these limits, see: T. Bodoasca - The regime of separation as regulated by the new Romanian Civil Code, op. cit, p. 59.

[38] See: art. 333, paragraph (4) of the Civil Code.

diplomatic missions or consular offices or before the competent local authorities, and the remark was made that the institution of the "notary public" does not exist in the respective country, the future spouses must travel back to our country in order to conclude the matrimonial convention.[39]

However, we do not share the critical opinion according to which "the fact that «all parties» is required generates ambiguity"[40] to the extent that we support the idea of the complex nature of this legal deed, which may imply the participation of third parties, too.[41]

Future spouses or current spouses, as the case may be, must express their consent before a notary public[42] either personally or by attorney appointed by a special and authenticated of attorney whose wording has been predetermined (in the sense that it must contain, in detail, the clauses of the matrimonial convention).[43]

In our opinion, the requirement regarding the "predetermined content" of the power of attorney is strictly limited to the will expressed by the future *or* current spouses, as the case may be.

6. Publicity of the convention

In order to assure the safety of the civil circuit, the law imposes that the following forms of publicity of the matrimonial convention be complied with:

a) mention made by the registrar on the marriage certificate;

b) registration in the Notaries' national register of matrimonial regimes;

c) note or, as the case may be, registration made in the land book, trade register or in other publicity registers required by law, depending on the nature of the respective assets.

As regards opposability against third parties, the Civil code makes a distinction based on the good faith or bad faith of such third parties. Thus, the matrimonial regime chosen by the matrimonial convention is opposable to third parties as of the date when the publicity formalities are completed; in the absence of such formalities, in relation the third parties in good faith, the spouses shall be deemed married under the matrimonial regime of legal community. In case of bad-faith third parties (namely the persons who have learned from the spouses themselves or from other sources of the applicable matrimonial regime), the matrimonial convention shall apply, notwithstanding the publicity default, the publicity system based on "effective knowledge" being thus consecrated.[44]

7. Simulation of the matrimonial convention

If the parties to the matrimonial convention have resorted to the operation of simulation, the Civil Code[45] prescribes inopposability of the secret deed against good-faith third parties. Between the parties to the matrimonial convention and in relation to bad-faith third parties the matrimonial regime agreed upon by the secret deed may be applied.

8. Caducity of the matrimonial convention

A matrimonial convention becomes invalid in the following circumstances: a) the parties have given up the marriage they were planning to conclude;

10

---

[39] See: T. Bodoasca - Aspecte privind reglementarea generala a regimului juridic matrimonial in noul Cod Civil roman, „Dreptul" Magazine, No. 5/2010. P. 60-61.

[40] Idem, p. 61.

[41] As regards the parties to a matrimonial convention, also see: M. Revcenco, op. cit., p. 91, note 37.

[42] The role of the notary public is not only to authenticate the respective convention, but as a specialist, also to give advice to the parties thereto, helping them to choose the most suitable solution.

[43] In the dedicated French literature we find the opinion that in case a matrimonial convention is concluded, the mandate is imperative, in the sense that it shall include all the clauses of the respective convention, see: L. Raucent, Y.-H. Leleh - Les regimes matrimoniaux. Contrat de mariage et modification du regim matrimonial, Larcier, 1997, p. 75.

[44] See: M. Avram, C. Nicolescu, op. cit., p. 102. 5

[45] See: art. 331.

b) the marriage was ascertained invalid or was annulled (except the putative marriage);

c) the tutelary court decided that the community matrimonial regime be modified and the regime of assets separation be applied.

The caducity of the matrimonial convention does not affect the deeds which have their own individuality (such as, for instance, a donation or a deed of acknowledgement of filiation).[46]

9. Modification of the matrimonial convention

A matrimonial convention concluded before marriage may be modified at any time. The spouses may modify the applicable matrimonial regime only after period of at least one year has elapsed since their marriage was concluded. [47]

A matrimonial convention may be modified totally or partially.

The operation of modification is subject to the same substantial, formal and publicity conditions applicable to the conclusion of a matrimonial convention.

To the extent that creditor third parties were prejudiced by the modification or liquidation of the matrimonial regime, they may resort to the following mechanisms in order to take advantage of their own rights:

a) they may file a revocatory action with the tutelary court, within one year as of the moment when the publicity formalities are duly completed or, as the case may be, as of the earlier date when they learned such facts from other sources;

b) they may invoke at any time the inopposability of the matrimonial convention modification.

10. Nullity of the matrimonial convention

Non-compliance with the substantial and formal legal requirements to be met in concluding a matrimonial convention shall lead to the sanction of nullity applied thereto. The facts listed hereinafter represent cases absolute nullity:

a) absence of consent;

b) inclusion of certain clauses representing derogations from the legal provisions regarding the chosen matrimonial regime;

c) inclusion of certain clauses which prejudice the equality between spouses, the parental authority or the devolution of the legal succession;

d) noncompliance with the form prescribed by law;

e) conclusion of the matrimonial convention by a minor who has not turned 16 yet;

The sanction of relative nullity shall apply:

a) in case the consent is vitiated by error, fraud or violence;

b) in case the matrimonial convention is concluded without the approval or the authorization prescribed by law.

Ascertainment of nullity or, as the case may be, annulment of the matrimonial convention leads to the application between the spouses of the legal community regime.

Good-faith third parties are protected in the sense that the rights they have acquired shall not be affected.

11. Conclusions

In this field of family relationships, the new Romanian Civil code restores the adequate efficiency of the traditional principle of matrimonial convention liberty, thus realigning our legislation with the modern judicial systems.

---

[46] See: C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu - op. cit., p. 36 and the subseq.

[47] See: art. 369 of the Civil Code.

The possibility conferred to future spouses or to current spouses, as the case may be, to choose the applicable matrimonial regime allows an adequate adaptation of legal "patterns" to the parties' effective needs.

Being concerned to confer stability to the patrimonial relationships between spouses, in the due legal variant, the legislator has not ignored the interests of third parties either, imposing substantial, formal and publicity-related requirements which are meant to satisfy such requirements.

The solutions adopted in this matter are flexible and modern, and they are to prove their effectiveness in practice.

However, from certain points of view - which we have highlighted hereinabove -they are criticisable and necessitate legislative interventions.

References:

- Matei B. Cantacuzino, Elementele dreptului civil. Restitutio. All Publishing House, Bucharest, 1998, edition supervised by Gabriela Bucur and Marian Florescu, p. 697 and 698.
- Idem, p. 698.
- M. Revenco - Conventia matrimonialS in sistemul de drept continental si common law, Revista Romana de Drept Privat, No. 5/2009, p. 84.
- C Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu - Tratat de drept civil roman, vol. Ill, republished All Beck Publishing House, Bucharest, 1998, p. 4.
- I.P. Filipescu - Tratat de dreptul familiei, All Beck Publishing House, Bucharest, 2000, p. 42.
- P. Vasilescu - Regimuri matrimoniale, 2nd editions, revised, Universul Juridic Publishing House, Bucharest, 2009, p. 203.
- A.F. Dobre, op. cit, p. 13 and 14.
- T. Bodoasca - Regimul separapei de bunuri in regiementarea noului Cod civil rom&n, "Dreptu!" magazine, No. 11/2010, p. 57 and 58.
- D. Lupascu, CM. Craciunescu - Dreptul familiei, 2nd edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2012, p. 139 and 140; CM. Craciunescu - Regimuri matrimoniale, All Beck Publishing House, Bucharest, 2000, p. 11.
- Niculescu - Despre conventiile matrimoniale, www.iuridice.ro, June 29th, 2011.
- T.R.Popescu, A. Anca - Teoria general a obligatiilor, Ed. StiintificS, Bucharest, 1968, p. 21.
- M. Avram, C. Nicolescu - Regimuri matrimoniale, Hamangiu Publishing House, Bucharest, 2010, p. 69.
- CM. Craciunescu, M.G. Berindei - Conventia matrimonială, Consideratii critice. Noul Cod civil. Comentarii. Academia Roma'na', Institutul de CercetSri Juridice, coordinator M. Uliescu, Universul Juuridic Publishing House, Bucharest, 2010, p. 350.
- CM. Craciunescu, D. Lupascu - Reglementarea clauzei de preciput in noul Cod civil roman, astfel cum a fost modificat prin Legea nr. 71/2011, „Pandectele Romane" magazine No, 8/2011, p. 39 and the subseq.
- Popa - Clauza de preciput in reglementarea noului Cod civil Abordare comparative. Revista Romana de Drept Privat, No. 6/2011, p. 137-164.
- CM, Nicolescu - Regimurile matrimoniale conventionale reglementate de noul Cod civil roman, Abordare comparative, Revista Romana de Drept Privat, nr, 4/2009, p, 112-179.
- D. Lupascu, CM. Craciunescu - Dreptul familiei, op. cit., p. 153-154.
- T. Bodoasca - The regime of separation as regulated by the new Romanian Civil code, op. cit, p. 59.
- T. Bodoasca - Aspecte privind reglementarea generala a regimului juridic matrimonial in noul Cod civil roman, „Dreptul" Magazine, No. 5/2010. P. 60-61.
- L. Raucent, Y.-H. Leleh - Les regimes matrimoniaux. Contrat de mariage et modification du regim matrimonial, Larcier, 1997, p. 75.

THE LAND LEASING AGREEMENT IN THE NEW CIVIL CODE

LIVIA MOCANU*

Abstract
Since ancient time this type of agreement was thought to have a special utility in exploiting the land property. The land leasing agreement is a juridical instrument specific for exploiting agricultural goods at present time as well. Therefore, after 1990, the land leasing agreement was regulated by Law no.16/1996 of the land leasing, complemented by the dispositions of the Civil Code in 1864.
The new Civil Code regulates the land leasing agreement in art. 1836-1850 and although mainly keeping the old regulation which, it also comprises aspects of novelty referring to several notions that define the contract, as well as the form, duration, parties' ability, managing risks or termination of the land leasing agreement.
Thus, an improved and better adapted to the new realities juridical regime is shaped, and we aim at analyzing it in the present study.

***Key words**: land leasing, landlord, tenant, first refusal, sublease*

1. Introduction

In the present study we will approach the juridical regime of the land leasing agreement whose existance, especially in the current economical background, cannot be ignored from the juridical point of view.

The presence of the land leasing agreement in the juridical relations whose object is the use of agricultural assets, and especially land, must be encouraged, and knowing and understanding the issue regarding singning, performimg and terminating such an agreement will be really useful.

Until 1991, the institution of land leasing was prohibited[1] but after that, the role played by the land leasing agreement increased in importance as a consequence of elaborating and implementing land legislation[2], as the holders of the right to private ownership over agricultural land, who actually could not work their land, used the land leasing agreement.

In this context, the land lease agreement became the subject of the special regulation given by the Land Lease Law no. 16/1994[3], whose stipulations completed those of the old Civil Code[4].

---

* Associate Professor, PhD, Faculty of Law and Socio-Political Sciences, "Valahia" University of Târgoviște (mocanulivia@yahoo. com).

[1] On the institution of land lease in Romania see, Florin Scrieciu, *Drept agrar şi drept funciar,* Lumina Lex, Publishing House, Bucharest, 2000, p. 149 -152.

[2] Land Law no. 18/1991, Published in the Official Gazette of Romania, part I, no. 37 from February 20th 1991 and republished in the Official Gazette no. 1 from the 5th of January 1998; Law no. 1/2000 for the reconstitution of the right to ownership over agricultural land and forested land, required according to the stipulations of the Land Law no. 18/1991 and of Law no. 169/1997, Published in the Official Gazette of Romania, part I, no. 8 from the 12th of January 2000, with the subsequent changes and complements; Law no. 247/2005 regarding the reform in the domains of ownership and justice, as well as some adjoining measures, published in the Official Gazette of Romania, part I, no. 653 from the 22nd of July 2005, with the subsequent changes and complements.

[3] Published in the Official Gazette of Romania, part I, no. 91 from the 7th of April 1994, the Land Lease Law suffered several changes and complements by means of Law no. 58/1995, Law no. 65/1998, O.U.G. no. 157/2002, approved with its changes by Law no. 350/2003, Law no. 247/2005, Law no. 276/2005, Law no. 223/2006 and Law no. 20/2008, in agreement with the changes suffered by the land legislation.

[4] As a variety of the lease agreement, the land lease agreement had a general regulation in the old Civil Code comprised in title III, and called „ On the lease agreement" (art. 1410-1453) and a specific regulation, containing rules that are specific to the lease, in art. 1454 -1469. Once Law no. 16/1994 entered into force, the stipulations of Civil Code that were not compatible with the new regulation were abolished.

In the present study we aim at analysing the regulation of the land lease agreement in the new Civil Code, while emphasizing the novelty elements. The specific of this regulation will also be approached in the light of a comparative analysis, in relation to the in force norms until October the 1st 2011[5].

Considering the land lease a variety of the agreement for leasing assets , the new Civil Code Cod regulates it under all the aspects particularizing it, in relation to the other varieties of lease. In those cases where the particular regulation is not enough, the norms of the common law in the matter of lease will apply[6].

Following the traditional analysis structure we will consider aspects such as: notion, legal frame and juridical features of the lease agreement, parties to the agreement and object of the agreement, the effects and the termination of the lease agreement.

Until today, the lease agreement constituted mainly the subject of academic manuals elaborated for the students' study, withour exhausting the theretical and practical issue in the matter.

The purpose of the present scientific approach is to underline the features of the current regulation that will certainly not be ignored in the future either by the doctrine or by the juridical practice in the matter.

2. Content

2.1. Notion, regulation, juridical features

2.1.1. Notion

Similarly to the Civil Code in 1864, the new Civil Code does not define expressly the lease agreement. Taking into account the particularities in the new Civil Code regulation, we can define the lease agreement as the agreement by which a party called lessor gives the other party, called a lessee the right to exploit agricultural assets, for a determined period of time, in exchange of a price, called a premium[7].

According to the provisions of art. 1778 al. (1) the new Civil Code, the land lease contract is a variety of the lease, presenting both resemblances and differences compared to other contracts, such as sale contracts.

The object of the lease contract makes it particular compared to the lease of things, for instance, concerning the price, duration and even form[8].

2.1.2. Regulation

The lease agreement is regulated in the new Civil Code[9], Book V "On obligations", Title IX "Different special contracts", Chapter V "The lease", 3rd Section "Specific rules referring to lease", art. 1836 - 1850.

2.1.3. Juridical features

The lease presents the following juridical features:

- It is a *deed indented* contract*,* because it creates mutual obligations between both parties, the lessor binding himself to transmit the use of the agricultural assets for a determined period, and the lesser binds himself to pay the lease price;

---

[5] The date when the new Civil Code entered into force.

[6] In art. 230 let. r) of the Law no. 71/2011 for the implementation of the Law no. 287/2009 regarding the new Civil Code, it was purposely stipulated the abrogation of the Lease Law no. 16/1994.

[7] Regarding the other definitions of the contract, see Francisc Deak, Tratat de drept civil. *Contracte speciale,* ACTAMI Publishing house, Bucharest, 1998, p. 234; Stanciu D. Carpenaru, Liviu Stanciulescu, Vasile Nemes, *Contracte civile si comerciale,* Hamangiu Publishing House, Bucharest, 2009, p.152; Eugeniu Safta-Romano, *Contracte civile,* Graphix Publishing House, Iaşi, 1995, p. 136.

[8] This aspect will be developed in the following sections.

[9] Law no. 287/2009 regarding the Civil Code*,* published in the Official Gazette of Romania, part I, no. 511 from the 24th of July 2009, modified by Law no. 71/2011, published in the Official Gazette of Romania, part I, no. 409 from June 10th, 2011, republished, the Official Gazette of Romania, part I, no. 505 from July 15th, 2011, into force since October 1st, 2011, in this study called the new Civil Code, in order to distinguish it from the old Civil Code.

- It is an essentially *for good and valuable consideration* contract, as both parties pursue their own patrimonial interest. If the use transmission is free of charge, the contract is void from the aspect of land lease but it can be considered valid as a gratuitous loan[10];

- It is a *commutative* contract, as, when signing the contract, the parties are aware of the existence and the extent of the services they bind themselves to. Although the crops realized depend on natural factors, always existing some risks of loss, the land lease is not an aleatory contract, as both parties' obligations are determined from the moment of signing the contract[11];

- It is a *formal* contract. While regulating the conditions of form, art. 1838 in the new Civil Code expressly stipulates the formal character of the land lease. Thus, according to art. 1838 par. (1): „The land lease must be settled in writing, under the sanction of absolute nullity. One can notice that, compared to the lease, which is a consensual contract, the land lease is a formal contract, its written form being required *ad validitatem* under the sanction of absolute nullity. Contrary to the principle of consensualism governing the Civil Code of 1864, the formal character of the land lease is also set by Law no. 16/1994[12]. Art. 1838 in the new Civil Code puts in the lessor's charge the obligation to file a copy of the land lease to the local board or boards responsible for the area where the asset is placed, and in case the lessor does not observe this obligation, he will be forced by the court to pay a civil penalty, for each day of delay [art. 1838 par. (2)]. Compared to Law no. 16/1994, the new Civil Code does not set a dead line for the registration of the land lease, but its dispositions are much more efficient, as after the date of signing the contract, every delay in registering it to the local board forces the lessee to pay a civil penalty. The registration of the land lease answers another condition of form, which is also derogatory from the principle of consensualism, which is the form required for the *enforceability against third parties.* According to art. 1838 par. (5) in the new Civil Code, all expenses occurring for signing, registering and advertising the land lease are the lessee's charge. This is a similar disposition to those in the land lease law, a suppletive norm, and the parties can depart from it, meaning that they can introduce in the contract clauses referring to the equal charges or they can charge only the lessor for such expenses;

- It is a *call-off contract* as the parties' obligations are fulfilled in time, during the lease. In accordance to the law, the parties are free to set the duration of the lease, without legal dead lines and in case this duration was not determined, one will consider that the lease was set for the time necessary to the lessee, usually an agricultural year (art. 1837). These dispositions reflect the fact that, traditionally, in Romania, leases are generally set for a year, without constraining the parties, like in the regulation of Law no. 16/1994, to sign the lease for an excessively long period[13];

- It is a contract *that does not transfer any property rights*, because by signing this contract, one will only transfer the right to use some agricultural assets for a determined period. Similarly to the tenant, the lessee is a simple temporary custodian, and not a holder. As a conclusion, he cannot acquire ownership over the real estates in prescription or over movable assets by possessing them in good faith(art. 935);

- It is an *intuitu personae* character, from the point of view of the lessee's person. Given this feature of the lease, the law expressly prohibits the total or partial sublease, and the non-observance of this interdiction will be sanctioned with absolute nullity [art. 1847 par. (2)]. The consequence of the *intuitu personae* character of the lease is that the lessee's death, physical entity, or the dissolution of the juridical entity determines the lease termination. The regulation in the new Civil Code is

---

[10] Francisc Deak, *op.cit.,* p. 235.

[11] L. Lefterache, C.M. Crăciunescu, *Legea arendării nr. 16/1994, Comentata si adnotata,* All Beck Publishing House, Bucharest, 2000, p. 14.

[12] According to an opinion that remained unique, the land lease was considered a real contract. See, in this matter, Ioan Adam, *Contractul de arendare (I),* in Dreptul magazine no. 6/1995, p. 13.

[13] As for the duration of the lease in the system of Law no. 16/1994, see Romeo Popescu, *Contractul de arendare(II),* in Dreptul magazine no. 6/1995, p.18; Aspazia Cojocaru, Bogdan Patrascu, *Contractul de arendare. Noţiune. Părţi. Caractere juridice (I),* in the magazine Drept Comercial no. 1/1995, p. 122-124.

similar to that in Law no. 16/1994 contrarily to the old Civil Code, where only fruit lease was signed *intuitu personae,* but the parties could expressly stipulate the possibility of sublease, as the norm was dispositive[14]. In case of money lease, the sublease was allowed, as a rule;

- Leases signed while respecting the authentic form required under the sanction of absolute nullity and those registered at the local board are considered *enforceable* for the payment of the premium at the terms and in the ways set by the parties when signing the contract (art. 1845). It is a stipulation considered new in relation to the previous regulations, and one that makes foreclosure easier in case the premium is not paid.

2.2. Parties and object of the land lease

2.2.1. Contracting parties

The parties to the land lease are the lessor and the lessee (physical or juridical entities). The owner, the user or any other legal holder of agricultural assets can be lessors. The previous doctrine that recorded many opinions and quite different of the old Civil Code, regarding the content of the notion of *legal holder of agricultural assets*[15]. Thus, we consider that we can include in this category the holders of other real and main rights over agricultural assets, such as the holder of the superficies right[16]. If the user can be the lessee, the holder of the right to use the asset cannot have this position, given the strictly personal character of this right[17].

The lessee cannot be the lessor, as the dispositions of art. 1847 in the new Civil Code forbid, under the sanction of absolute nullity, the sublease of agricultural assets that are already leased, and the lessee's services are also forbidden[18].

But the law allows the land lease transfer. Thus, according to art. 1846 in the new Civil Code, the lessee can submit the land lease to certain categories of people, determined by the legislator, namely to the people actually participating to the use of the asset subject to the lease, and to the coming of age heirs, but only with the lessor's written consent.

As for the parties'ability, in relation to the dispositions of art. 1784 in the new Civil Code, in order to sign a lease for a period longer than 5 years, because an act of disposition is settled, both the lessor and the lessee must have complete exercise capacity. The people, who, according to the law, can only sign administration documents, will only be able to sign land leases that do not exceed a period of 5 years [art. 1784 par.(3)].

Beyond these aspects, the new Civil Code does not stipulate, concerning the contracting parties, special incapacities in the matter of the land lease, which leads to a broader use of this contract[19].

2.2.2. Object of the land lease

Being a synallagmatic contract, the land lease has a double object: *the agricultural assets leased and the price (the premium).*

The assets that can be leased are mentioned by the legislator in art. 1836 in the new Civil Code. Here, the legislator defines the agricultural assets, contrarily to the old Civil Code, which defined them as rural funds[20].

---

[14] According to art. 1467 in the Civil Code of 1864.

[15] Notion used by the Land Lease Law no. 16/1994.

[16] Gheorghe Beleiu, *Contractul de arendare(II),* in Dreptul magazine no. 6/1995, p. 25.

[17] For the notion and features of the right to use, see, Bujorel Florea, *Drept civil. Drepturile reale principale,* Universul Juridic Publishing House, Bucharest, 2000, p. 205.

[18] Intermediation in the matter of land lease is not allowed.

[19] Contrarily to the Land Lease no. 16/1994 which set a special incapacity for the lessors in art. 4 par. (1) and in. art. 18, as changed by Law no. 350/2003, it set a special incapacity for the lessees, incapacity that leads to the absolute nullity of the lease.

[20] The Civil Code in 1864 defined the land lease as *the lease of rural funds*, agricultural land being the main rural fund (art. 1413).

As a conclusion, the land used in agriculture and the assets destined to the agricultural exploitation can be considered object of the land lease. These are movable or immovable assets destined to the agricultural exploitation. This regulation determines the particularity of the land lease, avoiding the confusion with the assets that constitute the object of other lease contracts.

The assets subject to the land lease must accomplish the following conditions:

- To exist when signing the contract;
- To be individually or generically determined;
- To be legal and possible;
- To be the lessors'property or to be owned by the user or legal holder;
- To be in the civil circulation, according to art. 1229 in the new Civil Code [21].

The new Civil Code no longer stipulates as the parties' liability, the obligation to include in this contract a detailed description of all the agricultural assets under lease, their inventory and a situation plan for the land[22].

In exchange for the use of the agricultural assets, the lessee pays a price called premium. According to the law, the premium can be set either in money or in fruit[23]. The parties are free to set the ways to pay the premium as well as the elements that determine its amount. As for paying the premium, it will be made at the dates and place set in the contract, taking into account the type of products and the way they were obtained. If the parties do not set a place for the payment, common law will apply in this matter (art.1494).

Taking into account the juridical nature of the land lease and the purpose of the parties, the land lease must be real[24] and serious, which means it must not be enormous compared to the object of the contract and obligations assumed by both parties[25].

2.3. Effects of the land lease

2.3.1. The lessor's obligations

The particular rules provisioned by the new Civil Code in the matter of land lease do not concern the lessor's obligations on which we will make appeal to the general rules stipulated in art. 1786, in the matter of lease. As a consequence, the lessor has the following obligations:

a) The obligation to hand in the leased goods;

b) The obligation to warrant against total or partial eviction coming from own or third parties deeds and from the hidden vices of the leased goods;

c) The obligation to respect the right to first refusal of the lessee.

d) One of the lessor's main obligations is to hand in the leased goods at the term and place convened by the parties in the contract. The lessor has to hand in the agricultural goods according to the contract, in a state proper for agricultural exploitation. After the hand in, the lessee has the obligation to maintain the leased goods in a usable condition for the whole contract period, taking into account the nature of the good or the one conferred by the parties' will.

e) It is also in the lessee's duty the obligation to warrant referring to the quite and efficient use of the leased good[26].

---

[21] L. Lefterache, C.M. Crăciunescu, *op.cit.,* p. 5-6.

[22] Such obligations were stipulated in art. 5 lit. b) of the Land Lease Law no. 14/1996.

[23] The old Civil Code regulates the two ways to pay the premium, in nature and money, and Law no. 16/1994 added another one: the premium in nature and money.

[24] It is the honest price.

[25] In the system of the Land Lease Law no. 16/1994, setting the amount of the premium for each category of land use could be done according to: surface, production potential, land division structure, relief and degree of accessibility for mechanization, access possibilities, distance to the storage facilities, industrialization or commercialization, condition of buildings, land improvement facilities or other endowments (art. 14).

[26] The law no. 16/1994 refers exclusively to the warranty against eviction (art. 8), its rules being completed with the dispositions of the common law regarding the obligation to warrant against the hidden vices of a thing.

Because, mainly, the land lease refers to agricultural land, the parties may stipulate in the contract the solutions for the possible issues generated by their spread in the conditions in which the new Civil Code does not contain dispositions regarding the resolution of a conflict related to this aspect[27].

Of course it will be possible to apply the rules from the sale having as consequence the increase or decrease of the price (premium).

f) In the matter of land lease, the new Civil Code admits expressly and abstrusely that the lessee has the right to first refusal. Thus, art.1849 stipulates that: "The lessee has the right to first refusal in relation with the leased agricultural goods, which is exercised according to art. 1730-1739". From this text results that, on one side, the law institutes a right of first refusal in favor of the lessee, and on the other side, under the procedural aspect, for the effective use of the right just created, it send to the rules regarding the exercise of first refusal in the matter of sale, which are applicable accordingly. As a consequence, the lessee benefits from a right of first refusal when selling the goods which make the object of the land lease[28]. This is why we mention the lessor's obligation to respect the lessee's right of first refusal as an obligation correlative to the real right instituted by law in his favor.

2.3.2. The lessee's obligations

Corroborating the particular rules in the matter of land lease with the general provisions in the matter of the lease contract, we take out the following obligations falling in the lessee's responsibility:

a) The obligation to pay the premium. The most important obligation of the lessee is to pay the premium at the terms, location and manner set up in the contract. The premium is paid in money or products.

In contrast with the Land Lease Law no. 16/1994, the new Civil Code does not impose on the contracting parties special obligations for fixing the premium, neither when the premium is paid in money, nor when the payment is done in nature. Leaving this initiative to the parties, the new Civil Code make a progress compared to the old rule often criticized in the specialty doctrine[29].

When the payment is done in fruit, taking into account that these are perishable goods, the law stipulates that the lessee has to make the pay at the picking up time and the lessor has to make the reception of the picked up fruits at the date when he is notified by the lessee (art. 1844).

If the parties did not establish the place of the payment in the contract, the rules of common right will be applied.[30].

b) The obligation to take over the leased goods. Generally, the goods are handed in to the lessee and taken over from him based on an inventory which testifies their condition at the moment of contract closure. In the absence of an inventory it is presumed that the goods have been received in a good condition. This is the relative presumption (*iuris tantum)* which can be denied with contrary evidence[31].

c) The obligation to use the leased goods as a good owner and according to their destination. The lessee is compelled to use the leased goods with the care and skills which their owner would

---

[27] In this respect, the old Civil code, stipulated in art. 1454 that: "If, in the land lease, is shown a surface smaller or larger than the one it has in reality, the lease will neither decrease nor increase with the exception of the cases and rules enclosed in the selling title". From these dispositions the parties could derogate either purposely or tacitly.

[28] And land lease Law no. 16/1994 instituted a preemption right for the lessee in case of selling agricultural unincorporated areas which he received in lease. In this respect, see also, Adina Foltiş, *Dreptul de preempţiune,* Hamangiu Publishing House, Bucharest, 2011, p. 184-187.

[29] At large, on the dispositions regarding the determination of lease according to Law no. 16/1994, see also, Romeo Popescu, *cit. op.,* p. 22-23.

[30] According to the provisions of art. 1494 of the new Civil Code.

[31] Francis Deak, *cit. op.,* p.247.

have employed, seeking the preservation of their production potential and the execution of the needed work in this purpose. This way the lessee will be responsible for *culpa levis in abstracto*, by the type of prudent and mindful person[32]. The lessee behavior is evaluated more severely because he is a professional, the feature imposed by the specific object of the land lease, which are agricultural goods[33].

Even though the new Civil Code does not comprise a distinct disposition for the lessee regarding the obligation to preserve the use category of the land, this results implicitly from the dispositions of art. 1839, according to which, the lessee may change the category of use for the leased land only with the previous and written agreement of the owner. In this respect, the new Civil Code maintains the same conditions in which such a change may happen like in the system of Law no. 16/1994, being necessary the owner's previous and written agreement and not of some other persons which may lease it (ex. user)[34]. *Mutatis mutandis*, the obligation instituted for the lessee by the dispositions of art. 1839 in the new Civil Code may be extended to the other leased agricultural goods in connection with the change of their destination.

d) The obligation to ensure the leased goods. We find it again in the dispositions of art. 1840 of the new Civil Code according to which, the lessee has the obligation to sign an insurance contract to ensure the goods which form the object of the land lease. If the insurance is missing the lessee will be responsible before the lessor for the prejudice thus caused.

e) The obligation to defend the leased good against usurpation, under the conditions of common law (lease contract). Similarly to any tenant, the lessee will have to notice the tenant in the case the good is being usurped by a third party. Otherwise he will be responsible for the damages suffered by the lessor.

f) The obligation to give back**.** At the contract termination, independent of the reason, the lessor has to give back the leased goods in the condition he received them, according to the inventory issued at the hand over. In case of refusal, the lessor may request the goods restitution either through the promotion of a claim of request (which can be used only if the lessor is also the leased goods owner), or through the promotion of a personal action *ex contractu*. As we already pointed out, by the dispositions of art. 1847 al. (2), the new Civil Code forbids the sublease and in principle, the lessee cannot surrender the contract. As an exception, only with the written agreement of the lessor, the lessee may surrender the land lease to a category of people determined by the legislator, like the husband that effectively participate at the exploitation of the good, object of contract and the descendants who come of age (art. 1846).

g) The obligation to pay the expenses. It is provisioned in the last paragraph of art. 1838 from the new Civil Code, according to which, all the expenses caused by the land lease contract closure, registration and publicity, are the lessee's charge.

2.4. The risk in the matter of land lease

The contracting parties have the possibility to insert in the land lease contract some clauses referring to the risk charge. In the case they are missing or insufficient, the problem of risk charge will be solved following the rules dedicated in the provisions of the new Civil code.

For that purpose, we mention the following situations:

- the risk of losing, totally or partially, the leased agricultural goods as an act of God, is born by the lessor, in his position of owner, according to the rule *res perit domino (*art. 558). In such a case, the lessee must bring evidence that the loss occurred without any of his fault (but due to a

[32] In the previous regulation, in case these obligations are not respected by the lessee, the lessor had the right to request the reposition of the leased goods to their previous state or the termination of contract with interests-damages (art. 24 al. (2) of the Law no. 16/1994 and art. 1455 al. (1) of the Civil Code.

[33] See also, Francisc Deak, *cit. op.,* p.246.

[34] For argument, see also Gheorghe Beleiu, *cit.op.,* p. 26.

strange cause, such as force majeure or acts of God). In case the lessor is not the owner of the assets (for instance the user), he will bear the risk of losing the asset, „...in accordance to the right he has over the asset"[35]. In case he was delayed, although the asset loss was due to an act of God, the lessee will bear the risk as he is the debtor of the obligation to return the leased assets[36];

- in case the lease was set in money and during the lease the whole crop is lost or at least half of it is lost due to an act of God, the lessee can ask for a proportional deduction of the premium set in the contract [art. 1841 par. (1)]. In case the land lease was signed for a period of several years, the premium deduction can be made at the termination of the contract, by means of a compensation, and after calculating the crop harvested during the contract [art. 1841 par. (2)]. By exception, the lessee cannot be granted a proportional deduction of the premium if the crop loss was due to an act of God occurred after being harvested or in case he was aware of the damage when signing the land lease (art. 1842);

- in case the premium was set under the form of fruit share (percentage wise premium) the crop loss due to an act of God will be proportionally born by both parties, according to the dispositions of art. 1843 par.1 in the new Civil Code. Things are different in case the fruit are lost after being harvested, when the risk is born by the party that delayed handing over the fruit [art. 1843 par. (2)].

According to art. 135 par. (1) of Law no. 71/2011[37], in the cases stipulated by the new Civil Code at art. 1841-1843, if signing the insurance contract for the risk of losing the crop due to an act of God is mandatory, according to the law or to the land lease, the insurance indemnity will be born by both contracting parties proportionally with the parties' bearing the risk of crop loss due to an act of God. In case an insurance contract was not signed, according to the law or to the land lease, the party compelled to sign the insurance contract is liable before the other party for the damage thus produced [art. 135 par. (2)].

2.5. Termination of the land lease

Along with the general causes to terminate the lease, applicable in the case of the land lease, article 1850 in the new Civil Code stipulates a series of special situations for the termination of the land lease such as: death, lessee's incapacity or bankruptcy. These dispositions set the *intuitu personae* character of the land lease, compared to the lease, which does not have this characteristic.

Contrarily to the Land Lease Law no. 16/1994[38], the new Civil Code no longer stipulates the possibility to continue the land lease in case the lessor or the lessee die, which means that in such cases a new land lease must be signed. This will also be the situation in case of lessee's incapacity or bankruptcy.

In the land lease case as well, the expiry of the term leads to the contract termination. Especially referring to the land lease, the dispositions of art. 1848 in the new Civil Code stipulate, in case none of the contracting parties noticed the other, in writing, within the terms stipulated by the law, the refusal to continue the contracting relations, the land lease is rightfully renewed.

3. Conclusions

From the analysis realized in this study, regarding the novelty aspects comprised by the land lease, in the light of the dispositions in the new Civil Code, a reconfiguration of this particularly useful instrument in the civil relations.

---

[35] Francisc Deak, *op.cit.,* p.243.

[36] Delaying moves the risk in the debtor's charge [art. 1047 par. (2) Civil Code in 1864]. According to art. 1844 in the New Civil Code, when the premium is paid in fruit, *the lessee is lawfully late* to hand them in at the date of harvesting them, and the lessor is lawfully late to receive them from the date he was notified in writing by the lessor.

[37] Law no. 71/2011 to apply Law no. 287/2009 referring to the Civil Code.

[38] See art. 25 of the Land Lease no. 16/1994.

The new Civil Code mainly keeps the previous regulation, but it also brings important changes that we aimed at emphasizing in this study.

Consequently, regarding the current juridical regime of the land lease, we must point out the following novelty aspects brought by Law no. 287/2009:

- the new Civil Code does not stipulate, from the point of view of the contracting parties, special incapacities in the matter of the land lease, aspect that is meant to produce a wider use of this type of agreement;

- more eficient are the dispositions regarding the form and the registration of the land lease (art. 1838);

- the parties are free to set the lease duration, without legal bound, and in case this duration was not determined, the contract is considered signed for the entire period necessary to the lessee, such as an agricultural year (art. 1837);

- within the conditions stipulated by the law, the land lease acquires an enforceable character (art.1845);

- the obligation to insure the leased goods is a new aspect (art. 1840);

- bearing the risks is a specific regulation of the land lease (art. 1841-1843);

- lessee's death, incapacity or bankruptcy as well as renewal of the contract lead to signing a new land lease.

References:

- Cărpenaru, Stanciu, Stănciulescu, Liviu and Nemeş,Vasile, *Contracte civile şi comerciale,* Hamangiu Publishing House, Bucharest, 2009.
- Deak, Francisc, *Tratat de drept civil. Contracte speciale,* ACTAMI Publishing House, Bucharest, 1998.
- Florea, Bujorel, *Drept civil. Drepturile reale principale,* Universul Juridic Publishing House, Bucharest, 2000.
- Foltiş, Adina, *Dreptul de preempţiune,* Hamangiu Publishing House, Bucharest, 2011.
- Lefterache, L. and Crăciunescu, C.M., *Legea arendării nr. 16/1994, Comentată şi adnotată,* All Beck Publishing House, Bucharest, 2000.
- Safta-Romano, Eugeniu, *Contracte civile,* Graphix Publishing House, Iaşi, 1995.
- Adam, Ioan, *Contractul de arendare (I),* in Dreptul magazine (6/1995), 11-25 .
- Beleiu, Gheorghe, *Contractul de arendare(II),* in Dreptul magazine (6/1995), 11-25.
- Cojocaru, Aspazia and Patrascu, Bogdan, *Contractul de arendare. Noţiune. Părţi. Caractere juridice (I),* in the magazine Drept Comercial (1/1995), 121-128.
- Popescu, Romeo, *Contractul de arendare(II),* in Dreptul magazine (6/1995), 11-25.

PREDECESSORS AND PERPETRATORS OF COOPERATIVE SYSTEMS IN EUROPE

ŞTEFAN NAUBAUER*

Abstract
The study hereby aims to bring forward afresh the cooperative ideas that have animated particularly the last two centuries of the past millennium. In the present context, labelled by the major difficulties the European labour market is facing, the proper knowledge and understanding of cooperative principles provide the premises for their implementation with the view to meet the current economic and social stability exigencies in today's Europe.

Keywords: *cooperative systems; cooperative principles; the European labour market.*

I. Introduction

The area covered by the subject matter of this study is the doctrine of cooperative property developed by the predecessors and perpetrators of cooperative systems in Europe. The study hereby is purposeful as it aims to bring forward afresh the cooperative ideas that have animated particularly the last two centuries of the past millennium. The manner in which we shall deal with the objective undertaken hereunder rests upon the detailed analysis of cooperative concepts that grounded the cooperative systems in Europe. With regard to the state of knowledge in matters dealt with and the contributions already established in the specialty literature, we argue hereunder that the status of legal relations existing within the cooperative system has been disregarded in the Romanian doctrine during the past decades, except for a monograph on labour relations in handicraft cooperative property published in 2012 by the author of this study and several issues reported in some papers released in the field of labour law, though not covering the matters reviewed hereunder.

II.1. France

In the valleys of the Pyrenees, dairy cooperatives[1] were initially established – the so-called "sociétés fromagères" or "les fruitières" - with the aim of jointly selling the milk, to process it into derivatives, respectively.[2] In the 17th century, these existed under this form, but later on were converted into real capitalist enterprises.[3] In addition to dairies, in France also emerged cooperatives – producers' cooperative societies - of viticulturists, with the aim of jointly retailing wine or grapes.[4]

In terms of cooperative ideas, a notable place is vested upon Charles Fourier (1772-1837), thinker who imagined utopia of human association in the so-called "phalanxes" (following the organization of armies led by Alexander Macedon) installed in common colonies, known as "phalansteries".[5] These "social palaces" would be gathering together people from all walks of life, the exponents of each and any human character, while conserving individual property and wealth

* PhD Lecturer, "Nicolae Titulescu" University of Bucharest, Faculty of Law, Private Law Department (stefannaubauer@yahoo.com).

[1] It was noted that traces of peasant groups established for milk processing have been discovered in France since the early part of the Middle Ages – see G. Mladenatz, *The History of Cooperative Doctrines*, The Romanian Cooperative System National Office, „Lupta" Graphic Arts Institute N. Stroilă, Bucharest, 1931, p. 11.

[2] I.N. Angelescu, *Cooperation and Socialism in Europe*, The Graphic Arts Establishment Albert Baer, Bucharest, 1913, p. 4.

[3] *Ibidem*.

[4] *Ibidem*, pp. 4-5 and the bibliography quoted thereunder.

[5] G. Mladenatz, *op. cit*., p. 31.

inequality, hence the conclusion that the phalanstery was not designed as a communist colony. [6] According to Fourier's theory, wage regime would have been replaced by associated work, owner of the means of production, which would be provided in series, each associate moving freely from one job to another, in accordance with the dictum: "harmony follows the series".[7] As it has been noticed, however, the Fourierist phalanstery was not purely cooperative, whereas it would be performed not based on shareholders' equity, but with the help of philanthropists – which, by the end of Fourier's life, failed to be achieved – and, moreover, it preserved equity income, that cooperatives do not accept.[8]

Philipe Buchez (1796-1865), considered the founder of the cooperative in France[9], envisaged a statist and hierarchical organization governed by the Christian belief[10] of love thy neighbour, where the associated work replaces the principle of competition among workers.[11] However, Buchez did not intend to restrain freedom of industry and fostered maintenance of competition, whereas this provided for "the impetus for progress in productivity".[12] Unlike the Fourierist concept, Buchez promoted the idea of the self-help working class, without the intervention of the State or of philanthropists, advocating for the establishment of a permanent capital[13] and the establishment of a "labour State bank".[14] According to his theory, "cooperatives are a kind of brotherhood, of industrial communities, formed by craftsmen within the same branch", Buchez seeking to achieve in industry the trinity of the French Revolution virtues: fraternity, liberty and equality.[15] In 1831, Buchez published a periodical entitled "The Social Sciences Journal", which later became "The European".[16] He himself established two producers' cooperatives: a carpentry (1832, though wound up shortly following its set-up) and a jewellery ("l'association des travailleurs bijoutiers en doré", in 1834, which operated until 1873, continuing to print the periodical named "The European" under the title "The Workshop").[17]

Louis Blanc (1813-1882) outlined his ideas in a booklet entitled "The Organization of Labour", putting forth that the settlement of the social problem related to the modern economic and social order rests with the organisation of labour by means of an association – term designating a real cooperative, in the modern sense of the word, whereas the term "cooperative" was not yet used by that time in France.[18] In his opinion, the economic system cell was represented by the so-called "social workshop" – an association (labour production cooperative) "resting on a democratic basis and on the spirit of fraternal solidarity, formed of workers sharing the same profession (*corporate-support system* – our parenthesis)".[19] Considering, however, that, at the beginning, the workers do not have the capital necessary for the establishment of such associations, Blanc argued that the State should provide finance in this respect, thus becoming the "banker of the poor", taking in charge,

---

[6] *Ibidem*, pp. 31-32.

[7] *Ibidem*, p. 32.

[8] *Ibidem*, pp. 32 and 34. However, under the influence of Fourierism, in 1859, Jean-Baptiste André Godin (1817-1888) established in Guise, France, a so-called "familistère", enterprise converted in 1880 into a cooperative - *ibidem*, p. 33.

[9] I.N. Angelescu, *op. cit*., p. 43.

[10] The sole condition for admission to the workshop (cooperative) was that workers are Christians – see I.N. Angelescu, *op. cit*., p. 48.

[11] G. Mladenatz, *op. cit*., p. 36.

[12] I.N. Angelescu, *op. cit*., p. 47.

[13] See also F. Espagne, *Le modèle buchézien et les réserves impartageables*, RECMA, 4/1994, no. 253-254, p. 54.

[14] G. Mladenatz, *op. cit*., p. 36.

[15] I.N. Angelescu, *op. cit*., pp. 46-47.

[16] *Ibidem*, p. 44.

[17] G. Mladenatz, *op. cit*., p. 37; I.N. Angelescu, *op. cit*., p. 49.

[18] G. Mladenatz, *op. cit*., p. 38.

[19] *Ibidem*.

however, the management of certain businesses.[20] Interesting is the fact that it was proposed that the workers should be paid out as per the formula "produced according to the abilities and amount of labour invested, and consumed according to their own needs", the solution being judged as a Communist principle in terms of the distribution of the "social product".[21] We should also note that Blanc has picked up the idea put forward by Buchez of setting up an inalienable and indivisible fund whose purpose was cooperative labour perpetration and cooperative system prevalence.[22]

At the end of 1848, a so-called "Chamber of Labour" (*chambre du travail*) was established in France, which served also as industrial court.[23] One year later, a federative of cooperatives was established in Paris (*l'Union des associations fraternelles de Paris*), in order to serve: the mutual exchange of goods between cooperatives; settlement of liabilities and receivables; the propagation of the concept of association; the guidance of cooperatives.[24]

Following the coup d'état dated December 2nd, 1851, and Napoleon III proclamation as Emperor, the cooperative movement is discontinued and a "complete silence stretches over the years, until 1863, when things change and new items make it start a new period in the history of French cooperative movement".[25]

In the Law of July 24th, 1867 on joint-stock companies has been inserted Title III (Articles 48-54) – "Dispositions particulières aux sociétés à capital variable", aiming to foster the development of cooperative societies.[26]

In 1894 was held in Lyon the first National Congress of Agricultural Unions.

Charles Gide (1847-1932), Professor at the Universities of Bordeaux, Montpellier, Paris and, finally, at the Collège de France, put forth the possibility of elimination of the employee regime within cooperatives, namely "a labour organization in which the worker would no longer be a completely passive production tool, but would take within the company his part of initiative, control, responsibilities and benefits, as well"[27]. This idea was developed by Hyacinthe Dubreuil (1883-1971), a member of the Administrative Commission of the General Confederation of Labour, which did not judge producers' cooperatives a solution to the social problem, but removing these cooperatives was not tantamount in his view to the rejection of the cooperative-like principle, but deemed necessary to identify a new form of cooperation – *the labour cooperative* (limited partnership workshop).[28]

The development of cooperatives was accompanied by strong political claims directed against capitalism and liberalism. Thus, in their theoretical and practical treatise on companies, Houpin and Bosvieux argued that, irrespective of their line of business, cooperatives always aim, eventually, to suppress the intermediaries in order to reduce costs or increase gains. They are characterized by the joining, in one and the same person, of two qualities, generally separate, between which there is a natural antinomy (employer and employee, vendor and consumer, banker and borrowing customer)

---

[20] *Ibidem*, pp. 38 and 39. In terms of this approach, Blanc was in fact considered one of the first creators of the doctrine of State socialism – *ibidem*, p. 39.

[21] *Ibidem*, p. 38.

[22] *Ibidem*, p. 39.

[23] I.N. Angelescu, *op. cit*., p. 55.

[24] *Ibidem*.

[25] *Ibidem*, pp. 56-57 and the bibliography quoted thereunder.

[26] C.C. Zamfirescu, *The legal regime of cooperative societies under Law of 1929*, "Independenţa" Printing House, Bucharest, 1932, p. 12.

[27] Ch. Gide, *Des institutions en vue de la transformation ou de l'abolition du salariat*, Paris, 1920, *apud* G. Mladenatz, *op. cit*., p. 162.

[28] H. Dubreuil, *La République industrielle*, Paris, 1924, *apud* G. Mladenatz, *op. cit*., p. 164.

and by the flat supporting role the capital plays thereunder in relation to personal involvement and members' work.[29]

2. Germany

The oldest forms of cooperative societies of the old German Empire were "the insurance companies for cases of misfortune, death or illness".[30] Early forms of credit cooperatives have been identified since the time of King Frederick II of Prussia (1740-1786), on whose initiative many farmers have set up such companies with the view to get credit on favourable terms.[31]

The founder of the cooperative movement in Germany is considered, though, Hermann Schulze-Delitzsch (1808-1883), the father of a basically cooperative system adopted in other countries as well, in particular by the cooperative organizations of the urban middle-class - small craftsmen employers and traders.[32] Schulze was a supporter of the liberal-individualist economic concept, deeming the principles of the society's capitalist order immutable, the cooperative movement being, in its view, a means of combating state communism.[33] One of the most prominent of his followers – Professor Hans Crüger - stated that "the purpose of the cooperative organization is to offer small businesses the opportunity to enjoy as well the advantages of the modern capitalist system".[34] The first cooperative associations established by Schulze in his hometown - Delitzsch, located near Halle, in Saxony, subsequently incorporated to Prussia - were: a benefit home for sickness and death whose members had equal rights in the General Meeting; an association of carpenters for the supply of raw materials, based on the joint liability of its members.[35] In 1850, Schulze founded the first *credit union* in Delitzsch, which differed from the popular credit institutions previously established in Berlin by the fact that it claimed its members the payment of interest on loans granted, as well as the accumulation of a personal fund to be deducted from loans obtained.[36] The credit unions established by Schulze were not charitable institutions, but were grounded on the idea of the members' *self-help*, the aim of the association being pursued in terms of the paid-up capital of partners and based on a reserve fund set up by taking-overs of the net realized gain, consecrating at the same time the unlimited joint and several liability of partners: all for one and one for all.[37] In addition to credit unions, Schulze also created *consumer cooperatives*, called "associations to purchase the necessities of life", but the last stage of the co-op's development – "the system's peak", in his view, was to be a *producers' cooperative*.[38] A special resonance also had the works published by Schulze: *Assoziationsbuch für deutsche Handwerker und Arbeiter* (1853), *Vorschuss-und Kredit-Vereine als Volksbanken* (1855) and *Die arbeitenden Klassen und das Assoziationswesen* (1858).[39] In 1854, at his initiative was issued the first co-op periodical: Die Innung der Zukunft, later renamed *Blätter für Genossenschaftswesen*.[40] In June 1859 was organized in Weimar the first Congress of Schulze-Delitzsch credit unions, deciding upon the establishment of a Central Office (Zentral-Korrespondenzbureau) headed by Schulze, converted in 1864 in a General

---

[29] T. II, 1935, no. 1568, *apud* W. Meynet, *L'adoption et l'evolution du statut coopératif en France: les passerelles existantes entre les formes sociales coopératives et les formes sociales non coopératives*, in D. Hiez (sous la direction), *Droit comparé des coopératives européennes*, Ed. Larcier, Bruxelles, 2009, p. 40.

[30] I.N. Angelescu, *op. cit*., pp. 5-6.

[31] *Ibidem*, p. 6.

[32] G. Mladenatz, *op. cit*., p. 64.

[33] *Ibidem*, p. 118.

[34] H. Crüger, *Einführung in das deutsche Genossenschaftswesen*, Berlin, 1907, *apud* G. Mladenatz, *op. cit*., p. 118.

[35] G. Mladenatz, *op. cit*., p. 65.

[36] *Ibidem.*

[37] *Ibidem*, pp. 65-66.

[38] *Ibidem*, p. 69.

[39] *Ibidem*, p. 66.

[40] *Ibidem*, p. 67.

Union of Self-Help Co-ops (Algemeiner Verband der auf Selbsthide beruhenden Erwerbs-und Wirtschaftsgenossenschaften), also under the leadership of Schulze, until his death (Potsdam, April 29th, 1883).[41] We also note that, in 1863, Schulze has developed a draft law on the cooperative movement, based on which, on March 27th, 1867, was enacted the first cooperative code of Prussia.[42]

As regards the *rural cooperative* type, it was established by the German Friedrich Wilhelm Raiffeisen (1818-1888).[43] In 1848(9) he set up the "Union in Aid of lmpoverished Farmers" in Flammersfeld, whose main activity was directed against usurious cattle trade, which later turned into a credit and savings institution.[44] In 1854, Raiffeisen founded an aid society in Heddesdorf (Neuwied), shortly replacing it with a credit company (Heddesdorfer Darlehnskassen-Verein), and in 1862 he set up four credit and savings institutions in different towns.[45] These companies were founded on the principle of benevolent assistance of people in distress and joint and unlimited liability: "the spirit of solidarity and love for thy neighbour".[46] Raiffeisen-type credit and savings institutions had a limited number of members[47] who neither submitted capital[48], nor did they receive dividends, the co-op's profit being directed to a reserve fund that preserved its indivisible character at the time of dissolution of the Company.[49] Within these societies, offices were held for free, with the exclusion of the accounting officer secretary, decision justified by the following three reasons: cooperative security, development of the solidarity spirit and economy in expenditure.[50] It is worth mentioning the fact that Raiffeisen intended to even set up a life insurance company, but did not receive an operating permit thereto.[51] In 1866, Raiffeisen published a book that has been successful also outside his country's borders, including on the territory of Romania[52] – *Die Darlehnskassen-Vereine als Mittel der Abhilfe der Not der ländlichen Bevölkerung, sowie auch der städtischen Handwerker und Arbeiter Praktische Anleitung zur Bildung solcher Vereine gestützt auf sechzehnjährige Erfahrung als Gründer derselben*, printed in five editions until his death, occurred in 1888.[53] In 1872 was established the first federal credit union in the Rhineland (Rheinische landwirtschaftliche Genossenschaftsbank), succeeded in 1874 by two similar federal unions for Westphalia and Hesse, and in 1876 the regional federal unions have been grouped in the central credit institute, in the form of a private company limited by shares (Landwirtschaftliche Zentral-Darlehnskasse für Deutschland, later Deutsche Raiffeisenbank A.-G.).[54] One year later was

---

[41] *Ibidem*, pp. 66-67.
[42] *Ibidem*, p. 66.
[43] *Ibidem*, p. 73.
[44] *Ibidem*, pp. 73-74.
[45] *Ibidem*, p. 74.
[46] *Ibidem*, pp. 75-76.
[47] Between 600 and 3,000 members, regularly the cooperative's territory corresponding to a parish - *ibidem*, p. 78.
[48] Considering that the German law on cooperation, enacted as already shown based on the draft bill proposed by Hermann Schulze-Delitzsch, required cooperatives to have their share capital established by the members' contribution, but did not set a minimum capital, Raiffeisen established for its cooperatives shares almost formal (at times, even sub-units of the national currency) - *ibidem*, p. 79.
[49] *Ibidem*, p. 75. The members had no right over this fund, neither during the operation of the cooperative, nor upon its dissolution when it was transferred to another cooperative - *ibidem*, p. 79.
[50] *Ibidem*, pp. 75 and 80. Professor Charles Gide noticed, during a course at the Collège de France - finding whose resonances seem more current than ever before – "how the concept of Buchez (see *supra* - our parenthesis) and of Raiffeisen is absolutely contrary to all financial organizations' practices of today, as well as to all States, that through the contracting of debts repayable on long terms *the future generations are to cover the costs made by the present generation* (our emphasis)" - *ibidem*, p. 80, footnote no. 1.
[51] *Ibidem*, p. 81.
[52] Under the influence of this work, Dr. Karl Wolff in Sibiu decided to establish similar cooperatives for the Saxons of Transylvania - *ibidem*, p. 77, footnote no. 1.
[53] *Ibidem*.
[54] *Ibidem*, pp. 76-77 and 83.

established Raiffeisen Union of Agricultural Cooperatives (Generalverband der deutschen Raiffeisen-Genossenschaften).[55]

Karl Marx (1818-1883), though failing to give too much importance to co-op as a means of introduction of a new social order[56], admitted, however, that the cooperative movement has its own purpose, subordinated though to the political action.[57] In 1864, Marx brought forward before the International Workingmen's Association a reference document – "Inaugural address" – in which he envisaged cooperation as "a great social experiment", which proved that production on a large scale, and in accord with the behests of modern science, may be carried on without the existence of a class of masters employing a class of hands.[58]

Ferdinand Lassalle (1825-1864), influenced in his conception of cooperative property by the ideas of Louis Blanc[59], advocated for the workers' production cooperatives, through which they had the chance to become their own entrepreneurs and thus eliminate the so-called "brazen law of wages"[60]: "*to make of the working class its own master*, here's the way, the only way to repeal this cruel law, the law of brass which determines the salary."[61] As Blanc, Lassalle recognized the important role of the State played in financially supporting these producers' cooperatives, except that the first thinker admitted the State leadership for the period in which the workers were not yet prepared to manage their own "social workshops".[62]

Wilhelm Haas (1839-1913) – whose cooperative property concept has proven to be a compromise between the Raiffeisen and Schulze-Delitzsch systems – set up in Friedberg, in 1872, a rural cooperative called by him "consumer cooperative" – in reality this being considered rather a joint supply one for performing agriculture.[63] In 1879, it was established the Agricultural Credit Cooperatives Union of Hessa, later on converted into an Agricultural Cooperatives Union in southern and western Germany, led by Haas.[64] A few years later, in 1883, was established under the chairmanship of Haas, the Agricultural Cooperatives Association, which brought together cooperatives other than the credit ones, later on the Haas General Union of Agricultural Cooperatives, judged as "the most powerful Cooperative Union in Germany and in the whole world".[65] In 1904, Haas founded the first cooperative property school for training staff in the field of agricultural cooperatives.[66] Following the withdrawal of the Agricultural Cooperative from the International Cooperative Alliance after the Congress in Budapest in 1904, at the initiative of Haas was born a new International Association of Agricultural Cooperatives (1907), later named the International League of Agricultural Cooperatives, based in Berlin.[67]

---

[55] *Ibidem*, p. 77.

[56] The following reasons of Marx's perception on the cooperative movement were identified: the first, in that there were not by that time enough experiments in the various categories of cooperatives to be able to wittingly appreciate the cooperative role in settling the social problem; the second, in that Marx could not be objective in the theoretical research of the cooperative movement, as it had already formed the doctrine of expropriation – Ed. Bernstein, *Die Voraussetzungen des Sozialismus und die Aufgaben der Sozialdemokratie*, IX[th] Edition, Stuttgart, 1920, *apud* G. Mladenatz, *op. cit*., pp. 138-139.

[57] G. Mladenatz, *op. cit*., p. 132.

[58] *Ibidem.*

[59] See *supra*.

[60] G. Mladenatz, *op. cit*., p. 128. Here's how Lassalle defined this "law" in the paper *Offenes Antwortschreiben an das Zentralkomitee zur Berufung eines Allgemeinen Deutschen Arbeiter-Kongresses zu Leipzig*: "regular limitation to essential needs, common to one nation with the view to support the existence and to reproduce thereof".

[61] F. Lassalle, *loc. cit*., *apud* G. Mladenatz, *op. cit*., p. 131.

[62] G. Mladenatz, *op. cit*., p. 132, including footnote no. 1.

[63] *Ibidem*, pp. 83-84.

[64] *Ibidem*, p. 84.

[65] *Ibidem.*

[66] *Ibidem.*

[67] *Ibidem*, pp. 113-114.

3. Italy

Giuseppe Mazzini (1805-1872), politician and hero in the struggle for independence and unification of Italy, reckoned as the forerunner of the cooperative movement, established in 1842 the "associazione nazionale degli operai", the concept of cooperative property in his opinion being expressed by "voluntary free association, organized by people who know, love and look up to each other, not a forced association, not agisted by the governing authority".[68]

Luigi Luzzatti (1841-1927), politician, Professor, and author of works in the field of economy and finance, esteemed rhetorician, is considered "the real founder of the Italian credit union movement".[69] In 1864 and 1865, Luzzatti establishes the first popular banks in the cities of Lodi and Milan, following the Schulze-Delitzsch model[70], which it has adapted, though, to the Italian realities – more precarious than in Germany – diminishing the value of the shares, but giving more importance to the reserve funds.[71] Unlike Schulze-Delitzsch, Luzzatti campaigned to ensure free cooperative governance - idea which approaches him for Raiffeisen[72] - and introduced the interest-free small loans system, "by word of honor"[73]. We also note the fact that he initiated the setting up, in Rome, of a central credit institute, with the participation of the State and of the co-op.[74]

Leone Wollemborg (1859-1932) established in 1883, in the village of Loreggia, Italy's first Raiffeisen-type credit union, without carrying forward the moral and Christian precepts involved.[75]

In terms of international concern, it is worth mentioning that, in December 1929, the "Confederazione cooperative italiana" convened the first International Conference in Rome, followed in 1930 by the conferences held in Innsbruck and Zürich, where it was decided upon the establishment of the International Confederation of Cooperatives, also known as the "International White Cooperative".[76]

The inter-war period also saw the development in Italy of a form of labour unions – "di braccianti cooperatives", for the purpose of self-help and savings institution.[77] Their members only performed work, collected capital of small monthly contributions and executed works pertaining to the State and the territorial-administrative units.[78]

4. Great Britain

England is deemed as being the first State to have specifically enacted for cooperative societies, implementing thereof from the outset an autonomous situation (under bills dated 1852, 1867 and 1871); however, until 1893 when it was adopted the "Industrial and Provident Societies Act", England has not had a cooperative encoding in the real sense of the word.[79]

Within the framework of outlining cooperative ideas, we note hereby that, in 1659, Peter Cornelius van Zürickzee (Pieter Cornelios Plockboy on his real name) – Dutch settled in England, published a pamphlet in which he imagined an economic association appreciated as integral

---

[68] *Ibidem*, pp. 40-41.

[69] In 1863 he published in Padua a work entitled *La diffusione del credito e le banche popolari*, carrying forth his primary ideas in respect of credit unions – *ibidem*, p. 88.

[70] See *supra*.

[71] Thus, if the share in Schulzer popular banks in Germany amounted to at least 100 marks – but, as a rule, ranged between 300 and 500 marks – in Italy the amount was fixed, usually to 25-50 pounds – G. Mladenatz, *op. cit*., pp. 88-89. See *supra*.

[72] See *supra*.

[73] G. Mladenatz, *op. cit*., p. 89.

[74] *Ibidem*.

[75] Luzzatti, who was himself Jewish, however, proved unlike Wollemborg a moral and Christian precept; in the meantime, the agricultural cooperatives in Italy came under the influence of the Catholic clergy - *ibidem*, pp. 89-90.

[76] G. Mladenatz, *op. cit*., p. 114.

[77] *Ibidem*, p. 165.

[78] *Ibidem.*

[79] C.C. Zamfirescu, *op. cit*., pp. 14-15.

cooperative, in order to meet the needs of its members, *i.e.* a "socialistic community with limited private property".[80] Another theorist concerned with the cooperative-related ideas was John Bellers, who in 1695 published a statement that promoted the so-called "cooperative labour colonies" ("a College of Industry"), designed to produce – unlike the entity described by Plockboy - over the members' consumption needs, the proceeds realized by the sale of surplus assets to others being employed for the expansion of the colony: "[…] will make *Labour,* and not money the standard to value all Necessaries by".[81]

The oldest English cooperative associations are consumer stores, the so-called "cooperative shops", which had more of a capitalist nature, established in Gova - 1777, also the birth date of the tailors' cooperative (producers' cooperative) in Birmingham - and in Mongewel (in 1794).[82] In 1795 was established a producers' cooperative – the mill in Hull, in which case, as in the case of those mentioned above, earnings were divided in proportion to the capital paid up by each co-op member.[83]

Robert Owen (1771-1858), regarded as the father of English cooperation and modern cooperation in general, became aware of the fact that the great plague of mankind was – and is – the chase after gain, what makes economic goods to be sold at a price higher than the cost, the latter being reckoned as the fair price.[84] In his view, the profit thus obtained is unfair, and this gain tool – money – had to be removed, for which Owen has set up a labour exchange of goods, based on cooperative principles, which provided to depositors of goods so-called labour notes which amounted in value to the one of the products submitted for sale.[85] Within this labour exchange, the price was firm in relation to the number of hours of work judged as being required for the production of the property, in consideration of the fact that the value of an economic good is determined by the labour and skills employed, and the purchaser paid the same amount in consideration for labour notes obtained in the exchange for its products offered for sale.[86] This institution was established in London in 1832, but was shut down two years later, in particular due to the fact that speculators, in exchange for goods of questionable quality, took from the exchange worthy goods which they sold on the market at a higher price, thus obtaining profits that Owen sought to remove.[87] From the perspective of international cooperative organizations, it is worth mentioning that Owen formed in 1835, in London as well, the Association of all Classes of all Nations, in order to transpose its social system in lifestyle.[88]

Rated as the foremost theorist of the cooperative movement, William King (1786-1865) established in 1827 a consumer cooperative in Brighton, called "The Co-operative Trading Association", and during the period 1828-1829 he published a monthly periodical called "The Brighton's Co-operator".[89] In his view, deeply Christian – which is why he was considered a forerunner of the social Christians[90], the emancipation of the working class had to be carried out exclusively by its own means, the idea of self-help being thus emphasized and regarded as a fundamental element of the cooperative action programme.[91] According to his theory, the social and economic basis of the cooperative movement is labour organization in the interest of those who

[80] G. Mladenatz, *op. cit*., pp. 17-19 and the doctrine quoted therein.
[81] *Ibidem*, p. 19.
[82] I.N. Angelescu, *op. cit*., p. 5.
[83] *Ibidem*.
[84] G. Mladenatz, *op. cit*., pp. 20-22.
[85] *Ibidem*, p. 22.
[86] *Ibidem*, pp. 22-23.
[87] *Ibidem*, p. 23.
[88] *Ibidem*, p. 93.
[89] *Ibidem*, pp. 25-26.
[90] *Ibidem*, p. 28.
[91] *Ibidem*, p. 26.

provide work, the co-op giving the possibility to the labour factor to be released from the state of dependency relevant for the capital factor.[92]

The most famous substantiation of the cooperative idea remains though the "Rochdale Society of Equitable Pioneers", founded in 1844 by the will of 28 poor flannel weavers, who, in December of the same year, opened the shutters of a consumer store "in the laughter of merchants and street romps gathered to see the "booth of old weavers".[93] This moment remained but one that glitters even today in the history of modern cooperative.[94] The famous system in Rochdale was characterized by the following rules: the sale for "ready money", including to its members, justified by the irrefutable argument that "if the associates would take goods on credit from the common store, it would mean that they lend money to themselves, which naturally is not possible" [95], and, on the other hand, if a cooperative with a modest capital[96] would practice selling on credit as well, "it can easily occur that it may find itself at one point with no cargo and no money"[97]; the sale of goods at the current, retail market price, with the aim that the members achieve savings that were distributed to the same, at the end of the year, in the form of the so-called "consumption bonus" (rebate)[98] representing the difference between the market price[99] and the cost price: "an economy achieved by members of the co-op, on account of the fact that, jointly procuring the necessities of life and by direct means, they appropriate the profit that would otherwise revert to intermediate traders"[100]; each shareholder has the right to one vote, no matter how many shares are purchased: one man – one vote;[101] non-restriction of access within the society, whereas in the Rochdalean cooperative the interest was that "the number of members, therefore of certain customers, be as high as possible, the surplus being distributed in proportion to their transactions;[102] the election of the members was however very carefully undertaken, each newcomer – who was expected "to make prove of a high sense of moral rectitude and perfect honesty" – being recommended by a member and subsequently accepted by the General Meeting;[103] neutrality in politics and religion;[104] the social labour, substantiated by the establishment of a provident sick and burial society, propaganda against alcoholism, care for the unemployed or low-waged, the establishment of a construction company for the benefit of associates,[105] the creation and development of a cooperative library, the establishment of schools for the children of the co-op members.[106] It should also be stressed that the Rochdale Pioneers have established, six years after the opening of the consumer store, a *producers' cooperative* – a cooperative mill, which, however, due to lack of profitability, was sold in 1860 and replaced by a more powerful one – and in 1854-1855 they founded two spinning factories, these cooperatives being established based on the principle of *the participation of personnel in benefits*.[107]

---

[92] *Ibidem*, p. 28.
[93] *Ibidem*, p. 49.
[94] *Ibidem*, p. 45.
[95] *Ibidem*, p. 52.
[96] The Rochdale Society's start-up capital amounted to no more than 28 pounds, a pound from each founder, which the "equitable pioneers" managed to collect only one year following the date on which they decided upon opening their store - *ibidem*, p. 47.
[97] *Ibidem*, p. 53.
[98] *Ibidem*, pp. 54, 56, *passim*.
[99] The Rochdale Pioneers sought to influence the market price on the basis of equity, thus contributing to "the establishment of the fair price" - *ibidem*, p. 56.
[100] *Ibidem*.
[101] *Ibidem*, p. 57.
[102] *Ibidem*, p. 58.
[103] *Ibidem*, p. 59.
[104] *Ibidem.*
[105] *Ibidem*, pp. 59-60.
[106] I.N. Angelescu, *op. cit*., p. 39.
[107] G. Mladenatz, *op. cit*., pp. 60-61.

However, in 1862, the General Meeting ruled upon, by 502 votes for and 159 against – the removal of the participation to profit of workers within the companies' factories, "with all the arduous opposition of the elderly pioneers".[108]

After the success reported at Rochdale, E. Vansittart Neale (1810-1892) became the leader of the consumer cooperative movement, holding, during the period 1875-1891, the office of Secretary General of the English Cooperatives Union.[109] Vansittart-Neale contributed to the first draft law on cooperatives, and the first cooperative code – "Industrial and Provident Societies Act" was passed by the British Parliament in 1852.

The first International Cooperative Congress was held in London, in 1895, on which occasion it was decided the establishment of the International Cooperative Alliance.[110]

In 1906, Arthur Penty (1875-1937) published in London the paper entitled "The Restoration of the Guild System", advocating for the restoration of the old medieval guilds, upgraded and generalized in all branches of economic business.[111] The said author also sought the establishment of an "orderly economic regime, organized on cooperative bases with the view to exclude the economic market and price fixing by economic corporations".[112]

In 1915, George Douglas Howard Cole (1889-1959) founded the Association "The National Guilds League" – branch of guild socialism, according to which the industrialization of the economy was a reality which could not be removed any longer, but laid the stress on the organization of production of the initiative and with the participation of the professional union.[113] In summary, the purpose of guild socialism relates to the "removal of the employee regime, in that the employer is suppressed, and the working class organised on the basis of the principle of self-management".[114] The practical application of this concept resulted in the construction guilds grouped in 1921 into a national organization, and one year later, in an international federation, following the Congress of Vienna.[115]

III. Conclusions

In the present context, labelled by the major difficulties the European labour market is facing, the proper knowledge and understanding of cooperative principles provide the premises for their implementation with the view to meet the current economic and social stability exigencies in today's Europe.

References

- G. Mladenatz, *The History of Cooperative Doctrines*, The Romanian Cooperative System National Office, „LUPTA" Graphic Arts Institute N. Stroilă, Bucharest, 1931.

[108] *Ibidem*, p. 61.
[109] *Ibidem*, p. 149.
[110] The wording of the proposal for the establishment of an International Cooperative Alliance has been made at the Cooperative Congress from Plymouth, in 1886 by the Frenchman Emil de Boyve - see W.P. Watkins, *L'alliance cooperative internationale 1895-1970*, London, 1971, *apud* D. Dângă, D. Cruceru, *Cooperation in Romania. Tradition and actuality*, Artifex Publishing House, Bucharest, 2003, p. 53.
[111] By that time, the organization in guilds was limited to craftsmen and merchants in urban areas - G. Mladenatz, *op. cit*., p. 166.
[112] *Ibidem*, p. 168.
[113] *Ibidem*.
[114] *Ibidem*, p. 169.
[115] *Ibidem*.

- I.N. Angelescu, *Cooperation and Socialism in Europe*, The Graphic Arts Establishment Albert Baer, Bucharest, 1913.
- F. Espagne, *Le modèle buchézien et les réserves impartageables*, RECMA, 4/1994, no. 253-254.
- C.C. Zamfirescu, *The legal regime of cooperative societies under Law of 1929*, "Independenţa" Printing House, Bucharest, 1932.
- D. Hiez (sous la direction), *Droit comparé des coopératives européennes*, Ed. Larcier, Bruxelles, 2009.
- D. Dângă, D. Cruceru, *Cooperation in Romania. Tradition and actuality*, Artifex Publishing House, Bucharest, 2003.

SOME CONSIDERATIONS RELATING TO THE UNFAIR TERMS WITHIN THE BANK CONTRACTS IN REGULATING OF THE LAW NO. 193/2000

VASILE NEMEŞ [*]

Abstract
In this study, we intend to make a brief analysis of some issues relating to the unfair terms within the contracts concluded in the banking activity by the credit institutions with the consumers.
The contracts concluded by the credit institutions with the consumers are contracts containing pre-formulated standard terms, meaning that they are set out prior to the conclusion of the contract and submitted to the consumer, substantially reducing the possibility to negotiate them.
On the other hand, due to the highly technical nature of the banking regulations and the terminology used by them, in the bank contracts there are several terms for whose understanding the consumer needs specialized knowledge.
Precisely for this reason, the legislator regulates a number of conditions relating to the negotiation and conclusion of the contracts between the professionals and the consumers, as well as the identification and finding of the unfair terms within the contracts.
At the same time, in the content of the bank contracts may also be identified certain terms that are part of the examples listed in the Appendix to the Law no. 193/2000.

Keywords: *credit institution, consumer, unfair term, bank contract, professionals*

1. Preliminary considerations

By the Law no. 193/2000[1] relating to the unfair terms within the contracts concluded between professionals and consumers have been introduced more regulations which are fully applicable within the contracts concluded between the credit institutions[2] and their customers having the capacity of consumers.

According to the provisions of article 3 of the Government Emergency Ordinance (G.E.O.) no. 99/2006, the credit institutions, Romanian legal entities, may be set up and may operate in one of the following categories:

a) banks;
b) credit cooperative organizations;
c) saving and lending banks in the housing sector;
d) mortgage loan banks[3].

According to the Law no. 193/2000, the consumer[4] means any natural person or group of individuals set up in associations which, pursuant to a contract covered by the law, are acting for purposes outside its commercial, industrial or production, crafted or liberal business.

---

[*] Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (avocatnemes@yahoo.com).

[1] Published in the Official Gazette no. 1014 of December 20, 2006.

[2] The main issues regarding the credit institutions are regulated by the G.E.O. no. 99/1996 relating to the credit institutions and the suitability of the capital published in the Official Gazette no. 1027 of December 27, 2006.

[3] For details on the organization and operation of different categories of credit institutions, see Lucian Săuleanu, Lavinia Smarandache, Alina Doocioiu, Banking Law, Academic course, Legal Universe Publishing, Bucharest 2009, page 39 and the following; Rada Postolache, Banking Law, C.H. Beck Publishing, Bucharest 2012, page 45 and the following.

[4] For a detailed analysis of the principles of the consumers' protection, see Anca Nicoleta Gheorghe, Camelia Spasici, Dana Simona Arjoca, Consumption Law, Hamangiu Publishing, Bucharest 2012, page 14 and following.

In regulating of the same Law no. 193/2000, professional means any authorized natural person or legal entity who, pursuant to a contract covered by this law, is acting within its commercial, industrial or production, crafted or liberal business, as well as any person acting for the same purpose, in the name or on behalf thereof[5].

Transposing the content of the article 1, paragraph 1, of the Law no. 193/2000 in the bank lending activity, it means that any contract concluded between the credit institutions, as they are set up and operating according to the G.E.O. no. 99/2006 and their customers with a professional status, for the purposes of the law, will include "clear contractual terms, unequivocally, for whose understanding shall not be required specialized knowledge" (article 1, paragraph 1, of the Law no. 193/2000).

2. Particulars regarding the content and the form to express the terms within the bank credit contracts

As seen above, the legislator requests to the credit institutions to insert within the contracts clear terms, unequivocally, for whose understanding shall not be required specialized knowledge.

In order to comply with the legal requirements, it means that the legal expressions, such as "the debtors and the guarantors are jointly liable and they waive the benefit of discussion and the benefit of division" should be explained to the meaning of a person who has no legal specialized knowledge.

The fact that certain terms are ambiguous and for whose understanding is required specialized knowledge does not automatically entail the nature of unfair terms thereof.

According to the provisions of the article 1, paragraph 1, of the Law no. 193/2000, a contractual term which has not been negotiated directly with the consumer will be considered unfair if, by itself or together with other provisions of the contract, creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties.

It follows that a strong clue regarding the unfair nature of a term is that it was not negotiated directly with the consumer. Therefore, such a term is not the result of the manifestation of will of both or all parties, as appropriate.

According to the law, a contractual term shall be deemed as not being negotiated directly with the consumer if it was determined without enabling the consumer to influence its nature, such as the pre-formulated standard contracts or the general conditions of sale applied by the traders on the market of that product or service (article 4, paragraph 2).

The Civil Code, in the article 1202, paragraph 2, legislates that the stipulations set up in advance by either party in order to be generally and repeatedly used and which are included in the contract without having been negotiated with the other party shall be deemed standard terms.

The credit institutions belong to the category of professionals who, according to the applicable law, are required to establish their own lending conditions and policies which will be communicated to the National Bank of Romania and which, obviously, are inserted in the contracts concluded with different customers.

---

[5] According to the article 3, paragraph 2, of Civil Code, are considered professionals all those who operates an enterprise. And according to the article 3, paragraph 3, of Civil Code, the operation of an enterprise represents the systematic exercise, by one or more persons, of an organized activity consisting of production, administration or alienation of goods or provision of services, whether it is or is not for profit. For details concerning the legal meaning of the professional and enterprise concepts in regulating of the current Civil Code, we recommend St. D. Cărpenaru, Romanian Commercial Law Treaty, in compliance with the new Civil Code, Legal Universe Publishing, Bucharest 2012, page 29 and the following; Gh. Piperea, Commercial Law. Enterprise in NCC regulating, C.H. Beck Publishing, Bucharest 2012, page 31 and the following; V. Nemeş, Commercial Law, in compliance with the new Civil Code, Hamangiu Publishing, Bucharest 2012, page 15 and the following.

Therefore, in the context of the above mentioned regulations, the professional - credit institution is required to explain and to negotiate each term inserted in the contracts concluded with the consumers.

In case the consumer claims that some terms have not been negotiated, the credit institution is required to prove the contrary. This requirement is stipulated in the article 4, paragraph 3, the final thesis of the Law no. 19/2000 which provides that if a professional claims that a reformulated standard term has been negotiated directly with the consumer, is his duty to submit evidence to that effect.

Therefore, the clues leading to the unfair nature of the terms of a bank contract are those containing ambiguous terms, for whose understanding is required specialized knowledge or/and which have not been negotiated directly with the consumer, such as the pre-formulated standard terms.

In order to confer the nature of unfair terms, is not enough that these terms to be ambiguous or have not been negotiated directly with the consumer, but they must create, eventually together with other provisions of the contract, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties.

Unfortunately, the legislator does not regulate, by way of indication, some criteria to appreciate that a term or more create(s) a "significant imbalance" between the rights and obligations of the parties.

Failing any other legal issues, is up to the exclusive discretion of the court to find the existence of such significant imbalance between the contracting parties.

Examples of such terms creating a significant imbalance between the rights and obligations of the parties in the banking field may be those which set up an obligation incumbent to the consumer without any consideration from the credit institution, as well as the payment of a fee that is not covered in the contract.

3. The identification and finding of the unfair nature of the terms within the bank contracts

The law establishes the way to identify and to find the unfair terms within the contracts concluded between professionals and consumers.

In this respect, the article 6 of the Law no. 193/2000 stipulates the principle according to which the unfair terms may be found either by the consumer of banking products and services or by the bodies authorized by law.

In the category of bodies authorized by law are found the authorized representatives of the National Authority for Consumers' Protection, as well as other authorized specialists of other public administration bodies, according to their competencies.

4. The effects of identification and finding of the unfair terms

As a principle, the law provides that those unfair terms will not affect the consumer and the contract will be carried out further, with the consumer's consent, only if it can continue after their disposal.

Therefore, (the article 6 of the law) the preservation of the contract concluded between the credit institution and the consumer, if it contains unfair terms, is up to the sole discretion of the consumer in that it will continue to have legal effect only if the consumer expresses his consent in this respect, provided that these terms to be removed and thus the contract may have legal effects.

It is possible that the operation of finding the unfair terms within the contracts to be carried out without the knowledge and consent of the consumer. In this regard, the article 12, paragraph 1, of the Law no. 193/2000 provides that, if it finds the use of some adhesion contracts containing unfair terms, the supervisory bodies foreseen by law shall notify the court related to the domicile or, where

appropriate, the premises of the professional, requiring to him to change the ongoing contracts by eliminating the unfair terms.

Likewise, the associations for the consumer's protection meeting the conditions provided in the articles 30 and 32 of the G.O. no. 21/1992 regarding the consumer's protection, may sue the professional who uses adhesion contracts containing unfair terms, so that the court may order the cessation of their use, as well as the amendment of the ongoing contracts by eliminating the unfair terms (the article 12, paragraph 3, of the Law).

It is therefore noticed a genuine exception to the principle of the binding force of the contract regulated in the previous Civil Code, in article 969, as well as in the current Civil Code, in article 1270, paragraph 1, according to which the validly concluded contract has the force of law between the contracting parties.

We have argued that it is a genuine exception because, as shown in the above mentioned text of law, if the court finds the unfair nature of some terms, it may require the professional to amend the ongoing contracts.

From this legal norm does not result that the amendment must be made with the consent of each consumer, meaning that the credit institution will unilaterally amend the ongoing contracts.

Such behavior of the credit institutions is also an exception to the binding force and to the principle of the expressed contractual freedom in that only the parties who concluded the contract can amend it, not just one of them.

The principle is provided by the article 1270, paragraph 2, of Civil Code according to which the contract shall be amended or terminated only with the consent of the parties or for reasons authorized by law.

Corroborating the two categories of regulations, we may conclude the amendment referred to in the article 12 of the Law no. 193/2000 is made "for reasons authorized by law", according to the article 1270, paragraph 2, of Civil Code.

This situation governed by special rules is not only an exception to the principle of relativity of the legal act and of the binding force thereof, but also cause deep legal consequences from procedural law prospects.

This is because the article 13 of the Law no. 193/2000 stipulates that the court, if it finds the existence of unfair terms within the contract, may require the professional to amend all the ongoing adhesion contracts and to remove the unfair terms from the pre-formulated contracts intended to be used within the professional activity.

We show that we met a genuine exception also in terms of the procedural law since from the above legal regulation follows that the decision of the court is compulsory for all the ongoing contracts, even if by hypothesis the consumers were not a party in the process by which was found the existence of the unfair terms within the contract.

Therefore, the professional shall be required to amend all the ongoing contracts without consulting the consumers, meaning that the judgment will take full legal effects also relating to them.

Such an effect is a genuine exception to relativity of the effects of the judgment[6], knowing the fact that, according to the Code of Civil Procedure, a judgment cause legal effects only between the parties to the process.

As concerns the amendments to the articles 12 and 13 of the Law no. 193/2000 arises the question of what happens if the consumer in the direct process with the financer obtains from the court an unfavorable judgment, meaning that shall be set up, by res judicata, that the terms have not

[6] For the detailed analyze on the effects of the judgments, see Ilie Stoenescu, Graţian Porumb, Romanian Civil Procedural Law, Didactic and Pedagogic Publishing, Bucharest 1966, page 271 and the following; Gabriel Boroi, Dumitru Rădescu, Code of Civil Procedure commented and annotated, All Publishing, Bucharest 1995, page 371 and the following; Viorel Mihai Ciobanu, Theoretical and practical Treaty of Civil Procedure, 2nd volume, National Publishing, Bucharest 1997, page 268 and the following.

an unfair nature, thus remaining binding on the consumer, and subsequently another court seized this time by the bodies authorized by law finds the opposite, namely that the professional's contracts contain unfair terms.

This is especially since the legal texts require the professional to amend all the ongoing contracts and to remove the unfair terms without making any statement, as they were or were not subject to a previous judgment.

Compared to the imperative and unconditional expression of the legislator arises the conclusion according to which will be amended all the ongoing adhesion contracts, even if some of them were subject to a previous judgment in which the courts have rejected the requests for finding the unfair terms.

The main argument for such a conclusion is the article 13 of the law requiring the professional to amend "all the ongoing adhesion contracts" without distinguishing any condition or circumstance.

In supporting the text argument may also be brought the principle of the consumers' protection, meaning that a judgment favorable to a consumer within a category of contracts should take advantage to all the consumers-parties within that category of contracts.

5. Analysis of some common terms within the bank contracts

In the following lines we shall make a brief reference to two of the examples of unfair terms covered by the appendix to the Law no. 193/2000.

Specifically, it is about the letter l and the letter n from the Appendix to the law.

According to the letter I, shall be deemed unfair terms those contractual provisions requiring the consumer to pay some disproportionately high amounts in the event of failure to fulfill his contractual obligations, compared to the damages suffered by the professional.

Within the content of such a term may be included the situation in which the credit institution assigns the debt to a recovery company at a price considerably lower than the amount of the debt (between 20-60% of the nominal value of the loan).

More specifically, it is about the fact that, if we consider the professional - credit institution, the amounts are "disproportionately high" compared to the damages suffered by him as long as he receives a price pursuant to the assignment and if we consider the professional - recovery company, the amounts are "disproportionately high" compared to the damages suffered, since the consumer shall have to pay the entire debt, not just up to the price paid by the recovery company.

Such a term also brings the invocation of the litigious retract by the consumer to the institution for selling the litigious rights between the credit institution and the recovery company.

Another example of term is the one from the letter n which entitles the professional (credit institution) to transfer the contractual obligations to third persons - agent, attorney-in-fact etc. - (recovery companies) without the consumer's consent, if such transfer is performed in order to reduce the guarantees or other liabilities towards the consumer.

Specifically, the consumer could invoke the loss of the guarantee for the repayment term considering that within the contract he had a repayment period (of 10, 20, 30 years), and following the transfer of the contractual obligations by the recovery company, the consumer shall be required to repay the loan at once.

References

- Law no. 193/2000.
- G.E.O. no. 99/1996 relating to the credit institutions and the suitability of the capital published in the Official Gazette no. 1027 of December 27, 2006.
- Lucian Săuleanu, Lavinia Smarandache, Alina Doocioiu, Banking Law, Academic course, Legal Universe Publishing, Bucharest 2009, page 39 and the following.
- Rada Postolache, Banking Law, C.H. Beck Publishing, Bucharest 2012, page 45 and the following.

- Anca Nicoleta Gheorghe, Camelia Spasici, Dana Simona Arjoca, Consumption Law, Hamangiu Publishing, Bucharest 2012, page 14 and following.
- St. D. Cărpenaru, Romanian Commercial Law Treaty, in compliance with the new Civil Code, Legal Universe Publishing, Bucharest 2012, page 29 and the following.
- Gh. Piperea, Commercial Law. Enterprise in NCC regulating, C.H. Beck Publishing, Bucharest 2012, page 31 and the following.
- V. Nemeş, Commercial Law, in compliance with the new Civil Code, Hamangiu Publishing, Bucharest 2012, page 15 and the following.
- Ilie Stoenescu, Graţian Porumb, Romanian Civil Procedural Law, Didactic and Pedagogic Publishing, Bucharest 1966, page 271 and the following.
- Gabriel Boroi, Dumitru Rădescu, Code of Civil Procedure commented and annotated, All Publishing, Bucharest 1995, page 371 and the following.
- Viorel Mihai Ciobanu, Theoretical and practical Treaty of Civil Procedure, 2nd volume, National Publishing, Bucharest 1997, page 268 and the following.

THE ROLE AND IMPORTANCE OF THE FIXED-TERM INDIVIDUAL EMPLOYMENT CONTRACT

CARMEN CONSTANTINA NENU *

Abstract
The emergence of new forms of employment contracts, which do not materialize all the classic elements of an employment contract, has remained inevitable. European governments have responded to the problems of lack of activity caused by repeated economic crises, through the approval of new forms of employment, which are more flexible and less protective. These new forms of employment contracts must not create differences and discrimination between employees on the ground of the type of contract. In consequence, an analysis of one of these types of contracts, such as the fixed-term employment contract, is required, in terms of union and national rights. Such an analysis is important for a correct understanding of the role and necessity of employment relationships flexibility in a competitive economy.

Keywords: *employment contract, flexibility, fixed-term, protection, unional law.*

Introduction

All categories of employees should enjoy the same rights and obligations in the employment relationship, regardless of the employment contract under which they perform their work. This principle is the main reason behind all actions in this field. Elimination of discrimination between these contracts and the classic ones is the real challenge of European legislation in this area, so that labor market flexibility and its legal framework is consistent with the principle of protection of workers' rights, on equal terms, without being affected by the types of individual labor contracts whose parties they are.

Such an employment contract is also the one concluded for a definite period of time. Therefore, it was considered necessary to analyze both the normative aspects of such a contract and its role on the labor market, in terms of union and national law.

Paper content

The typical employment contract means the contract governing the legal relationship created between an employer and an employee, concluded for an indefinite period and for a full time, as the work is carried out in an area belonging to the employer, under its control and direction. Atypical employment contracts are by definition those that do not meet one or more of these elements.

Emergence of atypical employment contracts in European legislation was a result of successive economic crises that affected the labor market on the one hand, and on the other hand, a response to the need to create new jobs through flexible content adaptation of work relationships to new demands and requirements of economic operators. These operators do not always need a continuous and steady supply of labor and any activity taking place only on the premises. Atypical employment contracts are the result of social developments in terms of increased employment in the labor market of people who want to supplement their current occupations with others of a different nature.

Therefore, the Community institutions have adopted a series of initiatives aimed to analyze, motivate and regulate, at Community level, some of these atypical employment contracts. Paragraph 7 of the Community Charter of Fundamental Social Rights of Workers provides, inter alia, that achieving an internal market must lead to improved living and working conditions of employees in

* Lecturer, PhD, University of Pitesti **(**e-mail: carmennenu2006@yahoo.com).

the European Community. This will be done by adjusting these conditions by improving them, especially in the forms of employment contracts, other than permanent ones, such as fixed-term contracts, part-time work, work at residence and temporary work.

Considering these aspects, the Romanian Labor Code, which entered into force on March 1, 2003, approached the need for flexible types of contracts, covering the following types of employment contract:

- The employment contract concluded for an indefinite period;
- The employment contract concluded for a fixed period;
- The individual part-time employment contract;
- Temporary work agency employment;
- Work at home;
- Apprenticeship work contract.

Each of the above mentioned contract types has specific legal regulations that complement those applicable to the typical employment contract, to which the Labor Code allocates most of its rules, which shows that, in general, the characteristics of the standard individual labor contract are also found in its atypical forms. To emphasize this, in what follows, each type of employment contract will be examined.

The typical individual employment contract

The current legislation maintains, as a rule, concluding full-time individual contracts of indefinite duration, where work is provided in locations belonging to the employer. This regulation aims to legally protect an employee to whom this type of legal work relationship provides stability.

The Labor Code in force exhaustively governs the institution of the classic individual employment contract, to which it devotes 69 articles. These articles contain provisions relating to the conclusion, performance, amendment and termination of the individual employment contract. In order to clarify the various legal nuances of the typical employment contract one must consider that its elements should be reviewed, that is, the indefinite duration for which it is concluded, the full time work and the work place.

Indefinite duration The indefinite duration of an individual employment contract does not mean that it is completed by the appearance of old age social risk but that the duration of that contract is not known at the time concluded. As shown in the literature[1], by the indefinite duration of the contract it should not be understood that the employee is required to work all his life for that employer or that the employer is required to keep the employee in service to death, but the duration is not known during the time the contract was concluded.

Obviously, an individual labor contract concluded for an indefinite period may be terminated at any time whether the limiting conditions specified by the law are met. The indefinite contract may be terminated at any time by the employer or by the employee, provided that the employer is restricted in the ability to fire the employee by the fulfillment of conditions imposed by the legislature.

Full time employment To qualify as typical employment contracts of indefinite duration a contract must be completed full-time, or for a full time job. The normal working hours for employees with labor contracts, according to Art. 109, paragraph 1 of the Labor Code, are, on average, 8 hours per day and 40 hours a week. For young people aged up to 18 years working full time means, according to paragraph 2 of the same Article, 6 hours per day and 30 hours a week. Distribution of working hours in a week, according to art. 110, paragraph 1 is usually uniform, 8 hours per day for five days, two days of rest, the parties being able to opt for an unequal distribution in days subject to the limit of 40 hours a week.

[1] E. Cristoforeanu, *Teoria generală a contractului individual de muncă,* Editura Curierul Judiciar, Bucharest, România, 1937, p. 84.

The work place . A typical employment contract requires that the place of work belongs to the employer, who is obliged to provide the necessary working conditions for employees, according to his own rules set out in establishing and organizing documents and in internal regulations.

The number of typical employment contracts concluded for an indefinite period and full-time in our country is overwhelming. This form of contract still responds best to the state of current social relations of work, being an incentive for employees that, in terms of a certain stability of employment, are interested in professional development and professional fulfillment of duties – a beneficial attitude towards the employer.

Also, with indefinite contracts, employees are defended against possible abuses by employers, the legal rules governing dismissal. Also, the typical individual employment contract is a legal instrument favorable to employers, who need constant work provided by individuals with certain training. Moreover, the employers are directly interested in investing further in training order to obtain benefits. Employees with an employment contract for an indefinite period demonstrate more responsibility, being stimulated, depending on the organizational culture, to contribute directly to the growth and development of the activity for an employer where they intend to work for an indefinite period of time, to be promoted professionally.

Measures to adapt to change in the labor market led to the appearance, besides the full-time work relationship with an indefinite duration, of other types of work relationships which are more flexible: fixed-term employment, part-time work, work at home and labor through temporary employment agency. These employment contracts are characterized by a decrease in the employee guarantees.

The need to make flexible forms of employment compatible, compatibility required by employers, with employee rights protection ensured, is the challenge that must be confronted by the social policy and labor legislation in the national law.

The national regulation of the individual employment contract of limited duration.

An employee with a fixed-term individual employment contract is the employee whose work contract is directly concluded with an employer. Termination of this contract is caused by objective conditions such as completion of the period on which it was concluded, the ending of the activity, service or production.

Termination cannot be caused by the will of the contracting parties[2].

Regulation of the individual employment contract of limited duration conducted in the Labor Code deals with this type of contract as an exception to the rule of conclusion of permanent and full-time contracts. The material is included in art. 82-87 reprinted in the Labor Code. According to art. 83 of the Labor Code, cases where fixed-term employment contracts may be concluded are exhaustively and expressly provided, as follows:

- To replace an employee on account of suspension of his contract, unless that employee participates in a strike. This is the so-called replacement contract or interim agreement in other legislation and it proved an effective means of creating and distributing jobs where an employee has the right to suspend the employment contract under the laws and under the collective agreement;

- For growth and / or temporary change of the activity structure of the unit; the contract is called in other legislations contract for production reasons. These reasons, be it an unexpected

[2] See on the analysis of this type of employment contract, IT Stefanescu, S. Beligrădeanu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii*, in „Dreptul" no. 4/2003, p. 5 et seq.; Al. Athanasiu, L. Dima*, Regimul juridic al raportuilor de muncă în reglementarea noului Cod al muncii,* in „Pandectele române" no. 4/2003; I. T. Ştefănescu *Modificările Codului muncii comentate*, Edition 2005 and 2006, Lumina Lex Publishing House, Bucharest; Al. Athanasiu, L. Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 58-59; Al. Ţiclea, *Tratat de dreptul muncii*, Rosetti, Publishing House, Bucharest, 2006, p. 365-369; I. T. Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer, Publishing House, Bucharest 2007, p. 403 et seq.; Magda Volonciu, *Comentariu (la art. 80-86), in Codul muncii, Comentariu pe articole, Vol. I art. 1-107*, by Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, C.H.Beck, Publishing House, Bucharest, 2007, p. 424 et seq.

number of orders or unusual reasons such as excessive absenteeism, preclude the possibility of the employer to meet production requirements;

- For development of seasonal activities, the contract is designed especially for agricultural campaigns;
- To temporarily favor certain categories of unemployed persons, under legal provisions issued for this purpose;
- To employ a person seeking a job, that within 5 years from the date of employment qualifies for old-age pension;
- To fill an eligible positions in trade unions and NGOs during the mandate;
- For employing pensioners who, under the law, can benefit from both salary and pension;
- In other cases expressly provided for by special laws, or for performing different projects or programs.

The maximum period for which an employment contract of limited duration may be concluded is 36 months. The parties may also conclude the contract for a shorter period and extend it within the maximum of 36 months, with no limit to the number of extensions. An individual labor contract extension must take place before the expiry of the original period for which the contract was concluded, because the individual employment contract is terminated at this time and, therefore, it cannot be extended since it is no longer valid.

During the 36 months, between the same parties, that is, employer and employee, no more than three successive fixed-term contracts can be concluded. Thus, if the employer has concluded an individual contract of employment with a person for a period of 2 months for the execution of certain work, they may conclude other two contracts with the same person, up to the maximum period of 36 months. One must consider as successive only fixed-term contracts whose duration cannot be longer than 12 months, without a break longer than three months between the first termination date and the date of conclusion of the next contract.

The individual fixed-term employment contract is concluded in written form, according to art. 82 paragraph 2 of the Labor Code. The content of the individual labor contract was approved by Ministry of Labor Order no. 64/2003, amended by Ministry of Labor Order no. 76/2003 and Order 1616/2011. It includes minimal provisions, and can be adapted to each type of employment contract. Obligation to register individual employment contracts in special registers for recording employees applies for any type of employment contract.

The fixed-term individual employment contract follows the same rules and procedures for conclusion in writing and for recording as the indefinite contract. Moreover, according to art. 87 par. 1 of the Labor Code, employees with fixed-term individual employment contracts will not be treated less favorably than comparable permanent employees, in terms of employment and working conditions, unless different treatment is justified on objective grounds. A'comparable permanent employee' refers to the employee whose individual employment contract is concluded for an indefinite period and who performs the same or a similar activity in the same unit, taking into account their qualifications, skills or training.

The fixed-term contract differs from the classical contract by conditions for termination, generally reaching the term and being terminated on the expiry date of the period for which it was concluded. Exceptionally, the employee may terminate the fixed-term contract, but only for justified reasons, which exclude his fault, otherwise risking paying some compensation to the employer for damages caused by improper exercise of his right to resign.

Limitations that the law requires for the conclusion of fixed-term employment contracts are intended to maintain the rule of conclusion of the indefinite duration employment contract. Thus, if the number of successive contracts had not been limited, one could notice some chain employment of the same employee. This chain employment is possible when each of the fixed-term contracts concluded by the same person has different objectives (e.g. replacement of the employee and fulfillment of a certain task).

Unnional legislation of the individual fixed-term employment

For rules on the conclusion of fixed-term individual employment contracts the provisions of Directive 99/70/CE, referring to the Framework Agreement of 18 March 1999 on fixed-term work concluded by ETUC, Confederations of Industry and of employers in Europe and the European Centre of Enterprises with Public Participation were considered. The signatories of the Framework Agreement recognize that the contracts of indefinite duration are and remain the general form of labor relations between employers and employees, but admit that these fixed term contracts respond, in certain circumstances, to labor market needs.

The Framework Agreement establishes the general principles and minimum requirements relating to fixed-term contracts, emphasizing the fact that their detailed application must take into account specific national realities[3]. It illustrates the will of the social partners to establish a framework in order to ensure equal treatment for fixed-term workers by protecting them against discrimination. For the purposes of the Community directive, a fixed-term worker means a person who has a contract or a fixed-term employment relationship concluded directly between an employer and a worker, where termination is caused by objective conditions such as reaching a specific date, fulfilling a specific task or the occurrence of a specific event.

Clause 4 of the Framework Agreement establishes the principle of non-discrimination, whereby workers with fixed-term contracts should not be treated differently from comparable workers with employment contracts concluded for an indefinite period, except to the extent that such different treatment is justified on objective grounds.

The Agreement establishes the general principles and minimum requirements relating to fixed-term work, recognizing that for their implementation one must consider realities of national, sectorial and seasonal situations. The main concern of the Community institutions and of the European social partners was to establish a framework that would ensure equal treatment and non-discrimination of employees with fixed-term contracts, protecting them against discrimination, given that more than half of those who signed these contracts are women.

The agreement applies to community employees who have a fixed term employment contract, excluding jobs available to a company through a temporary work agency, and is capable of not being applied to employment contracts of apprenticeship if so decided by the Member States and by the social partners.

1. The concept of fixed-term employment contract in accordance with Directive 99/70/CE[4].

According to clause no. 3 of the Agreement, the employee with the fixed term contract means 'an employee with an employment contract or employment relationship concluded directly between an employer and an employee, when the termination of work or employment relationship is caused by objective conditions such as the established date, completion of the activity or service or of production'.

Thus, as the intention of the Directive is to prevent discrimination, it establishes the concept of comparable employee with permanent contract, that is, 'an employee with a contract or employment relationship of indefinite duration, in the same unit, which performs work or an activity that is identical or similar, given their qualifications and the tasks they perform', and emphasizes that 'if there is no comparable permanent employee during the same unit, the comparison shall be made with reference to the collective agreement applicable or, where there is no applicable collective agreement, in accordance with legislation, collective agreements or practice'.

---

[3] **See A. Popescu**, "*Dreptul internaţional al muncii",* C.H.Beck publishing House, Bucharest, 2006, pp. 352-353.

[4] The analysis is based on the provisions of Directive 99/70/CE selection of information presented in *Relaţii de muncă. Modul de curs,* published by the Labour Inspection, Romania, Labour Inspection and Social Security, Spain, RO-03/IB/SO-01 PHARE Project, Oscar Print Publishing House, Bucharest, 2005, p 89-93.

In systems of the EU member countries there is no uniform regulation of fixed-term employment contracts. Given the main forms of different national legislations, they can be classified as follows:

- Fixed term contracts whose duration is determined according to a specific time;
- Fixed term contracts whose duration depends on achieving a specific fact, such as the completion of a job or return of the job holder.

The most important characteristic of these contracts in European legislation is usually causation. Besides offering the employee the chance to perform an activity or service, the fixed-term contract must have a specific reason that in some jurisdictions may be just one of those provided by law, while in other legislation any reason may be allowed, provided that it is not abusive.

2. Employment conditions for employees with fixed-term employment contracts.

The Directive highlights everything that is related to ensuring equal treatment for fixed-term contract employees and classic contract workers.

a. The principle of non-discrimination (clauses 4 and 6). The Directive establishes the general principle that 'employees with fixed-term contracts will not be treated in an unfavorable manner in relation to employees with comparable fixed contracts, solely for the fixed-term reason, unless there are objective grounds'.

The provisions for the implementation of the above mentioned clause must be defined by the Member States in consultation with the social partners and / or by the social partners, according to the Community law and the national law, to applicable collective agreements and to national practice. The Directive sets some provisions for the implementation of this clause on non-discrimination of employees with fixed-term employment contracts as compared to the employees with contracts of indefinite duration, namely:

- When deemed necessary, the pro rata principle will apply;
- Criteria relating to conditions of work experience will be the same for fixed-term contract employees and for employees with fixed agreements, unless different seniority criteria will be justified by objective reasons;
- Professional promotion: employers will inform employees on fixed term contract on vacancies in the unit, in order to guarantee equal chances of employment in permanent positions as for other employees. This information will be made available through a public notice displayed in an appropriate place in the unit.
- Access to training: as far as possible, employers will facilitate access of fixed-term contract employees to appropriate training opportunities to enhance their professional skills, career development and occupational mobility.

b. The rights to information and consultation (clause 7), in the following forms:

- Employees with fixed-term contract will be taken into account when determining the minimum number of employees to form representative bodies of employees under the national law and the Community law. Implementing provisions of this clause shall be defined by Member States in consultation with the social partners and / or by social partners according to national legislation, collective agreements and national practice.
- As far as possible, employers will try to facilitate appropriate information to employee representation bodies on fixed-term work in the unit.

c. Measures designed to prevent the misuse of fixed-term contracts. (Clause 5)

The directive states that, in order to prevent abuses resulting from the use of successive contracts or of fixed-term employment relationships, Member States, will introduce one or more of the following measures (consulted by social partners and by the law, collective agreements or practice, and / or the social partners, when there are no equivalent legal measures to prevent abuse, in order to consider the needs of different sectors and / or categories of workers):

- For objective reasons justifying the renewal of such contracts or of employment relationships;

- The maximum total duration of successive employment contracts or fixed-term employment relationships;

- Number of renewals of those contracts or employment relationships.

Member States in consultation with the social partners must decide under what conditions employment contracts or fixed term employment relationships are considered successive or are deemed concluded for an indefinite period.

3. Temporary chain employment. This type of employment is about the use of temporary contracts continuously and on just the same employee. Using chain employment contracts is permitted when each contract has a different focus (for example, replacing an employee and subsequently accomplishing a certain task) but not when the goal of all contracts is actually the same.

Employment without a reason or with a simulated reason. When temporary employment is aimed at achieving a specific activity, the activity must be well defined and have specific basis as related to the normal activities of the company. If an employee is hired to perform some work that is a regular and repeated activity of the company, a fraud would be witnessed. It is also a case of fraud in temporary employment when the cause of conclusion would be unreal or imaginary and would not really match a factual situation - such as the situation when the employee who is supposed to be replaced does not exist.

The misuse of temporary contracts for regular activities. Concluding fixed-term contracts may constitute a fraud in the case of exceptional circumstances of production during peak periods or periodic or seasonal activities. On the one hand, if the economic operator typically uses these contracts, then it is an obvious fraud, the contracts only being used in exceptional circumstances. On the other hand, the use of fixed-term contracts for seasonal work and regular activities such as agriculture, fisheries and tourism, has clearly determined that the courts law would consider the most appropriate in this case the so-called discontinuous fixed contracts. The employer, under this regime of contracts, would be forced to appeal to a seasonal employee at the beginning of the season.

Conclusions

In conclusion, the objectives of the Community Directive on fixed-term employment contracts are to create jobs, to avoid discrimination and differentiation between employees with employment contracts of indefinite duration and those with fixed-term employment contracts and also avoid abuse of the employer in the use of this type of contract. These objectives should, in principle, be reflected in the national legislation of Romania, as a Member State of the European Union.

References

- **A. Popescu**, "*Modernization of Labor Law in the European Union's Attention"*, in "The Law above All" Junimea Publishing, Iasi 2008.
- **M. Basuc. C. Nenu and others**, "*Labor Relations, Course Module"*. Labor Inspection, Romania, Labor and Social Security Inspection, Spain, Phare Project RO-03/IB/SO-01, Oscar Print Publishing House, Bucharest, 2005.
- **I.T. Ştefănescu**, "*Theoretical and Practical Treaty of Employment Law"*, Legal Publishing House, Bucharest, 2007.
- **I. T. Ştefănescu, S. Beligrădeanu**, „*Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii"*, in „Dreptul" no. 4/2003.
- **Al. Athanasiu, L. Dima**, *„Regimul juridic al raportuilor de muncă în reglementarea noului Cod al muncii",* in „Pandectele române" no. 4/2003.

- **T. Ştefănescu,** „*Modificările Codului muncii comentate”*, Edition 2005 and 2006, Lumina Lex Publishing House, Bucharest.
- **Al. Athanasiu, L. Dima,** „*Dreptul muncii”*, All Beck Publishing House, Bucharest, 2005.
- **Al. Ţiclea,** „*Tratat de dreptul muncii”*, Rosetti, Publishing House, Bucharest, 2006.
- **Magda Volonciu,** „*Comentariu(la art. 80-86), in Codul muncii, Comentariu pe articole”, Vol. I art. 1-107*, by Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, C.H.Beck Publishing House, Bucharest, 2007.
- **E. Cristoforeanu,** *Teoria generală a contractului individual de muncă,* Curierul Judiciar Publishing, Bucharest, România, 1937.

NOTARY PROCEDURE AND JUDICIAL PROCEDURE FOR THE DIVORCE WITH SPOUSES' AGREEMENT

ANDREEA DIANA PAPA[*]
IULIA FLORINA ŢĂPUŞ[**]

Abstract
Compared to the old divorce procedures, the dissolution of marriage analysed according to the provisions of the New Civil Code (art.373-404) and the New Code of Civil Procedure (914-934) represents a real legislative innovation.
Taking into consideration the judicial procedure, the legislator settles the amicable divorce, referring to spouses' consent on the divorce, as well as to the divorce caused by one of the spouses' poor health, and the divorce through no fault of their own.
According to the new legal matters, the dissolution of marriage does not come exclusively under court jurisdiction. Thus, as far as the amicable divorce is concerned, even if the spouses have minor children, either of their own or adopted, they have at their disposal not only the judicial procedure, but also the notarial one. If the spouses do not have minor children, they can go to court, but they can also go to the notary public or to the registrar in order to certify the dissolution of marriage of their own accord.
The legislator's preference of the amicable divorce is obvious, especially as the dissolution of marriage of spouses' own accord does no longer depend on either the length of marriage, or on their not having minor children.

Keywords: *divorce, juridical procedure, New Code of Civil, the dissolution of marriage, New Code of Civil Procedure.*

1. THE NOTARIAL PROCEDURE REGARDING THE DIVORCE

1.1. Preliminary Information

Seen as a legislative innovation, the divorce procedure before a notary public was initially stipulated in the Civil Code adopted in 2009 and subsequently undertaken by Law no. 202/2010. Through this law (namely through the introduction of articles 38^1-38^4), the Family Code was modified in such a way that it could only be applied to the collaborative divorce, in which case the spouses did not have minor children and they had to personally come before the notary public in order to file for a divorce – legal representation was not allowed.

In the new Civil Code, the relevant provisions are the legal matters stipulated in art. 375 - 378.

1.2. The Notary Public's Competence

On receiving the divorce petition, the notary public must check his non-exclusive jurisdiction.

1.2.1. The Notary Public's Territorial Jurisdiction

When determining his territorial jurisdiction, the notary public shall check whether the place of spouses' marriage or their latest home address are in located in the territorial jurisdiction of the court he has the notarial office in and also if they have not seen another notary public before.

In this respect, the proof of marriage shall be done via the Certificate of Marriage, and the proof of their latest home address shall be done via their ID cards – if it was the home address of at least one of them or via the contract which proves ownership or total utility. If the spouses lived in a house they did not have any act upon (for example one of their parents' or other relative or acquaintance) the proof shall be done through the legal declaration of them both, hereby declared

[*] Senior Lecturer, PhD, "Spiru Haret" University, Bucharest (papa.andreea1980@yahoo.com).
[**] Senior Lecturer, PhD , "Spiru Haret" University, Bucharest (fetita.iulia@yahoo.com).

under the penalty of perjury and registered both the in divorce petition and in the County Court decision, based on which the Certificate of Divorce shall be issued[1].

1.2.2. The Notary public's Subject Matter Jurisdiction

1. The collaborative divorce when the spouses have no minor children either of their own or adopted during their marriage, established through the provisions of art. 375 paragraph 1.

The following conditions must be totally satisfied in order for a notary public, under the subject matter jurisdiction, to ascertain the divorce taking into consideration the conditions stipulated in paragraph1:

a) spouses' consent on the divorce;

b) no minor children either of their own or adopted during their marriage;

c) the spouses decided upon the surname each of them shall have after the divorce, and the surname they had when they got married and during their marriage;

d) neither spouse is mentally incompetent;

e) both spouses expresses their free and uncorrupted consent.

When completing the consent, the notary public applies the provision of Notary Public Law no. 36/1995 and its implementing regulation, if one or both spouses are deaf, mute, deaf-mute or if they cannot speak Romanian. In such cases, the interpreter, via whom the consent is registered, shall sign the divorce petition next to the two spouses, and the County Court decision regarding the acceptance or dismissal of divorce next to the notary public.

The spouse' identification shall be made by the notary public only via their ID cards they bring when they file for divorce, as follows: for Romanian citizens resident in Romania – the ID card, the provisional identity card, the identity card, and for Romanian citizens who are resident abroad, the passport which clearly shows their home address.

The notary public shall check the identity cards issued by Romanian authorities with the Directorate for Persons' Record and Databases' Management, which is subordinated to the Ministry of Internal Affairs, according to the agreement between the U.N.N.P.R. (National Union of Public Notaries from Romania) and the Ministry of Internal Affairs.

As far as spouses' own accord on the divorce is concerned, it must also contain the effects of the divorce regarding the surname they shall have after the divorce (either to keep the surname they had during their marriage, or to take the surname they had before their marriage). It must be mentioned that the lack of accord shall lead to the dismissal of the divorce petition and to the spouses' guidance towards court (art. 376 paragraph 5 the New Civil Code).

Although the notary public does not have material competence to give a judgement on contentious matters regarding the other effects of divorce[2], if the spouses agree on the other effects of divorce, such as the maintenance obligation between them, common home, compensation payment, etc., the notary public may certify this agreement in a transaction contract in accordance with art. 2267 - 2278 Civil Code, fact also stated by the authors of the commented New Civil Code.

As far as the end of the state of being married is concerned, the provisions of art. 385 the New Civil Code stipulate that the marriage between the two spouses is over starting with the day they file for divorce.

In this respect, in accordance with art. 386 paragraph (1), the New Civil Code, the notary public shall mention the date when the divorce petition was filed for in the Certificate of Divorce.

---

[1] Instructions regarding noraries public's fulfillment of the divorce procedures, page 3, adopted theough .Decision no. 15/2011 of the Executive Bureau of UNNPR (National Union of Public Notaries from Romania)

[2] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constatinovici, Ioana Macovei , *The New Civil Code. Observation on articles* - CH Beck Publishing House, Bucharest, 2012, page 417.

We mention the fact that the provisions of art.386 are only applicable in case the divorce petition is made after the Civil Code has come into force, and the legal documents are signed by one of the spouses against the other spouse after the day the divorce is filed for.

Paragraph 2 of art. 385 of the New Civil Code stipulates that the spouses may ask the court to ascertain that the matrimonial regime was over on the day of the factual separation.

According to the opinions stated in the legal literature[3], the notary public may also authenticate a transaction contract if the spouses agree on this aspect.

Regarding the liquidation of the community regime, the provisions of article 355 NCC are applicable, in the sense that when community ends, it shall be liquidated via an authentic notarial deed, a complex deed, which has two phases: the first phase – the spouses' share of common assets is first determined (based on how much each of them contributed to their acquisition), and also the fulfilment of common duties; and the second phase is represented by the distribution of joint assets and debt settlement.

The state of marriage chosen liquidation deed shall be communicated by the notary public to the Notarial National Register of States of Marriage with the purpose of information, and to the other advertising registers stipulated by law, taking into consideration the nature of assets: for real estate – the Real Estate Register, and for the personal estate – Electronic Archive of Real Movable Guarantee and Trade Register.

As compared to the comments above, we do not share the opinion stated by the authors of the new commented Civil Code[4], naming that the liquidation of the matrimonial regime might be done via a transaction contract.

We must also mention the fact that, according to the provisions of article 356, until the liquidation of the matrimonial regime, the ex-spouses remain condominium co-owners of joint assets until the share entitled to each of them is decided.

2. In light of the statement stipulated by article 375 paragraph 2, the notary public is competent to ascertain the dissolution of marriage on the spouses' own accord also when there are minor children born during the marriage, out of the marriage, of both spouses or adopted by both spouses.

In this case, the notary public may ascertain the divorce only if the following cumulative conditions are fulfilled:

- the surname each of the spouses shall bear after the divorce;
- the obligation of both parents towards their children;
- the decision about children's home after the divorce;
- the way of preserving the personal relationship between the separated parent and each child;
- the decision upon parents' contribution to children's upbringing, education, school and professional development.

If the psychosocial investigation report shows that spouses' own accord regarding shared parenting or the one regarding children's home is not in the child's interest, the provisions of art. 376 paragraph 5 (NCC) shall be applied. In the case, the notary public shall dismiss the divorce petition and shall guide the spouses towards the court.

Although under the provisions of art. 375 paragraph 2, the legislator does not use the notion "child's best interest", the phrase "child's interest" must be interpreted in accordance with the provisions of art. 3 Law 272/2004 regarding the protection and promotion of children's rights, and with the provisions of art. 1 of the Convention regarding children's rights.

Furthermore, this principle constitutes a part of the right of respect for one's family life, stipulated in art. 8 of the European Convention on Human Rights (see: *C. Bîrsan,*Convention, p. 651; CEDO, *Ignaccolo-Zenide vs. Romania,*the decree of 25 January 2000, published in the Official

[3] E. Florian, *Family Law*, IV[th] Edition, CH Beck Publishing House, Bucharest, 2011, page 105.
[4] Flavius-Antoniu Baias (Coordinator), *quoted operas,* page 417.

Gazette no. 6 of 8 January 2001, when it was decided that state authorities have the duty "de a depune eforturi rezonabile pentru ca atunci când interesele părinţilor sunt în conflict, iar copiii nu sunt suficient de maturi pentru a-şi exprima ei înşişi, în mod clar, propriile preferinţe, interesele superioare ale acestora să fie promovate")[5]

Under the procedure of the amicable divorce, when there are minor children, it is compulsory that the tutelary authority should carry out the psychosocial investigation report and interview the minor who is 10 years old.

The procedure of interviewing the minor shall be carried out by the notary public, under the conditions stipulated in art. 264 the NCC.

If parents cannot agree upon one or all these aspects, the notary public issues the dismissal of the divorce petition and sends the parties to the court of law.

The provisions of art. 376 paragraph 4 the NCC were incorrectly interpreted in the legal literature[6], without taking into consideration the cumulative fulfilment of the conditions stipulated in art. 375 paragraph 2. These conditions state that the notary public may ascertain the divorce also in the case that the psychosocial investigation report shows that spouses' agreement is not in the minor's interest, with the argument that "the parties have no other solution but to go to court since they have agreed on child custody and since their main purpose, the dismissal of their marriage, has anyway been accomplished". We think this opinion is in complete contradiction with the legal provisions which settle the notary procedure of divorce.

1.3. <u>The divorce procedure when minor children are involved is</u>:

The divorce petition has to be personally submitted to the notary public by both spouses together.

Although the legislator does not mention the content of the divorce petition, the National Union of Public Notaries from Romania via its issued instructions, the notary guide and the notary guidebook, has outlined some professional notary routines and has contributed to the development of a common notary practice concerning the divorce (regarding the divorce petition, pronunciation and rejection of divorce, divorce certificate, etc.)

As an exception, the divorce petition can also be submitted by a mandatary having a special power of attorney.

As far as the notarial procedure divorce is concerned, representation is admitted but only when the divorce petition is submitted, case in which the mandatary (the special authentic power of attorney) shall contain the represented spouse's accord (principal) on all elements mentioned in the petition. When submitting the divorce petition, the fact that the represented spouse is aware of the hearing shall be mentioned in the trust mandate, according to art. 376 of the Civil Code. The lack of one of the mentioned elements from the trust mandate shall lead to the rejection of the divorce.

Representation is also admitted when submitting the divorce petition without minor children.

We reiterate the fact that the authentic representation procedure must contain investiture essential elements and state the fact that spouses' own accord has been reached regarding all elements which make the notary public's competence authority.

After the notary public confirms that he has been legally invested, he shall allow a 30-day period of reflection and shall request the fulfilment of the necessary formalities regarding the minor: the psychosocial investigation, the minor's interviewing.

The 30-day period of time is calculated according to the Civil Procedure Code, in the sense that the first and the last day are not taken into account.

---

[5] *Ibidem*, page 432 „spare no effort to have children's best interests promoted when parents' interests are in conflict, and the children are not mature enough to clearly state themselves their own preferences").

[6] E. Florian, *quoted operas.*, page 108.

If the report of the psychosocial investigation has not been submitted in due time and, on probable cause, the minor has not been interviewed, and both spouses insist on the divorce petition, other hearings can be allowed only with regard to the fulfilment of the two conditions.

In conclusion, the decision upon the scheduling of another hearing may only be because of the lack of the psychosocial investigation and/ or the impossibility of interviewing the minor.

We mention that, as compared to the divorce with minor children, for the divorce without minor children only one hearing can be scheduled.

In accordance with the provisions of art. 264 the NCC, the notary public shall interview the minor who is 10 years old, taking into consideration the following conditions:

- He/ she shall be accompanied by both parents;
- the interviewing shall be done in the presence of both parents;
- the notary public shall write down the minor's declarations.

In the case of divorce with minor children, the spouses must agree upon the following aspects:

-the obligation of both parents towards their children;

- the decision about children's home after the divorce:

-the way of preserving the personal relationship between the separated parent and each child;

-the decision upon parents' contribution to children's upbringing, education, school and professional development.

In order to certify the spouses' own accord upon the above mentioned, the notary public shall authenticate the spouses' settlement, which shall be stated in the divorce certificate.

As compared to the previous settlement in the Family Code, the legislator of the new civil code has provided the modern solution according to which the both parents together are responsible for the child's upbringing, thus the parental rights and responsibilities regarding both the child's person and assets are equally shared by both parents (art. 483 paragraph 2 the NCC).

Parents' agreement regarding the contribution of each of them to the expenses concerning the upbringing, education, learning and professional development may have various aspects and must take into consideration the minors' needs and the parents' possibilities.

We have to mention that the parent in whose house the minor lives cannot deny the other parent's contribution because the beneficiary of this right is the minor and not the parent.

The criteria for establishing the alimony are settled by art. 529-533 the NCC.

If after analysing the divorce petition and the documents submitted, the notary public sees that the legal provisions are not cumulatively satisfied, he shall dismiss the divorce, and shall guide the parties towards the court, according to the provisions of art. 374 Civil Code. In this case, the dismissal of the divorce shall compulsorily contain the reason of the divorce dismissal, as well as the parties' guidance towards the court.

The notary public issues the divorce dismissal in one of the following cases:

a) he does not have the legal competence to settle the divorce;

b) one of the spouses is under interdiction ;

c) one of the spouses cannot express his/ her free and uncorrupted consent;

d) if when the divorce petition is submitted one of the spouses is not present, or not represented, or the trust mandate does not contain all compulsory elements stipulated in art. 375 Civil Code, and the present spouse insists on having his/ her petition registered;

e) one of the spouses refuses to sign the petition personally in presence of the notary public;

f) the spouses refuse to fill in the official forms stipulated by the present regulation;

g) the spouses cannot decide upon the surname each of them shall bear after the divorce;

h) when they submit the divorce petition, the spouses do not submit the original certificate of marriage;

i) the spouses have minor children, either of their own or adopted during their marriage, and have not decided upon:

- the obligation of both parents towards their children;

- the decision about children's home after the divorce;
- the right of preserving the personal relationship between the separated parent and each child;
- the decision upon parents' contribution to child/ children's upbringing, education, school and professional development.

j) one of the spouses comes in front of the notary public within the term of 30 days, according to art. 376 Civil Code, and declares that he/ she does not want to proceed with the divorce petition;

k) one of the spouses does not proceed with the divorce petition because he/ she has not come in front of the notary public within the term of 30 days, according to art. 376 Civil Code, in order to declare that he/ she wants to proceed with the divorce petition;

l) the petition remained without an object as the marriage between spouses has been dissolved by another competent authority;

m) the spouses make up;

n) the spouses withdraw their divorce petition;

o) one of the spouses died before the closure of the divorce procedure, the marriage thus ending;

p) the lack of the psychosocial report;

q) the impossibility of interviewing the minor who is more than 10 years old;

r) the conclusions of the psychosocial investigation state that the spouses' agreement regarding the sharing of their obligations towards their children or regarding their decision about children's home after the divorce is not in the latter's best interest[7].

Paragraph 2 of the art. 378 the NCC stipulates the fact that there is not any way to attack the divorce dismissal by the notary public, but the lack of motivation or the improper argumentation of the divorce dismissal shall lead to his/ her tort liability, according to the provisions of art. 378 paragraph 3, the NCC.

If after the period of reflection, the spouses come personally and insist on divorcing, all the conditions stipulated in art. 375 the NCC being fulfilled, (and, in the case of the divorce with minor children, the psychosocial investigation report and the minor's testimony) the notary public shall write the divorce acceptance and shall issue the certificate of divorce, without mentioning any fault.

According to the provisions of art. 87 of the Notary Public Law implementing regulations, with subsequent modifications, after the issuance of the certificate of divorce, the notary public shall immediately send a copy to the town hall of the city where the marriage was registered or where the Certificate of Marriage was rewritten in order to add the specifications about the divorce in the certificate of marriage, and another copy to the Register of Births, Deaths and Marriages, kept by the County Directorate for Persons' Records. Together with the issuance of the Certificate of Divorce, the notary public shall give the spouses the Certificate of Marriage with the mention *The Marriage has been ended through the certificate of divorce no. ....*

Both in the case of admittance and in the case of dismissal of the divorce petition, the notary public shall immediately communicate the solution electronically with the purpose of the closure of the position in the National Register of Records for the Divorce Petitions.

The date when the marriage ends is the date when the Certificate of Divorce is issued, according to the provisions of art. 382, paragraph 3, the NCC, and the heritage elements of the divorce become opposable to third parties on the day the advertising formalities are fulfilled[8].

---

[7]Doina Rotaru(in group), *Notarial Practice Guide* (Ghid de practică notarială), Bucureşti, 2011, pages 232-234.

[8] E. Florian, *quoted operas.*, page 254.

2. JUDICIAL PROCEDURE FOR THE DIVORCE WITH SPOUSES' AGREEMENT

2.1. Preliminary Information

The annulment of the marriage with spouses' agreement has been initially mentioned in the Family Code (art. 38, paragraph 2). According to it, only the judgment instance could pronounce the divorce based on the agreement of both spouses and only if there have been accomplished the following conditions: at least one year had passed since the conclusion of the marriage, no minor children resulted from the marriage at the introduction date of the divorce request.

The Law no. 202/2010 concerning some measures for the acceleration of the judgments, anticipating big changes that will be determined by the New Civil Code, has modified the art. 38 and it has introduced the art. 38^1-38^4, dispositions by which there have been eliminated the cumulative conditions concerning the duration of the marriage and the inexistence of minor children resulted from the marriage, this dissolution form of the marriage not having any obstacle excepting the interdiction of one of the two spouses[9].

In the New Civil Code, the main material is constituted by the dispositions of the law mentioned in the art. 373 letter a, and in the art. 374 from the Chapter VII –The Second Book.

The new dispositions concerning the divorce are applicable no matter the conclusion moment of the marriages, before or after its application.[10]

The judicial procedure of the divorce by reciprocal agreement observes the special dispositions mentioned by the code of civil procedure that is in force at the moment when the request had been handed in, conclusion resulted from the interpretation of the dispositions of the art. 24-25 from the New Code of civil procedure and of the art. 3, paragraph 1 of the Law no. 76/2012[11]. As a consequence, after the entering into force of the New Code of Civil Procedure[12], the judgment instance will apply two codes of civil procedure, as it follows[13]: The code of civil procedure from 1865 will be applied for the cases in judgment and the New code for the trials introduced for judgment after its application.

The special procedure of the judicial divorce is mentioned in the old Code of civil procedure in the Book VI, Chapter VI, art. 607-619. In the New Code of Civil Procedure, the main material concerning the common dispositions is in the Book VI, Title I, Chapter I, art. 914-927, while the divorce by agreement, a form of the remedy divorce, is regulated in the Chapter II, art.928-931.

2.2. The Judicial Divorce by Spouses' Agreement. Notion. Forms. Conditions.

The Judicial Divorce by spouses' agreement has two forms depending on the moment when there appears the common agreement concerning the annulment of the marriage: the consensual divorce itself, when the divorce request is formulated by both spouses and the imperfect consensual divorce, when it happens at the request of one of the two spouses, accepted by the other one[14].

Concerning the incidence of the dispositions concerning the imperfect consensual divorce, the provisions of the art. 374 NCC are applicable in all the cases when the spouses- the accused person, agrees with the divorce asked by the claimant, no matter if the divorce is based on the separation in fact for a bigger period than 2 years (art. 379 paragraph 2 -art. 373 letter c) or if the divorce is promoted from the spouse's guilt (the accused person), who recognizes his facts, situation when the

---

[9] *Ibidem*, page 100.

[10] Art. 39 paragraph 2 of the *Law 79/2011.*

[11] *Law no. 76/2012 concerning the application of the Code of civil procedure.*

[12] The New Code of Civil Procedure has been applied on the 15th of February 2013.

[13] Ghe. Piperea (in group), *The New Code of civil procedure. Notes. Correlations. Explanations*., CH Beck Publishing House, Bucharest, 2012, page. 24.

[14] E. Florian, *quoted operas* , page. 104.

claimant agrees, the instance pronounces a decision for the annulment of the marriage by agreement without a serious analysis of the reasons of divorce[15] .

So, although legislatively, in the art. 373 letter a) it generically refers to the possibility of marriage annulment by agreement, with both spouses' agreement, or with the agreement of one of them (obviously based on the another one guilty), request accepted by the accused person- spouse, and at the letter c) it mentions the divorce at the request of one of the spouses for a separation in fact bigger than 2 (taking into consideration the claimant's guilt), the instance can pronounce the divorce based on the art. 373 lit. a) any time the accused person agrees with the divorce request promoted by the spouse -claimant, independently of the mentioned reason[16].

Now the divorce by agreement is not anymore conditioned [17] under the aspect of the marriage duration and nor under the aspect of the inexistence of minor children resulted from the marriage, the art. 374 NCC expressly mentioning that the divorce can be pronounced no matter the marriage duration and the existence or the inexistence of minor children resulted from the marriage. The syntagm „children resulted from the marriage" reefers to the children born from the marriage and also to the children born from the common life of the two before the marriage, and also to the children adopted by the two spouses during their marriage[18].

Although, according to the art. 373 paragraph 1 and to the art.374 NCC, the judgment instance can pronounce for the annulment of the marriage by agreement, only if:

- both spouses have formulated a divorce request or just one of them, the request being accepted by the accused persons- spouse
- both spouses have full exercise ability, none of them being subjected to a judgment interdiction
-both spouses personally express their agreement for the annulment of the marriage
-the common agreement is free and not corrupted

Concerning the reasons of the divorce request, if the divorce by the agreement itself, does not interferes the judgment instance and is not necessary to be indicated. If the divorce by the imperfect agreement, the request being formulated by a spouse against the another one that accepts then the divorce by agreement, the reasons are not verified anymore, even if they are mentioned in the request addressed to the judgment instance, resting just simple affirmations[19].

2.3. Procedural Aspects

2.3.1. The Competence for the Solution of the Divorce Request

According to the art. 914 NCPC, the divorce request is the competence of the law court belonging to the circumscription of the last common house of the spouses. If the spouses did not had a common house or of none of them does not live anymore in the circumscription of the law court where their last common house had been, the competent law court is the one from the circumscription of the house of the accused person (spouse), and if the accused person has no house in the country and the Romanian judgment instances are also internationally competent, it is the competence of the law court from the circumscription of the claimant's house.

---

[15] Art.613[1a] of the old Code of civil procedure (applicable for the divorces in judgment in the application moment of the New Code of civil procedure). The dispositions are also mentioned by the New Code of civil procedure in the art. 931 paragraph 1.

[16] Gabriela Frenţiu, The observations of the New Civil Code. Family. Hamangiu Publishing House, Bucharest, 2012, page. 284.

[17] Art. 38 of the Family Code , before its modification by the Law 202/2010 put a condition for the annulment of the marriage by spouses' agreement: till the introduction date of the divorce request, there should be passed at least 1 year since the marriage conclusion and there should not exist any minor children resulted from the marriage.

[18] The New Civil Code. Observation on articles - Coordinators Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constatinovici, Ioana Macovei – CH Beck Publishing House, Bucharest 2012, page 401.

[19] Gabriela Frenţiu, quoted operas, page 283.

The new dispositions have taken from the old regulation the law text referring to the material and territorial competence concerning the divorce, replacing only the syntagm „domicile" with the syntagm „ house", that refers to the place where the person effectively and stably lives, even if this does not correspond to the domicile.

2.3.2. **The Divorce Procedure by the Agreement Itself**

The divorce request will comprise, besides the mentioned stipulated by the law for the summon request, also specific mentions concerning the names of the minor children resulted from the marriage or adopted. If the two spouses have no minor children, this mention will be done. If the spouses have reached to an agreement concerning the solution manner of the accessory requests, they will mention this in the divorce request.

The accessory requests of the divorce concern the names of the spouses after the annulment of the marriage, the realization of the parental authority, the parents' contribution to the expenses for children' growth and education, the children' house and the parents' right of having personal connections with them, the family' house.

The requests having as an object the payment of expenses for the moral or material prejudices suffered after the divorce, as well as those concerning the compensatory performance are incompatible with the consensual divorce, because they have as a basis exactly the excusive guilt of one of the two spouses.

According to the art. 929 NCPC, the judgment instance receiving the request will proceed to the verification for the existence of the free and uncorrupted consensual agreement of both spouses and it will fix a term for the solution of the request in the Council Chamber.

The divorce request formulated by the two spouses together should be signed by both spouses or by a common mandatory with a special authentic power of attorney, but if one of the spouses had not signed, this aspect can be completed in the first judgment term. If till this moment the divorce request is not signed by both spouses, the judgment instance discuss about this aspect, having the possibility of reconsidering the request in a common law one[20].

In the first judgment term, the judgment instance will verify if the spouses still want to annul the marriage based on their agreement, and if not so, it will retains the parties' reconciliation, and in case of a positive answer, it will pronounce the divorce, without administrating proofs concerning the reasons for divorce.

Concerning the accessory request for the exercise of the parental authority there has been considered that in order to solve it, it is obligatory to exist in the file an psycho- social enquiry report from the part of the tutelary authorities, the pronunciation upon the request without this report being excluded[21].

According to the art. 930 paragraph 1, by the same decision the judgment instance will take into consideration the parties' agreement concerning the accessory requests. The Art. 396 NCC disposes that the judgment instance will decide upon the reports between the divorced parents and their minor children, taking into consideration the interest of the minor children, the conclusion of the psycho- social enquiry report and the parties' agreement.

In the sense of the art. 264 paragraph 1 of the NCC it is obligatory to hear the child that has reached the age of 10 years, but it is possible to also hear him even if he had not reached the age of 10 years, but the judgment instance considers necessary for the solution of this case even taking into consideration the interest of the minor child.

If the spouses had not reached to an agreement upon the solution manner of the accessory requests, the judgment instance will proceed to the administration of the tests in order to solve them, being obliged to also pronounce upon the requests concerning the names of the spouses after the

[20] Ghe. Piperea (in group), *quoted operas*, pages. 902.
[21] Gabriela Frenţiu, *quoted operas*, page. 287.

divorce, the exercise of the parental authority, as well as the parents contribution to the children's expenses for growth and education.

This decision is definitive and irrevocable concerning the divorce, and it cannot be subjected to an attach mean.

The dispositions of the art. 930 paragraph 3 stipulate that, if there it will be case the judgment instance can continue the judgment concerning the other accessory requests, pronouncing a decision subjected to the attack means, in the legal conditions.

2.3.3. The Divorce Procedure by Imperfect Agreement

According to the art. 931 NCPC, if the divorce request is based on the guilt of the accused person- spouse, and this one recognizes the facts that have lead to the destruction of their life together, the judgment instance, with the claimant's agreement, will pronounce the divorce without a serious analysis of the divorce reasons and without making any mention concerning the guilt for the marriage annulment, the divorce being pronounced based on the art. 373 letter a).

The simplified procedures applied only if there have been cumulatively accomplished the following conditions:

1. the summon request should be based on the guilt of the accused person- spouse

In the introduction moment of the divorce request, the claimant cannot have the certitude that the accused person will recognize, sense when all his tries belong to the classical model of the divorce by guilt[22].

2. the accused persons should recognize the mentioned facts that have lead to the destruction of their life together

According to the art. 931 paragraph 1 the accused person can recognize the facts determined by him, and the judgment instance, if the claimant also agrees, will pronounce the divorce without a serious verification of the reasons of divorce. In this sense, the opinion[23] is that the accused person can recognize the facts determined by him and mentioned by the claimant till the end of the judgment research.

The accused person can recognize the facts determined by him by appeal or by the answers given to the interrogatory addressed to him

3. the claimant should agree with the divorce without administrating proofs and without indicating in the divorce decision the guilt of the accused person

The judgment of the divorce request initially introduced by a spouse and accepted by the accused person- spouse, not having a special legal derogatory disposition concerning the judgment of such request in the Council Chamber, will take place in a public session according to the art 213 NCPC.

As in the case of the divorce by agreement itself, the decision pronounced by the judgment instance concerning the marriage dissolution, is definitive and irrevocable and it will not comprise references to the guilt of the accused person- spouse.

The accessory requests will be solve taking into consideration the parts' agreement, without being necessary to administrate proofs. Also, the requests concerning the payment of damages for the moral and material prejudices suffered after the divorce, as well as those referring to the compensatory performance are incompatible with the imperfect consensual divorce, for the same reasons that have been previously mentioned referring to the divorce by agreement itself.

The decision concerning the accessory requests is subjected to the attack means, in the conditions of the law (art. 930 alin.4-art. 931 paragraph 2).

No matter the form of the agreement by which the divorce appears, agreement itself or imperfect agreement) , the marriage will be annulled since the date when the decision upon the main

---

[22] E. Florian, *quoted operas,* page. 112.

[23] Ibidem, page.113, Gabriela Frenţiu, *quoted operas*, page. 284.

request had remained definitive, so since the pronunciation date according to the dispositions of the art. 382 paragraph 3 NCC.

The Art. 927 paragraph 4 NCPC mentions that the judgment instance, in order to accomplish the publicity forms, will send the definitive decision, by itself, towards the Civil Status Service where the marriage has been concluded, towards the national Register of the matrimonial regimes, as well as towards the Trade Register, if one of the spouses had been a professional.

As a conclusion, according to the new regulations, the divorce by the spouses' agreement, with or without minor children resulted from the marriage of the two spouses or adopted, represents a true legislative innovation, being clear the legislator's preference for the divorce in this manner, because the annulment of the marriage by agreement is not conditioned anymore by the marriage duration, nor by the inexistence of minor children, but also by the institution of the simplified procedure of the divorce initiated by the guilt against the accused person and consensually ended, without administration of proofs.

If both spouses reach to an agreement concerning the annulment of the marriage they can address to the public notary or to the judgment instance, and if they don't have minor children resulted from their marriage they can also chose the administrative procedure of marriage annulment.

If the parties also beneficiate of extrajudicial procedures, the reason for the existence of the possibility for the dissolution by agreement consists in the facts that the parties that have agreed upon the divorce, cannot agree upon the accessory requests of the divorce[24]. Based on the art. 930 paragraph 2 NCPC, if the spouses do not reach to an agreement concerning the accessory requests, the judgment instance will administrate the proofs admitted by the law for their solution, and based on the parties' request, it will pronounce a decision concerning the divorce, also solving the requests concerning the name taken by the spouses after the divorce, the exercise of the parental authority, as well as he parents' contribution to the expenses necessary for the minor children' growth and education. The paragraph 3 of the same article also mentions the possibility of the judgment instance of continuing the judgment of other accessory requests, pronouncing a decision subjected to the attack means, in the legal conditions.

References

- Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constatinovici, Ioana Macovei , *The New Civil Code. Observation on articles* - CH Beck Publishing House, Bucharest, 2012.
- E. Florian, *Family Law*, I^Vth Edition, CH Beck Publishing House, Bucharest, 2011.
- Gabriela Frenţiu, The observations of the New Civil Code. Family. Hamangiu Publishing House, Bucharest, 2012.
- Doina Rotaru(in group), *Notarial Practice Guide* (Ghid de practică notarială), Bucureşti, 2011.
- Ghe. Piperea (in group), The New Code of civil procedure. Notes. Correlations. Explanations., CH Beck Publishing House, Bucharest, 2012.
- A. Atanasiu (in group), The New Civil Code. Notes. Correlations. Explanations., CH Beck Publishing House, Bucharest, 2011.
- Law no. 76/2012 concerning the application of the Code of civil procedure.
- Instructions regarding noraries public's fulfillment of the divorce procedures, page 3, adopted theough Decision no. 15/2011 of the Executive Bureau of UNNPR (National Union of Public Notaries from Romania).

[24] Flavius-Antoniu Baias (Coordinator), *quoted operas,* page 374.

NEW MULTIANUAL FINANCIAL FRAMEWORK: PRIORITIES FOR THE EUROPEAN UNION, PRIORITIES FOR ROMANIA

ROXANA-DANIELA PĂUN*

Abstract
This article proposes a brief foray into the situation of the European economy, but especially of the banking system of the Member States affected differently by the current world economic crisis, or recession, but especially for a detailed analysis of the New Multiannual Financial Framework for the period 2014-2020, with the priorities which appear to be distinct for the EU and for Romania. After a comparative analysis of European regulations on the agreements of the previous financial negotiated for the period 2014-2020, and Delors I (1988-1992), Delors II (1993-1999), the Agenda 2000 (2000-2006) and multiannual financial framework (2007-2013) and ultimately the provisions of the Treaty of Lisbon (which convert multiannual financial framework in an essential act from a legal point of view); express personal opinions on Romania's priorities and on the challenges and perspectives in the actual European and global context.

Keywords: *Multiannual Financial Framework, budget deficit and current account deficit, fiscal capacity of the Euro area, the budget of the European Union.*

Introduction

At the time of Romania's accession to the European Union, the institutional structure and the European economic and political framework had another structure. Even if economic and financial policies of the European Union seem the same, with small changes, in fact realities makes European decision-makers to change many of the items that seemed stable at the economic, financial and banking level.

The dynamic of the realities is quite different, causing need for regulations and more elaborate of the way of forecast the national budgets, but most of all of the way to spend European money and not only.

Many specialists in the fields of finance- banking came in the course of time with scenarios in which they have came up with solutions with solutions for specific situations encountered in the different European states once with installation and generalization of the current world economic crisis.

Such renowned economists are also theoreticians pleading for this subject and practitioners of relevant field who have offered solutions after relevant and detailed analysis of the phenomena.

These solutions were analyzed by the union interests and political decisions that have been taken, unfortunately for some, out of happiness for others have generated consequences more or less commensurate in the short term, but with negative consequences for some states.

In the year of 2013, which began under the auspices of growth crisis in some member states and recession in the others, the perspective unfortunately remains less than optimistic, as long as, in my opinion, they do not unlock the functioning of the internal economies and as long as the banking sector remains lacking in the release and waiver of the liquidity in the system the use of true "financial engineering and banking".

Those financial instruments that have led to the bankruptcy of some banks of renown, in the USA (ex Lechman * Brothers) and of some companies that have sold illusions to the investors (eg: bankruptcy of the reputation American Enron company ...) and examples are many….

* Associate Professor, PhD, Faculty of Law and Public Administration, "Spiru Haret" University, Bucharest (mail address: roxanadpaun@yahoo.com).

These financial instruments have produced damages whereas they had been used and the renowned European banks and thus they have lost all the money investment and they have remained without liquidity.

In this way, financial and economic crisis that seemed to remain on American land has been propagated quickly in Europe and here has expanded gradually on the big European financial empires.

2. European Context prior to the adoption of new multiannual financial framework of the European Union.

The current economic crisis of the world started in the United States of America in 2008 and has been propagated at the speed of light in Europe. (Unlike the previous price crisis of 1929-1933, which has been started in 1929 in USA, but overcame the financial and banking system only in European 1933).

This has generated different approaches with respect to the evolution in crisis management in general, although each from the previous crisis has had different origins, different reasons, but especially different developments.

European Union has to react to a crisis whose evolution has not been until now stopped, and the solutions offered are far from being relevant, in order to put an end to crisis and minimise the effects global recession.

With all that, this global economic crisis is has differently feel in the Member States, at European level is attempting the adoption of solutions in the medium and long-term to boost and to restart economies of the member states.

3. The Multiannual Financial Framework of the European Union, priority in the Irish presidency. (MFF)

Up until the present time it have been concluded four such agreements: Delors I (1988-1992), Delors II (1993-1999), the Agenda 2000 (2000-2006) and Multiannual Financial Framework- MFF (2007- 2013). MFF became an essential from a judicial point of view in the Treaty of Lisbon. Currently they are debating the future multiannual financial framework after 2013[1].

In the 1980s, the balance of political and institutional community of the financial arrangements has been subjected to an increase pressures, having in essence three types of troubles: a conflictual climate in the institutional relations, budgetary imbalances problem, dealt with differently in the member of the Euro area and not only; a growing disparity between resources and requirements.

Accordingly, the european institutions have been driven to agree on a procedure designed to enhance budgetary procedure to ensure budgetary discipline, to decide on an programming in the medium term the main priorities of the EU budget for the next period and, eventually, to transpose these priorities into a financial framework in the form of an financial perspective.

In 1988, this allowed EU to develop and implement programs of policy yearly with more strictly observed.

First agreement, concluded in 1988, has included financial perspective for the period 1988-1992, also known under the name of the package Delors I, which was aimed at to provide resources for budget of the ”Single European Act”.

A new Agreement was agreed on 29 October 1993, including financial perspective for the period 1993 to 1999 - the package Delors II, a fact which allowed doubling of the structural funds and fare being raised ceiling of its own resources.

The third agreement on financial perspective for the period 2000 to 2006, a well-known and under the name of Agenda 2000, was signed on 6 May 1999, one of its main challenges consisting of

[1] http://www.europarl.europa.eu/ftu/pdf/ro/FTU_1.5.2.pdf, Fabia Jones, 01/2012.

the ensuring the financing required for the extend EU. The fourth agreement, relating to the period 2007-2013, was agreed on 17 May 2006.

MFF was included in the Lisbon Treaty, in which the 312 article is mentioning that MFF was adopted "for a period of at least five years", "aimed at providing the evolution ordered of the Union expenses within the limits of resources and reserves", and that the "annual budget of the Union shall comply with multiannual financial framework", thus laying the foundations of the financial discipline.

Lisbon Treaty stipulates that MFF: 'It shall establish the annual ceilings on the appropriations for commitments on categories of expenditure and of the roof of annual credits for payments, and also "provides for any other provisions helpful proper conduct of the annual budgetary procedure", thus meeting, to a large extent, the main objectives of the current loan agreement.

Interinstitutional Agreement (AII) currently has three pieces: Part I contains a definition and a series of provisions for the application for financial framework..

That section includes several tools that provides greater flexibility (the EU Solidarity Fund, the european adjustment to globalization, reserve for emergency aid and the flexibility instrument), in addition to ceilings MFF review "in the case of unforeseen circumstances" (point 21). Part II refers to improve collaboration in the interinstitutional budgetary procedure. Part III contains provisions relating to good financial management of the EU funds.

Financial framework itself is presented in Annex I to the Agreement. The adopted MFF on 17 May 2006 was reviewed in four rows of then, in order to:

- Galileo (* 4.8.6) and European Institute of innovation and technology (EIIT, * 4.14.0) (Decision of 17 December 2007)
- the plan european economic recovery 1 (May 2009)
- the plan european economic recovery 2 (December 2009)
- the project ”International Thermonuclear Experimental Reactor” (ITER) (dec. 2011)

MFF 2007-2013

A. The current agreement was agreed after a series of intense negotiations. On the whole, the agreement agreed has guaranteed that EU budget will be well managed and will standstill legislative and budgetary powers of the European Parliament during the period 2007-2013, for example, by means of providing greater flexibility in the context of the budgetary procedure, of some reactions improved and faster to catastrophes, of some obligations more clear for the Member States, the improved financial planning, as well as of some better controls for setting up of new agencies.

The European Parliament played a role in a review MFF essentials in order to ensure sufficient budgetary means to launch Galileo, the system of sailing by satellite from the EU, and European Institute of innovation and technology (EIIT), as well as with a view to finance the European Plan to economic recovery and the ITER.

B. Regulation of MFF in accordance with the Treaty of Lisbon, MFF becomes an compulsory act from a legal point of view, adopted by a special legislative procedure which involves adoption by the Council, acting unanimously, after obtaining the approval, which shall be decided by a majority of the members.

The role of the European Parliament is reinforced by article 312 paragraph (5) of TFUE (Lisbon Treaty). It provides that "during the entire procedure leading to financial framework, the European Parliament, the Council and the Commission shall take all necessary steps in order to facilitate the adoption".

The Commission published on 3 March 2010 a draft regulation on MFF, a new draft of the Agreement and changes in financial regulation it deemed to be necessary for full implementation of the course contents current agreement within the legal framework post-Lisbon.

The Council has adopted its position relating to the draft regulation on MFF and to the draft Interinstitutional Agreement, on 18 January 2011. On 6 July 2011, European Parliament has refused to give their approval to Council’s proposal, since this was much less flexible than the current

Arrangement and does not taking into account for none of the requests had expressed in oral questions, in a parliamentary rezolution and towards the trilateral discutions related to the budget for 2011.

In july 2010, European Parliament set up a special commission for a period of 12 months of political challenges and budgetary resources for a sustainable EU after 2013 (SURE), which has been requested to submit on a report prior to the submission of a proposal by the Commission following MFF figures. SURE Commission has been responsible for the:

1. Definition of priorities of the political to MFF after 2013 under domestic and budget point of view;

2. The estimated financial resources which the Union need to achieve the objectives and to implement the policies, for the period commencing on 1 January 2014;

3. determination of the duration of next MFF;

4. the proposal, in accordance with the mentioned foregoing priorities and objectives, of a structure for the future MFF, which indicate the main areas of activity of the Union;

5. Presentation of guidelines for an indicative distribution of resources between and within the framework of the different items of expenditure to the MFF, in accordance with proposed priorities and structure;

6. The connection between a reform of the financing system by the EU budget and a review of the expenses, to give the Commission on budgets a solid base for the negotiations on the new MFF mode.

On the basis of these works, the adopted on 8 June 2011 a rezoluţie entitled "The investment in the future: a new multiannual financial framework for a Europe competitive, sustainable and favorable to inclusion"[2]

The multiannual financial framework, presented by the European Commission "focuses on the financing priorities which generates added value real. For example, a facility to connect european - which will finance cross-border projects in the field of energy, transport and information technology, with the aim of strengthening internal market"

In addition to new fund created - "Connecting Europe Facility" – Press release issued by the European Commission more recalls that are allocated to "significantly more funds for research and innovation as well as for the area to youth. The Budget means, in terms of commitment appropriations 1,025 billion euros (1.05 % of GNI- Gross national income- and EU integration) and concerned at 972.2 billion euros (1% of GNI the EU) in terms of credits of payments.

The pressure of the sovereign debt crisis and external instability continues to be attention European officials all the more so as far as they affect the rich member states, and they have noticed the effects of the generalized economic crisis.

The only difficulty seems to be however, the different approach of the same problem. So, Alain Lamassoure, the head of the Commission budgets of European Parliament considered that: "there is no save today without budgetary austerity and it will not increase tomorrow without investing in the future."

During this time., member states, which are feeling plenty of both crisis and recession, (Greece, Spain, Portugail and France, Italy) to consider that we can not talk about a revived economy, if we can not fully power up the economy of each one of these states, by unlocking financial resources (Liquidity) and fare being raised of the internal consumption.

It is found so that Commission proposals reflect main priorities of the European Parliament: to spend more where necessary and thus to save in other areas, and find new sources of financing in such a way that national contributions to be reduced, is a priority for European leaders.

[2] Opinion expressed by Fabia Jones, 01/2012, http://www.parlamentor.ro/news/noul-cadru-financiar-multianual-2014-2020-al-ue-propune-un-nou-fond-dedicat.

Public debate on this topic is a new feature designed to streamline the process of fostering of new solutions to produce the expected effects from all over the world.

In this respect, much of information relating to the multiannual financial framework, remitted by the Department of European Affairs in the government of Romania, retrieve data published by the European Commission:

❖ European Commission also propose the strengthening programs of education and training vocational training. In the view of the Commission, investing in young people is one of the best business plans. In this respect, the said institution shall be pronounced for the creation of an integrated program of 15.2 billion euros for education, training and youth, with an emphasis on developing skills and mobility.

❖ At the same time, is provided for and a significant increase in investment in research and innovation. It is a strategy of the EU headed "Horizon 2020 ", worth 80 billion euros, which is to stimulate the competitiveness Europe at the global level to support the creation of new jobs.

❖ European Commission proposes investing of 4.1 billion euros in European security to fight crime and terrorism and 3.4 billion euros in policies of the migration and asylum. These two policies are considered crucial for the competitiveness and social cohesion of the European Union.

❖ Also, the Commission wishes to make the EU a influential actor at the global level, in the context of budget increase for external relations of the European Union, which will reach 70,2 billion euro. Shall be allocated to significant amounts of money for policy on the vicinity, so that it can be promoted around Europe democracy and prosperity. In addition, other amounts will be used for eradication of poverty.

❖ As regards the financing EU budget, the Commission proposes introduction of a system of own resources more transparent and equitable as possible, while allowing the reduce and simplify contributions required of the member states. Particular stress is to use innovative tools, as well as the addition of new its own resources, such as tax on financial transactions.

Common Agricultural Policy is still the most important in the EU budget, receiving consistent financing that is to say, by the amount of 371,72 billion euros, to which is added a additional margin of maneuver of 15.2 billion euros. In total, 386.9 billion euros in the period 2014-2020 for agriculture. Practically, the expenditure for the common agricultural policy (CAP) will be maintained at their level in 2013.

It is a good basis for the reform that they propose and allows you to maintain a solid structure for PAC, in terms of both direct payments, as well as rural development program. It is also a budget that allows reduce differences between east and west, between payments they receive farmers of the old and the new Member States

This sector is strategically important to the economy, for the development of the rural communities, but also for the environment. In fact, it is expected that 30% of direct aids granted farmers are subject to organic growth of farms.

4. Conclusions on the New Multiannual Financial Framework. (MFF)

The document is trying to include solutions to claims made by some states more strongly affected by the crisis, which up until the present time they have been expected, each Member State as he had been recommended to take the necessary measures in such a way as to diminish the effect crisis before the entry into force of the new multiannual financial framework.

The new regulatory framework introduces a partnership agreement between the Community and the Government of each Member State, between which, in this mode, it is relations shall be laid down more concrete and more pragmatic, which up until now they have been expected especially by the member in difficulty (and the list is getting longer as the recession is worsening).

In connection with the partnership contracts, conditions have existed and up until now. The news refers to the fact that these conditions for the future multiannual financial framework will be covered by a contract of partnership between the Community and the Government of each Member State and they will be more concrete, more pragmatic.

There will be no more generic quantification and will no longer provide an opportunity for interpretations, which in the end that is attracted in a manner effective and which do not permit different opinions from the initial point of view, from the persons who has undertaken the government concerned. Will be contractual relations, not of a political nature - will be contractual relationships of the kind 'will you take the money, but you must realize this in the following conditions'. These contractual terms are sometimes very tough one. Strengthens the relationship from this perspective, a tougher relationship may take between the Community and the governments of the member state.[3]

In this context, interesting is the point of view of Mrs. vice ambassador Blythe, opinion which is the point of view of Great Britain and who appreciate that it is necessary a freeze on EU budget in real terms, it's essential in the actual context of European economic and fiscal situation.

Although at the moment EU is facing with an acute crisis of the sovereign debt, the crisis in the long term, of a chronic nature - is that of growth and competitiveness. The most important strategic challenge the following budget must not exceed that of economic growth, is considering the UK through the voice of Mrs. Vice- ambassador Blythe.

In this context, interesting is the opinion of Mrs. vice ambassador Blythe, which is the point of view of UK, who appreciate that it is the point of view is expressed in conditions in which the budget of the United Kingdom has increased by two times in the period from 2000 to 2011.

Beyond the words and diplomatic exchanges of ideas and points of view, relevant is the fact that recession extended over the all Western Balkan area, the Czech Republic, Hungary, Slovenia, Slovakia, etc, except for Germany, that, in countries such as Bulgaria, Romania, Latvia, Hungary, and Spain, Portugal, poverty is increased and includes broad category of the population.

However, according to the estimates, 2013 desired to be a year for the increase in the GDP (except Slovenia), and the year 2014, in the optimistic version, may represent an "oasis of hope" for European economic fare being raised by stimulating Euro area.

With all these difficulties, it is assumed that Euro area shall not enter into collapse, (such as like some), especially in conditions in which European funding for developing member states, according to statistics, each 0.6 % of every euro spent is going back in the Member States, so it's a policy "win-win" and not charities, how would allow some people to understand!

References

- Points of view expressed by the Conference by the romanian and foreign specialists on economy, experts in the banking and financial sector, of "the new multiannual financial framework: piorities for the European Union, piorities for Europe."
- http://www.parlamentor.ro/news/noul-cadru-financiar-multianual-2014-2020-al-ue-propune-un-nou-fond-dedicat
- http://www.ier.ro/documente/arhiva_evenimente_2012/brosura_conf_anuala_2012_ro.pdf
- http://www.idr.ro/publicatii/Policy%20Paper%203.pdf

[3] Opinion expressed by Nicolae Idu, Şeful Reprezentanţei European Commission, in Romania, during the conference "New multiannual financial framework: priorities for the European Union, priorities for Romania", Bucharest, 13 dec. 2012.

THE "NEW LOOK" OF ACCESSION IN THE ROMANIAN LAW, A SOURCE OF INSPIRATION FOR ITS REGULATION IN THE COMMUNITY SPACE

ADRIANA IOANA PÎRVU*

Abstract

Although the trend is to interpret legal texts directly, regarding each legal regulation as a freestanding text, many times legal norms have to be correlated and interpreted ones by means of the others. Thus the legislative technique plays a very important part in drawing up an efficient legislative act whose enforcement should not generate any difficulties caused by the misinterpretation and misunderstanding of the norms.

It is obvious why the lawmaker has given such attention to accession, bearing important changes which have taken shape into a regulation much higher than the previous one.

If the lawmaker's attention to details is generally appreciated, i.e. it is useful to cover legislative lacunae by new regulations, sometimes excessive regulation is regarded critically by legal councillors, generating a poisonous inflexibility in enforcing the law. Also, the lawmaker's attempt to define some terms within the code is regarded critically, too, by legal councillors, considering that it is not pertinent to define some terms within a civil code.

We consider that by the regulating way the lawmaker succeeded in surpassing its old pattern, the French civil code adjusting better to the situations arising from practice. Also, the Romanian lawmaker evolved from the point of view of systematization of norms, compared to the French lawmaker which keeps on treating immovable accession, including the movable one, as conglomerates of norms.

The new accession regulation is a progress from the point of view of enforcing the norms of legislative techniques. It can certainly represent a pattern for the regulation of the accession in the law of other EU Member States, and not only them.

Key words: *accession, legislative technique, interpretation, ownership right, good faith.*

Introduction

Although there is a frequent tendency to interpret legal texts in a direct manner, regarding each legal norm as an autonomous text, regulatory texts should be often correlated and interpreted by means of each other. Thus, the legislative technique plays a particularly important role in the preparation of an efficient regulatory act, the application of which should not generate any difficulties, caused by the erroneous interpretation and understanding of the norms.

"Law was and will always be intimately connected with its language of expression, being rightfully named the necessary extension of legal concepts". The terms used within each system of law by means of the language, "the vocabulary specific to legal professions" truthfully expresses both the political options of the national lawmaker, his historical, cultural, religious traditions, and the influences of other regulations".[1]

Unfortunately, the legislative technique aspects have never been too much in the attention of the law researchers. Their criticism could be a very useful instrument for the legislator. The aim of this study is to bring to the attention of the law researchers that a regulation could be improved by simply using efficiently the legislative technique.

* Assistant Lecturer, Faculty of Judicial and Administrative Sciences, University of Pitesti, PhD candidate, Faculty of Law and Administrative Sciences, University of Craiova (adrianapantoiu@yahoo.com).

[1] S. Neculaescu, Noul Cod Civil, intre traditie, si modernitate in privinta terminologiei juridice normative, http://sacheneculaescudotcom.wordpress.com/2011/01/11/noul-cod-civil-intre-traditie-si-modernitate-in-privinta-terminologiei-juridice-normative/, accessed on 7.12.2012, 15.30 hours.

Any regulatory act should comply with the requirements of legislative technique, as the role of these requirements is to "ensure the systematization, unification and coordination of legislation, as well as the legal contents and form adequate to each regulatory act".[2]

The lawmaker from 1864 regulated accession by using the model of the French Civil Code.

Taking over this model, the Romanian lawmaker treats accession in Book II, more precisely in Chapters I and II of Title II, which dealt with the regulation of property,

The regulation of accession has a leading role within the norms regarding ownership, as the lawmaker probably considers that such order is natural, since the article preceding the chapters on accession (that article which concludes the general presentation of ownership) deals with the right to accession. We consider, however, that the regulation of accession should have been included in that part of the Code which deals with the different ways of obtaining the ownership right, our criticism aiming also at the new Civil Code, which maintained the same positioning of the texts regarding accession.[3]

In this way, after the lawmaker tries to define property in Art. 480, attempting to underline its importance under Art. 481, which provides it with a special protection, Art. 482 provided that "ownership over a movable or immovable asset gives a right to everything that merges, as an accessory, with the asset, in a natural or artificial manner." Probably this is the reason why the lawmaker, instead of developing the notion of ownership, its contents and effects under various regulations, intended to further treat the matter of accession.

Accession was regulated in two chapters: the first chapter regarded the right to accession over those working products, and the second chapter regarded the right to accession over those merged with and incorporated with the asset.

In this way, in full compliance with the French model, the first chapter which regulated accession also dealt with the matter of fruits. Art. 483 provided the fact that "Natural or industrial fruits of the land, civil fruits, animals' offspring (progeny), shall be due to the owner on the strength of the right to accession". With good reason, this provision was criticized in the specialty literature, being considered that "fruits are due to the owner, as prerogatives of its ownership right, and not on the strength of its right to accession, as Art. 483 erroneously provides".[4]

In the French legal literature[5], the following idea was developed: the right over the fruits of an asset derives from the accession right of the owner of the main asset over such asset. It is considered that accession should be viewed in terms of two stances: natural accession by incorporation (where the natural immovable accession would be classified and, depending on the stance, the movable accession cases) and natural accession by production, the latter referring to the fruits and products of the asset. In the Romanian legal literature, there are authors who supported this point of view; however, their opinion remained marginal, and it was not appropriated by the majority of authors.

In a general formulation, the Swiss Civil Code establishes that the owner of an asset is considered the owner of all that is an integral part of such asset, according to the custom of the place.[6]

---

[2] Art.2 para.1 of Law No. 24/2000 regarding the legislative technique norms for legislation elaboration, as republished in The Official Gazette, Part I, No. 260, of April 21, 2010.

[3] "It was said, with good reason, that the place of accession was in Book III, where the lawmaker regulates the ways in which ownership can be obtained." (D. Alecsandresco, Explicatiunea teoretica si practica a dreptului civil roman, vol.III, Atelierele Grafice SOCEC, Bucharest, 1909, p.284), O.Ungureanu, C.Munteanu, Tratat de drept civil, Bunurile. Drepturile reale principale, Ed. Hamangiu , p.609.

[4] E.Chelaru, Drept civil. Drepturile reale principale, Ed. C.H.Beck, Bucharest, 2009, p.30.

[5] Ch Larroumet, Droit civil. Les Bienes, Ed. Economica, p.369, quoted by O. Ungureanu, C. Munteanu, op.cit., p. 608 "the fruits and products of an asset are only accessories to this asset, and the economic function of property is precisely to allow the owner to fructify its asset and, therefore, to become the owner of such fruits and products. (…) this is, therefore, an obtainment of property by natural accession; production is a natural function of the asset, even if it implies the intervention of the human being, for instance, for industrial fruits and products."

[6] O.Ungureanu, C.Munteanu, op.cit., p.608.

The criticism made to this opinion seems to have been taken into account by the lawmaker of the new Civil Code, since the new regulation no longer refers to the obtainment of fruits as an effect of accession, but as a natural effect of the ownership right over the fruit-bearing asset. This new insight of the lawmaker is reflected into the inclusion of the obtainment of fruits as an effect of possession exerted in good faith among the methods of obtaining the ownership right. The good faith holder, the one who acts like a true owner, owning both animus, and corpus, shall retain the fruits produced by the asset exactly due to the assimilation by the lawmaker of this possessor, from the point of view of certain legal consequences, to the rightful owner of the asset.

By doing so, the lawmaker distanced itself from the model of the French Civil Code, which continued treating the obtainment of the ownership right over the fruits as an effect of the accession right.

However, we can say that the change in the lawmaker's insight occurred in the last minute, since Art. 435 of the draft new Civil Code defined accession as follows: "All that is produced by the asset, as well as all that merges with or is incorporated in the asset, as a result of the deed of the owner, another person or a fortuitous case shall be due to the owner unless otherwise provided by law."[7] We deem as opportune the lawmaker's brave attitude to take a distance from the traditional French doctrine and to adhere to the vision of the Romanian doctrine.

The second chapter on accession dealt with "the accession right over those merged with and incorporated into the asset". The chapter opened with a general provision, which preceded its two sections. Art. 488 had a general vision, according to which "all that merges with and is incorporated in the asset is due to the owner of the asset, according to the rules established below." This provision created the opening for a distinct treatment of the conditions and effects of accession, which had as its main asset either an immovable asset (Section I "On the Accession Right Related to Immovable Assets"), or a movable asset (Section II "On the Accession Right Related to Moving Assets").

In these sections, the lawmaker did not make any separation in subsections regarding the accession that occurred naturally and the accession that occurred artificially. For more legal rigor, the lawmaker of the new Civil Code dealt real with natural immovable accession and artificial immovable accession in separate sections. It is possible that such aspect is the result of the fact that the Romanian lawmaker drew his inspiration from the model of the Civil Code from Quebec. Moreover, due to the numerous controversies generated by the legal provisions regarding artificial immovable accession, the lawmaker of the new Code created several subsections regarding immovable accession to capture in a manner as exact as possible the aspects generating legal effects which occurred in practice. Using the regulation of the lawmaker from 1864, but particularly the experience generated by the judicial practice, the lawmaker of the new Code refined the regulation to simplify its application. In this way, they highlight again the advantages of observing the legislative technique norms, requiring, as a necessity in the elaboration of a new regulatory act, the documentation stage for substantiation purposes. The lawmaker of the new Civil Code has obviously gone through this stage, in which it examined the "practice of the Constitutional Court in the field, the practice of the courts of law as far as the application of the regulations in force is concerned, as well as the relevant judiciary doctrine."[8]

The new regulation includes in the situation of artificial immovable accession the same two primary situations: the situation in which a work is performed by the owner of the main asset, using the materials belonging to another owner and the situation in which works are performed by a third party, with its own materials, on the main asset. This latter situation is, however, distinctly regulated, based on new categories, introduced by the lawmaker, namely **autonomous** works with a durable nature and **added** works with a durable nature.

---

[7] http://www.just.ro/Sectiuni/PrimaPagina_MeniuDreapta/Proiectulnouluicodcivil/tabid/985/Default.aspx, accessed on 10.12.2012, 17.00 hours.

[8] Art. 21 of Law No. 24/2000.

As a novelty by comparison to the former regulation, the Civil Code in its new form contains not only general provisions, but also special provisions. In addition, the new code contains also an article entitled "the meaning of certain terms" (Art. 586). If, in general, the lawmaker's attention to details is appreciated, in the sense that it is useful to cover legislative gaps by new regulations, sometimes excessive regulation is critically regarded by jurists, as it generates a bad inflexibility in the application of the law. Also critically is regarded by jurists the lawmaker's attempt to define certain terms in the code, considering that defining certain terms is not opportune in a civil code.

Nonetheless, we consider that the specification of the meaning of the notion of "good faith" in the law of accession is opportune, as this notion is liable to have several interpretations, depending on the different fields in which it is applied.

Specifying the "meaning" of this notion, the lawmaker does nothing else but complying with the corresponding norms of legislative technique. In this respect, the article provides that "if a notion or term is not consecrated or can have different meanings, its significance in the context is established by the regulatory act instituting such meanings, within the general provisions or in an annex designed for the respective vocabulary, and it becomes mandatory for the regulatory acts from the same field". [9]

The scope of the regulation contemplated by the lawmaker of the New Code, in its attempt to update and correct all the flaws in the former regulation, caused the final result to differ from the expected result. Thus, the new regulation generated certain "legislative events", as such are conceived by Art. 58 of Law 24/2000 regarding the legislative technique norms for legislation elaboration. According to this article, in well-grounded situations, the regulatory acts having a particular importance and complexity can be amended, supplemented or, as applicable, repealed by the issuing authority also in the period comprised between their date of publication in The Official Gazette of Romania, Part I, and the date provided for their coming into force, on condition that the proposed interventions should come into force on the same date as the regulatory act subject to the legislative event". In this way we can explain the issue of Law No. 71/2011 for the application of Law No. 287/2009 on the Civil Code, having as "its primary object the reconciliation of the existing civil legislation with the provisions of such code (the Civil Code – our note), as well as the settlement of the conflict of laws resulting from the coming into force of the Civil Code"[10].

Although for accession is reserved an entire chapter in the new Civil Code, the vision of the contemporary lawmaker is not very different from the vision of the lawmaker from 1864, the regulation being realized by suppletive norms. However, as the lawmaker may have wished to ensure a higher safety for the civil judicial circuit, it expressly applies the principle of the non-retroactivity of the civil law, by Law No. 71/2011 for the application of Law 287/2009 on the Civil Code. In this way, Art. 58 of this law establishes that "in all the cases in which the artificial immovable accession implies the exercise of an option right by the owner of the immovable asset, the effects of accession are governed by the law in force on the date when the work began". An application of the same principle can be found also in case of Art. 576 regulating natural accession over animals, law 71/2011 specifying that such principle shall apply only to "the situations occurring after the coming into force of the Civil Code". (Art. 57).

An important objective that the new lawmaker had mostly to achieve in terms of the legislative technique was to update the used terminology. It is generally acknowledged the fact that the terminology used by the Civil Code from 1864 no longer matched with reality in many situations, the terms used being obsolete and, sometimes, even hilarious. When drafting the new Code, the lawmaker tried to use the words in their current meaning from the modern Romanian language,

[9] Art. 37 para.2 of Law No. 24/2000.

[10] Art.1 of Law No. 71/2011 for the application of Law No. 287/2009 on the Civil Code, published in The Official Gazette No. 409 of June 10, 2011.

avoiding regional phrases, taking into account the fact that "drafting is subordinated to the desideratum represented by the easy understanding of the text by its recipients"[11].

We consider that, by its regulation manner, the lawmaker managed to exceed the former model, the French Civil Code, being better adapted to the situations occurring in practice. Also, the Romanian lawmaker, unlike the French lawmaker, evolved in terms of the normative systematization, as compared to the French lawmaker, which continues treating the immovable accession, movable accession in the form of normative conglomerates. Systematization was necessary for "the insurance of a logical succession of legislative solutions (…) and the achievement of an inner harmony of the regulatory act (…), this being realized by grouping the ideas (our note) in accordance with their connections and natural relationship, within the general conception of the regulation"[12].

Taking these aspects into consideration, we could say that the new regulation of accession, in the Romanian Law, could become a source of inspiration for it's regulation in the Community Space.

The preparation of an efficient regulatory act requires the knowledge and appropriate application of regulation technique, although it does not seem so spectacular. In order to obtain a certain social or individual behavior we must first learn how to ask for it.

References

- Sache, Neculaescu, *Noul Cod civil, intre traditie, si modernitate in privinta terminologiei juridice normative*, http://sacheneculaescudotcom.wordpress.com/2011/01/11/noul-cod-civil-intre-traditie-si-modernitate-in-privinta-terminologiei-juridice-normative/.
- Dimitrie, Alecsandresco, *Explicatiunea teoretica si practica a dreptului civil roman,* vol.III, Atelierele Grafice SOCEC, Bucharest, 1909.
- Octavian, Ungureanu, Cornelia, Munteanu, *Tratat de drept civil, Bunurile. Drepturile reale principale*, Ed. Hamangiu, p.609.
- http://www.just.ro/Sectiuni/PrimaPagina_MeniuDreapta/Proiectulnouluicodcivil/tabid/985/Default.aspx.
- Law No. 71/2011 for the application of Law No. 287/2009 on the Civil Code, published in The Official Gazette No. 409 of June 10, 2011.

[11] Art. 36 para.4 of Law No. 24/2000.
[12]Art. 35 of Law No. 24/2000.

BRIEF OVERVIEW OF THE RULES GOVERNING THE CONFLICT OF LAWS IN SUCCESSION MATTERS ACCORDING TO THE NEW ROMANIAN CIVIL CODE

MONICA-FLORENTINA POPA*

Abstract
The new Romanian Civil Code, in force since 2011, has introduced considerable changes from the previous code in a wide range of aspects concerning our private law, as a response to the significant social developments that took place in the past two decades. Adopting a "monist" view, this code is a vast and ambitious undertaking to institute a coherent treatment of all areas of the private law that have previously been regulated in separate laws or codes, including those regarding the international private law.
The present article endeavors a brief analysis of the rules governing the conflict of laws in succession matters as set out in the new Romanian Civil Code, with comparative references to the previous applicable law, i.e. Law 105/1992, and to the new EU Regulation in this subject-matter. In the present context of ever-growing EU integration and increased global interconnectivity, a better understanding of the various national solutions to the conflict of laws can only benefit scholars and practicians alike.

***Key words**: conflict of laws, succession, private international law, EU Regulation, European Certificate of Succession.*

Introduction

The entering into force on October, 1st, 2011, of the New Civil Code (hereinafter referred to as NCC)[1], is without a doubt, one of the most important legislative reforms that took place in our country in the past two decades, reform that has stirred up a lot of controversy in the Romanian doctrine due to the rather unorthodox manner of its adoption – the Government assumed its political responsibility on this piece of legislation in front of the Parliament – and by the absence of impact studies on its effects, that should have preceded its adoption. As mentioned in the abstract, the code is an ambitious undertaking aimed at bringing together -for better or for worse- all legal norms pertaining to our private law, including those applicable to the international private law, previously regulated by Law 105/1992. The NCC has restated unchanged many provisions of this law, but at the same time, as a result of our EU membership, it has introduced novel legal solutions in some areas, such as the area of conflict of laws regarding succession. It is therefore useful, in our opinion, both for theoretical and practical purposes, to critically compare the new regulations in this subject-matter with those previously found in Law 105/1992.

Moreover, the legislative reform in Romania has entered a new stage with the coming into force at 15th of February 2013 of the New Civil Procedural Code (hereinafter referred to as NCPC)[2], which repeals in full the Law 105/1992, and replaces its procedural norms on conflict of laws in international private law with the provisions of the NCPC, Part VII, concerning "The international civil case".

My analysis concerns the current legal framework, with references -if appropriate- to the relevant jurisprudence based on the previous legislation. The overview of the relevant provisions on succession with an extraneous element will take into account not only the rules governing the law

* PhD, Assistant Lecturer, Faculty of Law, "Nicolae Titulescu" University (monica_popa@yahoo.com).

[1] Law 287/2009 concerning the Civil Code, re-published in the Official Journal of Romania no. 409/10.06.2011, Part I, on grounds of subsequent modifications after its first publication in the Official Journal of Romania no. 511/24.07.2009.

[2] Published in the Official Journal of Romania no. 465/15.07.2010, Part I, as Law 134/2010.

applicable to the devolution of property by cause of death according to the NCC, but also the provisions of the New Civil Procedural Code and the provisions of the EU Regulation 650/2012 on jurisdiction, recognition and enforcement of decisions and authentic instruments in matters of succession and on the creation of a European Certificate of Succession[3], due to fully come into force in 2015. Some of its provisions regarding preparatory measures incumbent on Member States as to the implementation of this new EU Regulation are already in force since 2012. As both national and European regulations mentioned above are fairly recent, this study may bring an interesting and useful perspective on a very important subject-matter of the international private law.

1. EU Regulation no 650/2012 – a new benchmark for Member States national legislations in area of cross-border successions within EU

Traditionally, states have closely guarded their national regulations on succession matters, since this area of law is in many instances associated with the family law[4], and hence it is deemed to posses a highly sensitive, culturally and sometimes even religiously charged nature. Moreover, the devolution of property by cause of death does imply significant issues such as transfers of property rights over land and other immovable assets, meaning that nation states have a direct stake in establishing rules for dealing with such transfers, especially when an extraneous element is involved.

It is therefore no mean feat for the European Commission to have drafted and passed a Regulation in such a sensitive matter, given the diversity of national legal solutions within EU. According to the European Commission data, made public on its website, almost half a million (450 000) cross-border successions occur every year in the EU, adding up to a considerable value, estimated to be in excess of 120 billion Euros[5]. The objectives the EU Regulation set out to achieve are the removal of obstacles within EU for citizens who face difficulties in asserting their rights in the context of a cross-border succession (Paragraph 7 of the Preamble)[6], the avoidance of parallel proceedings and conflicting judicial decisions, and hence faster, easier, cheaper procedures. The above-mentioned paragraph also states that citizens must be able to organize their succession in advance and the rights of heirs, legatees, creditors to the succession etc. must be effectively guaranteed. To this end, the Regulation institutes several rules, such as a consistent legal treatment of a given succession, dealt with as a whole, under a single law and under a single authority, the possibility for citizens to choose the law applicable to their succession between either the law of their habitual residence or of their nationality and the creation of a European Certificate of Succession, as an instrument by which the powers of the heirs, legatees, executors of the will or administrators of the estate can be demonstrated in any of the Member States jurisdictions.

In its carefully worded Preamble (Paragraph 9), and in Articles (1) and (2), the new Regulation defines the scope of its applicability as including "all civil law aspects of succession to the estate of a deceased person" and excluding revenue, customs and administrative matters of a public-law nature, matrimonial property regimes, the creation, administration and dissolution of trusts, transfer of property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts. Furthermore, the new Regulation expressly states in Article (2) that the substantive law of the Member States does not fall within its area of applicability: "This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession". Article (1) enumerates in a manner which, in our opinion, should be

[3] Published in the Official Journal of the European Union no. 201 from 27.07.2012.

[4] I.P.Filipescu, A.I.Filipescu, "Treatise on International Private Law", ed. Universul Juridic, Bucharest, 2008, p.412-413.

[5] http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm.

[6] All provisions of the EU Regulation 650/2012 quoted in this article are taken from its English version available in html format at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:01:EN:HTM.

construed as limitative, the exceptions to the applicability of the Regulation, including, *inter alia*, the status of natural persons, the legal capacity of natural persons, questions related to the disappearance, absence or presumed death of a natural person, issues regarding the matrimonial property regimes, maintenance obligations other than those arising by reason of death, questions governed by the law of companies and other bodies, corporate or incorporate, the nature of rights *in rem*.

Given the fact that this Regulation does infringe on the traditional jurisdiction of the national courts, by introducing the principle that a given succession will be subjected to one single law and one single authority, thus removing the conflict of competence based on the immovable/movable assets distinction, it is hardly surprising that Denmark, Ireland and United Kingdom have decided to opt out from the adoption of this Regulation and therefore are not bounded by its provisions[7]. Their decision has fragmented the unification movement of the international private law in Europe, though it is not likely that this movement towards ever greater legal integration will actually halt. In fact, the European Parliament has commissioned a study as to the "*Current gaps and future perspectives in the European private international law: towards a code of international private law*?"[8], aimed at identifying current gaps in the European legal framework concerning international private law and debating whether a European code of international private law can be achieved. The study suggests that an incremental policy by individual regulatory acts is preferable to one single piece of legislation, in order to prevent a further fragmentation of the unification agenda.

Since our country is bound by this EU Regulation, that will be applicable, after a transition and preparatory period, according to Article 83, "to the succession of persons who die on or after 17 August 2015", the current provisions of the Romanian code on conflict of laws in succession matters will also be evaluated by taking into account the provisions of the Regulation. The creation of the European Certificate of Succession will be dealt with separately, at the end of this paper.

2. Preliminary considerations on the concept of "succession"

NCC defines the notion of "succession" in Article 953 as "the transmission of the patrimony of a deceased natural person to one or more persons in existence"[9], which implies the fact that the rules governing succession apply only in the event of death of a natural person, and do not apply in the event of the disappearance of a legal person, in whichever way this disappearance may have occurred[10]. To the same effect are the rules instituted by the EU Regulation no.650/2012, which expressly stipulates in Paragraph 1 Section (2), (i), that its provisions do not apply to "the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated". NCC adopts a unified terminology, utilizing consistently the term of "succession", in lieu of "succession" and "inheritance", used alternatively in the previous regulation. The definition set out in Article 953 NCC, is -despite its brevity- in agreement with the definition of "succession" in Article 3 of the new EU Regulation, which stipulates that "succession" means "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of voluntary transfer under the disposition of property upon death or a transfer through intestate succession".

---

[7] This does not mean that there is no preoccupation in UK, for instance, for evaluating the possible effects of the British opt-out of this EU Regulation on UK law. The new EU Regulation and the consequences of its rejection by UK were the object of an international conference organized by the *British Institute of International and Comparative Law* in November 2012, suggestively named "*Out of the frying pan into the fire*? *The UK's rejection of the new EU Regulation on international successions"*, http://www.biicl.org/events/view/-/id/730/.

[8] http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=83495, author: prof. dr. Sandra Kramer, Erasmus University Rotterdam, Erasmus School of Law.

[9] All NCC provisions in this article are quoted from "The New Civil Code and the Previous Regulations", published under the supervision of dr. Mona Pivniceru, Ed. Hamangiu, 2012, Bucharest, p. 214 - 262 and p. 531-562.

[10] Fr. Deak, "Treatise on Succession Law", ed. Universul Juridic, 2nd edition, 2002, Bucharest, p.5.

Article 955(1) NCC stipulates that "the patrimony of the deceased is transmitted through succession by operation of law, insofar the deceased did not stipulate otherwise through a will", indicating the two classic forms of succession in our law – by operation of law and testamentary. These two forms are not mutually exclusive, but, according to section 2 "a part of the patrimony of the deceased can be transmitted through testamentary succession and the other part through succession by operation of law". Both forms fall within the scope of the NCC provisions concerning the determination of the law applicable to international private law relationships.

3. General provisions of the law applicable to succession, with references to the previous Romanian legislation and to the new EU Regulation in this subject matter

The current provisions of the NCC concerning the law applicable to the devolution of property by cause of death with an extraneous element has departed from the previous regulation as set forth by Law 105/1992, being in accordance with the new EU Regulation. Article 2633 NCC stipulates that succession is subject to the law of the State in which the deceased had his habitual residence at the time of death, unlike the legal regime instituted by Law no. 105/1992, which had regulated the succession in a different manner, based on the movable/immovable distinction of the assets forming part of the succession property. Article 66 of Law 105/1992[11] stipulated that a) as regards movable assets, wherever they may be located, the succession will be subject to the law of the State whose nationality the deceased possesses at the time of death and b) as regards immovable assets and goodwill, to the law of the State where each of these assets is located.

The new provisions are consistent with the EU Regulation 650/2012, which lays down as general rule in Article 21 that "unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death". Section 2 of this article institutes an exception from the general rule, allowing for the application of the "proper law" method: "if it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under Section 1, the law applicable to the succession shall be the law of that other State". In our opinion, the current NCC regulation in this subject matter is in agreement with the general objectives pursued by the European Commission, namely, that a given succession is treated coherently, under a single law and by one single authority, and parallel proceeding and conflicting jurisdictions regarding the same given succession are to be avoided. This holds true in respect to the applicable substantive law, but not in respect to procedural law, insofar as the provisions of the New Civil Procedure Code (NCPC) institute exclusive jurisdictional prerogatives for the Romanian courts to decide upon cases that involve an extraneous element as regards either 1. immovable assets situated on Romanian territory and/or 2. (movable) assets located in Romania, left by the deceased person with its last residence in Romania[12]. These special provisions, though imperative in nature, will have to be construed in accordance with the rules laid down by EU Regulation no. 650/2012, upon its coming into force in 2015, which institute in Article 4 a general jurisdiction in favor of "the courts of the Member State in which the deceased had his habitual residence at the time of death (…) to rule on the succession as a whole". The importance of this article should be viewed by taking into account the above-mentioned objectives of the Regulation, as explained in Article 37 of its Preamble: "… For reasons of legal certainty and in order to avoid the fragmentation of the succession, the law should govern the succession as a whole, irrespective of the nature of assets and regardless of whether the assets are located in another Member State or in a third State".

[11] Published in the Official Journal of Romania no. 245/1.10.1992, Part 1.

[12] All NCPC provisions in this article are quoted from the "Code of Civil Procedure", edition coordinated by dr. Viorel Mihai Ciobanu, ed. C.H.Beck, no.500, Bucharest 2013, p.332-354.

The meaning of "habitual residence" of a natural person is furthermore defined by Article 2570

NCC as being in the State where a natural person has its primary lodgings, even if they did not complete the legal registration requirements. The habitual residence of a natural person exercising its professional activity is the place where that person has its primary establishment. The primary lodgings are to be determined also by scrutinizing the personal and professional circumstances indicating lasting connections with the State or the intention to establish such connections. Similar provisions regard the habitual residence of a legal person, presumed to be located in the state where this entity has its principal establishment, i.e. its headquarters.

The applicable law determined in accordance with the Article 2633 NCC provisions will thus apply to all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death (*testate* succession) or a transfer through *intestate* succession. However, Article 2634 NCC stipulates that a person can choose as law applicable to his estate as a whole the law of the State of which he was a national. Should this right to choose the applicable law not be exercised, then the applicable law shall be the law of the State in which the deceased had his habitual residence at the time of death. The law institutes special formalities a person should fulfill for the existence and validity of the said choice of law. The former provisions contained in Article 68 of Law no 105/1992 were to the effect that a testator may subject the transfer by cause of death of his/her assets to a different law than the one indicated in Article 66 (mentioned above), without having the right to circumvent its imperative provisions (*evasion of law* or *fraud a la lois*). As regards the *testate* succession, the NCC institutes an alternative and optional regime that governs the formal requirements of a will[13]. Thus, according to Article 2635 NCC, the drafting, amendment or revocation of the will are deemed to be valid if the will complies with the applicable formal requirements, either on the date of its drafting, amendment or revocation, or on the date of death of the testator, in accordance with whichever of the following laws: a) the law of the State of which he is a national; b) the law of the testator's habitual residence; c) the law of the State where the will has been drafted, amended or revoked; d) the law of the status of the real estate which is the subject matter of the will; e) the law of the court or of the body that fulfills the procedure of transfer of the inherited assets. The only change introduced in this matter from the previous reglementation is that the law of testator's domicile (Article 68 s.3 (b) Law 105/1992) has been replaced with the law of testator's habitual residence, in accord with the new EU Regulation.

The conditions as to the validity of wills are set out in articles 1034-1085 NCC and concern, *inter alia*, formal requirements as regards the disposition of property upon death made in writing – holograph will (art. 1040 NCC), the disposition of property upon death made in front of a competent public authority (art. 1043 NCC), as regards privileged wills (art.1047 NCC), etc. These formal requirements are to be completed with those concerning the substantial validity of the will, such as the testamentary capacity (art. 988 NCC, which also sets forth special incapacities concerning those not allowed to dispose of their property by cause of death) and the consent of the person who disposes of his property (art. 1038 NCC)[14].

As to the scope of the law applicable to succession according to NCC, pursuant to Article 2636 (section 1), the law of succession, determined in accordance with the provisions analyzed above, shall apply to a) the time and place of the opening of the succession; b) the persons entitled to succeed; c) the capacity to inherit; d) the exercise of possession rights over assets forming part of the estate; e) the conditions and effects of the acceptance or waiver of the succession; f) the determination of the heirs' obligation to bear the liabilities; g) the conditions for the validity of the will, the amendment and revocation of a testamentary disposition, as well as special incapacities in

[13] Dan Lupaşcu, Diana Ungureanu, "International Private Law", ed. Universul Juridic, Bucharest 2012, p. 211.

[14] For a detailed presentation of these conditions under the provisions of the previous applicable law, see I.P.Filipescu, A.I.Filipescu, "Treatise on International Private Law", ed. Universul Juridic, Bucharest, 2008, p. 416-417.

order to receive or transmit an asset through a will; h) the partition of succession and (Section 2) the right of the State to claim a vacant estate as an heir. These main coordinates of the scope of succession law[15] belong to the substantive law, Romanian authorities being solely entitled to regulate these areas that do not fall under EU Regulation 650/2012. The old provisions did not expressly mention the conditions for the validity of the will and the partition of succession, although in practice these two categories were included in the scope of the succession law. An interesting change from the previous regulation is the replacement of the lapidary reference to "the rights of the state to a vacant succession" with an entire section stating that "in case that, according to the law of succession, a given estate is vacant, the assets situated or located on Romanian territory will be appropriated by the Romanian state under its own law according to the law of succession on vacant estates". One commentary on this article has interpreted this provision as limiting the rights of the Romanian state to claim a vacant estate only to those assets located on its soil[16], so if the vacant estate is formed in part by assets located on the territory of other states, the Romanian state will not be entitled to them. Romanian courts have recognized the right of a foreign state to claim movable assets part of a vacant estate left by its national on Romanian soil[17], the consensus being that the immovable assets should be appropriated by the Romanian state, though the now repealed law did not make this distinction. It is still too early to decide which way the new provision will be interpreted by our courts.

The EU Regulation leaves the matter of determining the rights of the state to a vacant succession to the discretion of the Member States, the only condition stipulated in Article 33 being that the creditors of the estate are to be allowed to seek satisfaction on their claims out of the estate as a whole.

Based on our comparative analysis between the new regulations of the international private law, the previous legislation and the EU Regulation no. 650/2012, we can conclude that the NCC provisions are in accordance with the European law and, at the same time, preserve most of the legislative solutions of the repealed Law 105/1992. One area where the NCC might have to be amended in the near future in order to comply with the EU Regulation regards the certificate of succession, currently regulated by Articles 1132-1134 NCC, as to its meaning, effects, issuing authority and annulment conditions. The related legislation, especially Law no. 36/1995 regarding the public notaries[18], will have to be amended, too.

4. The creation of European Certificate of Succession - a promising instrument to ease up the legal and administrative tangle for the European citizens

The EU Regulation dedicates Chapter VI to this new legal instrument it introduces for the purpose of speeding up the settling of successions with cross-border implications. The European Certificate of Succession (hereinafter referred to as "the Certificate") is, according to Article 62 corroborated with Article 64, an instrument which shall be issued in the Member State whose courts have jurisdiction in a given succession matter (either as general jurisdiction, by choice of law or subsidiary jurisdiction) for use in another Member State and shall produce the effects set out in Article 69. This Certificate is an instrument that has evidentiary effects (Paragraph 71 of the Preamble) as to the status and/or rights and powers of the heirs, legatees, executors of the will or administrators of the estate in another Member State, for instance in a Member State in which the

[15] Idem 14, p. 212-215.

[16] Diana-Alina Rohnean, "The New Civil Code. Commentaries, doctrine and jurisprudence", vol. III, co-authorship (D.M. Gavris, Marius Eftimie & co.), Ed. Hamangiu 2012, Bucharest, p. 1170.

[17] The case of a Greek national leaving a vacant estate on Romanian soil, in R.D.D. no.3/1973, quoted by I.P. Filipescu, A.I. Filipescu, idem 5.

[18] Public notaries are the competent authority to issues certificates of succession or certificates of recognition as heir/legatee in our legal system. The procedures regarding successions are set out in Law 36/1995, published in The Official Journal of Romania no. 92 from 16/05/1995.

succession property is located. Its use is not deemed mandatory and is in no way going to take the place of the internal documents used for similar purposes in the Member States. The competence to issue the Certificate is, according to Article 64, either a court as defined in Article 3 (2) or another authority which, under national law, has competence to deal with matters of succession. In our law, this competence will belong to the public notaries. The procedures for the application and the issuing of the Certificate are set out in Articles 65-67, issues regarding the rectification, modification and withdrawal of the Certificates, suspension of its effects, being dealt with in Articles 72-73.

As stated at the beginning of this paper, The EU Regulation no. 650/2012 will fully come into force on 5th of July 2015. However several of its articles already apply from 5 July 2012, including Article 78 that states, *inter alia*, the obligation of the Member States to provide the relevant information regarding the authorities competent to issue the Certificate and the redress procedures against decisions taken by the issuing authority.

The creation of the European Certificate of Succession is an important practical measure to ease up the difficulties involved in settling cross-border successions. Our recent court rulings in this field have dealt with the thorny issues of establishing the status and/or powers of heirs, legatees, etc. and hence the validity of their claims on a given estate. For instance, the Supreme Court ruled on a case of a succession involving property rights over an immovable asset located in Romania, left by a German citizen, where the certificate of succession proved to be a highly contentious issue. The court decided that, even if the deceased was a German national, it is not mandatory for the certificate of succession to be issued by the German authorities, since the succession concerning immovable assets is governed by the Romanian law and hence the certificate of succession can be validly issued by the Romanian competent authorities[19]. Another case decided by our Supreme Court highlights the difficulty of finding the right equivalent in Romanian law of an authentic act issued by a foreign authority as to the status, rights and obligations of the heirs/legatees. The case involved the testamentary succession of an Italian national that included immovable assets on Romanian soil and the issue of interpretation of an authentic act issued by the competent Italian public notary as being the equivalent of a certificate of succession[20]. In this case, an authentic declaration of the main plaintiff in and of two other witnesses in front of the public notary does not constitute a certificate of succession, but merely a declaration of assuming responsibility, due to the provisions of Italian substantive law concerning the effects of testamentary dispositions on legatees and their rights.

These two cases exemplify the practical difficulties that should be smoothed away in settling cross-border succession matters, after the implementation of the European Certificate of Succession.

5. Conclusions

The New Civil Cod does not significantly depart from the previous legislation in the manner of regulating the conflict of laws on succession matters with an extraneous element, and its provisions are consistent with the EU Regulation 650/2012. However, several procedural aspects will have to be addressed after the Regulation will come into force, to fully meet the general objectives of removing legal and administrative barriers that hamper citizens in the assertion of their rights in the context of a cross-border succession. Thus, the newly adopted Civil Procedure Code will have to be amended, so as to allow that a given succession is treated as a whole, subject to a single law and to a single authority. Other pieces of legislation will have to be amended as well, as to include the new legal instrument created by the Regulation, i.e. the European Certificate of Succession, such as Law 36/1995 regarding the public notaries and the notarial activity. It is too early to analyze court rulings

[19] Decision no. 4097/2003 of the Supreme Court of Justice, Civil and Intellectual Property Section, quoted from www.legalis.ro. by Dr. Dan Lupaşcu, Nicoleta Cristuş, in "Judiciary Decisions and Legislation in the Area of the International Private Law", ed. Wolkers Kluwer, 2009, Bucharest, Romania, p.41-46.

[20] Decision no. 503 from 31/01/2012 of the Supreme Court of Justice, Civil Section, quoted from www.legalis.ro.

in this subject-matter based on the NCC, due to the period of time involved in settling out a case, especially if it goes through all appeal stages. In most instances, the past rulings still have a persuasive effect and prove to be important study tools as to the established mode of deciding on a specific issue in cross-border successions.

Taking into account that most of the relevant legislation analyzed in this paper is very recent, and hence both doctrinal analysis and court decisions are scant or lacking entirely to this date, we hope that his paper will have started a debate as of the future developments in the conflict of laws regarding succession matters.

References

- I.P. Filipescu, A.I .Filipescu, "Treatise on International Private Law", ed. Universul Juridic, Bucharest, 2008.
- Fr. Deak, "Treatise on Succession Law", ed. Universul Juridic, 2nd edition, 2002, Bucharest.
- "The Code of Civil Procedure", edition coordinated by dr. Viorel Mihai Ciobanu, ed. C.H.Beck, no.500, Bucharest 2013.
- Dan Lupaşcu, Diana Ungureanu, "International Private Law", ed. Universul Juridic, Bucharest 2012.
- "The New Civil Code. Commentaries, doctrine and jurisprudence", vol. III, co-authorship (D.M. Gavris, Marius Eftimie & co.), Ed. Hamangiu 2012, Bucharest.
- Dr. Dan Lupaşcu, Nicoleta Cristuş, "Judiciary Decisions and Legislation in the Area of the International Private Law", ed. Wolkers Kluwer, 2009, Bucharest, Romania.
- "The New Civil Code and the Previous Regulations", published under the supervision of dr. Mona Pivniceru, Ed. Hamangiu, 2012, Bucharest.
- www.legalis.ro.
- http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm.

UNFORESEEABILITY ACCORDING TO THE REGULATIONS OF THE ROMANIAN CIVIL CODE. LEGAL NATURE

RADA POSTOLACHE[*]

Abstract
Unforseeability is regulated for the first time within the Romanian legal system, by the Civil Code, at article 1271, which integrates it to the effects of the contract between parties. On the basis of the legal norms included by the Civil Code, specialized doctrine and legal literature, the present study aims to carry out a monographic approach, aiming to determine the specific legal nature of unforseeability – considered exception from the "compulsory force" of a contract, cause authorized by law for adapting or terminating a contract, reason for revising the effects of contracts concluded, subject to the restrictive regime instituted by article 1271 of the Civil Code, having to respect the requirements of special law, when they exist; although unforseeability is a cause for adapting a contract, it is nonetheless subsidiary to the legal will of the parties. It must be stressed the usefulness of the present study with a monographic character, under the circumstances in which legal doctrine approaches unforseeability mainly from the perspective of its legal effects, which overcome here the theme of the study.

Key words: *pacta sunt servanta, adaptation of a contract, cause authorized by law, excessively onerous, legal regime.*

1.Introduction

Unacknowledged from A legal point of view, unforeseeability has been invoked throughout time on the basis of the general provisions of article 970 of the former Civil Code[1]. In the absence of clear common regulations, the legal literature in the field has been contradictory, prevailing the solutions which admitted unforeseeability as reason for revising the effects of the contracts concluded.

Unforeseeability is currently regulated by the Civil Code[2] in Book V ("Duties"), Title II ("Sources of duties"), Chapter I ("The contract"), Section 6 ("Effects of the contract"); article 1271 constitutes the general legal ground for unforeseeability, subject to analysis in the present work. Unforeseeability is integrated to the issue regarding the effects of a contract between the parties, its acceptance having the role to insure a balance of losses and benefits within a contractual legal relation.

Being placed in the area dedicated to the effects of a contract, but separately from the provisions regulating the "enforceability of a contract" (there are two articles in the Civil Code with clear distinct names: articles 1271 is named "Unforeseeability", whereas article 1270 is named "Enforceability"), unforeseeability has a legal nature subject to discussion: is it a cause integrated to

[*] Associate Professor, PhD, "Valahia" University of Târgovişte, Faculty of Law and Social-Political Sciences (radapostolache@yahoo.com).

[1] According to article 970 of the 1864 Civil Code, "Conventions must be accomplished in good faith. They are not compulsory only when it comes to their clear constituent elements, but also to all the consequences generated upon their duties by equity, customs or law". See for that matter also the commercial sentence of the Supreme Court of Justice, No. 21 of January 25th 1994, in Constantin Crişu, Nicorina Crişu Magraon, Ştefan Crişu, *Repertoriu de doctrină şi jurisprudenţă română*, volume I (Bucharest: Argessis Publ. House, 1995), 211. In this case, the court ruled that the plaintiff – the lessor – was entitled to demand a higher lease in relation to the change of circumstances – liberalization of prices and growth of inflation following the conclusion of the contract – being taken into account the provisions of article 970 of the Civil Code. This case involves basically a revision of the price, within a contract with successive execution, which was for 5 years.

[2] Law no. 287/2009 on the Civil Code, republished, Romanian Official Gazette, Part I, No. 505 from July 15th 2011, subsequently called the Civil Code.

the enforceability of a contract, is it an exception from the enforceability of a contract and thus a cause for adapting or terminating a contract?

Taking as point of reference the provisions of the Civil Code, articles 1270-1271, the legal literature and practice within the field, we aim to present unforeseeability as an exception from the "enforceability" of a contract and, consequently, as a cause authorized by law to lead to the adaptation or termination of a contract, having a legal character and being subsidiary to the legal will of the parties.

2. Definition and ground

2.1. Definition of unforeseeability

Unforeseeability signifies the significant change of the conditions which have been essential for a contract and established when it was concluded, when during the execution of the contract occurs an event independent from the deeds and will of the contracting parties, unpredictable and insurmountable by them, making the further execution of the contract extremely onerous for one of them[3].

There must be made a difference between unforeseeability and the legal institutions close to it (damage, force majeure, "alea" element, resolutive condition, unpredictable prejudice, indexing, guilty lack of execution of a contract, error), which are similar to it, either from the perspective of causes or from that of affects.

2.2. Ground of unforeseeability

By *lege lata* are synthetically used the criteria of cause and effect for the application of unforeseeability, without further explanations. In other words, it is mainly taken into account the "exceptional change of circumstances" considered at the conclusion of the contract, having as consequence an "excessively onerous" obligation and, eventually, an unbalance of the amounts of the money owed, which clearly and unfairly obliges the debtor to make such payment; the acceptance of unforeseeability has the aim of precisely "distributing the losses and benefits resulting from the change of circumstances in a fair way between the parties" or the termination of the contract, as the case may be [art. 1271 paragraph (2) letters a) and b)].

It is considered that the new regulations justify unforeseeability based on the idea of equity[4], dealing with the conflict either on favor of the debtor, when costs rise, or on the favor of the creditor, when the value of the amounts of the money which he has to receive back has excessively decreased.

We consider that unforeseeability concerns "contractual justice", imposing that, in the absence of specific contractual provisions, expenses and costs determined by an unpredictable situation[5] are not transferred only to one party's responsibility, this being eventually the idea of equity.

Irrespective of the ground on which is based, the acceptance of unforeseeability as reason for adapting or terminating a contract is conditioned by the compliance with the requests instituted by law, among which the expressed will of a party in regard to it or the so-called "negotiation in advance".

3. Legal nature of unforeseeability

3.1. Enforceability of a contract

The legal classification of unforseability needs first of all taking into account the principle of the enforceability of a contract – *pacta sunt servanda* – with its corollary *mutuus consensus, mutuus dissensus.*

---

[3] See for that matter Brânduşa Ştefănescu, *Dreptul comerţului internaţional*, *Note de curs* (Târgovişte: "Valahia" University,, Faculty of Law and Social-Political Sciences, 2004), 50.

[4] Paul Vasilescu, *Drept civil. Obligaţii. În reglementarea noului Cod civil*, (Bucharest: Hamangiu Publ. House, 2012), 457.

[5] According to the regulations of the Civil Code, article 1271 paragraph 2 letter b), "the unpredictable situation could not be reasonably considered at the moment when the contract was concluded".

a) Pacta sunt servanda. According to article 1270 of the Civil Code, (1) "The contract validly concluded has legal power between the contracting parties", legal provisions acknowledging that the principle of the enforceability[6] of a contract has a mandatory value (*pacta sunt servanda*). The Civil Code, just like former regulations - article 969 - assimilates the force of the contract to the force of law, in a metaphoric way, of course.

b) Mutuus consensus, mutuus dissensus. According to article 1270 paragraph (2) of the Civil Code, "A contract can be modified and terminated only with the agreement of the parties or for causes authorized by law". Thus, legal provisions reconfirm, just like the former law, the rule of the symmetry, or the principle *mutuus consensus, mutuus dissensus,* pointing out at the same time another basic effect of a contract, namely its irrevocability, which is integrated to its enforceability. Therefore, besides the will of the parties, only the causes authorized by law can exceptionally lead to the modification or termination of a contract.

Modification of a contract. Modification regards the expansion or restriction of the enforceability of a contract. Expansion signifies the prorogation of the effects of some legal acts, through the effect of law, beyond the term agreed by parties, for instance the prorogation at every 5 years or other periods of time of some lease contracts; an example is the hypothesis instituted by the provisions of article 1[7] of Law No. 17/1994 for the extension or renewal of the lease contracts concerning certain dwelling areas[8] or by the provisions of article 7 paragraph (1)[9] of Law No. 112/1995 for the regulation of the legal situation of certain buildings serving as dwellings and transferred to state property[10].

Unilateral denunciation of a contract. The provisions of article 1276 of the Civil Code – "Denunciation of a contract" – take into account the "right to denunciate the contract acknowledged to one of the parties", which constitutes the general legal ground of the "causes authorized by law" and refers at the same time to the special situations regulated by the Civil Code but also by other special normative acts, such as: termination of the lease contract due to the total or considerable loss of the profit [article 1818 paragraph (1) of the Civil Code]; termination of a lease contract within 30 days from the death of the tenant [article 1834 paragraph (1) of the Civil Code]; termination of the contract of mandate due to the death, incapacity or insolvency of the agent or principal [article 2030 letter c) of the Civil Code]; unilateral denunciation of a credit facility, for solid reasons regarding its beneficiary [article 2195 paragraph (1)].

Placed after the "enforceability" of a contract and doing nothing else but reconfirming it and acknowledging the will of the parties also in this field, "The provisions of the present article are applied in the absence of any other contrary convention" [article 1274 paragraph (4) of the Civil Code].

---

[6] Regarding the ground of the enforceability of a contract, see Cristina Zamşa, „Art. 1271 – Impreviziunea", in collective, *Noul Cod civil. Comentariu pe articole*, (Bucharest: C.H. Beck Publ. House, 2012), 1328.

[7] According to which, "Lease contracts, irrespective of the owner, regarding dwelling spaces serving as houses, subject to legal norms and lease according to Law No. 5/1973, but also dwelling spaces serving as socio-cultural-educational headquarters or which are used by political parties, labour unions and NGO-s, which are being enforced from the entrance in force of the current law, are extended for a period of 5 years, in the same conditions."

[8] Romanian Official Gazette, part I, No. 100 from April 18th 1994.

[9] According to which "Lease contracts concluded on the basis of Law No. 5/1973 on the management of dwelling areas and regulation of relations between owners and dwellers, for the apartments in the buildings provided for by article 1, are extended by law for a period of 5 years from the moment when the decision of the Commission provided for by article 15 last paragraph rests definitive".

[10] Romanian Official Gazette, part I, No. 279 from November 29th 1995.

3.2. Unforeseeability – exception from the "enforceability" of a contract

Specialized literature presents as another exception from pacta sunt servanda[11] the revision of the effects of some legal acts, due to the fact that the contractual balance has been affected, as a result of a considerable change of the circumstances considered when the contract was concluded – the so-called theory of unforeseeability.

In order to establish the exception from the principle *pacta sunt servanda* and, implicitly from *mutuus consensus, mutuus dissensus,* we will take into account the provisions dedicated to unforeseeability by the Civil Code, at article 1271. Being integrated to the effects of a contract between the parties, unforeseeability is distinctively regulated from the "enforceability" of a contract, instituted by article 1270 of the Civil Code. Did the lawmaker want to take unforeseeability out of the area of *pacta sunt servanda,* by providing an obvious exceptional character to it? Or, taking into account the specific character of unforeseeability, did the lawmaker want to provide a well defined legal regime to it, and a clear legal one at the same time – the provisions of article 1271?

According to article 1271 paragraph (1) of the Civil Code, "the parties are bound to fulfill their duties, even if such fulfillment has become more onerous, either due to the raise of the costs for one fulfilling his duty or due to the diminishment of the value of the counter-performance". In other words, law brings again in discussion the compulsory character of the clauses to which the parties of a contract commit themselves, even when the onerous character – one of the basic elements of a contract – changes. Yet, law takes into account here the raise of the costs for one fulfilling his own duty or, as the case may be, the diminishment of the value of the counter-performance, which are naturally integrated to the contractual risk[12], – which is dealt with by the debtor or creditor of the duty to be fulfilled, according to the case and in the absence of any contrary provision; any contract also involves risks, law accepting them within the limits of normality or "reasonability". In other words, "the affected party must deal with the risk of such changes of circumstances taking place".

The text above, which is quite particular, was necessary. Being placed in the area of unforeseeability, it has the role of separating the elements concerning contractual risk ("the fulfillment of duties has become more onerous"), which the lawmaker obviously leaves in the area of the enforceability of a contract, from the elements concerning unforeseeability, characterized by a fulfillment of duties which has become "excessively onerous".

According to article 1271 paragraph (2) of the Civil Code, "If the fulfillment of a contract has become excessively onerous, due to an exceptional change of circumstances which would obviously and unfairly force the debtor to pay back the due amount of money, the court can rule: a) the adaptation of the contract, so as to distribute the losses and benefits resulting from the changes of circumstances fairly between the parties, b) the termination of the contract, at the moment and in the conditions that it establishes".

Unlike the provisions of article 1271 paragraph (1), the lawmaker institutes above unforeseeability - exception from *pacta sunt servanda* – in the given conditions, by providing a well defined legal regime to it. By maintaining the contract in the area of changes, unlike the previous hypothesis, the lawmaker takes here into account an exceptional change of circumstances, capable to make the fulfillment of a contract excessively onerous, while forcing the debtor to give back the due amount of money would become clearly unfair. In other terms, in order to characterize a change as unforeseeability and not as a mere contractual risk, the lawmaker establishes a threshold, a limit, which are characterized from the perspective of cause and effect: exceptional changes, making the

[11] See for that matter: Gabriel Boroi, Liviu Stănciulescu, *quoted works*, 151; T.V. Rădulescu, „Art. 1271 – Impreviziunea", in collective, *Noul cod civil. Comentarii, doctrină, jurisprudenţă*, volume I, (Bucharest: Hamangiu Publ. House, Bucharest, 2012), 586.

[12] The relation between risk and unforeseeability is not precise, the change of circumstances being excluded form the area of risks, amendments being determined by interpreting the convention, according to the nature of the contract. See for that matter the commercial sentence of the Supreme Court of Justice, No. 1122 from February 21st 2003.

fulfillment of a contract excessively onerous and creating unbalance between the due counter-performances, making so that a party is excessively favored or "clearly and unfairly forcing the debtor to give back the due amount of money", according to law.

Although article 1271 paragraphs (2)-(3) of the Civil Code only refers to the debtor of the duty to be fulfilled, due to an omission made by the lawmaker, the unfairness of fulfilling the duty can concern any of the parties of the "excessively onerous" contract, as it also happens in the hypothesis provided for by article 1271 paragraph (1) of the Civil Code; the "excessively onerous" character concerns both the raise of the costs for one party fulfilling his duty, but also the diminishment of the value of the counter-performance. Just as a debtor cannot be forced to accept a counter-performance which has become excessively onerous, the creditor cannot be forced either to accept a counter-performance which has become moderate, due to the exceptional change of the circumstances considered when the contract was concluded.

The two texts presented above are well harmonized, both having the role to distinguish between the maintenance of the effects of a contract if a normal or natural change of the circumstances considered when concluding it occurs and the modification of the effects of a contract, including its termination, when the new circumstances have an exceptional character.

In fact, our statements do nothing but reinforcing the fundamental principle of law - „*pacta sunt servanda*", if „*rebus sic stantibus*", on which the mechanism of unforeseeability is based.

In the form it has been regulated, unforeseeability constitutes, in the given circumstances, an exception from the enforceability of a contract, which is well characterized from a legal point of view and aims to bring back the balance between the counter-performances owed by the contracting parties.

There are however authors considering that the involvement of a judge in a contract, by using unforeseeability, "is not an assault to the principle regarding the enforceability of a contract, but on the contrary, is capable to render full force and efficiency to it"[13].

3.3. Unforeseeability – cause authorized by law for adapting/terminating a contract

Instituted for the aims of contractual justice and the idea of equity, unforeseeability is only described by law as "cause authorized by law", having as effect the adaptation or termination of a contract. Before being a cause authorized by law, unforeseeability can be assigned, as a rule, to "conventional mechanisms", its scope being contractual.

On the ground mentioned above, the parties themselves can negotiate right at the conclusion of the contract an unforeseeability clause, integrated to the contract and basically functional, subject to the principle *pacta sunt servanda.* From this perspective, specialized literature mentions unforeseeability as a cause for adapting the value of a contract[14] or, according to us, as an application of the provisions of article 1270 paragraph (2) of the Civil Code, hypothesis I ("a contract is modified or terminated only with the agreement of the parties…")

In our opinion, the parties must consider the adaptation of a contract only when relevant changes take place, culminating either with "the raise of the costs of one's obligation or the diminishment of the counter-performance"; in other words they must consider a certain result, briefly described as "excessively onerous", otherwise the unforeseeability caluse can be interpeted and confounded with other similar ones, for instance the indexing clause[15].

---

[13] See for that matter Liviu Pop, *Tratat de drept civil. Obligaţiile*, volume II (Bucharest: Universul Juridic Publ. House, 2009), 503.

[14] Together with: clause of the customer befitting from more advantages; clause of the competitive offer; clause of negotiation of price; clause of the first refuse; clause of the first and last refuse. See for that matter B. Ştefănescu, *quoted works,* 50.

[15] When parties inserted in their contract *the indexation clause*, integrated to the "clauses for *maintaining* the value of the contract", unforeseeability does not operate, such clauses being subject to distinct rules. Being stipulated quite often, the indexation clause provides that a price can vary according to the fluctuations of an index or agreed

The parties have the possibility above even after the conclusion of the contract, when the exceptional change of circumstances has already occurred, negotiation concerning the hypothesis instituted at article 1271 paragraph (3) letter d) of the Civil Code – "the debtor has attempted in reasonable terms and in good faith to negotiate the reasonable and fair adaptation of the contract". Negotiation refers here to the adaptation of the contract, according to the circumstances created. Moreover, law itself speaks about the unforeseeability of conventional mechanisms, the negotiation attempt being a condition prior to addressing the court.

The expression "cause authorized by law for adapting/terminating a contract" is an application of the provisions of article 1270 paragraph (2) of the Civil Code, hypothesis II ["a contract can be modified or terminated (…) for causes authorized by law"], corroborated with the provisions of article 1271 paragraphs (2) and (3) letter d) of the Civil Code.

Unforeseeability – "cause authorized by law for adapting/terminating a contract" operates if the following conditions provided for by law are met:

a) an exceptional change of the circumstances existing at the conclusion of the contract occurs.

b) there has been an attempt to negotiate the reasonable and fair adaptation of the contract, in a reasonable term and in good faith. This second condition, which is distinct from the exceptional change of circumstances, places the adaptation of the contract under the will of the parties, providing to the legal revision of the contract only a *subsidiary* character.

Generally speaking, unforeseeability is a cause authorized by law for adapting/terminating a contract, with a subsidiary character, operating in the presence of conditions clearly provided for by law.

3.4. The legal character of unforeseeability – cause authorized by law

If when it comes to the unforeseeability clause negotiated by parties, the court appealed can only take act of the will of the parties, by interpreting it, when it comes to unforeseeability regarded as cause authorized by law, the court appealed must establish the exceptional character of the change of circumstances, taking into account the legal criteria, mentioned at article 1271 paragraph (3) of the Civil Code ant to order the adaptation or termination of the contract, in relation to their gravity.

According to law, any change must be out of the will of the parties. Law does not establish reference points for the change in question, these being the product of the specialized literature, which is different from a case to another.

Unforeseeability has a judiciary character only when the attempt to negotiate the reasonable and fair adaptation of the contract did not succeed and the parties could not reach an agreement about it.

4. Conclusions

The Civil Code institutes unforeseeability, for the first time in the Romanian legal system, readjusting the solutions proposed in legal and contractual practice or by legal doctrine.

Simplified and essential, the provisions of article 1271 of the Civil Code constitute the general ground and the substantial legal field for unforeseeability, having the role of shedding light upon its legal nature and facilitating at the same time its separation from other similar legal institutions. By regulating some "applications" of unforeseeability, both the Civil Code and some special provisions do nothing but enforcing and reconfirming its specific character.

---

benchmark, for instance the oil price; the enforcement of such clause involves a certain automatism, being easier to do than *legally revising a contract* and leading to the avoidance of conflicts. When it comes to indexation, parties can revise the contract, in certain circumstances and according to the existing clause, therefore abiding by the enforceability of the contract. If appealed, the court applies the provisions of the contract, abiding by its enforceability.

The provisions of article 1271 of the Civil Code concern unforeseeability – seen as ground for judicial revision of a contract – establishing the conditions in which is applied and making an exception from it.

By "obligating" the parties to attempt negotiation, law does nothing else but enforcing the autonomy of the will expressed by parties, in the spirit of principles *pacta sunt servanda* and *mutuus consensus, mutuus dissensus;* the reasonable and equitable adaptation of a contract, as well as its legal termination, as the case may be, constitute only a subsidiary or exceptional measure. Before being a cause authorized by law, unforeseeability is subject, as a general rule, to "conventional mechanisms", its scope being contractual.

Finally, unforeseeability is "a cause authorized by law" for *subsidiarily* adapting a contract, but also for terminating it, at the moment when, as a result of the contractual balance being broken, the parties could not reach an agreement or the court ruled for an exception from the rule *pacta sunt servanda* to be applied.

References

- Books:
- Boroi, Gabriel and Stănciulescu, Liviu. *Instituţii de drept în reglementarea noului cod civil*. Bucharest: Hamangiu Publ. House, 2012.
- Crişu, Constantin and Crişu, Magraon, Nicorina and Crişu, Ştefan. *Repertoriu de doctrină şi jurisprudenţă română*, vol. I. Bucharest: Argessis Publ. House, 1995.
- Pop, Liviu. *Tratat de drept civil. Obligaţiile*, vol. II. Bucharest: Universul juridic Publ. House, 2009.
- Ştefănescu, Brânduşa. *Dreptul comerţului internaţional*, *Note de curs*. "Valahia" University of Târgovişte, Faculty of Law and Social-Political Sciences, 2004.
- Vasilescu, Paul. *Drept civil. Obligaţii. În reglementarea noului Cod civil.* Bucharest: Hamangiu Publ. House, 2012.

- Articles:
- Rădulescu, T.V. „Art. 1271 – Impreviziunea", in collective, *Noul cod civil. Comentarii, doctrină, jurisprudenţă*, vol. I, (Bucharest: Hamangiu Publ. House, Bucharest, 2012), 586.
- Zamşa, Cristina. „Art. 1271 – Impreviziunea", in collective, „*Noul Cod civil. Comentariu pe articole"*, (Bucharest: C.H. Beck Publ. House, 2012), 1328.

THE ROLE OF THE ROMANIAN NATIONAL BANK IN APPLYING THE BANKRUPTCY PROCEDURE OF THE BANKING CREDIT INSTITUTIONS

RARES-SEBASTIAN PUIU-NAN*

Abstract
The article examines the role of the National Bank of Romania in the insolvency procedure of the banking institutions. The most important regulations regarding this issue consist in the Government's Order 10/2004 regarding the bankruptcy of credit institutions. According to it, the following officials are to be appointed in the insolvency procedure of banking institutions: insolvency courts of justice, insolvency judge and liquidator. Although the National Bank of Romania is not considered a participant, it has a very important role in this procedure.
My article presents in the beginning the Status of the National Bank of Romania. The next chapters are dedicated to the role of the National Bank of Romania in insolvency: withdrawal of the operating license of the credit institution, taking part in the insolvency procedure as an active participant or as a creditor side, appointing and dismissing of the interim administrator, mandatory or advisory opinion, role of information.

Key-words: *insolvency, National Bank of Romania, Banking Credit Institutions, judge, liquidator.*

Introduction

My paper work is about the role of the Romanian National Bank in the bankruptcy procedure of the banking credit institutions participants in insolvency.

The banking credit companies have a very important role in the economy of a nation. They represent the force, the "engine" that sustains the economy, the bases for the future development and a source of stability. Any masive decline of one the banking credit companies could produce a "chain reaction" and could compromise the national economy. For these reasons, based on legal previsions, it is extremely important to avoid the bankrupcy of such companies and its consequencies. Thus, it is very important for each legal system to adopt a clear and efficient legislation in this matter. It is also important to create and maintain a mechanism to supervise and prevent the insolvency of the banking credit companies.

The purpose of this paper is to realize a detailed analysis of the contribution of Romanian National Bank in applying the bankruptcy procedure of the banking credit institutions , its duties and powers. The analysis of this issue will help the persons involved in such procedures or which are about to be involved to have a concrete role of RNB in insolvency.

This issue, based on present regulation, tries to synthesize the role and the duties of the RNB in the insolvency procedure of the banking credit institutions.

Paper content

Chapter 1: General Issues. History

Starting with the second half of the 19th century, the specialty literature[1] discussed the development of the Romanian economy on modern bases. The dynamics of the economy strongly

* Assistant Lecturer, PhD candidate, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: raryseb@gmail.com). The study is elaborated within the frame of the project "CERDOCT – PhD scholarships to support doctoral research in technical and human areas, in environmental health, in national, European and global legislation with eco-economic and socio-economic impact", ID 79073, under the observance of Professor St. D. Carpenaru and Conf. Vasile Nemes.

encouraged credit organization which was weakly developed until then. In this period there was a group of money lenders within which there were five categories: the banks, the bankers, the exchange agencies, the lenders and the money changers. Their activity had a hard time developing because of the lack of adequate instruments and of modern regulations in the field.

To eliminate these flaws and to stop the financial chaos of that time, on April 10th 1867 a law was adopted on "the incorporation of a new national financial system and the manufacture of the national currency" by means of which the financial system of the Latin Financial Union was introduced, on grounds of the gold and silver bimetallism that promulgated national sovereignty on the currency. Yet, the war of 1877 hindered the enforcement of this law provisions, the government being obliged to issue mortgage notes for supplying for the lack of cash and treasury bills[2].

Another essential issue of the development of the financial system of that period consisted in the creation of an issue institute. The idea of creating an issue institute was formulated ever since 1832 and resumed in 1848. In 1857 this idea was put into practice by the incorporation of the National Bank of Moldavia with the assistance of lord Al. I. Cuza. Later, in 1860, I. Brătianu submitted for the first time to the Parliament a bill to this end. All these trials were unsuccessful in that period because of the opponents to such an idea.

In February 1880, the govern presided by I. Brătianu submitted to the Parliament a bill for the incorporation of a discount, circulation and issue bank, referred to as "The National Bank of Romania", law promulgated on April 17th 1880. Among the main causes that determined the incorporation of the National Bank of Romania, we mention:

-the need, for new creating class – the bourgeoisie, to procure "cheap money" to be able to develop;

-the needs of the state that had to resort to foreign capital, in the absence of a national bank to support in difficult periods and which might act as intermediary between the foreign capital and the internal market;

-the need to put into practice the financial reform that the war interrupted and created further difficulties by issuing mortgage notes that the further issue authority had to withdraw;

-the demands in the agricultural field that suffered great losses because of the lack of a discount and issue authority;

-the need to state the economic independence, by creating a national institute of issuance, imposed by the conquest of politic independence after the Independence War of 1877.

Second Chapter: The Status of the National Bank of Romania

The National Bank of Romania is governed by a special regulation, Law no. 312/2004 on the status of the National Bank of Romania and benefits from well featured legal status and identity, which firmly distinguishes it from the credit institutions. According to Law no. 312/2004, art. 1 paragraph 1, the National Bank of Romania is the central bank of Romania and it is a legal entity. Its structure comprises a main head office in Bucharest and it may have branches and agencies in the capital city as well as in other cities in the country. The main objective of the National Bank of Romania consists of the insurance and the maintenance of the prices, and finally of financial stability[3].

---

[1] D.D. Saguna, C.F. Donoaica, *Banking and Financial Law,* Prodarcadia Publishing House, Bucharest, 1994, p.37-42.

[2] I. Bostan, M. Avram, O. Filimon, *Financial and Banking Law,* Universitaria Publishing House, Craiova, 2010, p. 182.

[3] R. Postolache, *Banking Law,* Cartea Universitară Publishing House, Bucharest, 2006, p.28.

The National Bank of Romania is a public law legal entity, an independent public institution; in accomplishing its tasks and attributions, the National Bank of Romania and the members of the management do not request nor receive instructions from the public institutions or other institutions or authority. The National Bank of Romania is a state capital institution, its patrimony belonging to the public field of state property.

According to the economic doctrine[4], the independence of the central bank is approached from two points of view:

-relative independence, taking into account that its activity is subordinated to the executive authority;

-absolute independence, the central bank being coordinated by the legislature, but the financial policy is accomplished within the state macroeconomic wide frame.

It is considered that[5] a bank is independent if its main objective is to ensure the stability of the prices, benefiting from the full discretion in using the specific instruments for reaching this goal, if needed even against the will of the executive authority. Even if regulated, the law includes issues that might lead to the conclusion of partial autonomy:

- Shared capital entirely belonging to the state;
- Its members are appointed by the Parliament;
- Obligation of the National Romanian Bank governor to present a yearly report to the Parliament concerning the financial statements and the credit situation;
- Profit distribution
- The position of the National Bank of Romania as an agent on the account of the state and the circumstances it acts on the behalf of the state, according to the law;
- The National Bank of Romania supports the general economic policy of the State without prejudicing its fundamental goal concerning the insurance and the maintenance of prices stability" (art. 2 paragraph 3) and consequently, the natural question – how can an entity (the National Bank of Romania) support the general economic policy of the state without affecting its independence ?

The independence does not exclude the collaboration or the cooperation, regulated by art. 3 and 4 of the Law.

The main duties of the National Bank of Romania are:

a) drafting and applying the financial policies and the exchange rate policy;

b) authorization, regulation and prudential supervision of the credit institutions, promotion and monitoring the smooth operation of the payment systems to ensure financial stability;

c) issuing bank notes and coins as legal payment means in Romania;

d) establishing the financial regime and monitoring its observance;

e) administration of the international reserves of Romania.

The National Bank of Romania supports the general economic policy of the state, without prejudicing the fulfillment of the fundamental goal concerning the insurance and the maintenance of the prices stability.

As I previously mentioned, in fulfilling its attributions the National Bank of Romania and the members of the management body will not demand nor receive instructions from the public authorities or from another institution or authority. Any bill of the central public authorities on the fields the National Bank of Romania has attributions in shall be adopted after previously requesting the opinion of the National Bank of Romania. The opinion shall be provided within maximum 30 days from the request.

---

[4] I. Costică, S.A. Lăzărescu, *Banking Policies and Techniques*, *ASE Publishing House, Bucharest 2004, p.15,* quoted by R. Postolache*, quotted work,* p.29.

[5] A. Cukierman, *Measuring the Independence of Banks and Its Effects on Policy Outcomes,* World Bank Economic Review (sept.1992), quotted by R. Postolache, quotted work., p.29.

For its own needs, the National Bank of Romania drafts studies and analyses on the currency, the exchange rate, the credit and the payment systems' operations and the credit institutions.

To observe the undertaken obligations arising out of the agreements, treaties, conventions Romania is part of the National Bank of Romania collaborates with the authority in the country and abroad, by providing information, adopting adequate measures or in any other way compatible to the law.

The National Bank of Romania plays a major role in the bankruptcy proceedings of credit institutions, as I shall further present.

Third Chapter: The Role of the National Bank of Romania in the Bankruptcy Procedure of the Bank Credit Institutions

According to the provisions of art. 3 of the Government Order no. 10/2004, the authorities enforcing the bankruptcy procedure to the credit institutions are:

•the law courts

•the bankruptcy judge and

•the liquidator

Even if the Government Order no. 10/2004 does not include the National Bank of Romania among the participants in the bankruptcy procedure of the credit institutions, the National Bank of Romania has various attributions and roles in the bankruptcy procedure of the bank credit institutions, namely:

- May determine the opening of the bankruptcy procedure, by withdrawing the operating license of the credit institutions;
- May have an active procedural role in the bankruptcy procedure, being able to file the proceedings' opening petition, or, as a creditor, being entitled to take part in the distribution of the amounts obtained from the winding up;
- May play an active role and may have duties within the procedure by:
  - Appointing or revoking an intermarry administrator;
  - Approving the offers of assets purchase;
  - transfer of the available funds of the bankrupt credit institution in the accounts opened by the liquidator;
- may be summoned within the bankruptcy procedure;
- might issue different opinions within the procedure;
- information attributions

1. The National Bank of Romania is entitled to withdraw the operating license of the credit institution, according to the legal provisions, as a consequence of the impossibility of financial adjustment of a credit institution, whose consequence is the determined insolvency of the credit institution (art. 2 letter h).

2.a. The law (lato sensu) acknowledges the active procedural quality of the National Bank of Romania, as:

a) this may file the petition of opening the bankruptcy procedure of a credit institution. Thus, according to art.11, *The Bankruptcy Procedure starts on the grounds of a petition filed by the debtor credit institutions or by their Creditors or by the National Bank of Romania and according to* art. 14, paragraphs 1 and 2, *the National Bank of Romania, as banking supervision authority, will file a petition for opening the bankruptcy procedure against the credit institutions in one of the cases provided in art. 2 paragraph (1) letter h). The petition of the National Bank of Romania will be accompanied by the Decision of the Board of Directors of the National Romanian Bank of Romania*

to withdraw the operating license of that particular credit institution and by any other necessary actions to justify the deed the Court was informed by.

b) might notify the bankruptcy judge, according to art. 41 of the Government Order no.10/2004, so that this one orders that a part of the liabilities of the insolvent credit institution is borne by the members of the Board of Directors, censors, financial auditors, execution personnel and/or having control duties, who held those particular positions 3 years before the opening the procedure, provided that they contributed to the insolvency by one of the facts mentioned in art.39.

2.b. The National Bank of Romania may have the quality of creditor within the procedure and may take part in the distribution of the funds obtained from the winding up. Thus, according to art. 38 of the Government Order 10/2004:

In case of bankruptcy, the receivables shall be paid in lei, as it follows:

1. the taxes, stamp duties and any other expenses afferent to the bankruptcy procedure, including the necessary expenses for preserving and administrating the assets of the debtor credit institution patrimony and also the payment of the employed persons remuneration according to the law, including the liquidator.

2. the receivables resulted from the guaranteed deposits, including those of the Bank Deposit Guarantee Fund resulted from the payment of the indemnities to the guaranteed depositors and/or the financing, including by the issuance of securities, of certain operations that involved the transfer of guaranteed deposits of the debtor credit institution, as well as of the receivables arisen out of the employment relationships maximum 6 months prior to the procedure opening;

3. the receivables resulting from the activity of the debtor after the opening of the procedure;

4. budget receivables, receivables of the Bank Deposit Guarantee Fund, others than those at point 2, and also the receivables of the National Bank of Romania resulting of the credits granted by it to the credit institution ;

5. the receivables resulting from the treasury operations, inter-banking operations, clients operations, securities operations and other banking operations, and those resulted from products delivery, services or other works execution, rents and other chirographer debts etc.

3.a The National Bank of Romania appoints (and revokes, if applicable) an intermarry administrator – natural personal or legal entity to take conservatory measures to prevent the diminishing of the assets and the increase of the liabilities of the credit institution, from the moment of filing a petition to open the bankruptcy procedure until the appointment of the liquidator. Thus, according to art. 15 of the Government's Decision 10/2004:

(1) *After registering the petition filed according to art. 12, 13 and 14, the bankruptcy judge shall immediately notify it to the parties mentioned in these articles.*

(2) The National Bank of Romania shall appoint an intermarry administrator and shall establish his/her remuneration when submitting its demand or when receiving the notification mentioned in paragraph (1). If the credit institution is under a special administration procedure, the attributions of the intermarry administrator are exerted by the special administrator, according to the herein Order.

(4) If the credit institution was not under a special administration, the attributions of the Board of Directors of the debtor credit institution are duly suspended when appointing the temporary administrator until the expiry of his/her mandate. The Board of Directors may contest the filed petition, according to art. 13 and 14 also during the suspension.

As a consequence of the principle of the equability of the judicial deeds, the temporary administrator appointed by the National Bank of Romania, may be revoked by the National Bank of Romania.

3.b The National Bank of Romania approves the offers received by the liquidator from other credit institutions considered eligible by the National Bank of Romania to take part in the transactions for purchasing assets and undertaking liabilities. Thus, according to art. 28 of the Government Order 10/2004, after the bankruptcy judge approved the winding up procedure provided at art. 5 letter n) point1, the liquidator immediately organizes, provided that the approved winding up method stipulates it, the negotiation on the assets purchase and the undertaking of liabilities; this way the liquidator organizes an information session with all the credit institutions considered eligible on grounds of the previous evaluation of the National Bank of Romania that shall take into account the effects of the transaction on the financial statements of the purchaser credit institution and of its ability to observe the prudential requirements, in order to present the conditions and the terms of the negotiation.

As soon as possible the liquidator analyses the received offers and chooses according to the lowest cost principle, with the approval of the National Bank of Romania that shall take into account the criteria provided in art. 28, the offer of the tendering credit institution / institutions with which it is going to conclude the assets purchase and liabilities undertaking convention.

3.c The National Bank of Romania has the role of transferring in the bankrupt credit institution accounts opened by the liquidator all the availabilities of the credit institutions recorded in its registers. Thus, according to the stipulations of art. 5 of the Government's Order no. 10/2004, when the legal decision on the opening of the bankruptcy proceedings is received, it shall openwith a bank, Romanian legal entity or a branch of a foreign bank licensed to operate on the Romanian territory, two accounts, one in lei and another one in foreign currency, mentioning bankrupt credit institution account type, with exclusive right of disposal in the interest of the bankruptcy proceedings. In the bankrupt credit institution type accounts the amounts existing in other accounts of other financial – banking institutions shall be transferred at the order of the liquidator. The liquidator shall immediately inform the National Bank of Romania on the name of the commercial bank and of the accounts opened there and afterwards the National Bank of Romania shall immediately transfer in these accounts the available funds of the credit institution in its records. The operations of the bankrupt credit institution shall be still carried out through these accounts.

4. The National Bank of Romania may be summoned for:

a) the ruling of the last appeal if the National Bank of Romania filed the petition for the opening of the proceedings, it shall be summoned according to the conditions of art. 86 - 94 of the Civil Procedure Code.

Thus, according to art. 4 paragraph 2 of the Government's Order no. 10/2004, *the last appeal shall be ruled within 15 days from the registration of the case at the Court of Appeal. The parties shall be summoned observing the conditions of art. 86 – 94 of the Civil Procedure Code for the Bank Deposit Guarantee Fund and for the liquidator and by advertising in two national newspapers for the other parties. When the National Bank of Romania files for the start of the proceedings, it shall be summoned in terms of art. 86 - 94 of the Civil Procedure Code.*

b) Solution of the challenge drafted by the representative of the shareholders of the debtor credit institution and the creditors' committee against the measures adopted by the liquidator

In this case, according to art. 8 of the Government's Order no. 10/2004, *the bankruptcy judge shall rule the challenge within 10 days from its registration at the Counsel Chamber, summoning the challenger party and the liquidator and, if appropriate, being entitled to suspend the execution of the challenged measure. The bankruptcy judge shall also summon the National Bank of Romania if it filed the statement of claim.*

5. The National Bank of Romania provides a mandatory or an advisory opinion during the proceedings.

a) Mandatory opinion

If the petition of opening the proceedings is filed by the debtor credit institution or by its creditors it must be accompanied by a previous endorsement of NBR to be registered at the Court of Law.

On the grounds of art.12 paragraph.2, *In advance, the debtor credit institution must request the National Bank of Romania, within 10 days from the date the insolvency, a prior approval for filing the petition of bankruptcy proceedings opening.*

According art.13 paragraph 2, *the creditor shall not be entitled to file the petition without proving the prior approval of the National Bank of Romania of filing the petition of bankruptcy proceedings opening. The National Bank of Romania passes a verdict on the creditor's petition within 10 days from its reception making a motivated decision.*

The National Bank of Romania is entitled to reject the petition of the debtor credit institution or of its creditors if it considers that it is not insolvent as per the definition of art. 2 paragraph (1) letter h) point 1 or /and 2. In these circumstances, the National Bank of Romania is entitled to decide the creation of special administration if the legal provisions for the creation of this procedure are complied with. The decision of the National Bank of Romania to approve or reject the petition shall be motivated and it may be challenged in court observing the stipulations of the Emergency Government's Order no. 99/2006, approved with additions and amendments by Law no. 227/2007, with further additions and amendments.

b) Advisory Opinion

The National Bank of Romania must express its point of view whenever requested by the bankruptcy judge or by the liquidator, either by expressing a point of view or providing information whenever it considers appropriate during the proceedings. Thus, according to art. 6 of the Government's Order 10/2004, *in the execution of their attributions, the bankruptcy judge and the liquidator and entitled to request the point of view of the National Bank of Romania, as prudential supervision authority, on any prudential issue. During the bankruptcy proceedings the National Bank of Romania may send its point of view or other information considered relevant to the bankruptcy judge and to the liquidator whenever necessary.*

6. National Bank of Romania has information attributions:

a) of a bank supervision authority from a different country on the opening of the bankruptcy proceedings of the credit institution having branches opened in that country. According to art. 16 paragraph 5 and 6 of the Government's Order 10/2004,

(5) *If the credit institution has branches in other countries, the National Bank of Romania shall immediately inform the bank supervision authorities of the country where the branch is located on the opening of the bankruptcy proceedings according to the stipulations of this order.*

(6) The bankruptcy judge shall inform the National Bank of Romania on the opening of the bankruptcy proceedings of the debtor credit institution the day of its passing by fax, e-mail or phone. The National Bank of Romania shall immediately close, after the settlement of the payments of that day according to the applicable regulations, the accounts of the debtor credit institution opened as per its records. The available funds shall be transferred in the accounts of bankrupt credit institution type opened at a commercial bank according to art. 5.

b) on the bankruptcy proceedings of credit institutions, Romanian legal entities and their branches of other member states. This way, the competent court which is the only authority

authorized to decide the enforcement of bankruptcy proceedings of a credit institution, Romanian legal entity, including its branches of other member states, shall immediately inform by means of the National Bank of Romania the competent authorities of the host member states on the decision to open the bankruptcy proceedings, including on the practical effects such procedure may have.

c) on the bankruptcy proceeding of a credit institution and its Romanian branch when the credit institution has its registered office in a different state than the member state and it has branches opened on the territory of other member states as well

The National Bank of Romania shall immediately inform the competent authorities of the host member states on the reorganization measures or on the decision to open the liquidation proceedings adopted in non member state related to the credit institution and its Romanian branch, when the credit institution has the registered office in a different state than a member state and it has branches opened on the territory of other member states as well.

The notification shall be immediately after the National Bank of Romania withdrew the branch operating license or as soon as it is informed on the adoption of reorganization measures of the branch. The notification shall also mention the fact that the operating license of the Romanian branch was withdrawn.

Fourth Chapter: Conclusions

Following the accession of Romania to the European Union, the National Bank of Romania, focused more on the regulations that cover the quality management of the banks, on the fulfillment of every banking company of some key indicators in banking activity, on the internal control performed in each banking company and less on the individual banking supervision.

Consequently, the National Bank intervenes indirectly in the business of the banking companies, through policies and general regulations, particularly in the monetary field, so the banks have to adapt their activities and capital according to the general regulations stated by the National Bank of Romania.

Therefore, the National Bank of Romania changed the responsibility to the management of the banking companies, so that the banks are obliged to transpose these general regulations in policies and in the internal rules of each banking company.

By means of the role and duties which have been conferred, the National Bank of Romania has the responsibility to ensure stability of the banking circuit, to supervise the credit institutions and to prevent their decline. If this purpose could not be achieved, the only solution is to open bankruptcy of the credit institutions, the Law conferring among others, the capacity to pursue the proceedings.

We consider the solvency and liquidity indicators, calculated by the banking companies according to NBR Regulation no. 1/2005 regarding the payment systems which ensure funds clearing, published in Official Gazette no. 265/2005, republished in 2007, in the Official Gazette no. 596/2007, respectively NBR Regulation no. 24/2009 on the liquidation of credit institutions, published in the Official Gazette nr.891/2009.

Even if at the European level there is a unity approach on the insolvency of the credit institutions, there is no effective cooperation between national authorities in case of financial crises of credit institutions operating cross borders. We believe that a first step to this end would be the creation of responsibility for serious lack of supervision for the national supervision authorities that may endanger the European financial market by their negligence[6].

[6] L. Sorescu, *Insolvenţa bancară în dreptul comerţului internaţional,* Ed. Universul Juridic, Bucureşti 2010, p.288.

References

- Treaties, university courses, monographs.
- D.D. Saguna, C.F. Donoaica, *Banking and Financial Law*, Prodarcadia Publishing House, Bucharest, 1994.
- I. Bostan, M. Avram, O. Filimon, *Financial and Banking Law*, Universitaria Publishing House, Craiova, 2010.
- R. Postolache, *Banking Law*, Cartea Universitară Publishing House, Bucharest, 2006.
- I. Costică, S.A. Lăzărescu, *Banking Policies and Techniques*, ASE Publishing House, Bucharest 2004.
- A. Cukierman, *Measuring the Independence of Banks and Its Effects on Policy Outcomes*, World Bank Economic Review (sept.1992).
- L. Sorescu, *Insolvenţa bancară în dreptul comerţului internaţional*, Ed. Universul Juridic, Bucureşti 2010.

- Legislation
- a) Romanian legislation.
- Law no. 85/2006 on the insolvency procedure.
- Government's Order 10/2004on the bankruptcy of credit institutions.
- b) Foreign legislation.
- The Council Regulation (CE) nr. 1346/2000 on insolvency.

THE PRE-CONTRACT OBLIGATIONS REGARDING THE FRANCHISING AGREEMENT

DAN-ALEXANDRU SITARU[*]

Abstract

The current paper puts into context the Government Ordinance no. 52/1997 regarding franchising with the new concepts of the Civil Code. Thus, under the old Civil Code there were no specific regulations that could be applied to a pre-contractual obligation of the parties. During any negotiation, because the parties sent each other a series of offers, counter offers, and in the end decided whether to agree or not, some parts of a professional secret, know-how, or any other important information for one or both might be revealed to the other. Under international laws, such as the one in France, or by using internationally established unwritten law, such as the Franchising Model Contract by the International Chamber of Commerce and Arbitration in Paris, such a disclosure of important or secret information is protected from future unauthorized usage by any party or affiliate if the contract is not signed. In the view of the new Civil Code, this stage in the development of an agreement, not yet binding, is now regulated and protected.

Keywords: *franchising, franchisor, franchisee, business model, professional secret*

Introduction

The new civil code did not also include to its regulations the franchising agreement. Despite the same includes most of the civil and commercial agreements, the franchising agreement remains specifically regulated by the Govern Ordinance no. 52/1997 regarding the legal treatment of the franchising.

Under the law the franchising is a trading system based on continued collaboration between individuals or legal entities that are financially independent, by which a person named franchisor grants another person named beneficiary the right to operate or to develop a business, a product, a technology, or a service[1].

By encompassing the particularities set by the lawmaker the franchising may be comprehensively defined as the economic and legal operation by which a professional trader, the franchisor, being an individual or a legal entity, who is holding the title over tangible and/or intangible assets and the title over a successful business, allows another person or several persons, the franchisees (beneficiaries), to manufacture goods or trade them under their mark, using the know-how developed by the same, within a franchise network wherein the parties are independent from a legal perspective, but are operating the franchisable concept in a homogenous and collective manner.

As we stated in previous works[2] the conclusion of the franchising agreement involves going through three stages. The first of them, which also represents the subject matter of our study, is the pre-contract stage. The same is followed by the contract or proper stage, and after the expiry of the term set by the parties, or as result of a unilateral termination or of a cessation by fault of the agreement, respectively, for a period of maximum 5 years, the parties are bound by certain specific

---

[*] Lecturer, Ph.D., Faculty of Law, "NicolaeTitulescu" University, Bucharest (dan.alexandru@sitaru.ro)

[1] The Govern Ordinance no. 52/1997 regarding the legal treatment of the franchising, published with the Official Journal of Romania (*"MonitorulOficial al României"*), part I, no. 224 of the 30/08/1997, approved as modified by the Law no. 79/1998 (O.J. part I no. 147 of the 13/04/1998) and republished, with the texts being given a new numbering, with the Official Journal, part I, no. 180 of the 14/05/1998.

[2] Dan-Alexandru Sitaru, *Contractul de franciză în dreptul intern şi comparat* (The Franchising Agreement within the Domestic and Compared Law), Ed. Lumina Lex, 2007, Bucharest.

obligations such as the non-competition one. Such period subsequent to the cessation of the effects of the agreement is the post-contract stage.

Contents

1. The contents of the pre-contract stage

Based on the franchisor's right to choose and select their beneficiaries, they need to first conduct a market survey, choose the franchising method and form they shall apply within the new territory, check the competence and the professionalism of the potential future partners, all in accordance with the already existing franchising network, or in order to create a new one. For such issues to be possible to apply the franchisor needs to know the economic, social, and legal situation within the contemplated geographical area according to their requirements and with their economic interest. However, quite often, the franchisor would approach a beneficiary precisely in order to be able to enter a market where, on their own and directly, they could not have access.

Broadly, the pre-contract period consists of determining such elements, which are of essence for developing a franchising network[3], and which confer the importance and the necessity for such period. Such period is one of high legal importance as regards the rights and the obligations of the parties, being the stage of essence the future franchising agreement shall be built upon. This is the period when the information exchange occurs that shall, on one hand, allow the franchisor choose the best partner to entrust with the secret of the franchisable concept, and on the other hand allow the potential beneficiary (we shall call them so as they only gain the legal status of a beneficiary at the time the agreement is signed) check the reliability, the profitability, and the accuracy of the franchise network they are going to join, assess whether they could materially and professionally meet the requirements imposed by the franchisor, etc.

Summarising, both parties need to examine the convenience of the business they wish to conclude, and following the negotiations become convinced that they are making a choice being fully aware, i.e. to lawfully form their consent[4].

2. The obligation to inform

The key element during this phase is the one of the mutual obligation to inform. It arises from the article 2 paragraph 1 in the G.O. no. 52/1997, wherein it is stated that the purpose of the pre-contract phase is to allow the parties to form a decision to collaborate. It is common for all the franchise types and methods set out, being an obligation with a general nature. We shall discuss such obligation, and we shall examine its legal nature, its contents, and its penalty, each in its turn.

2.1. The legal nature of the obligation

The New Civil Code sets within the article 1,183 paragraph 1 that the parties have the freedom to initiate, carry on, and break the negotiations, and they may not be held liable for the failure of the same. Therefore, any legal act is preceded by a negotiation wherein the elements of the offer are debated and may be agreed upon or not by the parties involved. A significant part of such

[3] For the definition of the franchising network please refer to Stanciu. D. Cărpenaru, *Tratat de drept comercial român* (Romanian Commercial Law Treaty), Ed. Universul Juridic, 2012, p. 584; Liviu Stănciulescu, VasileNemeş, *Dreptul contractelor civile şi comerciale în reglementarea noului Cod Civil* (The Civil and Commercial Contract Law as Regulated by the New Civil Code), Ed. Hamangiu, 2013, p. 593.

[4] Article 1,182 in the Civil Code, paragraph (1) The agreement is concluded by negotiation between the parties, or by the acceptance without reservations of an offer to contract. Paragraph (2) It is sufficient for the parties to agree upon the elements of essence of the agreement even though certain secondary elements are left to be agreed upon subsequently, or the determining of the same is entrusted to another person.

negotiation is represented by the mutual informing the parties are carrying on as regards their person, the object of the future act, and the incumbent rights and obligations, respectively.

The article 2 paragraph 2 and 3 in the G.O. no. 52/1997 sets the legal nature and the contents of the prior informing obligation that is especially incumbent on the franchisor. Unlike the Deontological Code of the French Franchise Federation, which was the inspiration source for the Romanian lawmaker, such article in the Romanian law did not also take over a final paragraph in the Code that expressly provided for that the list and the listing included by the paragraph 3 are not exhaustive. This is where the first issue arises from when determining the legal nature of the obligation to inform, namely to answer the question whether within the Romanian law such list is provided for in a limiting manner, or in a merely illustrative one.

In partial accordance with the doctrine, but in our opinion closer to the spirit of the law, the listing provided by the lawmaker, although expressly provided for, is however not limitative. Thus, it is consistent with the spirit of the law that certain clauses should be express, due to their importance, but we are not yet on the contract ground, but at the level of negotiations of nature to form the future contract consent. It is not an accident that the Romanian lawmaker chose to regulate such agreement as a mixed agreement, with clauses imposed by the law, but also with provisions expressly left at the discretion of the parties. In the case of the listing we are referring to, the lawmaker, being aware of the fact that within the Romanian law the mere obligation to inform may lead to penalties, has expressly regulated the contents of the obligation, but nothing prevents the parties from also debating and mutually communicating a series of other information. It is tempting to say that the law would be limitative in order to protect the franchisor, but this is not the case as they are expected to show a conduct that is specific for any professional trader, who should be able to cope with the competition, and adapt to the issues and the speed of the market activities.

An issue that arises when the laws in force are looked at appears to be the border, or the limit the obligation to inform should have.

To set a limit within the negotiations between the parties would be a serious interference by the lawmaker, which would be completely unjustified. It is also impossible for the lawmaker to quantify which information is, or is not, relevant and fundamental for the forming of the will of one of the parties. It is the duty of the franchisor, who is required to be an experienced trader, to best choose which partner they shall collaborate with, and as regards the beneficiary the same enjoys a series of legal provisions protecting them should they be a novice. Between the parties should exist, from the very beginning, within the spirit of the franchising agreement, a collaboration based on trust and good faith. Let us not forget that the future agreement shall have as a fundamental feature the fact it is concluded *intuit personae*, wherefrom arises the idea that both parties should act accordingly.

Another argument may also be brought for the idea that the list provided for by the law is not a limiting one, by construing it systematically. Thus, at the level of the whole law the obligations of the parties are the only ones provided for in a limiting manner, which is justified, while the other notions are defined with the mere purpose of clarifying a conceptual issue. The same is the case here, where the list within the paragraph 3 represents a clarification and at the same time a minimum of information that needs to be communicated by the franchisor, all for the purpose of protecting the beneficiary. Such fact however does not reduce the exigency of the fact that the failure to inform according to the paragraph 3 may entail penalties.

The paradox arising from such situation however devolves from the practice. On the theoretical level the things are clear, but when the two planes meet the following dilemma arises: how important is such information for the franchisor and whether the same are not subjecting themselves to a risk this way. Should they communicate more than the law provides for, they could transfer part of the secret of the franchisable concept. Let us assume that the beneficiary is acting in bad faith, and aims to fraud their good faith partner.

A limit may be set however, which is stated by the doctrine, which shows that the secrecy of the business, and the nature and the contents of the know-how, respectively, are limits for the extent of the obligation to inform. A certain "proportionality" of what is disclosed should be maintained in order to keep the secrecy of the fundamental elements.

While under the old legislation no legislative consecration existed as regards the good faith the parties are bound to show when negotiating an agreement, within the New Civil Code is regulated, for the first time, as a general rule, the requirement of good faith for the negotiations. Thus, according to the article 1,183 paragraph 2, the party entering a negotiation is bound to observe the good faith requirements. From this arises the legal obligation to negotiate upon the offer, the counteroffer, the refusal, or the possible acceptance, with firmness, seriousness, and within the spirit of the diligence of a good professional.

It is within the same law text, within the second thesis, that it is stated that the parties may not agree upon limiting or excluding such obligation. Therefore, the parties are free to conclude any additional agreement that would guarantee, for example, the confidentiality of the negotiations, namely to protect them from the situation described above when one party, as a rule the beneficiary, may only have the intention to obtain information, and not to conclude an agreement. They shall however never be able to derogate, by an express or tacit clause, from the requirement of good faith in conducting the discussions.

Within the paragraph 3 of the same article in the Civil Code the lawmaker states, generally, which the main deed or situation that would lead to a breaching of the obligation to observe the good faith negotiations is. Thus, it is against the good faith requirements, among other things, the conduct of the party that initiates or continues negotiations without the intention to conclude the agreement.

We feel that this law text comes to complete the previous paragraphs and perfectly fits the situation the old Civil Code was not covering. It was acknowledged the importance of the pre-contract phase, of the existence of the risk that by negotiations essential information may be disclosed without a possibility to hold liable the person taking advantage in bad faith by attending the negotiations without any intention to conclude the agreement.

It is also the New Civil Code that regulates, in order to avoid the situation previously described, the interdiction to disclose the confidential elements a person may become aware of during the negotiations. The obligation of confidentiality within the pre-contract negotiations is included to the article 1,184, which states that when information is communicated by a party during the negotiations the other party is bound not to disclose the same, and not to use the same for their own interest, notwithstanding that the agreement is concluded or not. The breaching of such obligation entails the liability of the party at fault.

Several important points result from this[5]. In the first place, the law does not require the parties to conclude a special agreement for the purpose of protecting the confidentiality of the information disclosed on the occasion of the negotiations. This, however, does not prevent the parties to, by their express will, conclude such an agreement. The Civil Code only covers the situation where no such agreement was concluded, by expressly stating that a confidentiality clause is presumed between the parties irrespective of their expressed will.

In the second place, for such presumption to operate the opposed party should be notified about the confidential nature of the information they received. We feel that in absence of such a notice the parties may apply the good faith principle, but the concerned party may not invoke, and may not impose the other party to be aware of the confidential nature. Even in the case of the franchising agreement, where arguments could be brought that both parties should have already been

[5] Please also refer to the comments on the article no. 1184 in the work: Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod Civil - Comentariu pe articole* (The New Civil Code – Comments by Articles), Ed. CH Beck, 2012.

aware that what involves the franchisable concept is confidential, we feel the presumption of confidentiality may not be held in absence of a clear, specific, and prior notice.

Finally, the New Civil Code specially regulates the situation where one party considers a certain element to be of essence for the conclusion of the agreement. Such element of essence may lead to refusing to reach a valid agreement. Thus, according to the article 1,185, when during the negotiations one party insists that an agreement is reached upon a certain element, or upon a certain form, the agreement shall not be concluded until an agreement upon the same is reached.

The law text perfectly applies as regards the franchising agreement. Often the elements of the franchisable concept are not negotiable, the franchise network is strictly controlled and regulated by the franchisor, and any transgression may entail the exclusion from the same and interest damages. This is precisely why the lawmaker allows from the very beginning that the elements of the future agreement on which in the opinion of one of the parties the formation of the same essentially depends should be clearly delimited, and in the event of one of the same being refused the continuation of the negotiations may become pointless.

The second issue regarding the legal nature of the obligation to inform is to determine whether it is an obligation of means (of caution and diligence) or one of result[6]. Following the majority line of the doctrine we state that this is an obligation of means, with all the consequences arising from this fact.

In keeping with the spirit of the law and of the future agreement, we state that the obligation to inform should go two ways, namely both from the franchisor towards the beneficiary, and, to a smaller extent, from the beneficiary towards the franchisor. Doubtlessly, the main obligation is on the side of the franchisor, and it consists of the provision of concrete data regarding the financial conditions, the exclusivity clauses, the term of the agreement, the termination, the renewal, etc. This however does not mean that the franchisor should make the future beneficiary also understand the information. They are bound to use all diligence for those listed by the law to reach the beneficiary in a clear and correct manner, but not also explained or detailed.

It may be construed that such a detailing or attempt to explain would lead to exceeding the protection limit of the secrecy of the franchisable concept mentioned above, meaning that it would be an exaggeration to construe the article 2 paragraph 3 in the Ordinance to the effect that the franchisor should guarantee the result, i.e. the debtor should understand the information. The information should be intelligible and concrete, and only an emphasis may be accepted for the purpose of drawing attention on certain major elements such as the duties, the volumes of goods to be sold, etc. On the other hand, a passive attitude from the beneficiary of the obligation to inform may not be excused later, as they also have the obligation to choose who they can and wish to enter a legal relation with.

By reference to the requirements the offer to contract imposes under the Civil Code, namely to be specific and complete, we feel that the same are not breached. The legal nature of the offer to join a franchise network is limited to stating the general elements of the franchisable concept, and not to actually teaching the concrete elements to the beneficiary. Such stage shall be completed in order to observe the franchisor's obligation to provide technical support and information after the contract was signed, therefore during the contract stage.

As regards the term the obligation to inform should be fulfilled within, unlike the French legislation that requires a document to include all the information to be prepared and submitted within 20 days after the agreement was signed, the Romanian law does not set a specific term. The mere submission of the contract offer to be read does not work instead of the obligation to inform, notwithstanding that the same may include or not the list provided for by the G.O. no. 52/1997 unless the submission manner is specific and complete.

[6] Article 1,481 in the Civil Code (1) In the case of the obligation of result the debtor is liable to procure for the creditor the promised result. (2) In the case of the obligations of means, the debtor is liable to use all the required means in order to achieve the promised result.

As regards the time the informing should take we feel that the same should be sufficient for the beneficiary to form their consent, being fully aware, as regards the conclusion of, and then the performance under the agreement.

2.2. The contents of the obligation

The contents of the information is expressly provided for within the paragraphs 2 and 3 of the article 2 in the G.O. no. 52/1997. Thus, the paragraph 2 provides for that the franchisor shall provide the future beneficiary with information to enable the same to participate, being fully aware, in the performance under the franchising agreement. Doubtlessly, the text once again shows the care of the lawmaker for the protection of the beneficiary. However, we feel that the same article may also be applied in order to protect the franchisor within the hypothesis that the same would have every interest to have the beneficiary join their network.

Concretely, the article 2 paragraph 2 sets the general requirement for the franchisor to provide all the information required for the formation of the future beneficiary's consent.

The article 2 paragraph 3 lists the categories of information the franchisor may discuss with the beneficiary[7]. We feel that the same, within the context of the old Civil Code, appeared to be the only information required and possible to be provided. The listing however is not limitative. Within the context of the New Civil Code, along with the regulation of the obligation of good faith during the negotiations, such listed elements are an orientation for the parties within the negotiations.

2.3. The penalty for breaching the obligation

As any legal obligation, the obligation to inform also needs to have a penalty attached.

The first issue we need to determine consists of determining whether the breaching of the obligation to inform may entail the civil contract liability, or the tort liability.

The agreement represents the manifestation of will arising from the offer to contract meeting the acceptance of the same. Or, in our case, since we are within the pre-contract period, it may not be stated that a legal act was validly concluded. The pre-contract stage represents a negotiation in order to conclude a franchising agreement. This is equivalent within the Romanian law with the franchisor submitting an offer to contract and the negotiations with the potential beneficiary in order to have the same enter the franchise network. As a conclusion we identify as applicable, in the event of breaching the obligation to inform, the civil tort liability.

The civil tort liability is regulated by the New Civil Code within the article 1,349. From the contents of the same also arise the elements of such form of liability. The illicit deed may consist either of entering a negotiation without observing the good faith requirements[8], or of providing inaccurate or false information. The damage is the result of the wrong fulfilment, or of the failure to fulfil the obligation to inform, and of the initiation or continuation of the negotiations without the intention to conclude the agreement, respectively, and needs to be proven. The damage should be the

---

[7] The article 2 paragraph 3 provides for that: The franchisor undertakes to provide the beneficiary with information regarding:

- their acquired and transferable experience;
- the financial conditions of the agreement, namely the initial royalty or the network entry fee, the periodical royalties, the advertising royalties, the determining of the tariffs regarding the provision of services and of the tariffs regarding the products, the services and the technologies, in the case of the contract obligations to purchase;
- the elements enabling the beneficiary to calculate the forecasted result and to prepare their financial plan;
- the goals and the area of the granted exclusivity;
- the term of the agreement, the renewal, termination, assignment conditions.

For a detailed analysis please refer to Mihaela Mocanu, *Contractul de franciză* (The Franchising Agreement), Editura C.H. Beck, Bucharest, 2008; D.A. Sitaru, *the quoted work*, p. 47 and the following.

[8] Please also refer to the article 14 in the Civil Code, which provides for that: Any individual or legal entity should exercise their rights and fulfil their civil obligations in good faith in accordance with the public order and the good morals.

direct result of the illicit deed, and the absence of a causality relation between the two elements may lead to the inexistence of the tort liability. Not in the last place, the fault also needs to be proven.

The New Civil Code, within the article 1,183 paragraph 4, brings to attention a special case. In the case where the party that initiates, continues, or breaks the negotiations against the good faith, as we examined above, shall be liable for the damage caused to the other party.

In such case it is about the party that either attends the negotiations without the intention to become legally bound but possibly with an illicit purpose, namely it is about that unlawfully breaks the negotiations. Such a person might be the one that took a legal commitment towards another person and continues the negotiations being aware that they could not reach the conclusion of a new act since they would then be breaching their first commitment.

In such special case, in order to determine such damage shall be taken into account the expenses engaged in order to conduct the negotiations, the renouncing of the other party on other offers, and other such circumstances.

It is very possible for the franchisor to make a series of expenses in order to be able to concretely negotiate with a potential beneficiary, these including for example the transport expenses, those generated by the ceremonial, etc. The lawmaker's solution to allow the party that was harmed as result of the conduct exercised in bad faith by the other party to claim damages is equitable. The most serious case is when one party, being in good faith convinced by the immoral and illicit conduct of the other party, renounces on one or several other offers regarding the same object the same agreement. We feel that it is imperative that, as regards the renouncing on other offers made by third parties, as the law text states, the same should regard the same issue brought to negotiation, and the party acting in good faith should have renounced on them because they felt, or had all the elements to feel that they had reached an agreement with the other party, which would have initiated, or would be continuing the negotiations without the intention to conclude the agreement.

3. Conclusions

The pre-contract stage has taken shape in view of the legislation, but not sufficiently. The lawmaker has covered part of the previous gaps, but for similarity with the international legislations a stricter determining of the concept, and of the applicable penalty especially, would have been required.

We are seeing this stage more and more often on various agreement categories, such as the exclusive distribution agreement, the agency agreement, etc., but within any of them it does not have such an important weight as within the franchising agreement. It represents the birth of the agreement, the time the basis for a long-term collaboration is set, since as it is already known the franchising agreement is concluded for at least the period required for the beneficiary to cover their expenses.

References

- Stanciu. D. Cărpenaru, *Tratat de drept comercial român* (Romanian Commercial Law Treaty), Ed. Universul Juridic, 2012, p. 584.
- Liviu Stănciulescu, VasileNemeş, *Dreptul contractelor civile şi comerciale în reglementarea noului Cod Civil* (The Civil and Commercial Contract Law as Regulated by the New Civil Code), Ed. Hamangiu, 2013, p. 593.
- Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod Civil - Comentariu pe articole* (The New Civil Code – Comments by Articles), Ed. CH Beck, 2012.
- Mihaela Mocanu, *Contractul de franciză* (The Franchising Agreement), Editura C.H. Beck, Bucharest, 2008; D.A. Sitaru, *the quoted work*, p. 47 and the following.
- Dan-Alexandru Sitaru, *Contractul de franciză în dreptul intern şi comparat* (The Franchising Agreement within the Domestic and Compared Law), Ed. Lumina Lex, 2007, Bucharest.
- The Govern Ordinance no. 52/1997.

HARMONISATION OF EUROPEAN CONTRACT LAW: SLOWLY BUT SURELY?

GEMA TOMÁS*

Abstract

This paper deals with the harmonisation of European Contract Law from a gradual point of view. The main objective is to show the different academic and official steps carried out in this field. The so called Commission on European Contract Law under the leadership of Professor Ole Lando was the starting point in 1982. Some international research teams set up by European scholars and lawyers have been devoted to this aim for two decades. Time and effort have been made in the academic level to get a serious advance on bringing closer contractual national rules. This bottom-up approach met a stronger support in the last years although the European Parliament had "requested" the creation of a European Civil Code already in 1989. The momentous time comes in 2010 with a Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses. This Green Paper opened a public consultation period in 2011 and afterwards an expert group was appointed to draft a feasibility study for a future Instrument in European Contract Law. After all, a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law was adopted in October 2011 arising not few doubts, worries and misgivings from different points of view. This will be not the last step in this process.

***Keywords**: Harmonisation, European Contract Law, Private Law, Common Sales Law, Consumer Acquis.*

Introduction

In the next pages we will try to give an overall impression of the harmonisation of European Contract Law from a gradual perspective from the beginning to the current proposal for a Common of European Sales Law. Academic works and European official rules have paved the way for more than two decades since the well-known Principles of European Contract Law were published. These Principles were drafted by an international research team under the leadership of Professor Ole Lando. It started in 1982 and later on some international research teams set up by European scholars and lawyers have devoted time and effort to this aim in several projects. We will track these academic works interrelated with the European Commission initiatives. The paper deals with the most relevant academic literature on these initiatives.

This issue is relevant now, more than ever, because it is drawing the attention of every European Private Law jurist since a Green Paper from the European Commission on policy options for progress towards a European Contract Law was published in 2010. A public consultation period was launched for a short period of time. In a few months European Commission decided to appoint an expert group to draft a feasibility study for a future Instrument in European Contract Law and soon we all could read a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law in the European Official Journal (October 2011). It is the first time we are before an initiative of this kind: a set of European Common rules on sales law (including related services such as instalment or repair, and digital content supply). As a Regulation the Proposal is considered a relevant step forward in this field. This Proposal offers a single set of rules for cross-border contracts in all 27 EU countries. CESL will work as a second national legal system in all European countries, not as the 28th regime and Member States could be able to extend it for domestic contracts.

This Proposal is currently under debate. The voting during the Justice and Home Affairs Council meeting held in 7-8th June 2012 was the starting shot and it is still on-going. Eleven

* Associate Professor, PhD, Faculty of Law, University of Deusto (Bilbao, Spain); (gema.tomas@deusto.es).

Member States were for and 10 against in that meeting. This implies that Member States look at the Proposal as a controversial issue. Great divergences among the European traditions may complicate its success. Even more, the optional instrument itself arises so many doubts and misgivings that its future is by now uncertain.

1. - First steps in European Contract Law harmonisation

The background of the European Contract Law harmonisation began in the eighties with two important projects. First and most important were the "Principles of European Contract Law" (PECL). The PECL were prepared by the Commission on European Contract Law under the leadership of Professor Ole Lando since 1982. These Principles are divided in three parts and they have been published between 1995 (Part I and II, revision in 1998) and 2002 (Part III in 2002). The harmonisation work in Europe has an important weight of academic work (bottom-up) from the very beginning. This perspective helps to understand the way harmonisation tries to make progress in a multilevel framework, official and no official or academic. On the other hand, the insight of the Contract Law harmonisation from this first approach does not deal with special rules on consumer rights. This will change in the future.

Secondly, and with lower influence, the "Contract Code" drawn up on behalf of the English Law Commission by Professor Harvey McGregor must be mentioned. In this case, it was a personal commitment, not a team work, which was published in 1993 and it has been translated into different language.

In 2001 a Communication on "*European Contract Law"* by the European Commission launched a process of extensive public consultation on the problems arising from differences between Member States' Contract Laws and on potential actions in this field. This moment may be considered as the "official starting point" for European Contract Law harmonisation although the European Parliament had "requested" the creation of a European Civil Code already in 1989.

In the light of the responses the European Commission issued an "*Action Plan*" in 2003 proposing on one hand, to review the *acquis* in the area of Consumer Contract Law, to remove inconsistencies and to fill regulatory gaps. On the other hand, to improve the quality and coherence of European Contract Law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. We can say that this is the moment when both, Consumer Law versus Contract Law harmonisation, take two different tracks:

2. - Consumer *acquis*: review and harmonisation

To start with the consumer acquis review, it was important to make a comparative analysis of the Member States legislation on Consumer Law in order to know how Directives had been implemented in (then) 25 Member States. It was an academic work known as Compendium prepared for the European Commission by an international research group directed by Prof. Schulte-Nölke in co-operation with Dr. Christian Twigg-Flesner and Dr. Martin Ebers (University of Bielefeld, Germany, February 2008)[1]. The scope of the study was not arbitrary. It covered eight of the most important Directives:

- The Doorstep Selling Directive (85/577/EEC);
- The Package Travel Directive (90/314/EEC);
- The Unfair Terms in Consumer Contracts Directive (93/13/EEC);
- The Timeshare Directive (94/47/EC);
- The Distance Selling Directive (97/7/EC);
- The Price Indication Directive (98/6/EC);
- The Injunctions Directive (98/27/EC); and

[1] http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf

• The Consumer Sales Directive (1999/44/EC).

Apart from that, from 2004, another academic group, the "Acquis Group", was created to focus on existing European Community Private Law. Its work has been published under the title Principles of the Existing EC Contract Law (*Acquis Principles*) in three editions already, *Contract I* (2007); *Contract II* (2009) and *Contract III* (2013).

In October of 2008, the European Commission submitted a Proposal for a Directive on Consumer Rights[2], a measure designed to boost the retail internal market focused only on four Directives:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC
- Consumer Sales Directive 99/44/EC
- Unfair Contract Terms Directive 93/13/EEC

The planned Directive merged these four Directives (and only these four, not eight, as it was the original aim) into one single horizontal instrument regulating common aspects (such as the definition of "consumer" and "trader", information duties and rights of withdrawal) in a systematic way. In contrast to the existing Directives, the proposal moved away from the minimum harmonisation approach introducing instead the controversial principle of full harmonisation. It means that Member States could not maintain or adopt provisions diverging from those laid down in the Directive.

But after four years a Directive on Consumer Rights was published in 2011[3] merging in the end only two Directives:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC

Therefore the scope of the proposal had been limited in a huge proportion compared to the original purpose and not maximum harmonisation, except for some aspects, had been implemented. It is not difficult to understand the disappointment.

Perhaps because of this unsatisfactory result and also owing to the effort to increase confidence in the Digital Single Market about consumer protection when acceding and using online services, a kind of "code" of online rights was published in December 2012. The "Code of EU online rights" is one of the 16 initiatives of the Digital Agenda for Europe. This "Code" is not a real Code. It only summarizes the existing digital consumer rights scattered across various European rules in a more clear and understandable way. The complexity of the legal framework makes many online consumers not be aware of them. This is the way to make citizens aware of their rights and principles recognised in EU law when entering into contracts online.

3. - Contract Law harmonisation on "bottom-up effort"

On the other hand, the Communication of October 2004[4] that followed the Action Plan 2003, abovementioned, outlined the plan for the development of a CFR intended to be a "toolbox" for the European Commission when drafting proposals to improve the Contract Law. Once again, an international academic network was created by the Study Group on a European Civil Code (successor of the Lando Commission) and the Research Group on EC Private Law (Acquis Group) in 2004 to carry out a preparatory legal research in view of the adoption of this Common Frame of Reference (CFR)[5]. The research work was the "Draft Common Frame of Reference" (DCFR). It was handed in 2008. The final version was published in 2009 as an outline edition and as a full edition of six volumes containing comments and notes by national reporters. It is an overwhelming work which

[2] Brussels, 8.10.2008. COM (2008) 614 final.
[3] OJ L 304/64, 22.11.2011.
[4] 11.10.2004, COM (2004) 651 final.
[5] The European Commission financed it through a grant under the 6th Framework Programme for Research.

is being translated into some European languages. The DCFR covers principles, definitions and model rules of Civil Law including not only Contract Law but also Tort Law. DCFR contains provisions for both B2B (Business-to-Business) and B2C (Business-to-Consumer) contracts.

The DCFR was built on the several projects previously undertaken at European and international level. Not only PECL but also the UNIDROIT Principles drafted by the International Institute for the Unification of Private Law for international commercial contracts and strongly inspired by Vienna Convention 1980 (CISG), a creation by the United Nations Commission on International Trade Law (UNCITRAL), the almost worldwide standard for commercial contracts of sale. This CISG applies only by default whenever the parties have not chosen another law (opt out). At the moment there is no mechanism (i.e. supranational Court) to ensure their uniform interpretation.

Meanwhile, the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de législation comparée* joined the academic network on European Contract Law in 2005 to work on the elaboration of a "common terminology" and on "guiding principles" as well as to propose a revised version of the PECL (see supra).

Another important project was outlined since 1999 to 2004: the "Code européen des contrats" drafted by the *Accademia dei Giusprivatisti Europei*. It was the Pavia Project directed by Prof. Giuseppe Gandolfi[6]. This Code contains no principles but "only" 173 articles strongly inspired in the Roman and civilian tradition and outlined as a Civil Code. There is no specific regulation for consumers unlike DCFR. It is currently «rot in oblivion».

In addition to all these projects, we should mention the "Common Core of European Private Law"[7]. The first general meeting held in Torino in 1995 and annually over two decades European lawyers and scholars have been working together, and still they are, on different topics related to Contracts, Tort and Property. They try to seek the "common core" of European Private Law. The methodology is inspired by Schlesinger's monumental work on formation of Contract in the seventies based on cases and discussion and it is a very good example of the informal European approach in the harmonisation task.

4. - Green Paper on policy options for progress towards a European Contract Law: A "toolbox" or anything else?

A momentous time comes in 2010. A Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses[8]. This Green Paper opened a public consultation period (from 1 July 2010 to 31 January 2011) on seven options:

Option 1: Publication of the results of the Expert Group to be used by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions, also useful in higher education or professional training as a compendium drawn from the different contract law traditions of the Member States. However, if there is not endorsement at European level, the divergences would not be significantly reduced.

Option 2: An official "toolbox" for the legislator. This could be seen as a "toolbox" for the European Commission when drafting proposals for new legislation or when revising existing measures. Such an instrument would be effective immediately upon adoption by the Commission, without the approval of the Parliament and Council. It could be seen also as an inter-institutional

[6] http://www.accademiagiusprivatistieuropei.it. The original version was French. It is translated also into English, German and Spanish.

[7] For more information: See http://www.common-core.org. The general editors are Ugo Mattei and Manuro Bussani. Rudolf B.Schlesinger as the Late Honorary Editor and Rodolfo Sacco as Honorary Editor.

[8] COM (2010) 348 final.

agreement on a "toolbox" between the Commission, Parliament and Council to make consistent reference to its provisions when drafting and negotiating legislative proposals bearing on European Contract Law.

Nevertheless, a "toolbox" does not provide immediate, tangible internal market benefits since it will not remove divergences in Law and it cannot ensure a convergent application and interpretation of Union contract law by the courts.

Option 3: Commission Recommendation on European Contract Law addressed to the Member States, encouraging them to incorporate the instrument into their national laws. In this case, the disadvantage comes from considering a European Recommendation not having any binding effects on the Member States.

Option 4: Regulation setting up an optional instrument of European Contract Law. The Green paper considered a regulation setting up an optional instrument as "a second regime" in each Member State, thus providing parties with an option between two regimes of domestic contract law. It would insert into the national laws of the Member States as a self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts. It may be applicable in cross-border contracts only (internal market primarily, also useful in international private law), or in both cross-border and domestic contracts. Two important challenges arise from this solution: the rules must be very clear to the average user (consumer, specially) and secondly, it should provide legal certainty.

Option 5: Directive on European Contract Law. This option could harmonise national Contract Law on the basis of minimum common standards. Nevertheless, harmonisation through directives based on minimum harmonisation has not led to uniform implementation so far. The existing consumer *acquis* shows that. Therefore, harmonisation should be pursued through Regulations because directives can help decreasing legal difference among national legislations but this is not enough to get a major degree of European convergence.

Option 6: Regulation establishing a European Contract Law. This option would replace the diversity of national laws with a uniform European set of rules, not upon a choice by the parties, but as a matter of national law and for cross border transactions and domestic contracts. Subsidiarity and proportionality principles may be a problem in order to justify this option because replacing national laws on domestic contracts does not seem at least initially a proportionate measure to deal with the obstacles to trade in the internal market.

Option 7: Regulation establishing a European Civil Code. A Code includes not only Contract Law but also other types of obligations such as tort Law or benevolent intervention. A Civil Code is always a very extensive instrument. Subsidiarity and proportionality principles may be even more serious handicaps than for option 6.

Some of these options were ruled out at the first moment (i.e. European Civil Code). Other policy options, as we have said, were presented as binding or non-binding "toolbox" for European politicians or legislators to be used in the adoption of new rules ensuring a more coherent and better regulation. The final option was done for setting up an optional instrument of European Contract Law (option 4) in 2010. An Expert Group was appointed by the European Commission in April 2010 to draft a Feasibility Study for a future Instrument in European Contract Law (published in May 2011)[9].

5. - The choice for an optional instrument: CESL

Finally, a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) was adopted in October 2011[10]. The Proposal includes an

[9] http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf. A second non-official version was uploaded in the European Commission website in August 2011.

[10] COM (2011) 635 final. 2011/0284 (COD).

Annex (I) of 186 articles focused only on sales, related services (installment, repair) and digital content supply. Not every contract or other civil rules are included. After a voting during the Justice and Home Affairs Council meeting held in 7-8th June 2012[11]) the debate on this Proposal started and it is still on-going. Eleven Member States were for and 10 against in that meeting.

This Proposal offers a single set of rules for cross-border contracts in all 27 EU countries. Member States will be able to extend it for domestic contracts. This may be very convenient otherwise sellers will have to be available in two models of contracts. CESL will work as a second national legal system in all European countries, not as the 28Th regime.

Some worries, doubts and misgivings arise from this optional instrument. For instance,

1. - The *material scope* is very limited.

Many important contracts for consumers like service contracts; leasing and insurance contracts are not included. On the other hand, sales are already regulated in CISG, therefore ¿what need for more rules on sales? However, CESL implies maximum harmonisation and incorporates the regulation of the whole life of the contract and a regulation of contractual damages. We can say that CESL scope is broader than CISG (e.g. defects of consent, period of time and unfair terms control – these three aspects were not regulated in CISG) and it has an added value.

2. - The *personal scope* is for Business-to-Consumer (B2C) and Business-to-Business (B2B) where at least one party is an SMEs (small and medium enterprises)[12].

This is the way to break down trade barriers and to benefit consumers by providing increased choice and a high level of protection. CESL contains a high level of consumer protection, it implies maximum harmonisation usually higher than the consumer national Law of most European countries. Nevertheless, the choice for the Common European Sales Law requires an agreement of the parties to that effect (opt-in, unlike CISG) and the choice in B2C contracts is valid only if the consumer's consent is given by an explicit –written- statement separate from the contract indicating the agreement to conclude a contract. This is strongly criticized because it might complicate the legal environment by adding a parallel system[13]. In addition to that, can consumers choose CESL given that consumer contracts are usually standard term contracts? Consumers will not be able to choose for CESL, only if business gives them that option. Therefore the legal contract system will be likely be chosen by the trader (*take it or leave it*). And at last and non least, to think that consumers are able to choose between two legal systems is not real.

3. - The consistency with Rome I Regulation provisions (Art.6)[14]:

The Rome I Regulation will continue to apply and will be unaffected by the CESL. Under the conditions of Article 6(1) of the Rome I Regulation: If the parties in B2C transactions do not choose the applicable law, that law is the one of the habitual residence of the consumer under the normal operation of the Rome I Regulation. However, if the parties choose the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6 (1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his or her habitual residence according Article 6 (2). Therefore where the mandatory consumer protection provisions of the consumer´s Law provide a higher level of protection, these rules need to be respected. As a result, traders will need to find out in advance whether the law of the Member State of the consumer's habitual residence provides or not a higher level of protection and ensure that their contract is in compliance with all requirements. If the parties choose CESL within the

[11] http://europa.eu/rapid/press-release_PRES-12-241_en.htm.

[12] Maximum 250 persons or annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

[13] If the contract is concluded by phone, consumers will not be obliged. The contract will not be binding.

[14] Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

applicable national law, this will be by definition the same in every Member State and only in very few occasions CESL consumer rules give not so high level of protection than the national rules.

In consequence, Member States should agree the level of protection really wanted for their national consumers and how to ensure the same (and high, of course) level of protection. A high level of consumer protection considering his/her position as the weaker party does not mean the same at the moment for all Member States.

4. - Language

Not a minor problem is the language because legal terminology is rooted in every national legal tradition. This may be a very important handicap to Private Law harmonisation. A major effort will be done in the next future on this issue.

5. - The legal basis

Legal basis is also controversial on the provisions of the TFEU such as Article 114.

Conclusion

It is plain to see that European Commission tries to meet its economic goals and recover from the economic crisis[15]. A European Contract Law instrument can help the Single market of more than twenty million companies open to five hundred million consumers. The abovementioned projects and combined efforts have paved slowly the way.

A strategy for making easier and less costly for businesses and consumers to conclude contracts may work with European model contract rules and clauses such as the abovementioned CESL. However, many doubts arise from this proposal and it must be said without any doubt that European Contract Law harmonisation is after three decades a work still in progress but more attractive than ever. The future optional instrument is a step forward towards a future unification of European Contract Law but for sure not the last one. Its future is uncertain and we will see which will be the next stage.

References

- Acquis group (Research Group on the Existing EC Private Law), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I (2004), Contract II (2009), Contract III (2013)* (Munchen: Sellier European Law Publishers, 2009).
- Augenhofer, "A European Civil Law – for Whom and What Should it Include? Reflections on the Scope of Application of a Future European Legal Instrument", *European Review of Contract Law* 2 (2011): 195-218.
- Baaij, ed., *The Role of Legal Translation in Legal Harmonization* (Amsterdam: Wolters Kluwer International, 2012).
- Basedow et al., eds, *The Max Planck Encyclopedia of European Private Law* (Oxford: Oxford University Press, 2012).
- Beale, *Principles of European Contract Law*, Parts. I y II prepared by the Commission on European Contract Law (Amsterdam: Kluwer Law, 2000).
- Beale et al., *Cases, Materiales and Text. Contract Law,* 2 ed. (Oxford: Hart Publishing, 2012).
- Cartwright, "Choice is good. Really?", *European Review of Contract Law*, 2 (2011): 335-349.
- Commision Expert Group European Contract Law, *Feasibility Study for a Future Instrument in European Contract Law,* (website: European Commision. Accessed: May 3, 2011). Second non-official version: "*Contract law-work in progress*" (website: European Commision. Accessed: August 19, 2011.
- Cherednychenko, *Fundamental rights. Contract Law and the protection of the weaker party a comparative analysis of the constitutionalisation of contract Law, with emphasis on risky financial transactions* (Sellier, Sellier European Law Publishers, 2007).

[15] Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth. Brussels, 3.3.2010 COM (2010) 2020 final.

- De Ángel Yágüez, *Derecho de Obligaciones en Europa. Algunos rasgos de la evolución en las dos últimas décadas* (Barcelona: Bosch, 2013).
- English and Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government from the Law Commission,* November 2011, 42-44. (http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf
- Fauvarque-Cosson and Mazeaud, eds., *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Munchen: Sellier Law Publishers, 2008).
- Hartkamp et al., eds., *Towards a European Civil Code,* 4ª ed. (Amsterdam: Wolters-Kluwer - Ars Aequi, 2011).
- Hesselink, *CFR & Social Justice. A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice* (Munchen: Sellier European Law Publishers, 2008).
- Hondius, "The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis" *Journal of Consumer Policy* 27 (2004)*:* 245-251.
- Howells, "European Contract Law Reform and European Consumer Law – Two Related But Distinct Regimes" *European Review of Contract Law* (2011): 173-194.
- International Institute for the Unification on Private Law, *Principles UNIDROIT on International Commercial Contracts 2010* (Rome, 2010).

- Kröll et al., eds., *UN Convention on Contracts for the International Sale of Good*s (Munchen, München/Oxford/Baden-Baden: C.H. Beck/Hart/ Publishing, 2011).
- Loos,, "Scope and application of the Optional Instrument, Centre for the Study of European Contract Law, Working Paper Series Núm. 2011/09" (http://ssrn.com/abstract=1890683).
- Marchetti, "Legal Categories and Legal Terms in the Path towards a European Private Law: The Experiment of the DCFR", *European Review of private Law* 5/6 (2012): 1265–1276.
- Meli, "Social Justice, Constitutional Principles and Protection of the Weaker Contractual Party" *European Review of Contract Law* 2 (2009): 159-166.
- McGregor, *A Contract Code: Drawn up on Behalf of the English Law Commission* (Oxford*:* Sweet & Maxwell, 1994).
- Micklitz el al., eds, *Cases, materials and Text on Consumer Law* (Oxford: Hart Publishing, 2nd ed, 2010).
- Micklitz, "The Principles of European Contract Law and the Protection of the Weaker Party" *Journal of Consumer Policy* 27 (2004): 339-356.
- Micklitz and Reich, "Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights", 46 *Common Market Law Review* (2009): 471-519.
- Micklitz and Cafaggi, eds., *European Private Law after the Common Frame of Reference* (Cheltenham, UK/Northampton, MA, USA: Edward Elgar Publishing, 2010).
- Rutgers, "An Optional Instrument and Social dumping revisited", *European Review of Contract Law (European Review of Contract Law* (2011): 350-359.
- Schlechtriem and Schwenzer, eds., *Commentary on the UN Convention on the International Sale of Goods 8CISG),* 3ª ed. (Oxford: 2010).
- Schulze, ed., *Common European Sales Law (CESL). Commentary* (Nomos-Munchen: H.Beck-Hart-, 2012).
- Schulte-Nölke et al., eds., *EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States* (Munchen: Sellier European Law Publishers, 2008).
- Von Bar et al., eds., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (DCFR), Outline ed. And Full edition (Munich: Sellier European Law Publishers, 2009).
- Whitted, "The UNIDROIT Principles of international commercial contracts: an overview of their utility and the role they have played in reforming domestic contract law around the world", *Journal of International & Comparative Law* 18-1 (2011).
- Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996).

REPARATION OF THE MORAL PREJUDICES IN ROMANIAN LABOR LAW

AURELIAN GABRIEL ULUITU[*]
IOANA PĂDURARIU[**]

Abstract
Recent decisions issued by national labor Courts contain interesting references to the problem of the moral prejudices' reparation (especially suffered by the employee). During the application of Romanian Labor Code – Law no. 53/2003[1], the Courts offered a poor practice regarding the above mentioned problem. Usually, the employees' claims having as object the material reparation of a moral prejudice caused by the employers were rejected. The Courts considered that the claims were not founded, because the employees did not prove the irregularity and/or the existence of a moral prejudice.
The present paper is trying to identify the situations (as categories) which confer to the employees the right to ask for the moral prejudices' (material) reparation and the procedural mechanism in order to obtain a favorable solution (especially from the proves necessity point of view).

Keywords: *labor law, employee, employer, liability, moral prejudice, material reparation, labor court, court case, evidences*

Introduction

The juridical liability of the labor individual contract's parts is one of the most sensitive issues regarding the labor relation. Romanian Labor Code stipulates four categories of labor contract parts' different liability – disciplinary (art. 247 – 252), patrimony (art. 253 – 259), contraventional (art. 260) and criminal (art. 261 – 265). From these categories, only the disciplinary liability is a Romanian Labor Law specific form of liability[2].

The possibility to determine the occurrence of a moral prejudice for one or the other contractual part exists in case of each form of liability, but the most cases are linked to the disciplinary and patrimony liabilities.

It is important to observe the framework of discrimination regulation (the principle of the equal treatment for all employees and employers) – art. 5 from Romanian Labor Code, Government Ordinance no. 137/2000 on the prevention and punishment of all forms of discrimination[3] and Law no. 202/2002 on equal opportunities and treatment for women and men[4].

Observing these regulations, it is possible, in principle, to identify situations which imply a moral prejudice for one of the labor contract part, caused by the unfulfillment of one or more specific obligations.

The labor individual contract's part who claims the moral prejudice and its material reparation by the other part has to address to the Labor Court in order to obtain a favorable decision. The trial will follow the special rules of Labor Jurisdiction (art. 266 – 275 from Labor Code and art. 208 – 216 from Law no. 62/2011 on Social Dialogue[5]).

---

[*] PhD, Lecturer, "Nicolae Titulescu" University, Bucharest, Faculty of Law (gabi_uluitu@yahoo.com).
[**] PhD, Lecturer, "Nicolae Titulescu" University, Bucharest, Faculty of Law (padurariu_ioana@yahoo.fr).

[1] Republished in the "Official Gazette of Romania", 1st part, no. 345 of 18 May 2011.

[2] See I.T. Ştefănescu, *Theoretical and Practical Paper for Labor Law,* Second edition, Universul Juridic Editor, Bucharest, 2012, p. 725; Al. Ţiclea, *Paper for Labor Law*, Sixth Edition, Universul Juridic Editor, Bucharest, 2012, p. 777-778.

[3] Published in the "Official Gazette of Romania", 1st part, no. 431 of 2 September 2000.

[4] Republished in the "Official Gazette of Romania", 1st part, no. 150 of 1 March 2007.

[5] Republished in the "Official Gazette of Romania", 1st part, no. 625 of 31 August 2012.

Art. 266 from the Romanian Labor Code disposes that the object of the labor jurisdiction is to solve labor conflicts concerning the conclusion, execution, amendment, suspension, and termination of individual or, as applicable, collective labor contracts stipulated in the present code, as well as the requests concerning the legal relationships between social partners, set forth under the Labor Code (and Labor legislation).

The cases having as object the (material) reparation of the moral prejudice are included in the labor jurisdiction, because they are often related to the execution or the termination of the individual labor contract.

For both theoreticians and practitioners in Labor Law, it is important to determine the specificity of this kind of cases, at least the one regarding: the conditions for the occurrence of the part's liability and special limits of liability, the determination of the moral prejudice, the prove of the prejudice, the reparation of the prejudice.

1. A) Art. 253 Paragraph (1) from Romanian Labor Code stipulates that the employer indemnifies the employee, pursuant to the norms and principles of contractual civil liability, if the latter has undergone material or moral damage because of the employer's fault during the performance of his job duties or while performing a job-related activity.

In case of employee's patrimony liability, art. 254 Paragraph (2) form Labor Code stipulates that the employees are patrimony liable, according to the norms and principles of contracting civil liability, for the material damages caused to the employer because of their fault and in relation to their work.

The first conclusion is regarding the different solution regarding the status of the two individual labor contract's parts: while the employers are possible liable for both material and moral prejudice, the employees are liable *only for the material prejudice* caused to their employer[6].

The multilateral protection of the employees had determined such solution, which represents a limitation of their liability in relation with the employers. It is a positive discrimination, which does imply the following observation: the moral prejudice is possible to be suffered by the employer as a consequence of an employee's action, but *the employer doesn't have the right to claim its reparation*. If the parts of the contract agree to generalize the liability conditions (in order to determine even for the employee to respond for the moral damages caused to the employer), such contractual clause is null, based on the provisions from the art. 38 Labor Code: employees may not waive the rights acknowledged to them by the law; any transaction the aim of which is to waive the rights recognized by the law to employees, or to limit such rights shall be null.

In conclusion, only the employees are able to ask the reparation of the moral prejudice caused by the employer.

B) The regulation of the patrimony liability (art. 253 – 259 from Romanian Labor Code) establishes a particular form of civil contractual liability. The provisions of the Romanian Civil Code – Act no. 287/2009[7] – are the common law for the patrimony liability. Art. 278 Paragraph 1 from Romanian Labor Code stipulates that the provisions of Code are completed by the other provisions in the labor legislation and, unless inconsistent with the typical labor relationships stipulated in the Code, *the provisions of the civil legislation*.

So, in the Romanian Civil Code will be founded the specific provisions regarding the employer's liability in case of a moral damage caused to their employees.

Art. 1350 paragraph 1 from Romanian Civil Code stipulates that any person has to fulfill its contractual obligation. When the person, without any excuse, doesn't fulfill its obligation, will be responsible for the prejudice caused to the other part of the contract and is obliged to repair that prejudice (paragraph 2).

---

[6] See I.T. Ştefănescu, *op. cit.*, p. 773.

[7] Republished in "Official Gazette of Romania", 1st part, no. 505 of 15 July 2011.

Art. 1531 paragraph 3 from Romanian Civil Code stipulates that the creditor has the right to ask the reparation of the moral damage, but this damage has to be certain (art. 1532 paragraph 1 Civil Code).

As general rules, the creditor has to prove that he had suffered a moral prejudice and this prejudice is certain.

2. A. The dynamic of labor relations shows that the most of the cases when the employees are entitled to ask from their employer the (material) reparation of the moral damages are linked to:

- Discrimination, the equal treatment for all employees and employers, the equal opportunities and treatment for women and men regarding the execution of the individual labor contract;
- Termination of the individual labor contract, especially in case of dismissal;
- Labor health and safety;
- Disciplinary liability, when the employer applies a disciplinary sanction to the employee.

B. As a specific rule in the labor court procedure, art. 272 from the Romanian Labor Code stipulates that the employer shall be responsible for providing evidence in labor conflicts, being obliged to submit evidence in his defense by the first day of trial.

By exception, when the employee is claiming for the reparation of the moral prejudice, the above mentioned rule doesn't apply. The employee has the procedural obligation to prove the existence of the entire employer's liability conditions:

- Existence and the nature of the prejudice; regarding the moral prejudice, this kind of damage
- Fact that the prejudice is certain;
- Fact that the prejudice is the direct consequence of an unjustified or culpable action of the employer;
- Estimate value of the material reparation and its determination.

C. There is no legal framework to quantify the material value of moral prejudice's reparation. The judge has the freedom to appreciate about the amount that express the reparation value, independent of the amount asked by the employee. It is possible to have a huge difference between the amount claimed by the employee (by example, 100,000 euros) and the amount accepted by the Court (1,000 euros). This fact doesn't transform the employee's claim in an abusive one, because:

- Employee has the freedom to estimate the value of the moral prejudice (and is important to notice that the court cases having as object aspects of the labor relations are free of stamp tax);
- Courts are free to appreciate the value of the moral damage's material reparation, when the conditions of the contractual liability are fulfilled.

3. In the situations mentioned above, at the 2nd point of this paper, regarding the cases when the employees are entitled to ask from their employer the (material) reparation of the moral damages, the moral prejudice is determined by the injury caused to the person (to the employee).

This negative consequence which is the object of the moral prejudice is regarding the harm of the personal rights of the person. The object of these rights is regarding the life of the person, its health, corporal integrity, honor, dignity, social and/or professional status of the employee.

The moral prejudice could represent the death of the employee (as a result of an accident related to his work or activity), the injury or the harm suffered by the employee, the decrease of the professional or social reputation of the employee, the injury of another personal employee's attribute which define the human condition[8].

In case of death of the employee, its successors could claim the material reparation of the moral damage they had suffered. Because of the death of the employee, its successors loose an important material and moral support. They are obliged to modify their life conditions. The successors have the right to obtain the full cover of their prejudice. This right is obtained directly by them (as assurance, by example), or by the effect of the inheritance. In case of inheritance, the rights

[8] See M.N. Costin, C.M. Costin, *Civil Law Dictionary from A to Z*, 2nd Edition, Hamangiu Editor, Bucharest, 2007, p. 771.

of the victim are transferred to the successors. These rights were born between the moment of the accident and the one the death occurred. The right of moral prejudice's reparation is born directly in the successors' patrimonies when they prove that this kind of prejudice was determined by losing of the person which had provided them material and moral support.

In case of the employee physical integrity's or health's harm, the prejudice could by material and moral also. In moral form, the prejudice consists in losing or decreasing the work capacity, or losing or decreasing the work benefits (wage and other form of remuneration).

4. Once the moral prejudice is born, the way it should be repair is, as a rule, also moral. But, the prejudice's victim has also the right to estimate the value of the moral prejudice. So, there is no any incompatibility between the forms of the reparation. The moral prejudice's victim has the possibility to choose between the two forms of reparation. Of course, the interest of the victim – the employee – is to determine a higher material value of his moral damage, accepted by the Court.

Anyway, the author of the moral prejudice (the employer) and the victim of the prejudice (the employee) could agree an amiable solution having object the amount's determination which they evaluated the prejudice. In this case, the agreement is legal and the provisions of art. 38 from the Romanian Labor Code are observed.

When the prejudice is covered by an assurance, the victim has the right to claim any difference between the amounts he consider the prejudice is valued and the one he received through assurance.

5. One recent decision of a Court case offers new interesting elements regarding the way of perception by the national Courts of the matter we are analyzing.

In February 2008, the parts had signed the individual labor contract. The employee had occupied the position of TV presenter at a local specialized TV network.

The employer had the initiative of termination the individual labor contract. The employer had issued the individual dismissal decision (its first decision) in April 2009. The employee asked the Court (Bucharest Tribunal, Section no VIII, Labor and Social Insurances Conflicts) to dispose the cancellation of the decision and to oblige the employer of reinstatement the employee in his former workplace.

We mention that the Labor Code – in Section no. 7 ("Control of and sanctions for unlawful dismissals") from the 5th Chapter ("Termination of the individual labor contract") – stipulates the consequences of the dismissal decision's cancellation.

Art. 78: "The dismissal ordered in non-compliance with the procedure stipulated by the law is struck by absolute nullity".

Art. 79: "In the event of a labor conflict, an employer may not resort, before a court of law, to other de facto or de jure reasons than the ones stated in the dismissal decision".

Art. 80:

- Paragraph (1): "If the dismissal has not been based on good grounds or has been unlawful, the court shall order its cancellation and force the employer to pay an compensation equal to the indexed, increased and updated wages and the other rights the employee would have otherwise benefited from".

- Paragraph (2): "At the employee's request, the court having ordered the cancellation of the dismissal shall restore the parties to the status existing before the issuance of the dismissal document";

- Paragraph (3): "In case the employee does not request the reinstatement in the situation previous to the issuance of the dismissal document, the individual labor contract shall be rightfully terminated at the date when the judgment remains final and irrevocable".

By the decision issued by the Court in April 2010, the employee's complain was partially accepted. The Court decided that the employee has to be reinstatement in the former workplace and the employer to pay the compensation, but it was rejected the claim having object the moral prejudice

(the employee had asked for an amount of 10,000 euros as material reparation of the moral prejudice caused by the unilateral act of dismissal).

After the appeal issued by the employer was rejected by the Bucharest Court of Appeal (in February 2011), the employer had sent an address (issued in July 2011) to the employee inviting him to come at work starting with the date of 19th of July 2011.

But, the employer did not modify the organizational structure of its position in order to reestablish the position occupied by the former employee. The reinstatement was only formal, because at the beginning of August 2011, the employer had issued the second individual dismissal decision (at 3rd of August 2011).

This second time, the employee asked the Court to dispose the cancellation of the second individual dismissal decision and to oblige the employer to pay 15,000.- euros (in lei equivalent, at the National Bank of Romania's official exchange rate in the day of the effective payment of the amount).

The Court – Bucharest Tribunal, Section no VIII, Labor and Social Insurances Conflicts – had accepted the claim of the employee and had obliged the employee to pay a "record" amount of 3,000.- euros as material reparation of the moral prejudice caused by the employer through its second individual dismissal decision[9].

Regarding the moral prejudice, the Court had mentioned that based on art. 253 Paragraph (1) from Labor Code, the employer is obliged to repair the material and/or moral prejudice caused to its employee because its fault.

The Court had retained that an individual dismissal ordered by the employer in non-compliance with the conditions and procedure stipulated by the law is able to determine by itself to the employee a moral prejudice. This moral prejudice consists in:

- Loosing the work place occupied by the person based on an individual labor contract with unlimited period of execution is able to affect the employee's stability previsions; it is well-known that the labor is done by the employee in order to cover the living necessities;
- Lock of an occupation, of a workplace based on an individual labor contract, in a society which promotes the active living and obtaining of the living means by work is able to induce to the dismiss person a social inferiority feeling and an image prejudice in relation with the other members of society.

Such moral damages are emphasized by the particular fact that the employee, as a consequence of a previous court case in relation with the same employer, had obtained a favorable decision which was not respected by the employer.

The moral prejudice is the direct consequence of the employer's unlawful and guilty actions, consisting in the unfulfillment of the contractual obligations. The employer's guilt in the matter of contractual liability is a relative presumption and the employer did not invoke any cause in order to exclude or to decrease the guilty. Furthermore, such manner of action proves that the employer had acted with direct intention, which represents the most serious form of guilty. The employer had wondered and accepted the consequences of its action, its will being to not allow the employee to work.

Conclusion

The legal framework of the reparation of the moral prejudice in the Romanian Labor Law is determined by two categories of legal provisions: the one stipulated in the Labor Code (art. 263 Paragraph 1) and the second stipulated in the Civil Code (art. 1350, art. 1531 Paragraph 3).

The most of the cases when the employees are entitled to ask from their employer the (material) reparation of the moral damages are linked to discrimination, the equal treatment for all

[9] Bucharest Tribunal, Section no VIII – Labor and Social Insurances Conflicts, Decision no 9250 of 2nd November 2012.

employees and employers, the equal opportunities and treatment for women and men regarding the execution of the individual labor contract; termination of the individual labor contract, especially in case of dismissal; labor health and safety; disciplinary liability, when the employer applies a disciplinary sanction to the employee.

Once the moral prejudice is born, the way it should be repair is, as a rule, also moral. But, the prejudice's victim has also the right to estimate the value of the moral prejudice. There is no any incompatibility between the forms of the reparation. The moral prejudice's victim has the possibility to choose between the two forms of reparation.

If the creditor and the debtor did not agree about the way or the amount of the reparation, the Court is able to verify the fulfillment of liability conditions and the amount of reparation.

References

- I.T. Ştefănescu, *Theoretical and Practical Paper for Labor Law*, 2nd Edition, revised and completed, Universul Juridic Editor, Bucharest, 2012.
- A. Ţiclea, *Paper on Labor Law*, 6th edition, revised, Universul Juridic Editor, Bucharest, 2012.
- M.N. Costin, C.M. Costin, *Civil Law Dictionary from A to Z*, 2nd Edition, Hamangiu Editor, Bucharest, 2007.
- C. Stătescu, C. Bîrsan, *Civil Law. The General Theory of Obligations*, 9th edition, revised and completed, Hamangiu Editor, Bucharest, 2008.
- L. Pop, I.-F. Popa, S.I. Vidu, *Elementary Paper on Civil Law. The Obligations*, Universul Juridic Editor, Bucharest, 2012.
- P. Vasilescu, *Civil Law. Obligations*, Hamangiu Editor, Bucharest, 2012.

COMMISSION CONTRACT UNDER THE NEW ROMANIAN CIVIL CODE

DAN VELICU*

Abstract
The adoption of the new Civil Code and its entry into force on October 1st 2011 has involved an extensive reform of the private law.
The new Code has aimed primarily to achieve a unification of the private law, the largest part of the land commerce regulations from the commerce code adopted in 1887 being absorbed into the new text and, secondly, to harmonize the basic institutions of the private law with the European regulations and directives.
This study is preliminary and aims to highlight the inspiring models of the new Civil Code and to analyse the functionality of the newly used concepts.

***Keywords**: new Civil Code, commission contract, mandate contract, Code of Commerce, professional contract*

1.The concept of the commission agreement under the rule of the new code.

The current definition of the commission agreement is significantly different from that promoted by the Code of Commerce in 1887.

On the one hand, the commission is conceived as a kind of mandate, the text of art. 2043 NCC highlighting this aspect, unnecessarily, in our opinion, and on the other hand, the object of the contract is limited by the same norm upon "the purchase or sale of goods or service delivery on account of the principal and on behalf of the commissioner".

The provisions from art. 2043 NCC present, superfluously, the mechanism of the mandate without representation, based on the assumption of rights and obligations in one's own name, but on account and behalf of another person.

The differences suggested by comparing art. 2039 and 2043 NCC would consist in the nature, at least apparently professional, of the activity unfolded by the commissioner on behalf of the principal and onerous of the contract.

This onerous nature, emphasized by reference to remuneration and its designation as commission resulted however by applying the provisions of art. 2010 paragraph 1 NCC.

One of the requirements listed by art. 2043 NCC is that, in the projected activity, the trustee should act "on a professional basis".

The usage of this expression by the legislator, usage with no accidental nature, since it is later mentioned in the definition of agency, raises an important issue of interpretation.

Obviously, if the commissioner is a self-employed person or a legal entity whose object of activity includes practicing such brokerage, the requirement presented in art.2043 NCC is accomplished.

In the event that the trustee does not have this professional status, recognized publicly and based on constant activity, and one faces an accidental brokerage, one can wonder whether the term "on a professional basis" would cover this situation and the generated legal report would fall, as a consequence, under art. 2043 et seq. NCC.

In support of a positive response, it will be argued that, if the legislator used the phrase "on a professional basis", he acted in derogatory way, because the alternative would have been the possibility to indicate, as in other cases[1], that within the agreement mechanism the commissioner is a

* Lecturer, Ph. D., Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University, Bucharest (email: dan.velicu@univnt.ro).

[1] See art.1709 paragraph 2, art.1778 paragraph 3, art. 2107 paragraph 2, art. 2172 paragraph 2 NCC.

"professional", with reference to the summarized content of art.3 NCC, a person who "exercises systematically an organized activity, which consists either in the management or disposal of goods or in service delivery".

Therefore, the phrase "on a professional basis" would imply both the assumption that the broker is a professional within the meaning of provisions from art.3 NCC and the one when he acts accidentally, as an intermediary, under the appearance of a professional.

Conversely, given that, under the rule of the Code of Commerce, the mandate and the commission were agreements considered "acts of commerce" – whether the trustee or commissioner had the status of trader, by applying art.3 c.com., they are covered by the commercial law – one will claim, however, that, under the new civil Code, the concept "fact of commerce" has disappeared and, therefore, relating exclusively to the professional status of the contracting party or at least of one of the parties, the legislator has imposed that the derogatory rules which usually come from the commercial code, to be based on a single criterion, namely the subjective criterion, the "professional" status of the person.

Consequently, in the situation referred to, the provisions relating to the commission agreement will only apply if the trustee has a professional quality and, under this status, becomes a subject endorsed by the norm.

2.The features of the contract.

Being a variety of the mandate contract without representation and thus of the mandate, the commission is a consensual, bilateral and a synallagmatic agreement.

Since the activity unfolded by the principal is a professional activity, along with the previous rules of the code of commerce, the commission agreement is an essentially onerous agreement.

3.Effects of the contract.

A. Obligations of the commissioner

The main obligation of the commissioner is to execute the mandate entrusted by the principal. Since the trust between the two parties is the essence of the mandate, once the empowerment is accepted the trustee may not exceed the *limits set by the mandate* (art. 2017 paragraph 1 NCC).

Under the rule of the Code of Commerce, although exceeding the commissioner from the content of the committed obligations was regulated, there is no reference to the instructions given by the principal.

The explanation was simple. If in the case of the commercial mandate the trustee would "comply with the instructions received from the principal" (art.381 Romanian Code of Commerce, art.356 Italian Code of Commerce), in the operations where the trustee was a trader, in other words, a professional, since he was an agent acting in his own market, he was conferred the ability to decide how and by what means to fulfil his obligations assumed towards the principal[2]. Precisely the presumption of the commissioner as being a good expert of the market mechanisms and the prices evolution limited, by the provisions of art.408 c.com., the penalization of the limits outreach only in a few particular cases, where the negligence or lack of professionalism of the commissioner were obvious.

In the mandate's current general regulation, as already noted, the second paragraph from art. 2017 NCC enables, in an exceptional way, the outreach of the received instructions only in the event when the prior notification of the principal is "impossible" and provided that there are certain facts that can be proven, which would establish the assumption that the principal would have approved the limits outreach if he had known the circumstances justifying it.

[2] See Agostino Ramella, *Del contratto di contocorrente, del mandato commerciale, della commissione*, (Torino: Utet, 1928), 185.

The term "instructions" is borrowed in the scope of the commission as a benchmark in establishing how professionally the commissioner has acted in relation to third parties.

With regard to the general provision, which may have found its application *ex* art. 2039 paragraph 2 NCC, art. 2048 NCC imposes to the commissioner, on the one hand "the responsibility to comply precisely with the *express instructions* received from the principal", and on the other hand, it enables him to act, by moving away "from the *instructions* received from the principal only if the following requirements are cumulatively complied:

a. there is not enough time to get prior authorization in relation to the nature of the business;

b. one can reasonably consider that the commissioner, knowing the changed circumstances, would have given his authorization, and

c. the alienation from the instructions does not fundamentally change the nature and scope or economic requirements of the empowerment received.

First of all, by *instructions*, we believe that one can usually understand those explanations given by the principal – which can be contained even in the mandate agreement – that seek requirements and ways for a better execution of the mandate.

Assuming that these instructions are sent following the conclusion of the agreement de mandate, they may not consist of new obligations or duties other than those agreed by contract and of other tasks, which do not fall into the specifics of his professional activity [3].

The principal may however require to the commissioner to begin talks with certain potential customers, not to arrange the legal acts taken into account with different persons, may materialize the requirements of the contracts or a certain form of these contracts.

The notion of *express instructions*, unknown including to the previous mandate regulation, seems to have its origin in the Swiss code of obligations, used as parameter in the assessment of the consistent execution of the mandate contract[4].

The way art. 2048 NCC is drawn clearly shows the code's authors' intention that this norm should be a waiver.

If in the case of the mandate with representation, drafting the power of attorney was absolutely necessary to bring to the attention of third parties the powers or empowerments conferred to the trustee, in the case of the commission agreement, the terminology used raises several problematic concerns.

Between the principal and the commissioner a written document may be signed, document containing the powers granted; in this case, by *express instructions* we understand the empowerments that arise from the contract or, at least, the purpose intended by the parties.

After the conclusion of the contract and the document preparation, the principal may issue new *instructions* to be communicated in writing or verbally to the commissioner; in the latter case, the issue of probing the *instructions* will raise.

The new regulation from the Civil Code limits the scope of the sanctions envisaged by the Code of Commerce and, implicitly of the protection provided to the principal, to the unique hypothesis of accepting a term in favour of the third party to pay the price.

Therefore, according to art. 2047 paragraph 1 NCC, upon the request of the principal the commissioner is personally liable, being responsible to immediately pay the loans with interest and other benefits that would appear if in the absence of authorization the principal has performed credit sales agreements.

---

[3] *Ibidem*, 185-6.

[4] **Art. 397 Exécution conforme au contrat.** Le mandataire qui a reçu des *instructions précises* ne peut s'en écarter qu'autant que les circonstances ne lui permettent pas de rechercher l'autorisation du mandant et qu'il y a lieu d'admettre que celui-ci l'aurait autorisé s'il avait été au courant de la situation.

Lorsque, en dehors de ces cas, le mandataire enfreint au détriment du mandant les instructions qu'il en a reçues, le mandat n'est réputé accompli que si le mandataire prend le préjudice à sa charge.

The norm taken into account is similar to art.1732, paragraph 2 Italian Civil Code[5]; an essential difference is that, similarly to the previous regulation of the Code of Commerce, the Romanian legislator did not retain the exception, based on the normative commercial uses, as the Italian legislator had acted, thus recognizing their primacy[6].

The second obligation of the commissioner is to give account to the principal regarding the way he has fulfilled his mandate.

3. Obligations of the principal

3.1. The principal have to provide the commissioner with the necessary means for the execution of the mandate.

As we have noticed, in view of fulfilling the granted power, the principal is required to put at the trustee's disposal all the necessary tools.

Since the commission is a variation of the mandate without representation it seemed logic that this rule should also apply to the relation between the principal and the commissioner.

Therefore, under the rule of the Code of Commerce, in the absence of a contrary convention, the provision according to which the principal was assigned to provide the trustee with the necessary means to fulfil the mandate was applicable to the commission agreement (art. 385).

In the current regulation, based on art.2039 paragraph 2 NCC, art.2025 paragraph 1 NCC is applied, paragraph that, in the absence of a contrary convention, imposes the principal the obligation to provide the trustee with the *necessary means for the execution of the mandate*.

The notion of *necessary means* is, obviously, very large. If the principal's obligation is outlined by the fact that in the lack of these means the trustee could not complete his proposed activity, in the commission matter, we believe that this notion should be interpreted in a very narrow sense.

The mandate with representation, whether it has or not a commercial objective, targets in principle the conclusion of one or more legal acts (art.2009 NCC). In comparison, the relation between the principal and the commission intends to conclude contracts with obvious economic content, by virtue of the professional nature of the commissioner's activity, which clearly implies a long-term non-accidental activity.

From such a perspective, the obligation to provide the *necessary means* can only focus on those tools absolutely necessary for the purchase and sale of goods or service delivery. Thus, if the sale of goods is conditioned under the law by the buyer's delivery of certificates with different indications or of special packaging, the principal is required to issue those certificates or to send the requested packages, since otherwise the commissioner will not be able to perform his activity under the law.

By *necessary means* we will not however retain different methods and tools for promotion of the goods, even if these, engaged in the commissioner's activity, would obviously lead to an increase in turnover, in the number of customers or to the quick unfolding of the sent goods.

3.2. The principal have also the obligation to pay the commission for the commissioner.

For this purpose, the provisions from art. 2049 paragraph 1 NCC are completely unnecessary. According to this norm, the principal is not entitled "to refuse to pay the commission when the third party executes exactly the contract signed by the commissioner in compliance with the received empowerment".

Unless otherwise stipulated, the commission is due even if the third party does not execute its obligation or conjures the breach of contract exception.

If the empowerment for the sale of property was given exclusively to a commissioner, the commission remains payable by the owner even if the sale was made directly by him or through a third party.

---

[5] According to art.1732 paragraph 2 of the Italian civil code.

[6] Il commissionario si presume autorizzato a concedere dilazioni di pagamento in conformità degli usi del luogo in cui compie l'operazione, se il committente non ha disposto altrimenti.

Logically, the counterperformance for the activity performed is usually established in terms of the amount within the contract signed with the principal.

For exceptional cases, where contracting parties have not determined an amount, art. 2049 paragraph 4 NCC provides that it is to be established according to the provisions from art. 2010 paragraph 2 NCC.

Including this reference is unnecessary because, in the absence of contractual provisions regarding the amount of the commission, the application of art. 2010 paragraph 2 NCC would have been applied, pursuant to paragraph 2 NCC art.2039.

Therefore, determining the amount of the due commission will be made by reference to any statutory provision, failing such provisions by reference to usage or by value of carried out services.

The principal have to reimburse all expenses incurred by the commissioner for carrying out the assignment received.

As the commissioner acts to meet certain commercial interests of the principal, if the fulfilment of the mandate required a series of charges, these will be reimbursed by the principal to the commissioner, upon termination of the activity or at a period determined by the parties.

Therefore, as in the section dedicated to the mandate without representation there is no provision in this regard, under art.2039 paragraph 2 NCC, the provisions on obligations of the principal to cover all expenses incurred by the trustee for the execution of the mandate will apply.

In the matter of the mandate with representation, as we noted above, art. 2025 NCC provides that the principal will reimburse to the trustee *reasonable expenses advanced* by the latter *for the execution of the mandate*, together with statutory interest thereon, calculated from the date of expenditure (paragraph 2).

4.Revocation of commission

Similarly to the mandate contract, the principal may revoke the authority given to the commissioner.

However, art. 2051 paragraph 1 NCC, identical in writing with the counterpart provisions of the Italian Civil Code, allows only the proxy revocation until the commissioner has concluded the act with the third party.

Anyway, the principal have the obligation to pay the commission for the commissioner's activity previous revocation.

5.Conclusions

The new regulation of the commission contract manages to offer a legal frame for this kind of professional intermediation.

However, on the one hand we consider that the new regulation is not an innovative one and, on the other hand it targets only the commercial relations, regulated by the previous Code of Commerce.

References

- Atanasiu, Ana- Gabriela, Dimitriu, Alexandru- Paul, Dobre, Adriana- Florentina, *Noul Cod civil: note, corelaţii, explicaţii*, C.H. Beck, Bucharest, 2011.
- Baias, Flavius-Antoniu, Chelaru, Eugen, Constantinovici, Rodica, Macovei, Ioan, *Noul Cod civil: comentariu pe articole: art. 1-2664*, C.H. Beck, Bucharest, 2012.
- Cuffaro Vincenzo et alli, *Il mandato. Disciplina e prassi*, Zanichelli, Bologna, 2011.
- Motiu, Florin, *Contractele speciale în Noul Cod civil*, Universul Juridic, Bucharest, 2012.
- Ramella, Agostino, *Del contratto di contocorrente, del mandato commerciale, della commissione*, Utet, Turin, 1928.

FREEDOM OF CONTRACT AND ITS LIMITATIONS IN THE ROMANIAN CIVIL CODE

EUGENIA VOICHECI*

Abstract
This study aims to present the vision of the Romanian Civil Code about the freedom of contracting.
The Romanian legislator has restated in terminis that the principle of contractual freedom is a fundament of the conventions but has also established its restraints: the law, the public order and the moral values.
In order to attain the stated goal of this research, the effort was directed toward: presenting the freedom to contract as a principle of the private law, evoking the autonomy of the will theory as a fundament for the freedom to contract and toward systemically enunciating the competing theories and the decline of the actual autonomy of the will theory.
The effort was also directed toward presenting the restraints of the freedom to contract, as they are stated in the Civic Code and the different categories of contracts which are the consequence of those restraints.

Keywords: *the freedom to contract, legal restraints, moral values, good faith, adhesion contracts, law enforced contracts*

A . Introduction: freedom of contract – the private law principle

Art. 1169 of the new Civil Code has the merit of consecrating *in terminis* the freedom of contract principle, stipulating that parties are free to enter into any contracts and determine content of the same. The legal text also stipulates the limitations of this freedom: law, public order and morality.

The provisions of art. 1170 of the Code add to the freedom of contract principle the requirement of good faith which must be met both in contract negotiation and execution, and contract implementation, and which can neither be conventionally removed or restricted.

The legislative consecration of the much debated contractual freedom principle may be considered "revenge" in its own right. The question is whether it is equitable reparation or not?

A traditionally caution-based conduct makes us postpone the time when we state our complete victory and further seek for reasons that might shade this victory as we have become accustomed to regulations that, in the next article, make previously proclaimed rights *tabula rasa* or almost that.

In reality, we can but wonder what and, especially, how much of the splendid principle of contractual freedom is left available by "law", "public order" and "morality".

Are all these limitations cases of the ineffectiveness of the freedom of contract? And why not, what and how much remains of this principle?

We valiantly and hopefully face these questions and attempt, by scientific arguments, to outline the area of application and consequences of the freedom of contract principle as are nowadays given the circumstances for the enforcement of the new Civil Code, and also other legal provisions, as we attempt to define the limitations for the application of said principle as regulated by law and also imposed by our social and economic reality.

B. Freedom of contract – a corollary of the autonomy of will

An examination of the provisions of art. 1166 of the new Civil Code leads to the conclusion that the Romanian lawmaker established the parties' agreement as a basis of a contract. Equally, the provisions of art. 1169 of the Code result in the fact that the Code has acknowledged the freedom of

* PhD Candidate, "Nicolae Titulescu" University (eugenia_voicheci@yahoo.com).

contract principle; the logical conclusion is that the freedom of contract is based on the autonomy of will and it is a necessary consequence of the autonomy of will and its utmost achievement.

The freedom of contract is acknowledged to all persons, except for the cases of incapacity and prohibition laid down by law. This is the conclusion of the provisions of art. 1180 of the New Civil Code that stipulate that "any person who is not declared unable by law and stopped to enter into certain contracts may contract". As the right to contract is the rule, it has been rightfully stated[1] that the freedom of contract is part of the content of the natural and legal entities' civil capacity.

C. Consequences of the freedom of contract principle

Bringing back to mind the provisions of art.1169 of the New Civil Code, we note that the Romanian lawmaker has defined two of the coordinates of the freedom of contract principle: the parties' freedom to enter into any contracts and the freedom to establish contract content.

In the area of commercial contracts, the freedom of evidence and the freedom to settle disputes by arbitration were mentioned[2] with the same status besides the two aforementioned consequences.

Also, in close connection with the freedom of contract principle, one must separately consider the principle of consensualism and formalism, also in consideration of the relation f their forces, as this is influenced by the effectiveness of the new Civil Code.

Thus, we should highlight the fact that another consequence of the freedom of contract principle is the freedom of contract form, known in the doctrine as principle of consensualism.

Art. 1178 of the new Civil Code equally consecrates the autonomy of will theory and the principle of consensualism, underlying the fact that the parties' mere agreement is required for contract execution, showing its limitations – formalities required by law.

Therefore, the contracts entered into as *solo consensu* are the rule, whereas formal contracts are the exception.

It has been shown[2] in specialised literature that in the area of commercial contracts the multitude of such contracts and the necessity to enter into the same with rapidity lead to the fact that they are entered into in the form the parties consider best: verbally, by phone, via electronic means, in writing.

It has also been highlighted[2] that, for contracts entered into *inter absentes* (or remotely), the contracting parties' manifestations of will may take various forms, e.g. simplified contract (or order followed by immediate execution), as laid down in article 36 of the former Commercial Code and taken over in art. 1186 para. 2 of the new Civil Code.

When manifestations of will are expressed in various forms, it is required that their interpretation result in the idea of convergence which, in fact, is the agreement such manifestations of will should reach.

The doctrine[3] has also highlighted the distinction between civil contracts and commercial contracts. In the former case, the focus is placed on the identification of the parties' actual will whereas in the latter case it is placed on declarative will in connection with the fact that often professionals resort to standardized forms, conventions referring to general, framework contract terms and conditions.

D. Limitations of the freedom of contract principle

We have shown in the preceding rationale that, given the provisions of art. 1169 of the new Civil Code, the freedom of contract is the rule, however, this principle should not be considered absolute as the legal text itself also states its limitations: law, public order and morality.

---

[1] Adam , Ioan , - Drept civil . Obligaţiile . Contractul , Bucharest, C.H.Beck Publishing House, 2011, page 28.

[2] - idem.

[3] Pătulea, Vasile; Turianu, Corneliu – Curs de drept comercial român. 2nd edition, Bucharest, All Beck Publishing House, 2000, page 74.

The provisions of art. 1170 of the new Civil Code stipulate, if not a limitation of the will to contract, at least a conditioning thereof, which is, in fact, a good faith obligation – good faith that the parties should meet both in the negotiation and execution stages of the contract, and during contract implementation.

The law as limitation of the freedom of contract

We estimate this analysis has four lines of interest: 1) limitations laid down by law concerning the capacity to contract, also known as incapacities; 2) incompatibilities and termination of rights concerning certain persons; 3) prohibition laid down by law to enter into certain types of contracts; 4) prohibition to enter into contracts with certain subject matters.

1) Incapacities are strictly related to the capacity to exert a right, defined by art. 37 of the new Civil Code as a person's capacity to enter into civil legal documents on his/her own.

The sanction for the failure to comply with the capacity to exert a right is the cancellation of the document, as results from the interpretation of provisions art.44 para.1 of the new Civil Code.

Pursuant to art. 28 of the New Civil Code, the rule is the existence of the capacity to use which no person can be prevented from exerting according to art. 29 para. 1 of the Code and the existence of the capacity to exert which people can be fully or partially deprived of only in the cases and under the conditions laid down by law, according to the same art. 29 para. 1 of the Code.

Art. 43 para.1 of the new Civil Code states that, except for other cases laid down by law, children under the age of 14 and the mentally disabled have no capacity of exertion, therefore these are the cases where the natural person cannot enter into legal documents on his/her own.

As concerns legal entities, the legal regime of their capacity to use is provided by clauses of art. 205-208 of the new Civil Code, whereas the legal regime of the capacity to exert is provided by the clauses of art. 209-211 of the same law.

It is worth signalling that, as concerns membership to administration and control bodies, art. 211 speaks about incapacities and incompatibilities and includes in these categories those deprived of the right to exert a position within these bodies and those declared unable to occupy such position by law or under the articles of association.

In reality, the legal text should have marginally taken into consideration the fact that it speaks of incapacities (which have a legal origin), termination of rights (of the same origin) and incompatibilities (that can be of legal or conventional origin).

In this case as well, the sanction for the failure to comply with the provisions of art. 211 of the new Civil Code is cancelation of the deed(s) entered into under these conditions.

2. a Incompatibilities

With strict reference to commercial activities[4], a long list of incompatibilities, all required by law, has been drafted in connection with certain positions or professions that should remain within the limits of their specific dignity and prestige:

- judge, prosecutor and judge of the Constitutional Court – art.125, 132 and 144 of the Romanian Constitution;
- deputy, senator, member of the government, especially local public official – art. 81, 84, 87 and 94 of Law No. 161/2003, alongside clauses of Law No. 188/1999 on the status of public officials;
- officer and diplomat – clauses of Law No. 80/1995 and Law No. 269/2003;
- lawyer – art.15 letter c of Law No. 51/1995 ;
- public notary – art. 69 letter e and f of Law No. 36/1995.

The sanction for breach of incompatibility is not deed cancelation, but a professional and/or disciplinary sanction.

[4] Cărpenaru, Stanciu D. – Tratat …, 2009 edition, pages 93-94.

2b. Termination of rights

Sanctions are laid down for commercial activities upon breach of the legal provisions concerning public order and morality.

Provisions of Law No. 12/1990 on the protection of population against illegal commercial activities are laid down, however it has been estimated[5] that the sanction of termination of right does not operate under the law and that such termination could be determined by a criminal conviction sentence, i.e. by enforcement of termination as complementary sanction.

3. Prohibition to enter into certain types of contracts

Still in relation to commercial activities[6], it has been decided that, for the purpose of protecting some general interests of society, with economic, social or moral content, there are activities that cannot be scope of trading companies, which activities are expressly laid down in the Government's Decision No. 1323/1990.

Also, by virtue of Law No. 31/1996 on the regime of state monopoly, as well as under the Government's Decision No. 1323/1990 on some measures for the enforcement of the Law on trading companies, it has been decided that the activity conducted by traders in relation with certain economic activities should be subject to limitations in the form of licences, approvals and agreements.

The sanction for failure to comply with the legal requirements on the approval of competent bodies is particularly drastic and leads to the cancelation of the memoranda of association.

4. Prohibition to enter into contracts of certain subject matters

The major prohibitions are related to the sale-purchase contract, more accurately, the assets that are the subject matter thereof. The legal texts prohibiting the execution of these contracts require it in consideration of a certain quality of the contracting parties, either to protect a social interest, or in the interest of a person placed in a certain legal relation with the person the prohibition concerns.

Thus, in order to ensure dignity typical of certain positions and professions, but also in order to provide a general feeling of trust related to the exertion of said positions and professions, art. 1653 para. 1 of the New Civil Code stipulates that judges, prosecutors, court registrars, judicial executors, lawyers, public notaries, legal advisors and insolvency experts cannot buy, directly or by intermediaries, litigious rights that fall under the competence of relevant courts of law, otherwise the sanction is absolute nullity.

Art. 1654 para. 1 of the new Civil Code stipulates both a prohibition to buy, and a series of incapacities related to the buyer. Thus, the following are unable to buy, directly or by intermediaries, even by a public auction:

a) attorneys-in-fact – for the assets they are authorized to sell, except for the case laid down in article 1304 of the new Civil Code, i.e. contract with oneself and double representation as agreed by the person appointing his/her attorney-in-fact or who is not in a situation of conflicts of interests with the attorney-in-fact.

The sanction is relative nullity.

b) parents, tutor, custodian, provisional administrator – for the assets of the persons he/she represents.

The sanction is relative nullity.

c) public officials, syndic judges, insolvency experts, judicial executors, as well as any such persons (Attention: not positions or professions!) that could influence the conditions of the sale done through them or whose objects are the assets they administer or the administration of which they supervise.

---

[5] - *Ditto*, pages 95.

[6] - *Ditto*, pages 95-97.

The sanction is absolute nullity.

Article 1655 para. 1 of the New Civil Code also rests upon the same persons the prohibition to sell one's own assets for a price consisting of a sum of money resulting from the sale or use of the asset(s) that he/she administers or the administration of which he/she supervise, as the case may be.

Paragraph 2 of the same article extends the area of prohibitions to other contracts as well (not named) where, in exchange for an activity promised by the persons laid down in article 1654 para. 1, the other party undertakes to pay a sum of money.

If the freedom of contract principle may authorise the persons laid down in article 1654 para. 1 letters a and b of the Code to perform a legal activity, it is unclear what the case is with „activities" that may be promised, and particularly performed by the persons laid down in article 1654 para. 1 letter c, given that the legal system of these persons' professions and positions is strictly regulated by special laws that stipulate the types of activities that may be carried out, which activities have nothing in common with the freedom of contract.

Public order – limitation of contractual freedom

When it comes to public order, the existence of a system of rules is essential, that aiming at the political and administrative organisation of society within the state, ensure the activity of political institutions, i.e. the prevalence of the collective entity over the individual.

The doctrine is almost unanimous to consider there is no definition of the public order concept, which means, however, that the preeminence of this concept over the concept of individual is questionable.

In time, given the ongoing economic changes, there appeared a need that the state quit the "laisser faire, laisser passer" position and have a say in this area by means of imperative legal provisions that have alleviated the autonomy of will principle.

This attitude of the state has been known as contractual dirigisme, a phenomenon that was not manifest in the economic area only, but in the area of civil and employment contracts.

Some authors[7] believed that contractual dirigisme replaced liberalism by creating and extending commercial public services (mail, telecommunications, banks, railroads) and by what is of interest in this analysis, i.e. restricting contractual freedom, by prohibiting the inclusion of abusive clauses, requiring the inclusion of consumer protection clauses, legal obligations to contract or creating prior administrative authorisations.

In the same context, it has been estimated[8] that the decline of contractual individualism was manifest by the recognition of standard contracts by the public authorities and the legality of adhesion contracts.

Other authors[9] agreed to the concept of contractual dirigisme, which dramatically limited in time the freedom of contract, the widening of the public order notion that penetrated both the economic, and social areas.

It is constantly acknowledged that public order is a concept with an economic dimension, apparent in monetary and price policy, loan policy and economic planning, a fundamental dimension that influences the existence and evolution of contractual relations with economic content.

Also, the social dimension of public order is acknowledged, having an impact particularly on the regulation of legal relations (hence, contracts) of labour.

---

[7] Turcu , Ion; Pop , Liviu – *Contracte comerciale . Formare şi executare* , vol.I, Bucharest, Lumina Lex Publishing House, 1997, pages 15-16.

[8] *Ditto*, page 16.

[9] Stătescu , Constantin; Bîrsan, Corneliu – Drept civil . Teoria generală a obligaţiilor, 9th edition, Bucharest, Hamangiu Publishing House, 2008, pages 20-21.

At the same time, public order acquired a professional dimension, and a European one as well, the latter being focused on the consumer protection requirement and manifest in the prohibition of abusive clauses in the contracts consumers enter into.[10]

In any case, the state's intervention in the economy and contract dynamics, known as contractual dirigisme, has evolved from the vision of planned economy[11], an expression of the political public order acknowledgement to the goal of removing social inequities that the autonomy of will theory determined as this was the extent of its lack of contact with the reality it affirmed.

Contractual dirigisme is considered[12] an instrument to correct social inequity that autonomy of will generates, a mechanism that is at the disposal of the state that undertakes the role of arbitrator of social justice.

It appears of significance to recall that this goal of "social justice" seems to reach limits that should represent a shield intended to protect not only the consumer exposed to the professionals' abuse, but also the vulnerable entrepreneur, trapped in the mechanism of a contract marked by apparent disbalance.

In the Italian legal order at least, the theory of the third contract[13] is spoken of, which means that the contract is entered into in an egalitarian fashion, aspiring to the maximum freedom and that it requires the need to cover a legislative gap, characterized by lack of discipline that should grant protection to the "weak" entrepreneur involved in a disbalanced contractual relation.

The goal of the "contractual justice" of public order is thus extended from the individual consumer considered a vulnerable (disfavoured) contractor in its relations to the professionals to the "weak entrepreneur", involved in the same type of legal relations, which protection is legislatively acknowledged for consumers.

Morality as a limitation of the freedom of contract

A concept that seems to "say" everything from the very beginning, but that is as evanescent as smoke and the institution of "good faith", morality has always censored the extent and even the substance of contracts entered into individuals, being mentioned in the former Romanian Civil Code with the same purpose (article 5).

No code or legal provision has defined "morality" that were intended and even managed to maintain the parties' agreements within the limitations set by moral precepts. Even if there is no (legal, jurisprudent or doctrinary) concept definition available, law practitioners must acknowledge the minor percentage of litigations where the validity of contracts was objected to on the grounds that it presumably was contrary to morality.

However, as they are considered a legal limitation of contractual freedom, morality should be paid attention to at least by the theoretical determination of the concept.

Some authors[14] believe morality is "the totality of conduct rules shaped in society's conscience, the compliance of which became imperatively compelling by extensive experience and practice, for achieving the general interests of a given society".

In that respect, it has been estimated that morality has a religious aspect, impregnated by the moral norms of Christian dogma, morality that, in its turn, is public and personal.[15]

---

[10] *DItto*, page 21.

[11] Cărpenaru, Stanciu D. – Contractele economice. Teoria generală, Bucharest, Scientifical and Encyclopedical Publishing House, 1981, pages 21-22 and 35-36.

[12] Stătescu , Constantin.; Bîrsan , Corneliu – quoted work, page 21.

[13] Marsico , Rita , "Le nuove frontiere della dottrina civilistica : il terzo contratto" – http://www.filodiritto.com/index.php?azione=visualizza&iddoc=.

[14] Adam , Ioan – quoted work, pages 33-35.

[15] *Ditto*.

At the same time, it has been estimated[16] that the other side of morality is empirical, based on sociological rules regarded as natural habits or habits acquired by tradition and education, centered on the idea of "good" and "bad".

The same author[17] believes this concept of "morality" is at full speed and includes rules concerning morality, habits or customs that society deems fundamental principles. The judge summoned to decide any violation thereof will determine, in reality, their importance.

However, it must be highlighted that the execution of a contract in breach of the law, public order and morality leads to various sanctions that are laid down, in principle, in art. 1247 and 1248 of the New Civil Code:

Art. 1247 of the New Civil Code states the sanction of absolute nullity of a contract executed in breach of a legal provision laid down for the protection of a general interest.

Art. 1248 of the Code states the sanction of relative nullity (i.e. cancelability) of a contract executed in breach of a legal provision laid down for the protection of a general interest.

As the Code does not establish criteria to determine general and individual interest, the actual analysis of this aspect lies with the court of law.[18]

Good faith and the freedom of contract

In the above, by the interpretation of the provisions of article 1170 of the New Civil Code, good faith was estimated to be not a factor limiting contractual liberty, but a factor conditioning the exertion of this principle, which turns it into an intrinsic element thereof. There are no *in terminis* sanctions for the violation of this obligation that is not simultaneous with the contract negotiation stage, is at the basis of contract execution and accompanies the contract like an actual „guardian angel" to the date it is terminated.

However, the provision of article 1170, final thesis, of the new Civil Code, that consecrates the inherent, irremovable and insurmountable nature of the good faith obligation leads to the fact that the breach of this obligation be sanctioned by nullity, absolute nullity, we dare say, as good faith has acquired, via this regulation, the role of instrument defending a general interest.[19]

Adhesion contracts

It has been shown[20] that an adhesion contract is a non-negotiable, hence non-negotiated, contract. The entire contract is devised exclusively by one of parties, whereas the other does not have the power to discuss or change it. The only possibilities are to accept the contract as a whole, adhering to all its clauses, or to refuse to contract.

Worryingly, nowadays quite a few contracts are adhesion contracts: utility contracts (electrical power, gas, water supply, waste management), bank contracts, leasing and insurance contracts etc. These are dictated contracts and are explainable by the fact that one of the parties has great economic power, sometimes the actual monopoly of the provided service, which renders it unavailable for negotiations.

Good examples are contracts based on exclusive[21] or selective distribution agreement, as well as franchise contracts that, in practice, attach the parties and forbid them to provide typical services in any other context than the one set by contract. They are also known as dependency contracts[22].

---

[16] *Ditto*, page 34.

[17] *Ditto*, page 35.

[18] In the same respect, please see also Pop , Liviu; Popa, Ionuţ-Florin ; Vidu , Stelian Ioan , Tratat elementar de drept civil . Obligaţiile , Bucharest , Universul Juridic Publishing House, 2012 , pages 69-70; Piperea, Gheorghe – Introducere în Dreptul contractelor profesionale , quoted work, pages 137-139.

[19] Considerations on the good faith implication in contracts: Turcu, Ion, Tratat teoretic şi practic de drept commercial , vol. III, Bucharest, C.H. Beck Publishing House, 2008 , pages 105-111.

[20] Fabre-Magnan, Muriel – Droits des obligations . Contrat et engagement unilatéral , II-ième edition, I-er volume , Paris , Presses Universitaires de France , 2010 ,page 230.

[21] Chirică, Dan – „Principiul libertaţii de a contracta şi limitele sale în materie de vânzare-cumpărare" în Studii de drept privat , Bucharest , Universul Juridic Publishing House, 2010.

[22] Piperea, Gheorghe – quoted work, page 71.

Equally, mention must be made of contracts that hospitals and family GP's are obliged to enter into with the health authorities, which contracts are executed in the context of a framework agreement signed by the Ministry of Health and the National Authority of Health Insurance[23].

Law-imposed (forced) contracts

The distinction resides in that their execution is mandatory under the law.

It is most often the case of mandatory asset (housing) insurance contracts or third party liability contracts or health insurance (the latter being mandatory when travelling abroad).

We should say that the law imposes exclusively the type of contract and the obligation to enter into the same, but it is the parties who actually agree on the contractual clauses.

Special debate should be associated with the cases where, under the law or according to the parties' agreement (actually manifested as a preliminary contract), an obligation to enter into the contract is generated, but either party refuses to meet such obligation.

In the context of Decree No. 144/1958 on regulating the issue of construction, construction repair and demolition permits, as well as those concerning alienation and sharing of land, with or without constructions on it, the refusal of any of the parties to be present before a public notary for the authentication of the alienation document may be sanctioned by a court of law.

The provisions of art. 12 para.1 of Decree No. 144/1958[24] granted the party having met its obligations the right to address the court of law in order to get a decision to substitute the authentic alienation deed, this way the court replacing the promissory seller's consent.

Decree No. 144/1958 was abrogated by Law No. 50/1991 on the construction permits and some measures for housing, and the abrogation law no longer contained the trial remedy made available in the old text. In this context, though there was no other legal text of similar content concerning real estate alienation, with or without constructions on it, the practice of making decisions to replace an authentic alienation deed was maintained in certain courts of law that, this time, went back to the legal grounds of the provisions of art. 1073 of the former Civil Code, which provisions grant the creditor the right to obtain the **exact** fulfillment of the relevant obligation.

We estimate this option is debatable in the absence of an express legal provision granting the court of law the right to substitute a party's consent in the execution of a contract. The contractual freedom principle focuses on agreement and autonomy of will, and its limitations should be expressly laid down by law.

In the given situation, we believe the creditor of an unfulfilled obligation was not left with no legal protection whatsoever as long as it is still art.1073, final thesis, in the old Civil Code the one to stipulate its right to indemnification for failure of the exact exertion of the contracted right.

The Romanian lawmaker has remained constant in its options to make a decision to replace a contract.

Thus, it is worth mentioning the provisions of art. 16 of the Government's Ordinance No. 51/1997 on leasing transactions and leasing companies, stating that, if the lessor/lender fails to comply with the lessee's/user's right of option, as laid down in the ordinance, the former owes damages equal to the total prejudice caused by the breach of this obligation, and the court of law authorized to determine the damages *will be able to make a decision to substitute a deed of sale.*

In the same context, mention must be made of the provisions of art. 5 para. 2 of Title X – Legal circulation of land in Law No. 247/2005 on the reform in property and justice, as well as some adjacent measures. These provisions follow the tradition of those of art. 12 of Decree No. 144/1958 and stipulate that, if, after the execution of a preliminary contract concerning land, either party later

---

[23] Ditto, page 70-71.

[24] Chirică, Dan – "Acţiunea întemeiată pe art.12 din Decretul nr.144/1958 şi hotărârea judecătorească de admitere a acesteia" in the quoted work, pages 127-128.

refuses to enter into said contract, the party having met its obligations may notify the competent court that may make a decision to substitute the contract.

Law No. 287/2009 on the Civil Code abrogated the provisions of Title X of Law No. 247/2005, however, the new Civil Code continued the previous solution, stipulating with regard to sale, in art. 1669 para. 1, the following: when either party having entered into a bilateral sale promissory deed refuses, with no justification, to enter into the promised contract, the other party may request the court to make a decision to substitute the contract if all the other validity requirements are met.

In relation to the aforementioned legal provisions, that are the most recent in the researched area, two observations must be made:

The first concerns the fact that the substitution by the court of ether party's consent no longer predominantly occurs in alienation deeds for which the law requests an authentic document, as previously was the case of land with or without constructions on it.

The second is related to the fact that, in order to submit an action before a court of law, the requirements of art. 1669 para.1 of the new Civil Code, the beneficiary of the promissory sale no longer has to prove that, in his turn, has met the obligations undertaken by he promissory deed, but only that all the other validity requirements have been met.

Again with regard to law-imposed contracts, the provisions of two laws are worth mentioning, both concerning small and medium enterprises (SME's).

Law No. 133/!999 on stimulating private entrepreneurs to establish and develop small and medium enterprises stipulated in art. 12 the access of SME's to the available assets of trading companies and national companies with predominantly state capital, as well as those of autonomous administrations, also establishing access conditions as well.

In addition, the second paragraph of the same article stipulates the obligation of trading companies, national companies and autonomous administrations to enter into sale contracts, and ensure priority access respectively to the lease, concession or leasing of the assets laid down in the previous paragraph.

There are similar provisions in art. 12 of Law No. 346/2004 on stimulating the formation and development of SME's, a law that abrogated Law No. 133/1999.

The two aforementioned laws do not grant SME's the right to request the court to make a decision to substitute an authentic deed, hence, in practice, these enterprises submitted requests to courts via which they requested obliging the other party to enter into the contract. In this case, one can notice that, if the SME's were granted favorable decisions, they had no guarantee that the relevant contracts would be entered into even when the obligation to enter into said contracts was stated by the court under the civil sanction of comminatory damages.

As a general conclusion, as concerns law-imposed contracts, one may notice that the legal limitation to contract merely consists of the obligation imposed on the execution of the type of contract, not the selection of the co-contracting party or the actual contractual clauses, which allows for the freedom to negotiate that is higher than typical of an adhesion contract.

Contracts containing law-imposed clauses

Strictly referring to commercial contracts, in the first years after the 1989 Revolution, the lawmaker intervened in the contractual balance by passing Law No. 76/1992 on measures to refund loans derived from compensation, system of payments for merchants, prevention of incapacity to pay and financial blockage.

The provisions of this law stipulate the parties' obligation to state late-payment penalties in the contracts they execute, the minimum threshold of these penalties, as well as the limitation of the total penalties to the sum for which they are calculated (art. 7 of the law).

The provisions concerning late-payment penalties similar to those in Law No. 76/1992, abrogated by the Government's Emergency Ordinance No. 10/1997 on the reduction of the financial

blockage and losses in the economy, could be found in Law No. 469/2002 on some measures for the consolidation of contractual discipline[25].

These provisions have sparkled fierce debate[26] as concerns the obligation to include the clause concerning the obligation to pay the penalties, which clause, in the absence of all sanctions, was estimated to serve as mere recommendation.

The same law resulted in critical reactions[27] as concerns cumulated penalties and damages, and the limitation of the penalty amount to the level of the main debt, and, in the absence of a contrary agreement between the parties[28], the provision was estimated to contrary to the principle of full prejudice reparation as a result of the failure to comply with contractual obligations [29].

Mention must be made that Law No. 469/2002 was abrogated by Law No. 246/2009 and was no longer replaced by a similar law.

The provisions of art. 46 of the Government's Emergency Ordinance No. 50/2010 on loan contracts for consumers should be mentioned still in the category of law-imposed clauses.

Included in *Section II – Information that must be included in loan contracts*, the provisions of art. 46 of the Government's Emergency Ordinance No. 50/2010 stand for as many clauses that the parties' contract must include, however, the content of which remains at the parties' discretion.

Contracts containing law-prohibited clauses

We highlighted in the above the community lawmaker's intervention mostly in the area of contracts entered into by consumers, wherein the purpose of said intervention was to protect the consumer – an individual regarded as a "weak", vulnerable contractor in his/her legal relations with professionals.

This tendency could also be found in the Romanian law, as the Romanian lawmaker passed Law No. 193/2000 on abusive clauses in contracts entered into between merchants and consumers.

Consumer protection imposed as a measure intended to limit abusive contracts. As concerns the notion of abuse, the following were suggestively shown[30]:

"In the latter decades, qualifying a conduct as abusive extends to all areas of law. Thus, for example, the clauses of a contract may be classified as abusive as regards the consumer, a dominant position-imposed abuse is forbidden, economic dependency is reprehensible, the termination of the employment contract or contract of mandate are sanctioned, majority abuse is consecrated to the trading company-related area of expertise in terms of jurisprudence and legislation, and some price unilateral establishment clauses are qualified as abusive in order to prevent the stipulation of abusively high or low prices".

As concerns contracts entered into with consumers, the state's intervention taking the form of prohibition of abusive clauses is justified by the pressing need to prevent a significant disbalance of the contract[31] and is based on the good faith obligation in contracts.[32]

---

[25] Cărpenaru, Stanciu D. –"Tratat …." Edition 2009. As regards the same topic, please see Chera, Nicolae, quoted work, page 39-40.

[26] Cunescu, Constantin; Balaciu, Anca Alina, Leaua, Crenguţa; Beligrădeanu, Ştefan – "Prezentare de ansamblu şi observaţii critice asupra legii nr.469/2002 privind unele măsuri pentru întărirea discuţiei contractuale" in Dreptul, issue 11/2002, page10.

[27] *Ditto*, page12-14. In the same respect, please see also Cărpenaru, Stanciu D. – "Tratat …." Edition 2009 .

[28] Cărpenaru, Stanciu D. – "Tratat …." Edition, 2009 .

[29] A comprehensive study of the topic belongs to university professor Stanciu D. Cărpenaru, Ph.D., in article "Consideraţii asupra noii reglementări privind întărirea discuţiei contractuale" in Curierul judiciar, issue No. 11/2002 – page1-9.

[30] Turcu, Ion – Tratat teoretic şi practic de drept comercial – vol. III, Bucharest , C.H. Beck Publising House, 2009, page 105.

[31] Jeannin, Marie-Véronique – "Le désequilibre significatif au regard de la liberté contractuelle" – http//www.avocats-fourgoux.com/Droit-des-affaires. For the topic of contractual balance and disbalance, please also see Turcu, Ion – Tratat … vol. III, quoted work, pages136-156.

The doctrine[33] has drafted real inventories of clauses deemed abusive and even spoke of presumption of abuse.[34]

In terms of contractual freedom, however, the prohibition to include presumably abusive clauses, as laid down in Law No. 193/2000, in consumer contracts, the applicable sanction, absolute nullity respectively, as well as possible enforcement of an offence sanction to the merchant having made use of such clauses is of interest.

One should note that absolute nullity applies to the abusive clause only, not necessarily to the entire contract[35], and the latter may stay effective if this is possible in the absence of the relevant clause.

The provisions of the Government's Emergency Ordinance No. 50/2010, as amended to date, are significant as concerns consumer loan contracts via which the lawmaker established a series of forbidden clauses depending on the type of loan, the most significant being the provisions of art. 35 and art. 36 on fees chargeable by the bank.

Speaking of the same law, mention must be made of the provisions of art. 40 para. 1, that prohibit the inclusion in a contract of clauses entitling the creditor to unilaterally amend contractual clauses, without entering into an addendum agreed on by the consumer

Recently, the European Court of Justice decided in favour of the national court's right to *ex officio* investigate abusive clauses in consumer contracts, if any.

E. Conclusions

For the time being it is difficult to establish if the contractual freedom principle still owns the supremacy. The multitude of contracts that the common citizen is required to enter into as well as the discrepancy generated by the different economical position of the contractual parteners lead to the conclusion that the contractual freedom is rather a desideratum. This proves, more often than not, that the freedom of contracting resides solely in entering into a contract with preestablished clauses or not entering into it al all .

References

- Adam , Ioan – Drept civil . Obligaţiile . Contractul , Bucharest , C.H. Beck Publishing House, 2011.
- Cărpenaru, Stanciu D. – Contractele economice. Teoria generală, Bucharest, Scientifical and Encyclopedical Publishing House , 1981.
- Cărpenaru , Stanciu D. – „Consideraţii asupra noii reglementări privind întărirea disciplinei contractuale" in Curierul judiciar , issue 11/2002.
- Cărpenaru, Stanciu D. – Tratat de drept comercial român, Bucharest , Universul Juridic Publishing House , 2009.
- Chera, Nicolae – Obligaţii comerciale . Studiu de doctrină şi jurisprudenţă , Bucharest , Hamangiu Publishing House, 2008.
- Chirică , Dan – Studii de drept privat , Bucharest , Universul juridic Publishing House , 2010.
- Cunescu , Constantin ; Balaciu , Anca Alina ; Leaua , Crenguţa – „Prezentare de ansamblu şi observaţii critice asupra Legii nr.469/2002 privind unele măsuri pentru întărirea disciplinei contractuale" in Dreptul , issue 11/2002.
- Fabre-Magnan, Muriel – Droit des obligations.Contrat et engagement unilatéral, 2nd edition , vol. I , Paris , Presses Universitaires de France, 2010.

[32] Popa, Ionuţ-Florin – "Reprimarea clauzelor abuzive" in Pandectele Române, issue 2/2004, pages194-195.

[33] "Clausole vessatorie. Elenco indicativo di clausole abusive" – www.signoreesignori.

[34] Minussi, Daniele – "Presunzione di vessatorietà" – http://www.e-gloso.it/wiki/prezunzione_di_vessatorieta.aspex.

[35] Piperea, Gheorghe – Drept comercial, vol. II, Bucharest, C.H. Beck Publishing House, 2009, page 67.

- Jeannin , Marie – Véronique - „Le déséquilibre significatif au regard de la liberté contractuelle" in Revue française du Marketing , issue 231/2011 , pag.97-100 – www.avocats-fourgoux.com/Droit-des-affaires/le-desequilibr...
- Marsico , Rita – „Le nuove frontiere della dottrina civilistica : il terzo contratto" – http://www.filodiritto.com/index.php?azione=visulizza&idddoc=2094.
- Minussi , Daniele – „Presunzione di vessatorietà" – http://www.e_glosa.it/.
- Pătulea , Vasile ; Turianu , Corneliu – Curs de drept comercial român , 2nd edition , Bucharest , ALL Beck Publishing House , 2000.
- Piperea , Gheorghe – Introducere în dreptul contractelor profesionale , Bucharest , C.H. Beck Publishing House , 2011.
- Piperea , Gheorghe – Drept comercial , Vol. II , Bucharest , C.H. Beck Publishing House , 2008.
- Pop , Liviu ; Popa , Ionuţ - Florin ; Vidu , Stelian Ioan – Tratat elementar de drept civil . Obligaţiile , Bucharest , Universul Juridic Publishing House , 2012.
- Popa , Ionuţ Florin – „Reprimarea clauzelor abuzive" in Pandectele române issue 2/2004.
- Stătescu, Constantin ; Bîrsan, Corneliu – Drept civil. Teoria generală a obligaţiilor, 9th edition , Bucharest , Hamangiu Publishing House , 2008.
- Turcu , Ion ; Pop , Liviu –Contractele comerciale . Formare şi executare , vol. I , Bucharest , Lumina Lex Publishing House , 1997.
- Turcu, Ion – Tratat teoretic şi practic de drept comercial, vol. III , Bucharest , C.H. Beck Publishing House , 2008.
- „Clausole vessatorie" – www.signoreesignori.it.

TRANSITIONAL JUSTICE AND DEMOCRATIC CHANGE: KEY CONCEPTS

ELENA ANDREEVSKA*

Abstract

This Article proposes a genealogy of transitional justice and focuses on transitional justice as one of the key steps in peace building that needs to be taken to secure a stable democratic future. Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. The paper focuses on key concepts of transitional justice before addressing its traditional components: justice, reparation, truth and institutional reform. This Article meeting point on the transitional process in a society which has experienced a violent conflict and needs adequate mechanisms to deal with the legacies of the past in order to prevent future violence and cover the way for reconciliation and democratic consolidation. It provides key stakeholders with an overview of transitional justice and its different components, while examining key challenges faced by those working in this area. The present paper concludes with some remarks that challenge the traditional concept of transitional justice and its processes in order to initiate important debate on where future work in this field is needed.

Keywords: *Transitional justice, democracy, human rights, institutional reforms, democratic consolidation.*

Introduction

The presumption in much of what has been said about transitional justice is that we can speak in general terms about these real-world practices. Some commentators have spoken explicitly of one common theory of transitional justice.[1] These generalizations concern the dilemmas of dealing with massive human rights abuses and ways to assess and evaluate the practices utilized when confronting such legacies of violence and injustice. Nonetheless, in a diverse world one risk of constructing a general theory is that it can lack sensitivity to different and nuanced circumstances. In particular, it is problematic to utilize a common normative framework that presupposes the liberal democratic nature of an incoming regime, or law's ability to generally further such values. While some case studies of transitional justice have argued that law can also serve to restrict democratization,[2] and while objectives such. As reconciliation, peace, and victims' healing are now increasingly examined in the general literature[3], the fact remains that the scholarship is dominated by the conception that transitional justice is about applying a number of legal and quasi-legal processes in democratic political transitions, and that dealing with the past will help consolidate liberal values.[4]

There are significant problems connected to understanding the complex and very diverse instances of transitional justice by depending on a theoretical framework that is heavily influenced by ideas about transitions from authoritarian rule to democracy that were developed in the late 1980s and early 1990s. Though the scholarship analyzes cases that are radically different from "transitions to democracy," the conceptual underpinnings of transnational justice as an academic field continue to be heavily influenced by values and understandings of dilemmas that connect intimately to liberal

* Elena Andreevska, Ph.D.,SEE-University, Tetovo, Republic of Macedonia (e.andreevska@seeu.edu.mk).

[1] See Riti G. Teitel, Transitional Justice (Oxford University Press, 2000): 213.

[2] See Brian Grodsky, "*Justice without Transition:Truth Commissions in the Context of Repressive Rule*",*8 HUM. RTS. L. REV,* (2008): 218.

[3] See, Ibid., Supra 1; Carlos Nino, *Radical Evil on Trial* (Yale University Press,1996); Neil J Krotz: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Country Studies* (US Institute of Peace Press,1995); and James McAdams: *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, 1997).

[4] Phil Clark: Establishing a Conceptual Framework: "Six Key Transitional Justice" *Themes, in AFTER GENOCIDE 191*(Phil Clark & Zachary Kaufman, 2008).

transitions. In a world where systematical dealing with serious abuses can take place in democratic transitions, in non-liberal transitions, as well as in highly diverse contexts of non-transitions, there is a clear need for "updating" transitional justice theory.

A genealogy of transitional justice indicates that from the post-World War II tribunals at Nuremberg and Tokyo to the proliferation of tribunals and truth commissions in the present, the field of transitional justice has both expanded and normalized. The burgeoning of transitional justice is often associated with the post-Cold War political climate in which a significant number of authoritarian, oppressive and frequently violent nation-states began to transition towards peace and procedural democracy. Particularly, since the end of the Cold-War, the field of transitional justice has metamorphosed from an initially narrow focus on justice and retribution to a much more complex study of how human rights abuses, genocide and other mass atrocities are confronted by societies emerging from violent conflict or transitioning to democratic forms of governance. Transitional justice emerged as both a field of practice and field of scholarly inquiry in the 1980s and 1990s in response to dramatic political changes occurring in Latin America, Central and Eastern Europe, and South Africa. In each case, the transition to democracy included public demands to acknowledge and redress human rights abuses committed by former regimes.

This paper focuses on transitional justice as one of the peace building steps that needs to be taken to secure a stable democratic future. Since the field of transitional justice is very broad and complex, this paper focuses on its key concepts.

1. Defining Transitional Justice

Transitional justice can be defined as the conception of justice associated with periods of political change,[5]characterized by legal response to confront the wrongdoings of repressive predecessor regimes.[6] The origins of modern transitional justice can be traced to World War I.[7] However, transitional justice becomes understood as both extraordinary and international in the postwar, phase of transitional justice. The second, or post-Cold War, phase associated with the wave of democratic transitions and modernization that began in 1989. Toward the end of the twentieth century, global politics was characterized by acceleration in conflict resolution and a persistent discourse of justice throughout law and society. The third phase of transitional justice is associated with contemporary conditions of persistent conflict which lay the foundation for normalized law of violence. [8]

The International Center for Transitional Justice (ICTJ) defines transitional justice as "a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy."[9] This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern

Europe—and to demands in these regions for justice. At the time, human rights activists and others wanted to address systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called "transitions to democracy," people began calling this new multidisciplinary field "transitional justice."

---

[5] See Gulljermo O'Donnell and Phillippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1998), 6.

[6] See Neil J. Kritz , *Transnational Justice: How Emerging Democracies Reckon with Former Regimes* (1997).

[7] See Ibid., Supra 1, pp. 31, 39-40; Michael Walzer, "*Regicide and Revolution: Speeches on the Trial of Louis XVI"* (1992) (providing a historical account).

[8] See Ruti G. Teitel, *Transitional Justice Genealogy, Harvard Human Rights Journal, I Vol. 16* (2003):. 69-70. Also, there is a rich scholarship on transitional justice. Early analyses reflected mostly Latin American and Southern European experiences of democratic transition. But current thinking about transitional justice is informed by a much broader range of experiences, including post-socialist transitions in Eastern Europe and various post-conflict settings, many in sub-Saharan Africa and Asia.

[9] ICTJ website, http://www.ictj.org/en/tj/. Accessed January 4, 2009.

It is important to be emphasized that four processes are believed to constitute the core of transitional justice, even if there is disagreement about what each of them entails and the relationship that should exist between them. Usually, a transition encompasses a *justice process*, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a *reparation process*, to redress victims of atrocities for the harm suffered; a *truth process*, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an *institutional reform* process, to ensure that such atrocities do not happen again (OHCHR, 2009).[10] In addition to these core processes, others have become part of the transitional justice agenda: primarily, *national consultations*, which have been strongly recommended by the Office of the High Commissioner for Human Rights (OHCHR) and the Peacebuilding Commission, which emphasize that "meaningful public participation" is essential for the success of any transition[11]. National consultations should take place in relation to different aspects of transitional justice. Finally, *Disarmament, demobilization and reintegration* (DDR), which usually take place in parallel rather than as part of the transitional justice processes, actively interact with and complement transitional justice mechanisms and policies.[12]

As the field has expanded and diversified, it has gained an important foundation in international law. Part of the legal basis for transitional justice is the 1988 decision of the Inter-American Court of Human Rights in the case of Velázquez Rodríguez v. Honduras,[13] in which the court found that all states have four fundamental obligations in the area of human rights. These are:

- To take reasonable steps to prevent human rights violations;
- To conduct a serious investigation of violations when they occur;
- To impose suitable sanctions on those responsible for the violations; and
- To ensure reparation for the victims of the violations.

Those principles have been affirmed explicitly in later decisions by the court and endorsed in decisions by the European Court of Human Rights and UN treaty bodies such as the Human Rights Committee. The 1998 creation of the International Criminal Court was also significant, as the court's statute enshrines state obligations of vital importance to the fight against impunity and respect for victims' rights.

In spite of this impressive evolution, there are still many questions in need of answers. One such question revolves around the role of international organizations, especially United Nations and European Union, in promoting transitional justice.

2. United Nations Approach to Transitional Justice

Over the years, the United Nations has acquired significant experience in developing the rule of law and pursuing transitional justice in States emerging from conflict or repressive rule. Experience has demonstrated that promoting reconciliation and consolidating peace in the long-term necessitates the establishment or reestablishment of an effective governing administrative and justice system founded on respect for the rule of law and the protection of human rights.

For the United Nations system, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.[14] Transitional

---

[10] Office of the High Commissioner of Human Rights (2009), *Analytical Study on Human Rights and Transitional Justice*, A/HRC/12/18, Geneva: United Nations.

[11] (A/HRC/12/18, 2009, and A/63/881-S/2009/304, 2009).

[12] Clara S. Villalba, "Transitional Justice: Key Concepts, Processes and Challenges*", I.DCR, Knowledge for governing the world* BP 07/11 (2011): 3-4.

[13] *The Velasquez Rodriguez case, INTER-AM. CT.H.R., June 26, 1987 (preliminary objections), July 29,1988(merits); see Facts on File, Aug. 5,1988, § A3, at 577; N.Y. Times, July 30, 1988, at I, col. 2.*

[14] See S/2004/616.

justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.

Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in

integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.[15]

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations, along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice,[16] the right to truth,[17] the right to reparations,[18] and the guarantees of non-recurrence of violations (duty of prevention).[19] In addition, treaty bodies and court jurisprudence, as well as a number of declarations, principles, and guidelines[20] have been instrumental in ensuring the implementation of treaty obligations.

To comply with these international legal obligations, transitional justice processes should seek to ensure that States undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including sexual violence. Moreover, they should ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of violations, in accordance with international law.[21] Without doubt, transitional justice processes and mechanisms do not operate in a political vacuum, but are often designed and implemented in fragile post-conflict and transitional

---

[15] United Nations rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.

[16] See International Covenant on Civil and Political Rights, article 2, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, articles 4, 5, 7 and 12, International Convention for the Protection of All Persons from Enforced Disappearance, articles 3, 6, 7 and 11. See also E/CN.4/2005/102/Add.1, Principle 19.

[17] See International Covenant on Civil and Political Rights, article 2, International Convention for the Protection

of All Persons from Enforced Disappearance, article 24. See also E/CN.4/2005/102/Add.1, Principles 2-5.

[18] See Universal Declaration of Human Rights, article 8, International Covenant on Civil and Political Rights, article 2, International Convention on the Elimination of All Forms of Racial Discrimination, article 6, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 6, International Convention for the Protection of All Persons from Enforced Disappearance, article 24, the Convention on the Rights of the Child, article 39. See also A/RES/60/147.

[19] See International Covenant on Civil and Political Rights, article 2, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 2, International Convention for the Protection of All Persons from Enforced Disappearance, article 23. See also LaGrand Case (Germany v. United States), Judgment of 27 June 2001, I.C.J. Reports 2001. See E/CN.4/2005/102/Add.1, Principle 35.

[20] Inter alia, founded on the 1948 Universal Declaration of Human Rights.

[21] These international standards further set the normative boundaries of UN engagement, for example: the UN will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements (See Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution ,1 Dec. 2006) that include amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights (gross violations of human rights include torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity).

environments. The UN must be fully aware of the political context and the potential implications of transitional justice mechanisms. The question for the UN is never whether to pursue accountability and justice, but rather when and how.[22]

Finally, transitional justice programmes include the following elements:

- Prosecution initiatives;[23]
- Facilitating initiatives in respect of the right to truth;[24]
- Delivering reparations;[25]
- Institutional reform;[26]and
- National consultations.[27]

Taking into account the emerging developments in international law, the principles and needs of UN, including its field presences, the following approaches should be incorporated into transitional justice activities of the UN:

- Adopt an approach to transitional justice that strives to take account of the root causes of conflict or repressive rule, and address the related violations of all rights, including economic, social, and cultural rights in a comprehensive and integrated manner;
- Take human rights and transitional justice considerations into account during peace processes;[28] and
- Coordinate disarmament, demobilization, and reintegration (DDR) initiatives with transitional justice processes and mechanisms, where appropriate, in a positively reinforcing manner.[29]

United Nations rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.

3.The EU and Transitional Justice: A comprehensive approach to justice and peace building

The UN has led the field in developing norms and standards regarding human rights and peacemaking, and in practice, EU mediators are already actively engaged in these issues. Yet despite

---

[22] The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights, and should seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the postconflict and transitional periods.

[23] See The Rule of Law Tools for Post-Conflict States, http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx.

[24] See E/CN.4/2005/102/Add.1, Principles 6-13 and E/CN.4/2004/88 and E/CN.4/2006/91.

[25] The General Assembly has reaffirmed the right of victims to reparations in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. See A/RES/60/147.

[26] Public institutions that helped perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law. Also See E/CN.4/2005/102/Add.1, Principle 36.

[27] National consultations are a critical element of the human rights-based approach to transitional justice, founded on the principle that successful transitional justice programmes necessitate meaningful public participation, including the different voices of men and women. Effective outreach must address both specific groups affected by the particular mechanisms involved as well as the broader community. It requires careful planning during the design phase and adequate resources.

[28] See the study on human rights and transitional justice activities undertaken by the human rights components of the United Nations system (E/CN.4/2006/93) and the progress report on human rights and transitional justice (A/HRC/4/87); and the Human Rights Council Resolution, Human Rights and Transitional Justice, No. 9/10.

[29] Guidance Note of the Secretary-General (2010). 'United Nations Approach to Transitional Justice', p.p. 1-10.

this emerging normative framework, the extent to which peace and justice issues are brought to the fore depends very much on the conflict and on the personality and personal experience of the mediator, regardless of his/her institutional affiliation.[30]

Transitional justice is a relatively new area of concern for the European Union (EU). Indeed, until recently it was largely absent from EU policies promoting democracy, the rule of law and human rights. But that does not mean that it was ignored.[31] Moreover, there is no specific reference to transitional justice in the corpus of treaties establishing the European Union. Also, the EU does not have a common definition of "transitional justice" despite its support for and engagement in transitional justice processes in Europe and beyond.[32]On the other hand, transitional justice can contribute to the rule of law by strengthening the legitimacy of public institutions and the processes by which laws are made, including through promoting public participation. Transitional justice can also contribute to changing social norms which in turn strengthen legitimate rule of law and democracy. Transitional justice contributes to public recognition that the abuse suffered by victims was and remains wrong; this recognition can help strengthen inclusive citizenship, enabling the excluded and marginalised more generally to become fully rights-bearing citizens who participate in a common political project.[33]

According to the treaty on European Union, 'The Union's aim is to promote peace, its values and the wellbeing of its peoples'.[34] In Stockholm in December 2009, the Council of the EU declared: 'The Union is an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes'.[35] Moreover, the EU has provided extensive political and financial support

---

[30] Laura Davis, *"The EU and advancing justice issues in mediation" Brussels: Initiative for Peacebuilding,* (2010), www.initiativeforpeacebuilding.eu.

[31] Avelle, M. (2008*) European efforts in Transitional Justice*. Working Paper 58, Madrid:FRIDE, Fundación para las Relaciones Internacionales y el Diálogo Exterior, 9.

[32] This is discussed in detail in Matthew L. Davis (2010). *The European Union and transitional justice.* Brussels: Initiative for Peace-building.

[33] Pablo De Grieff, *"Justice and Social Integration"* in P. de Greiff and R. Duthie (Eds.). *Transitional justice and development: Making connections* (New York: Social Science Research Council (2009): 56-62.

[34] Article 3.1., of the Treaty of European Union, Official Journal of the European Union, EN C 321 E/1 (2006).

[35] Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09, p.12. The Stockholm Programme, which is concerned with justice and home affairs, is the exception. It outlines how the EU has a three-fold role in combating impunity for the gravest crimes. It does this firstly, by promoting cooperation with the International Criminal Court and other international tribunals and secondly, through exchanging judicial information and best practices in relation to the prosecution of perpetrators of genocide, crimes against humanity and war crimes through the European Network of Contact Points. And thirdly, by acting as a facilitator for Member States' approaches to dealing with crimes committed in their own past, including by totalitarian regimes, for 'in the interests of reconciliation, the memory of those crimes must be a collective memory, shared and promoted, where possible, by us all'. Also See *Report on the implementation of the European Security Strategy – Providing security in a changing world* (December 2008). European Council, S407/08[35] Laura Davis, *"The EU and advancing justice issues in mediation" Brussels: Initiative for Peacebuilding,* (2010), www.initiativeforpeacebuilding.eu.

[35] Ibid., Supra 31.

[35] Ibid.

[35] Ibid., Supra 33.

[35] Ibid., Supra 34 ,Article 3.1.

[35] Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09, p.12. The Stockholm Programme, which is concerned with justice and home affairs, is the exception. It outlines how the EU has a three-fold role in combating impunity for the gravest crimes. It does this firstly, by promoting cooperation with the International Criminal Court and other international tribunals and secondly, through exchanging judicial information and best practices in relation to the prosecution of perpetrators of genocide, crimes against humanity and war crimes through the European Network of Contact Points. And thirdly, by acting as a facilitator for Member States' approaches to dealing with crimes committed in their own past, including by totalitarian regimes, for 'in the interests of reconciliation, the memory of those crimes

to the ad hoc tribunals, including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the Extraordinary Chambers of the Courts of Cambodia, and the Special Court for Sierra Leone. It also supports the trial of the former Chadian president Hissène Habré in Senegal,[36] and the Special Tribunal for Lebanon.[37]

Some of the strongest commitments to international criminal justice are found in the EU's Enlargement policy. The European Council meeting in Copenhagen in 1993 laid down conditions for EU membership, which included 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and the protection of minorities'[38] and provided financial assistance for countries in the region to strengthen democratic institutions and the rule of law as a way to 'advance regional cooperation as well as reconciliation'.

Cooperation with the ICTY became a condition for membership candidacy, as spelled out in the Thessaloniki Agenda for the Western Balkans:

'The EU urges all concerned countries and parties to co-operate fully with the International Criminal Tribunal for the former Yugoslavia. Recalling that respect for international law is an essential element of the SAP [Stabilisation and Association Process], the EU reiterates that full co-operation with ICTY, in particular with regard to the transfer to The Hague of all indictees and full access to documents and witnesses, is vital for further movement towards the EU'.[39]

Missing a consistent overarching framework, legal or otherwise,[40] the EU approaches transitional justice from primarily two perspectives. First, transitional justice mechanisms are nested in various policies that promote human rights, development, democracy, and enlargement under what is known as the Community Pillar (First Pillar) of the EU.[41]

Additionally to the Community Pillar, the EU promotes transitional justice as part of its Common Foreign and Security Policy (Second Pillar), filtered through the prism of the European Security and Defense Strategy (ESDP). From this vantage point transitional justice mechanisms are embedded with other peace-building and security-oriented tasks, such as crisis-management, security sector reform (SSR), and disarmament, demobilization and reintegration (DDR).

The EU is committed to promoting peace, to the protection of human rights and to the strict observance and the development of international law.[42] One of the objectives of the Union's common foreign and security policy (CFSP) is 'to consolidate and support democracy, the rule of law, human rights and the principles of international law'.[43]

The Concept on Strengthening EU Mediation and Dialogue Capacities states that:

'Issues such as holding human rights violators accountable in justice for their actions, reparations to victims, reintegration of ex-child soldiers, restitution of property and land … have to be tackled during the peace negotiations and the drafting of peace agreements. Although it is widely acknowledged that it is only through justice to victims that enduring peace can be achieved, there are

---

must be a, p.12; and Commission Staff Working Document SEC(2009) 932: Accompanying document to the *Annual report from the European Commission on the Instrument for Stability in 2008* COM(2009) 341, p.57.

[36] European Communities (2008). *EU Report on Human Rights 2008*, p.74.

[37] European Commission (2009). *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Lebanon* COM(2009) 188, p.6.

[38] European Council in Copenhagen 21-22 June 1993 Presidency Conclusions SN 180/1/93, p.13.

[39] General Affairs & External Relations Council (GAERC). Extracts from successive General Affairs & External Relations Councils 16 June 2003.

[40] See Heiner Hänggi and Fred Tanner, *"Promoting Security Sector Governance in the EU's Neighbourhood", Challiot Paper no. 80,* (July 2005).

[41] In these instances, decisions are made using the so-called "Community method": the Commission holds a monopoly on the right of initiative; the Council employs the qualified majority voting rule; and the European Parliament takes a moreactive role in co-legislating with the Council.

[42] Ibid., Supra 34, Article 3 paragraphs 1, 5.

[43] Ibid., Article 21.2 (b).

often tensions between these two objectives, and the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity. EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law, and must contribute to fighting impunity for human rights violations'.[44]

Peace-building and human rights agendas are pushed by activist Member States (usually Sweden, Denmark, Finland, the Netherlands, Belgium and sometimes the United Kingdom, plus others depending on the issue) and by activist officials in the national capitals and in Brussels. The extent to which these issues are prioritised in dealing with third countries depends on Member States' other interests there, or indeed the interests of third countries. In the Western Balkans, by

contrast, human rights and justice are seen as integral to the EU's interests in the region and cooperation with the ICTY is a condition of furthering relations with the EU. Yet even there, Member States set the bar at different heights.

Moreover, civilian crisis management is a central focus of the European Security and Defense Policy (ESDP) and is now considered the "core" of a human security based approach (Dwan 2006: 265). Increasingly, the most overt expression of the EU's support for transitional justice occurs in the context of EDSP, but without additional support provided by communitarized programs "winning the peace" would be that much more difficult. In examining how the EU's ESDP capabilities and missions have evolved, as well its first pillar instruments dedicated to the promotion of democracy, development and human rights, we observe an expanding EU international role that explicitly integrates the importance of ethical and normative concerns in formulating foreign policy, particularly in the areas of human rights and the security of individuals. Such concerns animate, indeed permeate, the EU's newly launched efforts in the area of transitional justice. The ethical power Europe model emphasizes what the EU does, and what the EU does in promoting transitional justice is to help establish the conditions for legitimate political authority, legitimate institutions, and the rule of law, all of which are preconditions for ensuring human security.

Lastly, transitional justice is recognised as an important policy area in the Mediation Support Concept, and indeed, the transitional justice element of the concept was the subject of most substantive debate during the drafting process. The concept also states that 'the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity'.[45]

Conclusion

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. The approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.[46]

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. The approach to the

[44] Doc. 15779/09 II. 4 (d), p.8; Council Common Position 2003/444/CFSP; European Communities (June 2009). *The European Union and Central Asia: The new partnership in action*, pp.16-17; Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06; and The Rome Statute of the International Criminal Court (July 2002), Preamble.

[45] Doc. 15779/09 II. 4 (d), p. 8.

[46] For example, the UN main role is not to build international substitutes for national structures, but to help build domestic justice capacities. See UN Doc S/2004/616.

justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.[47]

Furthermore, despite the fast development of transitional justice as a field and of the processes described, such mechanisms are not always based on consistent normative foundations, simply because in periods of radical change different political forces and goals can be incompatible.[48] Also, the goals of each individual process (truth, justice, reparations and institutional reform) are not always achievable in parallel.

New practical challenges have forced the field to innovate, as settings have shifted from Argentina and Chile, where authoritarianism ended, to societies such as Bosnia and Herzegovina, Liberia and the Democratic Republic of Congo, where the key issue is shoring up peace. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities and the role of justice in peace-building have become important new issues.

Ultimately, there is no single formula for dealing with a past marked by large-scale human rights abuse. All transitional justice approaches are based on a fundamental belief in universal human rights. But in the end, each society should—and indeed must—choose its own path.

References

- A/HRC/12/18, 2009, and A/63/881-S/2009/304, 2009.
- A/HRC/4/87.
- A/RES/60/147.
- A/RES/60/147.E/CN.4/2005/102/Add.1.
- Accompanying document to the *Annual report from the European Commission on the Instrument for Stability in 2008* COM (2009) 341.
- Avelle, M. "European efforts in Transitional Justice". *Working Paper 58, Madrid: FRIDE,Fundación para las Relaciones Internacionales y el Diálogo Exterior, 9,* (2008).
- Bell, C. (2009), „Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"", *International Journal of Transitional Justice*, 3(1), (2009): 5-27.
- Brian, Grodsky. "Justice without Transition: Truth Commissions in the Context of Repressive Rule".8 HUM. RTS. L. REV, (2008).
- Carlos, Nino. *Radical Evil on Trial.* Yale University Press, 1996.
- Clara, S. Villalba. "Transitional Justice: Key Concepts, Processes and Challenges*"*. I.DCR, Knowledge for governing the world BP 07/11. (2011).
- Commission Staff Working Document SEC (2009): 932.
- Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment.
- Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment.
- Convention on the Rights of the Child.
- Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09, p.12.
- Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09.
- Doc. 15779/09 II. 4 (d), p.8; Council Common Position 2003/444/CFSP.
- Doc. 15779/09 II. 4 (d).
- E/CN.4/2004/88 and E/CN.4/2006/91.
- E/CN.4/2005/102/Add.1, Principle 35.
- E/CN.4/2005/102/Add.1.
- E/CN.4/2005/102/Add.1.

[47] Ibid.

[48] Bell, C. (2009), „Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"", *International Journal of Transitional Justice*, 3(1): 5-27.

- E/CN.4/2005/102/Add.1.
- E/CN.4/2006/93).
- European Commission (2009). *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Lebanon* COM (2009) 188.
- European Communities (2008). *EU Report on Human Rights 2008.*
- European Communities (June 2009). *The European Union and Central Asia: The new partnership in action*, pp.16-17; Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06 (June 2009).
- European Council in Copenhagen 21-22 June 1993 Presidency Conclusions SN 180/1/93.
- European Council, S407/08.
- General Affairs & External Relations Council (GAERC). Extracts from successive General Affairs & External Relations Councils 16 June 2003.
- Guidance Note of the Secretary-General (2010). 'United Nations Approach to Transitional Justice'.
- Gulljermo, O'Donnell and Phillippe, C. Schmitter. *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies.* 1998.
- Heiner, Hänggi and Fred, Tanner, *"Promoting Security Sector Governance in the EU's Neighbourhood", Challiot Paper no. 80,* (July 2005).
- Human Rights Council Resolution, Human Rights and Transitional Justice, No. 9/10.
- ICTJ website, http://www.ictj.org/en/tj/. Accessed January 4, 2009.
- International Convention for the Protection of All Persons from Enforced Disappearance.
- International Convention for the Protection of All Persons from Enforced Disappearance.
- International Convention for the Protection of All Persons from Enforced Disappearance.
- International Convention on the Elimination of All Forms of Racial Discrimination.
- International Covenant on Civil and Political Rights.
- James, McAdams: *Transitional Justice and the Rule of Law in New Democracies.* University of Notre Dame Press, 1997.
- LaGrand Case (Germany v. United States), Judgment of 27 June 2001, I.C.J. Reports 2001.
- Laura, Davis. "The EU and advancing justice issues in mediation". *Brussels: Initiative for Peacebuilding,* (2010). www.initiativeforpeacebuilding.eu.
- Matthew, L. Davis (2010). "The European Union and transitional justice". *Brussels: Initiative for Peacebuilding* (2010).
- Michael, Walzer. *Regicide and Revolution: Speeches on the Trial of Louis XVI.* 1992.
- Neil, J. Kritz . *Transnational Justice: How Emerging Democracies Reckon with Former Regimes.* 1997.
- Neil, J. Krotz. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Country Studies.* US Institute of Peace Press, 1995.
- Office of the High Commissioner of Human Rights (2009), *Analytical Study on Human Rights and Transitional Justice*, A/HRC/12/18, Geneva: United Nations.
- Pablo, De Grieff, Justice and Social Integration in P. de Greiff and R. Duthie (Eds.). *Transitional justice and development: Making connections* (New York: Social Science Research Council (2009): 56-62.
- Phil, Clark. "Establishing a Conceptual Framework: "Six Key Transitional Justice" Themes". AFTER GENOCIDE 191, 2008.
- Report on the implementation of the European Security Strategy – Providing security in a changing world.
- Riti, G. Teitel. *Transitional Justice.* Oxford University Press, 2000.
- Ruti, G. Teitel. "Transitional Justice Genealog". Harvard Human Rights Journal, I Vol. 16. (2003).
- S/2004/616.
- The Rule of Law Tools for Post-Conflict States, http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx.
- The Velasquez Rodriguez case, INTER-AM. CT.H.R., June 26, 1987 (preliminary objections), July 29,1988(merits).
- Treaty of European Union, Official Journal of the European Union, EN C 321 E/1 (2006).
- UN Doc S/2004/616.
- Universal Declaration of Human Rights.

THE PRINCIPLES OF LAW. PHILOSOPHICAL APPROACH

MARIUS ANDREESCU*

Abstract
Any scientific intercession that has as objective, the understanding of the significances of the "principle of law" needs to have an interdisciplinary character, the basis for the approach being the philosophy of the law. In this study we fulfill such an analysis with the purpose to underline the multiple theoretical significances due to this concept, but also the relationship between the juridical principles and norms, respectively the normative value of the principle of the law. Thus are being materialized extensive references to the philosophical and juridical doctrine in the matter. This study is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between "given" and 'constructed" we propose the distinction between the "metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.

Key words: *Principles of the law/ / "given" and "constructed" in the law / Moral value / juridical value/ metaphysical principles/ constructed principles.*

I. Introduction

In philosophy and in general, in science, the principle has a theoretical value and an explanatory one as it is meant to synthesize and express the basis and unity of human existence, of existence in general and knowledge in its diversity of manifestation. The discovery and the assertion of the principles in any science concedes the certitude of knowledge, both by the expression of the *prime element*, that's exist by itself, without having the need to be deducted or demonstrated, as throughout the achieving of cohesion within the system, without which the knowledge and scientific creation cannot exist.

The principle has multiple significances in philosophy and science, but for our scientific approach, one keeps in mind this one:" as element, idea, basic law on which a scientific theory is grounded, a norm of conduct or the totality of laws and basic concepts of a discipline"[1]. The common place of the meanings of the term of principle makes the essence, a common category important both for philosophy as for the law.

The principle represents the *given as such*, that may have a double significance: a) what existed before any knowledge as aprioric factor and ground for the science; b) theoretical and resulting element of the synthesis of the phenomenon diversity for the reality of any type. The distinction, but also the relationship between "given" and 'constructed" are important in understanding the nature of the principles in science and mainly in law. In his work "*Science et tehnique en droit positif"* published at the beginning of XX century, François Geny[2] analyzes for the first time the relation between science and juridical technique starting from two concepts" the 'given" and the 'constructed". In his opinion Geny one thing is "given" when it exits as an object outside the productive realities of human. On this meaning the author distinguishes four categories: the *real given, the historical given; the rational given;* the ideal given. From our researching theme's

* Lecturer, PhD, University of Piteşti; Judge, Piteşti Court of Appeal (e-mail: andreescu_marius@yahoo.com).

[1] *Romanian explanatory dictionary*, Publishing House of the Socialist Republic of. Români, Bucharest, 1975, p.744.

[2] Author quoted by Ion Craiovan, in the Monography *Introduction into Law's Philisophy,* Publishing House All Beck,Bucharest, 1998, p.63.

perspective two of these categories are of interest, namely:" the rational given" that consists of those principles that come out from the consideration that needs to be shown to the people and human relationships, and the "ideal given" throughout which is being established a dynamic element, respectively the moral and spiritual relationships of a particular civilization.

One thing is being "constructed" when being achieved by man, as reasoning, a juridical norm, etc. The "given" is relative in the meaning that is being influenced by a 'constructed", by human activity. Regarding the "given", man's attitude consists in knowing it by the help of science. Regarding the "constructed" the man is by hypothesis the "constructor", he can make from this respect, art or technique. The sphere of the constructed stretches out onto the social and political order.

The question that arises is if the law is "given", object of science, in other words for a finding, recording or it is "constructed, as technical work? From historical perspective, the law is obviously "given", object of science, such as it appears in the old law, in the international or national contemporary law. The drafting of the positive law yet assumes a "construction" and the juridical rules are the work of technique on this respect.

In the juridical literature this distinction has been retained, in compliance with which the science explores the social climate that requires a certain juridical normality, and the technique is aiming towards the modalities through which the law maker transposes them into practice, "builds" the juridical rules. It was emphasized nevertheless upon the relativeness of this distinction, having into consideration that the juridical technique also assumes a creation, a scientific activity[3].

Therefore the principles represent the "given" as ideal or background for the science and the 'constructed" in situation they are developed or transposed into a human construction, included by juridical norms.

A good systematization of the meanings which the principle notion has is done in a monography[4]: "a) the founding principle of a field of existence; b) what would have been hidden to the direct knowledge, and requires logical-epistemological processing; c) logical concept that would allow the knowledge of the particular phenomenon."

This systematization, applied to the law means: a) the discussion referring to the substance of law; b) if and how we may know the substance; c) the efficiency of placing into the phenomality of the law, related or not with the substance."[5]

The need of the spirit to raise up to the principles is natural and mostly persistent. Any scientific construction or normative system must relate to the principles that will guarantee or substantiate them. This regressive motion towards unconditioned, towards what is prime in an absolute way is for example of the motion that Platon follows in the Book VII of the Republic[6], when he puts the essence of the "Good" as a prime and non-hypothetical principle. In the same meaning another great thinker[7] speaks about the "first principles" or the eternal principles of the "Being", non-demonstrable, a ground for any knowledge and of any existing one, beyond which is nothing else but ignorance.

The question then is to know if what seems necessary, in the virtue of logics of knowledge is necessary also in the ontological order of the existence. In the "Critic of the Pure Reason",[8] Kant will show that such a passing from the logic to the existing (the ontological argument) is not legitimate. If the unconditioned, as a principle, is put in a necessary way by our reasoning, this fact cannot and

[3] Jean Dabin, *Théorie générale du Droit,* Bruxelles, 1953, p. 118-159.
[4] Ibidem, *op.cit*., p.20.
[5] Ibidem, *op.cit*., p.20.
[6] Platon, *Works* – volume V, Scientifical and Encyclopedic Publishing House,Bucharest, 1982, p.401-402.
[7] Aristotel, *Metaphysics, Book I,* Ed. IRI,Bucharest, 1996, no.9-69.
[8] Immanuel Kant, *Critique of Pure Reason,* Publishing House IRI, Bucharest, 1994, p.270-273.

must not lead us to the conclusion that this unconditioned exists outside it and independently of any reality.

In consequence, as the principles aim the existence in all its fields, they cannot and must not be immutable, but are the outcome of the becoming. They are a "given", but only as a result of the existential dialectics or as a reflection of becoming into the phenomenal world and of the essence.

II. Paper content

Since the law is assuming a very complex relationship, between the essence and the phenomena, and also a dialectics specific to each of the two categories in the plane of theoretical, normative and also social reality, cannot be outside the principles.

The problem of the statute of the principles of law and their explaining was always a concern for the theoreticians. The natural law school argued that the source, origin, and therefore the grounds of the juridical principles are of human nature. The historical school of law, under Kantianism influence. The law historical school, under Kantianism's influence, opens a new view in researching of juridical principles' genesis, presenting them as products of the people's spirit (Volkgeist) which shifts the grounds of law from the universe of pure reasoning, to the junction of some historical origins scattered in a multitude of transient forms. The versions of the positivist school claim that the principles of law are generalizations induced by the social experience. When the generalization covers a series of social facts, in a sufficient number, we are in the presence of principles. There are authors such as Rudolf Stammler that deny the lastingness of any juridical principle, considering the contents of law diversified in space and time, lacking universality. In the author's concept the law could be a cultural category.[9]

Referring to the same problem, Mircea Djuvara asserted: "All law science does not consist in reality, for a very serious and methodical research, but merely in releasing out of a multitude of law dispositions, their essential, which are precisely these last principles of justice of which other dispositions derive from. In this way the entire legislation is of a large clarity and what it is called the juridical spirit comes into being. Only thus the scientific drafting of a law is being done. "[10]

In our opinion this is the starting point for understanding the principles of law.

In the specialized literature there is no unanimous opinion regarding the definition of the principles of law[11]. A series of common elements are identified, which we mention below:

- The principles of law are general ideas, guiding postulates, fundamental provisions or bases of the law system. They characterize the entire law system, constituting in the same time features specific to a certain type of law;
- The general principles of law configure the entire structure and the development of the law system, provide the unity, homogeneity, balance, coherence and its development capacity;
- The authors differentiate between fundamental principles of law, that characterize the entire law system and which reflect what is essential within the respective law type and the principles valid for certain law branches or juridical institutions.

Thus in the doctrine were identified and analyzed the following general principles of law: 1) providing the juridical bases for state's functioning; 2) the principle of liberty and equality; 3)

---

[9] Rodolf Stammler, *Theorie der Recktswissenschaft,* University of Chicago, Press, 1989, p.24-25.

[10] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitv, General Theory of Law. Rational Law, Source and Positive Law*. Publishing House All Beck,Bucharest, 1999, p.265.

[11] On this meaning see also : Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului, Introduction in Law General Theory* Publishing House All,Bucharest, 1993, p.30; Gheorghe Boboş, *Teoria generală a statului şi dreptului, General Theory of State and Law* Didactical and Pedagogical Publishing House, Bucharest, 1983, p.186; Nicolae Popa, *General Theory of Law,* Publishing House Actami,Bucharest, 1999, p.112-114; Ion Craiovan, *Tratat elementar de teorie generală a dreptului, Elementary Treaty of Law General Theory* Publishing House All Beck,Bucharest, 2001, p.209,; Radu Motica, Gheorghe Mihai, T*eoria generală a dreptului, General Theory of Law* Publishing House Alma Mater, Timişoara, 1999, p.75.

principle of responsibility; 4) principle of justice[12]. The same author considers that the general principles of law have a theoretical and practical importance that consists in: a) the principles of law are drawing the guiding line for the juridical system and orientates the activity of the law maker; b) these principles are important for the administering of the justice as "The man of law must ascertain not only the positiveness of the law, he has to explain the reason of its social existence, the social support of law, its connection with the social values"; c) the general principles of law take the place of the regulating norms when the judge, in the silence of the law, solutions the cause based on law general principles[13].

One of the main problems of the juridical doctrine is represented by the relation between the law principles, law norms and social values. The opinons expressed are not unitary they differ pending on the juridical conception. The natural law school, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside their norms, positive and superior to them. The principles of law are grounded on the human reason and configure valorically the entire juridical order. Unlike this, the positivist law school, the Kelsian normativism considers that the principles are expressed by the norms of law and in consequence there are no law principles outside the juridical norms system.

Eugeniu Speranţia established a correspondence between the law and law principles:"If the law appears as a total of social norms, mandatory, the unity of this totality is due to the conseqvence of all norms related to a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between them. "[14]

In connection to this problem, in Romanian specialized literature was emphasized the idea that the law principles are fundamental provisions of all juridical norms[15].In another opinion, it was considered that the law principles orientate the drafting and enacting of the juridical norms, they have the force of some superior norms, that are found in the text of normative acts, but they can be deduced from the "permanent social values" when they are not expressly formulated by the positive law norms[16].

We consider that the general law principles are delimited by the positive norms of law, but undoubtedly there is a relationship between these two values. For instance, the equality and liberty or equity and justice are valoric foundations of social life. They need to find their juridical expression. In this way appear the juridical concepts that express these values, concepts that become foundations (principles) of law. From these principles derive the juridical norms. Unlike the norms, the general principles of law have an explanatory value because they contain the grounds for law's existence and development. [17]

Besides other authors[18] we consider that the juridical norms relate to the law principle in two meanings: the norms contain and describe most of their principles; the functioning of the principles is achieved by putting into practice of the conduct provided by the norms. In relation to the principles the juridical norms have an explanatory, teleological narrower value, the purpose of the norms being to preserve the social values, not to explain the causal reason of their existence. The principles of law are the expression of the values promoted and defended by the law. One can say that the most general principles of law coincide with the social values promoted by the law.

---

[12] Nicolae Popa, *quoted works.*, p.120-130.

[13] Ibidem, *quoted works,* p.119.

[14] Eugeniu Speranţia, *Principii fundamentale de filozofie juridică, Fundamental Principles of Juridical Philosophy* Cluj, 1936, pg.8. On this meaning see also Nicolae Popa, *op.cit.,* p.114.

[15] Nicolae Popa, *quoted works,* p.114.

[16] Ioan Ceterchi, Ion Craiovan, *quoted works* p.30.

[17] Nicolae Popa, *quoted works*, p.116-117.

[18] Nicolae Popa, *quoted works,* pg.116-117, Radu I. Motica, Gheorghe C. Mihai, *Teoria generală a dreptului. Curs universitar, General Theory of Law. Academic Course* Ed. Alma Mater, Timişoara, 1999, p.78.

For a correct understanding of the problematic of the values in law and their expressing by the principles of law some brief comments are needed in the context of our researching theme. The different currents and juridical schools, from antiquity up to the present, have tried to explain and substantiate the regulations and juridical institutions by some general concepts appreciated as being special values for the society. The law is grounded on judgments of value. Indeed by its nature the law implies an appreciation, a value rendering of human conduct in relation to certain values, representing the finality of juridical order such as: justice, common good, liberty etc [19]

The values are neither of a strict nature nor of an exclusively juridical nature. On the contrary, they have a larger dimension, moral, political, social, philosophical, in general. These values must be understood in their historical-social dynamics. Though some of them are to be found in all law systems, for instance the justice, nevertheless the specific and historical particularities of the society leave their print on them. The values of a society must be primordially deduced from philosophy (social, moral, political, juridical) which leads and guides the social forces in the respective society.

The law maker, in the enactment process, oriented be such values, expressed mainly in the general principles of law, transposes them into juridical norms, and on the other side, once these vales "enacted" they are defended and promoted in the form specific to the juridical regulation. The juridical norm becomes both a standard for the appreciation of the conduct pending on respective social value, or a means to ensure the achieving of the exigencies of such a value and the prediction of the future development of society. Needs to be added that the juridical norms substantiate the juridical values in a relative way because, either as a whole or individually, they don't show totally a juridical value, they do not exhaust its richness in contents.

In regard to the identification the values promoted by the law, the oppinions of the authors do not coincide, yet they stay in closed related spheres. Thus, Paul Roubier named few such values *the justice, juridical security and social progress*[20]. Michel Villey named four large finalities of the law: *justice, good conduct, serving people and serving society*.[21] François Rigaux speaks about two categories, namely: the primordial ones called by him formal, *order, peace and juridical security* and the material ones *equality and justice*.[22]

The undeniable value that defines the finality of the law, in the concept of the most distinguished thinkers, yet from the ancient times, is the *justice.* The most complex concept *justice* was approached, explained and defined by numerous thinkers – moralist, philosophers, counselors, sociologists, theologians – that start in defining it from the ideas of *just, equitable*, in the meaning to give everyone what deserves. The general principle of law, equity and justice is the expression of justice as a social value. Many concepts about the law would be suitable, be it on a rationalist line or in a realistic one. The rationalists argue that the principle of justice is innate to men, it holds onto our reasoning in its eternity. The realists argue that the justice is an elaborate of history and human general experience.

Regardless of theoretical orientation, the justice undoubtly constitutes a complex ground of the juridical universe. Giorgio del Vecchio asserts that the justice is a conformation to the juridical law, the juridical law being the one that contains the justice. According to Lalande the justice is the owner of what is just; Faberquetes considers the law as a unique expression of the principle of justice, and the justice, as, naturally, the unique content of the expression of law. It has been said that the justice is the will to give everyone what it is his; is the balance or proportion of the relationships between people, is the social love or the harmonious fulfilling of the human being essence. [23]

---

[19] Paul Roubier, *Théorie générale du Droit,* L.G.D.J., Paris, 1986, p.267.

[20] Paul Roubier, *quoted works*, p.268.

[21] Quoted by Jean-Louis Bergel in *Théorie générale du Droit,* Dalloz, Paris, 1989, p.29.

[22] Quoted by Ioan Ceterchi and Ion Craiovan in *Introducere în teoria generală a dreptului*, *Introduction into General Theory of Law* Publishing House All,Bucharest, 1993, p.27.

[23] For enlarging the topic see Gheorghe C. Mihai, Radu I. Motica *Fundamentele dreptului. Teoria şi filozofia dreptului*, *Law Fundamentals. Theory and Philosophy of Law* Publishing House All,Bucharest, 1997, p.128.

The justice as a value and principle of the law exists throughout the juridical norms contained in constitutions, laws etc. This does not mean that the objective law, with expressings, carries on entirely and unavoidably "justice": not all that is lawfully in force is just. On the other side there are juridical norms, such for instance, the technical ones that are indifferent to the idea of justice. There are circumstances when the positive law is inspiring more utility considerents than the justice ones, in order to maintain the order and stability in society.

In our opinion, the justice, as social value and also as a general principle of law, dimensions itself in the ideas of just measure, equity, lawfulness and good faith. Mainly the concepts of just measure and equitly express the proportionality.

The principle of justice has a guidance contents on the cognitive-acting line: to give each one what deserves. A law system is unitary, homogenous, balanced and coherent if all its components "provide, protect, establish" in such a way that every physical and juridical person be what it is, to have what he deserves without injuring one another or the social system.

The equity is a dimension of the principle of justice in its consensuality with the moral good. This concept moulds the formal juridical equality, makes it human, introducing into the law systems in force the categories of the moral from the perspective of those for which the justification is a making for good and for liberty." Thus considered, the equity disseminates till the farthest spheres of the juridical norms system, fructifying even the strictly technical or formal fields, apparently indifferent towards the axiological concerns" [24]. Understood by the idea of proportionality, the equity regards the diminishing of the inequality there where the establishing of a perfect equality (also named formal justice) is impossible due to the particularity of the situation in fact. In other words, in relation to the generality of the juridical norm, the equity suggests to take into consideration the situations in fact, personal circumstances, unicity of the cause, without falling into extreme.

The idea of justice develops under the influence of the social-political transformations. Thus, in the contemporary democratic states, in order to underline the economic, social, cultural rights, one speaks about the *social justice.* The achieving of the social justice is mentioned as a requirement of the lawful state in the document adopted at the Conference for European Security and Cooperation, Copenhague 1990.

Another problem of the juridical doctrine is to establish the relationship between the principles of law and those of the moral. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)[25], dinstinguished between the mission of the right to protect the external relationships of human individuals through provisions that form perfect and sanctionable obligations and the mission of the moral to protect the inner live of individuals, only throughout provisions that form imperfect and unsanctionable obligations. This difference between morals and law has become classic.

Undoubtedly, the law cannot be mistaken with the morals, for several reasons analyzed in specialized literature[26]. However, law and morals are from ancient times in a closed relationship that cannot be considered as accidental. The respective relationship is axiological. The juridical and ethical values have a common origin, respectively the conscience of the individuals living in the same community. The theory of justrationalism – the modern form of justnaturalism – tried to argument that there is a background of universal and eternal justice, because they are written within

[24] Ibidem, *quoted works. p.133.*

[25] Quoted by Ion Dobrinescu în *Dreptatea şi valorile culturii, Justice and Values of Culture,* Romanian Academy Publishing House, Bucharest, 1992, p.95.

[26] See also Giorgio del Vecchio, *Lecţii de filozofie juridică*, *Lessons of Judicial Philosophy* Publishing Europa Nova,Bucharest, 1995, p.192-202; Ion Dobrinescu, *quoted works*, p. 95-99; Gheorghe Mihai, Radu I. Motica, *quoted works,* pg.81-86; Ion Ceterchi, Ion Craiovan, *quoted works*, p. 39-42.

human reasoning where they connect with the principles of good and truth. Therefore, as law is rational, it is natural and because it is natural, it is also moral.

Of course, the law is eminamently governing the outer conduct of human individual. Nevertheless the law is not disinterested by the morals, "by the fact that by means of equity it seeks the good acting to harmonize the exterior with the inside of the individual, throughout the same equity"[27]

We consider that indeed the morals and law have a common valoric structure and it can be deducted only from the assertion pretty often met and according to which "the law is a morals minimum" but also from the observation that there isn't a moral assertion to be denounced as unfair, yet sometimes are being discovered juridical assertions in disagreement with the moral principles. It is noticed the tendency of the law to make appeal to values with a moral character so that they can be introduced into juridical regulations. In this respect Ioan Muraru stated that: "the moral rules, though usually are closer to the natural rights and customary laws, they express ancient and permanent desires of mankind. The moral rules, though usually are not fulfilled, in case of need by using the coercive force of the state, they need to be juridically backed up in their fulfilling when they defend human life, freedom and happiness. Therefore, in Romania's Constitution the referring to moral hypostasis is not missing. These constitutional referring provides efficiency and validity to the morals. Thus, for example, item 26, item 30 protect « good habits », item 35 mentions the « public morals » also the « good faith » which is obviously first a moral concept consecrated by item 11 and item 57[28]. Therefore the general principles of law and those of the morals have a common background of values. The norms of the law can express values that at their origin are moral and are to be found in the contents of the general principles of law, such as is for example the equity or its particular form, the proportionality.

The principles of law have the same features and logical-philosophical significances as the principles in general. Their particularities are determined by the existence of two systems of dialectical relationships specific to law:

a) principles – categories – norms;
b) principles – law, as social reality.

Few of the most important features of the principles of law can be identified, useful in order to establish if the proportionality can be considered a principle of law:

A) Any principle of law must be of the order of essence. It cannot be identified with an actual case or with an individual assessment of juridical relations. The principle must represent the stability and balance of the juridical relations, regardless the variety of normative regulations or particular aspects specific to juridical reality. In consequence, the principle of law must be opposed to the aleatory and should express the necessity as essence.

However, the principle cannot be a pure creation of the reasoning. It has a rational dimension, abstract of maximum generality, but is not a creation of metaphysics. Yet of substance order, the principles of law can neither be eternal nor absolute, but they do reflect the social transformations, they express the historical, economical, geographical, political particularities of the system which they contain and at their turn, which they substantiate. [29] The principles of law develop so that the realities they reflect and explain be subject to improving. The scientific improving of the juridical

[27] Gheorghe C. Mihai, Radu I. Motica, *quoted works*, p.84.

[28] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii publice, Constitutional Law and Public Institutions* Publishing House All Beck,Bucharest, 2003, vol.I, p.8.

[29] On this meaning see Mircea Djuvara, *Drept şi sociologie, Law and Sociology* I.S.D.,Bucharest, 1936, pg.52-56 and Nicolae Popa, *op.cit.*, p.113-114.

analysis could never be ended. But in law, one needs to give immediate solutions so that the practical life does not wait"[30].

Being of the substance order the principles of law have a generalizing character, both for the variety of the juridical relationships as for the norms of law. At the same time expressing the essential and the general of the juridical reality, the principles of law are grounds for all other normative regulations.

There are great principles of law that do not depend on their consecration on the juridical norms as it is the juridical norm that determines their concrete contents in relation to the historical reference time.

B) The principles of law are consecrated and acknowledged by constitutions, laws, customary, jurisprudence, international documents or formulated by the juridical doctrine.

The principles must be accepted internally and must be a part of the national law of each state. The general principles of law are consecrated in constitutions. The characters of the state's juridical system influence, and even determines, the consecration and acknowledging of the principles of law.

The work of consecration of the principles of law in the political and juridical documents is in full progress.

Thus, in the international documents such as U.N.O Charta or the Declaration of U.N.O. General Assembly in 1970, are consecrated principles [31] that characterize the democratic international law order. The regional law systems had known and acknowledged their own principles. For example, the community law consecrates the following most important principles : principle of equality, protection of the human fundamental rights, principle of juridical certitude, principle of subsidiarity, principle of authority of res judicata and principle of proportionality[32]. Most democratic constitutions consecrate principles such as: principle of sovereignty, principle of juridicality and supremacy, constitution, principle of democracy, principle of pluralism, principle of representation, principle of equality etc.

The jurisprudence has a significant role in the consecration and applying of the principles of law. There are situations when the principles of law are acknowledged by jurisprudential ways, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends to the judges to decide in the absence of some texts, in the light of the general principles of law.

There are systems of law in which not all principles have a normative consecration. We refer mainly to the great system known by the name of *common law*, consisting in essence of three normative, autonomous and parallel subsystems: common law (in a narrow meaning); equity; and statute-law. Equity represents a set of principles coming out from the practice of the instance and is a correction brought to the common-law rules.

With all variety of the consecratation manner and the recognition of the principles of law, comes out the need at least for their recognition in order to be characterized and enacted in the system of law. This consecration or acknowledging is not enough to be doctrinary, nevertheless it must be realized throughout norms or jurisprudence. However, a distinction between the consecration and acknowledging of the principles of law must be made, and on the other side, in their enacting.

C) The principles of law represent values for the law system, because they express both the juridical ideal, as the objective requirements of society, have a regulating role for the social relations. In situation in which the norm is not clear or it does not exist, the solving of the litigations can be

---

[30] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, *General Theory of Law. Rational Law, Source and Positive Law* Publishing House All Beck,Bucharest, 1999, p. 265.

[31] Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, *Drept internaţional contemporan, Contemporary International Law* Publishing House All Beck, Bucharest, 2000, p.52-71. ONU Charta specifies the "General Principles of Law Acknowledged by Civilized Nations" as source of law.

[32] Ion Craiovan, *quoted works* p.211.

achieved directly based on the general or special principles of the law. As ideal, they represent a coordinating ground for the work of law making.

D) In classifying the principles of law it is started from the consideration that between them there is a hierarchy or relation from the general to particular[33]. Starting from this observation one can distinguish:

1. General principles of law which form the contents of some norms with universal application with a maximum level of generality. These are acknowledged by the doctrine and expressed by the normative acts in the internal law or internationally treaties as having a special importance. As a rule these principles are written in constitutions having thus a superior juridical force in relation to the other laws and all law branches. Referring to the theoretical and practical importance for studying the law branches, Nicolae Popa remarks: "the general principles of law are fundamental provisions that cumulate the creation of law and its enacting…. In conclusion the action of the principles of law has as a result the conceding of *certitude of law* – the guarantee granted to individuals against the unpredictability of the coercive norms – and the congruence of the legislative system, namely the concordance of the laws, their social character, credibility, and opportunity."[34]

The general principles have a role also in the administering of justice, because those in charge with the law enforcing must know not only the letter of the law, but also its spirit, and the general principles' make up of this spirit. As part of them one can include: principle of lawfulness, principle of consecration, respecting and guaranteeing human rights, principle of equality, principle of justice and equity etc.

2. The specific principles that express particular values and as a rule have a limited action to one or several branches of law. They are mentioned in codes or other laws. In this category can be included the principle of lawfulness of penalties, binding of contracts, presumption of innocence, principle of compliance with international treaties etc. The special principles have their source of values in the law's fundamental principles.

For instance the proportionality is one of the oldest and classic principles of law, rediscovered in the modern age. The significance of this principle, in a general meaning, is that of an equivalent relation, balance between phenomena, situations, persons etc., but also the idea of just measure.

Ion Deleanu specifies that: "At the origin, the concept of proportionality is outside the law; it calls up the idea of correspondence and balance, but also of harmony. Appeared as a mathematical principle, the principle of proportionality was developed also as a fundamental idea in philosophy and law receiving different forms and acceptions: "reasonable". "balance", "admissible", "tolerable", etc.[35]. Therefore, the proportionality is a part of the content of principle of equity and justice, considered as being a general principle of law. At the same time by its normative consecration, explicit or implicit, and by jurisprudential applying, the proportionality has particular significances in different branches of law: constitutional law, administrative law, community law, criminal law etc. This principle definition, understanding and applying, in the above shown significances result from the doctrinary analysis and the jurisprudential interpretation.[36]

III Conclusions

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice

---

[33] Ioan Ceterchi, Ion Craiovan, *quoted works,* pg.31. Radu I. Motica, Gheorghe C. Mihai, *Teoria generală a dreptului, General Theory of Law, quoted works,* p.77.

[34] Nicolae Popa, *quoted works,* p.117.

[35] Ion Deleanu, *Drept constituţional şi instituţii politice, Constitutional Law and Political Institutions* Publishing House Europa Nova, Bucharest, 1996, volume.I, p.264.

[36] For details see, Marius Andreescu ,*Principiul proporţionalităţii în dreptul constituţional* , *Principle of Proportionality in Constitutional Law* Publishing House C.H. Beck,Bucureşti , 2007.

accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law metaphysics; these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law.* The distinction which we propose has as philosophical grounds the above shown difference between 'constructed" and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequently, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no pre-constituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a 'given" in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental 'given" and not a transcendent of the law, consequently, are not "beyond' the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may

have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental 'given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty*. In a future study, we will explain extensively the considerents that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the pruinciples of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work *„Substamzbegriff und Funktionsbegriff"* (1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientifical knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that 'world of ideas" which Platon was talking about.[37]

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality[38].

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice

[37] For more details see also, Constantin Noica, *Devenirea întru fiinţă*, *Becoming into Being* Publishing House Humanitas, Bucureşti, 1998,p. 332-334.

[38] Constantin Noica , *quoted works. p. 327-367.*

Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The jurisprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16th 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: "The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the constitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawful state and the social state"[39].

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge respects the character of being of the juridical system, not only the functions or juridical relations.

References

- Gheorghe C. Mihai, Radu I. Motica, Fundamentele dreptului. Teoria şi filozofia dreptului, Ed. All Beck, Bucureşti, 1997.
- Platon, Opere – vol.V, Ed. Ştiinţifică şi Enciclopedică, Bucureşti, 1982.
- Aristotel, Metafizica, Cartea I, Ed. IRI, Bucureşti, 1996.
- Immanuel Kant, Critica raţiunii pure, Ed. IRI, Bucureşti, 1994.
- Rodolf Stammler, Theorie der Recktswissenschaft, University of Chicago, Press, 1989.
- Mircea Djuvara, Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitv, Ed. All Beck, Bucureşti.
- Nicolae Popa, Teoria generală a dreptului, Ed. Actami, Bucureşti, 1999.
- Eugeniu Speranţia, Principii fundamentale de filozofie juridică, Cluj, 1936.
- Paul Roubier, Théorie générale du Droit, L.G.D.J., Paris, 1986.
- Marius Andreescu ,Principiul proporţionalităţii în dreptul constituţional ,Ed.. C.H. Beck,Bucureşti , 2007.
- Constantin Noica , Devenirea întru fiinţă,Ed. Humanitas,Bucureşti,1998.

[39] For details see ,Andreescu Marius , *quoted works, p. 34-38.*

THE EQUALITY PRINCIPLE REQUIREMENTS

CLAUDIA ANDRIŢOI*

Abstract

The problem premises and the objectives followed: the idea of inserting the equality principle between the freedom and the justice principles is manifested in positive law in two stages, as a general idea of all judicial norms and as requirement of the owner of a subjective right of the applicants of an objective law. Equality in face of the law and of public authorities can not involve the idea of standardization, of uniformity, of enlisting of all citizens under the mark of the same judicial regime, regardless of their natural or socio-professional situation. Through the Beijing Platform and the position documents of the European Commission we have defined the integrative approach of equality as representing an active and visible integration of the gender perspective in all sectors and at all levels.

The research methods used are: the conceptualist method, the logical method and the intuitive method necessary as means of reasoning in order to argue our demonstration. We have to underline the fact that the system analysis of the research methods of the judicial phenomenon doesn't agree with "value ranking", because one value cannot be generalized in rapport to another. At the same time, we must fight against a methodological extremism.

The final purpose of this study is represented by the reaching of the perfecting/excellence stage by all individuals through the promotion of equality and freedom. This supposes the fact that the existence of a non-discrimination favourable frame (fairness) represents a means and a condition of self-determination, and the state of perfection/excellency is a result of this self-determination, the condition necessary for the obtaining of this non-discrimination frame for all of us and in conditions of freedom for all individuals, represents the same condition that promotes the state of perfection/excellency.

In conclusion we may state the fact that the equality principle represents a true catalyst of the Romanian law constitution phenomenon, succeeding not just in entraining significant modifications of the legislation, but also determining an obvious acceleration of his phenomenon, an enlargement and in the same time further studies.

Keywords: *equality, privileges, interpretation, perspective, evolution.*

Introduction

The domain covered by the subject of the study refers to the incursion in the history of philosophic and religious ideas, which allows us to also observe a gap between what the great thinkers expressed through their ideas, contained by true thinking systems, and what the social reality has underlined. The importance of the study results from the fact that it is somewhat difficult to follow the problem of equality between people in abstract, by not taking into consideration the facts that generated the respect of disobedience of human rights. Still, it is easy to observe that in the entire modern history the efforts to prove the need of an exercise of human rights and freedoms was a permanent battle to affirm and to invoke human reasoning, in the name of which different institutions took birth, national and international organisms and, which by their activities and the documents emitted tried to establish a social order in which peace and social harmony rule.

The objectives of this study are formed on the basis of an analysis of equality between all citizens in front of the law, an equality in judicial treatment and of connections with other realizations of the process of human thinking which have found some mirroring in the national and international regulations.

These will be fulfilled through the use of research methods indicated in the abstract of the paper, which will lead to the obtaining of assumed finalities.

* Assistant Lecturer, PhD, "Eftimie Murgu" University Resita (e-mail: andritoiclaudia@yahoo.com).

In this paper I have made references to scientific papers relevant for the specialty literature, thus indicating the state of knowledge of the principle of equality in internal and international law. The idea of freedom, equality and human dignity is materialized in basic law principles which govern the entire law process. These aspect are mentioned in contributions of known authors, thus starting our scientific analysis Rousseau, Djuvara, Deleanu and reaching the Beijing Platform[1] and the position documents of the European Commission, which define the integrative approach of equality as representing and active and visible integration of the gender perspective in all sectors and at all levels.[2]

1. The intercalation of the equality principle between the freedom and the justice principles

Equality, like freedom and justice, can be examined from a double perspective. A perfect equality (ideal) which is the real one and an imperfect equality ("earthling") which in fact doesn't exist, but aspires towards an ideal. Platon shows in "The laws" that equality and proportion are not based on the perception of senses, nor on the pleasure that can be found in them, but first of all on truth and almost, on nothing[3]. The foundation of equality is underlined through this sentence: the non-perennial human spirit through which we are equal in front of the Absolute (Supreme Reasoning). The great Greek recognizes the fact that "… truth and perfection is not easy to be known: only Zeus and very few people have this notion"[4] .

In fact, humankind exists due to great ideas of freedom, equality and brotherhood, said E. Roerich. If these ideas will be considered utopian and on for this reason humankind will separate from them, then this will be the equivalent for the death of humankind. Without the assimilation of great ideas in our hearts, mankind will be invaded by unseen crimes and lust, the consequence of which will be human decomposition and death. The principles of equality, justice and freedom represent the ideational trinity of law. Ch. Montesquieu considers that "freedom is the right to do anything permitted by laws and if a citizen could do what is forbidden, he would lose his freedom, because other could do the same thing."[5] The principle of justice according to the containing area encapsulates the principles of freedom and equality. Equality is not just a form of justice, the first being subordinated to the latter.

Platon said that justice is just the equality between unequal things, according to their nature and that there isn't equality between unequal things, but in the measure in which proportion is being kept. Continuity in thinking regarding the rapport equality-freedom has been sustained over centuries by Nicolae Popa, for example. The doctrinaire has the conviction that "there can't be equality but between free humans and not freedom but between humans the equality of which is enshrined from a judicial point of view. Equality refers to the balance of life and freedom looks at humans' capacity to act without obstacles"[6].

The main unit of equality and freedom is materialized from a judicial point of view in the Universal Declaration of Human Rights. "All human beings are born free and equal in dignity and

---

[1] In the United Nations Organization, the most important document dedicated to women's world is the Beijing Platform (1995) signed by 189 states. The platform identifies 12 intervention domains on the women's condition at the world level, from being poor to human rights, health and education. This document and the CEDAW Convention represent beacon-manifests regarding women's situation and are report permanently their legal activity and their practical action of UN and European Union member states.

[2] *National legislation for discrimination prevention and control, promotion of women's rights and equality in chances between men and women* – legislative frame – www.gendermainstreaming.ro.

[3] Platon, *Legile.* Bucharest, IRI Publishing House, 1995, p.85.

[4] Idem, p.170.

[5] Montesquieu, C. *Despre spiritul legilor.* - Bucharest: Scientific Publishing House, 1964, p. 89.

[6] Marian Mihăilă, Dan Stan, Carmen Sucium*, Tratat de drept internaţional public*, Vol. III, BREN-V.I.S.PRINT, Bucharest, 2006.

rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." is stipulated in art. 1 of the Universal Declaration of Human Rights. This principle results from the inalienable rights of people as human being[7]. All human beings are gifted with the same basic rights and must be treated with respect and dignity regardless of numerous differences that nature and the surroundings of life create. The human being is considered a lawful person, individually or as a group, and represents the purpose of law, in insuring and guaranteeing the most appropriate judicial conditions for the affirmation and realization of freedom and equality in a society. The values on which law is based on indicate the human being as the main landmark and at the same time as purpose, the judicial norms not being able to find substance, respectively genesis without a plenary affirmation and a judicial guarantee of individual's freedoms and rights.

In this context, J.J. Rousseau stipulates that the process of governing must be realized on law norms provided in a ***Social Contract***, which should contain the rights and obligations of governors and of the ones governed, so that the principles of justice and equity will be fulfilled according to the following commandments. **"***No one must be so rich so he could buy another***"** and **"***No one so poor that he will be obliged to sell himself*"[8]

This aspect refers to equality in rights and in dignity. It doesn't refer to uniformity. Contrary, it allows the foundation of respect of differences. This principle of "equality in dignity and rights" represents a basic pedestal for the law edifice. These ideas receive viability at a subjective level, being consecrated as rights and basic freedoms. A special merit for this is offered to French revolutionaries, who affirmed the principles of freedom, equality and justice as fundaments of the state.

The principle of equality is intercalated between the principles of freedom and justice, equality being manifested in positive law in a double state, as a general idea of all judicial norms and as requirement of the subjective law owner towards the applicants of objective law.

According to the professor Mircea Djuvara, equality represents the means to realize a social equity, one of the "logic elements of justice".

The rejection of uniformity based on the difference of situations is consecrated in the Romanian constitutional jurisprudence for the first time in a decision of 1993[9], in which the law referred to the Court aimed the students' transfer from private faculties to public ones; thus being forbidden the students' transfer from private faculties to public ones, while the contrary was possible at any moment. The judge's reasoning is supported by a comparison of situations, found from an objective point of view as being different, being motivated by the fact that allowing students' transfer both ways would be the equivalent of a privilege for private faculty students which even if they didn't sustain an admission context as all public education students, will benefit from all the rights they have. Thus, we deal with different situations in which the students of the two types of institutions are found, fact which determined different solutions from the legislator, without this breaking the constitutional principle of equality, which doesn't refer to uniformity. But, the legislator's will to respect the principle of equality is hardened by the fact that for certain aspects that are common to the two institutions the law provides identical solutions.

Remarkable is the fact that the Romanian judge has observed not only the variant of relative equality, but also its possible evolutions in time, so that the distinctions which are not discriminatory today will become as so tomorrow. The contrary may also be valid.

2. The judicial configuration of privileges and discriminations

In a traditional conception, discrimination as notion, supposed an ascendant of the party that applies the discriminatory treatment on the other party, of a discrimination essence considering it to

[7] Toma Toader, *Aspecte constituţionale ale realizării ordinii juridice în statul de drept,* Chisinau, 2005, p.4.
[8] J.J. Rousseau, *Contractul social*, Bucharest, Scientific Publishing House, Philosophical Library, 1957, p.121.
[9] Decision no. 70/1993.

be (even if only implicitly) a certain subordination. In other words, we can speak about discrimination in the plan of judicial rapport of public law and less or at all in the judicial rapport characterized by the parties' judicial equality.

Equality in front of the law and in front of public authorities can not involve the idea of standardization, uniformity, of enlisting all citizens under the mark of the same judicial regime, regardless of their natural situation or their socio-professional one. The principle of equality supposes that in equal situations the equal judicial system will be applied. But, at the same time, and apparently paradoxically, the equality principle also involves the right to differences in a judicial treatment, because, in the measure in which equality is not natural, the imposing of an equal judicial treatment would mean discrimination. In other words, equal situations must correspond to equal judicial treatment; to different situations, the judicial treatment cannot be but different. Still, for this action there must be an objective and reasonable motivation, in order to avoid reaching a disproportion between the purpose desired through an unequal judicial treatment and means used[10].

Today, the non-discrimination and the interdiction of arbitrary principles has crossed the borders of a rapport with public authorities and has begun to enter every days life, in judicial rapports characterized by a judicial equality of the parties, in the most frequent of the contracts signed (buy-sell agreement, credit contracts, property contracts etc.) and even in extra-contractual social rapport (addressing formulas, behaviour, attitude).

Starting with the year 2000 the protection against discrimination is no longer realized in Romania, but on the grounds of constitutional provisions and of international regulations, and on the basis of detailed internal regulations, that aim (even expressly) work rapports. Thus, more than a self-standing right, non-discrimination appears to be o concrete modality of exercise for other rights. Besides the equality principle has always been understood as representing a "right to rights equality", being added to fundamental rights that need to be strictly respected, but also exercised in conditions of full equality.[11]

Reporting at such a definition, Romanian legislation regarding the gender equality domain is far from retaining and promoting an integrative approach of gender equality. From this point of view, the investigation of Romanian legislation in the domain offers the image of a punctual initiative on segments of problem regarding gender equality. Principles regarding the affirmation of equality, consecrated by the Constitution, the Labour Code and other laws, are taken punctually in normative acts destined to regulate aspects connected to anti-discrimination, labour rights, social protection in a general belief, maternity protection and family violence. The respective normative acts represents in most cases the expression of Romania politic commitment to adopt standards conform to the community acquis.

An equality of chances supposes the solving of all existent discrepancies between individuals, fact resulted from the deficit of individuals' capacities and opportunities for which many circumstances of personal, social and economic nature are outside their control, and which lead to inequality through an inequality of chances[12]. In order words, inequality is a problem derived from perspectives and unequal chances of success in the employment process and the fulfilling of their own goals, thus the reaching of an optimum level of self-determination. This situation leads to losing control over life circumstances, and in the end of their own lives.[13]

The theory of equal opportunities justifies the correction of social injustices (*social redress*) in the favour of those found in a disadvantageous situation, affirming that all individuals have the right

---

[10] I. Deleanu*, op. cit.,* pp. 456-457.

[11] Raluca Dimitriu*, Principiul nediscriminării în raporturile de muncă. Egalitatea de tratament între femei şi bărbaţi,* web page.

[12] Gans, Herbert J., 1991, People, Plans, and Policies: Essays on Poverty, Racism, and Other National Urban Problems (Columbia History of Urban Life), Columbia University Press.

[13] Adrian Dan, *Spre o nouă arhitectură a inegalităţii sociale* Romanian sociology journal, no. 1/2003 www.iccv.ro/romana/dictionar/adi/adi_egalsanse.htm - 47k.

to self-determination, while psychological and social conditions derived from the experimenting of freedom determines that some individuals and some groups experiment incorrect advantages in the determination of their own future, in comparison to others, to diminish their chances of self-determination of those found in a disadvantageous situation, fact resulted from social forces found outside their control and as a consequence of these declines/diminution, it is mentioned the collectivity duty to promote the improvement of success chances in the process of self-determination for those in disadvantage.[14] For this reason, the collective action must include an optimization of chances of success in the process of self-determination through the improvement of autonomy *capacities* in thinking and acting, through the enlargement of the spectrum of *opportunities* of choice and effective action and through an optimization of the *rapport* (*match*) between the individual's capacity and the social opportunity, through the elimination of obstacles and the building of opportunities that encourage in a more accentuated measure and more frequently the expressing and experimenting of self-determining.

But are there equal chances for all individuals?

For this question we have found four answers:

(1) the first results from a dominant ideology of social layering which equals a correct chance and an equal opportunity – in consequence, the lack of chance of some is due to their failure in profiting from opportunities available to all in an equal manner;

(2) the second answer derives from the justice theory as Rawls' *favourability/opportunity* (1971)[15], who affirms that "equal opportunities" refer to an equal splitting of the surplus created, in other words with the redistribution of well-being from those that have more to those that have little;

(3) the theory of justice as Nozick's *empowerment* (entitlement) (1977)[16] – a correct chance means a free exercise of the power of self-determination, minimally restraint only when this expression breaches the self-determining of other;

(4) a theory which is a mix of the three already presented and which takes into consideration three basic factors: capacity, opportunity and final result (*outcome*). The variation of capacity affects and is affected by the results of self-determination in thinking and acting.

The process measurement in the realization of social equity demands a different approach of this concept, the citizen being considered as being interdependent and variable, when referring to him as a person or at the environment, depending on the optimization of values that he attaches to himself in judging correct chances for the reaching of relative different goals of self-determination.

The outcome is represented by the reaching of a state of perfection/excellency by all individuals, by promoting equality and freedom. This supposes the existence of a favourable non-discriminative frame (*fairness*) represents a *means* of self-determination and the state of perfection/excellency is a *result* of this self-determining, and the necessary condition for the obtaining of a non-discriminative frame for all and in conditions of freedom for all individuals, represents the same condition that promotes the state of perfection/excellency.

The promotion of the concept of equality of chances supposes automatically that at the social system level some discriminative actions are manifested at the address of some individuals, damaging actions in general, for the entire society. For this reason, the most affected social groups are minorities (ethnic, religious, sexual), women, old people and disabled persons and in a quasi-general manner – *poor people*, people in general with modest jobs and incomes who don't have the capacity and are not found in the position of influencing and negotiating different structures of power formed in the social system frame. For this reason, two complementary concepts have been launched – *positive discrimination and affirmative action.*

[14] Mithaug Dennis .E., 1996, Equal Opportunity Theory, SAGE Publications, London.
[15] Rawls, John, 1971, *A Theory of Justice*, MA: Belknap, Cambridge, web page.
[16] Nozick Robert, 1977, *Anarchy, State and Utopia,* Basic Books, New York, web page.

Positive discrimination/affirmative action refer to the promotion and application of programs that desire to solve the effects produced by certain discriminations manifested in the past, suffered by different individuals, in the labour sphere, the education one etc., and to prevent the re-apparition and re-manifestation of these discriminations. Affirmative action was promoted especially in the labour and education spheres; *The Civil Rights Act* promoted by the USA Congress in1964 which interdicts discrimination in the employment sphere and an equal treatment from this point of view between men and women. Other legislative documents have forbidden discrimination in employment of old people (*Age Discrimination Act* – 1967) and of disabled people (*Rehabilitation Act* – 1973). Positive discrimination/affirmative action is distinguished from self-discrimination or the laws that promote equal opportunities (which interdict an unequal treatment), because it proposes *positive corrective measures* focused expressly on persons/groups that have suffered in the past from different discriminations.[17]

The adopting of the EU legislation regarding equality between citizens was an indispensable condition for the adherence to the European Union, representing an integrative party of the politic criterion regarding human rights and being necessary for a proper institutional capacity. During the enlargement process, the European Parliament has appealed to an economic support in order to help future member states in adapting procedures and their statistic methods to the European Union standards. The purpose is to develop and to publish gender statistics which are in accordance with the ones used by the European Union, fact which will allow to underline problems and to facilitate comparisons, and to continuously monitor situations regarding equality.[18]

In 1975 the Rome Treaty introduced, in community law, the principle of gender equality regarding the remuneration obtained for the work realized. The European integration process has stimulated the creation of new instruments for the insurance of an equal treatment by developing the provision of the Rome Treaty.

The Amsterdam Treaty stipulated that the promotion of equality between men and women is one of the Union basic tasks, and inequalities had to be eliminated from all activities. A step forward was also represented by the introduction of a new article on the basis of which EU could take measures regarding fighting all forms of discrimination based on sex. The European Charter of Fundamental Rights signed in 2000 and included in the Constitutional Treaty reaffirmed and completed these principles. Persons who were victims of gender discrimination may appeal institutions established in member states according to EU legislation. Beyond the legal frame, Central European institutions are assisted by structures that represent the interest of women, do lobby in their favour and assist the Commission in formulating and implementing measures in this domain. The oldest structure of this type is the Consultative Committee on the equality of chances, established by the Commission in 1981 (representatives of ministries and of different structures of member states which are connected to the subject).

3. Equality - reference norm for the control of constitutional law

Jean Jacques Rousseau mentions the fact that force always tends to destroy equality and legislative force must do its best to maintain it.[19] Direct guarantees offered to individuals under the shape of subjective rights underline a dimension of objective law in the measure in which this represents a condition of exercised of fundamental rights. For this fact, the objective law has been

---

[17] Cox, Raymond W., Buck, Susan J., Morgan, Betty N., 1996, *Public Administration in Theory and Practice*, Prentice Hall, New Jersey.

[18] *European Union – equality as a basic principle, web page*. www.socialistgroup.eu/gpes/media/documents/21531_21531_gender_equality_ro_060110.pdf.

[19] Notebooks of the Constitutional Council, no.12, *Studies and doctrines*, Presentation du principe constitutionnel de l'egalite, ORACLE, University of Reunion.

qualified in the French doctrine as "guardian" right, also mentioning the fact that the equality principle represents a support for all other fundamental rights.[20]

The democratic principle strictly implemented will need rights of economic equality and politic equality. Lucien Sfez speaks about democracy in correlation to the equality principle, sustaining that democracy doesn't resume only to a normative model, or to a social inclusion or exclusion rapport. The democratic state, in his belief, represents an ensemble, a finite unity, in which equality and freedom pretended to be able to realize they don't find their application field in a well determined circle. Democracy has always been "just one, the democracy of all, of many".[21]

The constitutional principle of equality authorizes differences in treatment, so that equality is susceptible from derogations, the Constitutional Council announcing that "the equality principle in front of the law involves the solving of similar solutions through identical solutions; this doesn't mean at all the fact that different solutions cannot make the objective of different solutions."[22] I

Even before the apparition of the Constitutional Court, in the Romanian judicial plan, equality didn't represent the object of proper analysis; it was studied in a more general context of citizens' rights.

The doctrine as the constitutional jurisprudence constantly underlines that the equality principle doesn't pretend uniformity, so that to equal situations an equal treatment must correspond, and to different situations there may exist a different treatment.

In **Decision no. 90/2005**, emitted on 10.02.2005, regarding the waiver of unconstitutionality of the dispositions written in article 15, paragraph 1 of the Law no. 80/1995 regarding the Statute of military personnel, the Constitutional Court was notified by the civil section with an exception of unconstitutionality of the dispositions of article 15 of the Law no. 80/1995 regarding the Statute of military personnel, exception which was risen by Gabriel Hulea after obtaining a solution for the appeal formulated against the Civil Sentence no. 17 of 16 January 2004, pronounced by the Bacau Court in the Case no. 8.304/2003. The representative of the Public Ministry states rejection conclusions of the exception as being ungrounded. Thus, he shows that the equality principle mustn't be interpreted according to uniformity, so that when situations are objectively different, as in the case presented, the application of a different judicial treatment is justified.

In motivating the waiver of unconstitutionality the author sustains, in essence, that the dispositions of the art. 15 of the Law no. 80/1995 contravene the constitutional principle of equality in rights, because these have a discrimination character. For this reason it has been shown that, contrary to general regulations regarding the public pensions system and other social insurance rights, the criticized law text allows the approval of a paid leave for child care until the age of two only for women which are active military personnel. This being the case, unlike all other categories of employees, active military personnel men cannot benefit from this right and, in consequence, they are discriminated in rapport to civil persons and in rapport to women active military personnel.

The Appeal Court from Bacau – Civil Section appreciated that the dispositions of article 15 of the Law no. 80/1995, which refer to the approval of a child care leave are unconstitutional in comparison to the provisions of article 16 paragraph (1) of the Constitution.

The Ombudsman appreciates that the criticized law text doesn't contravene the criticized legal dispositions. Thus, in his opinion, "the establishment of leaves, in a different manner, for persons – active military personnel – in comparison to those that don't have the same statute, is not generated by supposed discriminations between citizens on arbitrary criteria, but is due to the specific of military activity, which imposes to certain professional categories certain obligations and

---

[20] F. Melin –Soucramanien, *Le principe d'egalite dans la jurisprudence du Conseil Constitutionnel,* Economica –PUAM, 1997, p.251-252.

[21] L.Sfez, *Leçons sur l'Egalité,* Presses de la Fondation Nationale des Sciences Politiques, 1984, p.24.

[22] François GILBERT, *La discrimination positive en France,* in La revue pratique de droit français, no. 20/11/2005.

interdictions". The government appreciates that the waiver of unconstitutionality is grounded. For this reason, it is shown that the law text criticized is in contradiction to the dispositions of the Law no. 19/2000, which provides that the persons insured by the public pension system have the right to a leave and to an allowance for the care of a sick child, and from this allowance benefits, optionally, one of the parents, if the claimant fulfils the conditions of fee stage provided by the law..

After examining the seizure closing, the Government and the Ombudsman's points of view, the rapport written by the reporting-judge, the prosecutor's conclusions, the criticized law dispositions in comparison to the Constitution provisions and the dispositions of the Law no. 47/1992, the Court retains the following: the object of the waiver of unconstitutionality is represented by the dispositions of article 15 of the Law no**.** 80/1995 regarding the Statute of military personnel, published in the he Official Journal of Romania, Part I, no. 155 of 20 July 1995, with subsequent amendments, dispositions according to which: "Women, active military personnel, have the right to a maternity leave and to a leave for child care in the conditions established by the order of the National Defense Ministry, on the basis of legal dispositions applied at a national plan.

Also, women, active military personnel benefit from pauses for child nursing and child care and from other rights provided by the law regarding employed women from public administration."

In sustaining the unconstitutionality of these law texts, the authors of the waiver invoke the breach of provisions from article 16 paragraph (1) of the Constitution, according to which:

- Art. 16 paragraph (1): "Citizens are equal in front of the law and of public authorities, without privileges or discriminations."

By examining the waiver of unconstitutionality the Court observes that, even if its author entirely attacked art. 15 of Law no. 80/1995, in reality his criticism addresses only the dispositions of the first paragraph of this article, dispositions that regulate the granting of a child care leave. In consequence, the Court will examine only the conformity of provisions of article 15 paragraph 1 of the Law no. 80/1995 with the constitutional provisions invoked.

Regarding active military personnel, the Court observes that, indeed, under the aspect of conditions of admission, of attributions, or rights, of incompatibilities and of interdictions, these are in a different situation than other categories of employees. Regardless all these, as insured employees, active military personnel are not different from other categories of insured people, thus the institution of a different judicial treatment, which deprive them of the benefit of a social insurance form provided by the law for all insured persons, it appears as being discriminatory.

Keeping in mind that the right to a leave for child care is granted, according to the criticized law text, only to active women military personnel, with the exclusion of the other parent, also belonging to military personnel, the Court appreciates that article 15 paragraph 1 of the Law no. 80/1995 must also be analysed from point of view of equality in judicial treatment that our state must insure between men and women. For this reason, the solution pronounced by the European Court of Human Rights appears as relevant in the case Schuler-Zgraggen against Switzerland (1993), when it was agreed that an equality between sexes is an important goal for member states of the Europe Council and only very strong reasons may lead to the appreciation that the instauration of a differentiated treatment is compatible to the Convention. Moreover, the Strasbourg Court has underlined the need of an objective and rational justification for the institution of such a treatment.

The Constitutional Court appreciates that, in the case of the text subjected to a constitutionality control, the ideas kept in mind by the legislator cannot be considered to be strong enough to justify, in an objective and rational manner, the institution of a differentiated treatment between women and men, active military personnel, in the granting of a leave for child care. In conclusion, because the two categories of persons have the same professional status, this leads to the conclusion that the only identification of a difference in treatment is based on sex.

According to the reasons exposed, on the ground of article 146, letter d) and of article 147 paragraph (4) of the Constitution, articles 1-3, article 11 paragraph (1) letter A. d) and of article 29 of the Law no. 47/1992, with a majority of votes, the Constitutional Court, in the name of the law, has

decided the admission of the waiver of unconstitutionality raised by Gabriel Hulea in the Case no. 4.089/2004 of the Bacau Appeal Court – Civil Section and observes that the dispositions of article 15 paragraph 1 of the Law no. 80/1995 regarding the Statute of military personnel which contravene the provisions of article 16 paragraph (1) of the Constitution.[23]

In the Decision no. 173 of 22/03/2005[24], regarding the waiver of unconstitutionality of the dispositions of article 1, article 2 paragraph (1) and of article 19 paragraph. (1) letter a) of the Government Emergency Ordinance no.102/1999 regarding the special protection and labor admission of disabled persons, a waiver raised by in the Case no. 563/2004.

The cause being judged, the representative of the Public Ministry states conclusions of rejection of this waiver as being ungrounded. For this reason, he shows that the criticized legal provisions do not represent a differentiated judicial treatment between disabled persons in rapport to age or the date at which the disability appeared. Regarding the difference between the sums of the allowance, for seriously disabled persons, according to article 19 paragraph (1) letter. a) of the Government Emergency Rule no. 102/1999, it has been shown that this is justified by a different situation in which these persons are found under the aspect of incomes realized. In motivating the waiver of unconstitutionality its author sustains, in essence, that the provisions of article 1, article 2 paragraph (1) and of article 19 paragraph (1) letter a) of the Government Emergency Ordinance no.102/1999 **contravene the constitutional principle of equality in rights** and the constitutional dispositions which consecrate the states obligation to grant a special protection to disabled persons. Also, he appreciated that the law texts subjected to control of constitutionality are found in contradiction to the provisions of article 25 paragraph 1 of the Universal Declaration of Human Rights, thus also referring to the dispositions of article 20 of the Constitution, which consecrate the priority towards internal laws of international instruments in the domain of human rights, to which Romania is a party of. For this reason, he has shown that, though the definition offered to this notion of disabled person and through the establishing of social protection granting criteria, the criticized law texts create discrimination between disabled persons, under the aspect of special protection from which these benefit from.

Thus, keeping in mind that the admission in the category of disabled persons is conditioned by a cumulative fulfilling of two demands, respectively the fact of needing support in admission to a social life, and in a professional life, it is considered that persons who have the standard age for retirement and those which gained this affection that determined the disability after the standard age of retirement, are excluded from receiving special protection.

The President of the Deputes Chamber appreciates that the waiver of unconstitutionality is not grounded. The government appreciated that the author's support regarding the unconstitutionality of dispositions of article 1, of article 2 paragraph. (1) and of article 19 paragraph (1) letter a) Of the Government Emergency Ordinance no. 102/1999 are ungrounded. The Ombudsman appreciates that the provisions of article 1, article 2 paragraph (1) and of article 19 paragraph (1) letter a) of the Government Emergency Ordinance no. 102/1999 is constitutional. In sustaining the unconstitutionality of these law texts, the author of the waiver invokes the breaching of provisions of articles 16 paragraph (1) and 50 of the Constitution, according to which:

- Article 16 paragraph (1): "Citizens are equal in front of the law and of public authorities and without discriminations";
- Article 50: "Disabled persons enjoy a special protection. The state insures the realization of national politics of equality in chances, of prevention and of disability treatment, for an effective participation of disabled persons in community life, respecting the rights and duties of parents and tutors"

[23] Decision no. .90/2005, pronounced by the Constitutional Court during the meeting of 10 February 2005.
[24] Published in the Official Gazette, 1st part, no. 447 of 26/05/2005.

- Also, the author of the waiver appreciates that the criticized law texts breach the dispositions of article 20 of the Constitution, because these contravene the provisions of article 25 paragraph 1 of the Universal Declaration of Human Rights.

The Court concludes that the author's support for this waiver cannot be retained, according to which provisions of article 19 paragraph (1) letter a) of the Government Emergency Ordinance no. 102/1999 contravene the constitutional principle of right equality, so that this law text doesn't make a difference between adults according to their ages not in rapport to the period in which the disability appeared. The difference established by this law text is between the sum of allowances offered to seriously disabled persons, which is justified by different situations kept in mind by the legislator, that is, these persons realize or not incomes from salaries or pensions. Thus, the criticized law text is in full agreement to the constitutional principle of equality in rights, as it has already been stated in the jurisprudence of the Constitutional Court and doesn't suppose uniformity, so that different situations justify the institution of a different judicial treatment.

Conclusions

The main directions approached in this paper analyse equality as autonomous norms with a proper structure found under the label of "constitutional principle of equality" – a reference norm for the control of constitutionality of laws, but hiding a large frame of judicial origins the constitutional judge has the freedom to use according to circumstances. The equality exigency is contained by many articles of the Constitution, but also in numerous dispositions of international pacts and treaties[25], the manner in which the Constitutional Court uses all these reference norms depending especially in their normative content.[26]

Another analysis circumscribes the ideal of equality which was born as a demand of natural law, being justified by religious, psychological and philosophical argument, but all proved to be unsustainable. It is real that people are gifted by nature so that the demand that all people are to be treated equality cannot be based on a theory that we are all alike.

If we desire to understand this principle we must begin from a historical examination, as we have done. During modern times, as in ancient times, this principle was used as means of destroying feudal differentiation of individual legal rights. As long as the individual development and the development of important sections of population are stopped by barriers, social life will be troubled by violent uprisings. People without rights are always a threat for social order.[27] Their common interest for the removing of these barriers unites them; they are prepared to use violence when they cannot obtain what they want by peaceful means. Social peace is reached only when all members of the society are allowed to participate in democratic institutions. And this means everyone is equal in front of the law.

The impact of the analysis realized on the principle of equality is represented by the affirmation of the equality principle in internal and international law, fact which was realized in a small measure as a result of doctrinaire constructions realized and more on the basis of a jurisprudence of constitutional jurisdiction. This jurisprudence allowed the identification of all constitutional origins of equality in Romanian law, the stating of all beneficiaries of the constitutional principle of equality and the observing of rapports equality maintains with other fundamental rights consecrates by fundamental law.

[25] The 1991 Constitution refers to the term equality in the following articles: 4,6,16,38,41,44,53 and 59.

[26] Elena Simina Tănăsescu, *op.cit,* p.45-46.

[27] Ludwig von Mises, *Socialism. An economic and Sociological Analysis,* Liberty Classics, Indianapolis, 1981, web page www.misesromani.org.

References

- Cox, Raymond W., Buck, Susan J., Morgan, Betty N., *Public Administration in Theory and Practice*, Prentice Hall, New Jersey,1996.
- Dan Adrian, *Spre o nouă arhitectură a inegalităţii sociale* Romanian Sociology Journal, no. 1/2003 www.iccv.ro/romana/dictionar/adi/adi_egalsanse.htm - 47k.
- Deleanu, I., *Justiţia constituţională*, Bucharest, Lumina Lex, 1995.
- Herbert Gans, J., 1991, People, Plans, and Policies: Essays on Poverty, Racism, and Other National Urban Problems (Columbia History of Urban Life), Columbia University Press.
- Gilbert François, *La discrimination positive en France,* in **La revue pratique de droit français**, no.20/11/2005.
- Mihăilă Marian, Stan Dan, Suciu Carmen, *Tratat de drept internaţional public,* Vol. III, BREN-V.I.S.PRINT Publishing House, Bucharest, 2006.
- Melin F., Soucramanien, *Le principe d'egalite dans la jurisprudence du Conseil Constitutionnel,* Economica –PUAM, 1997.
- Ludwig von Mises, *Socialism. An economic and Sociological Analysis,* Liberty Classics, Indianapolis, 1981, web page. www.misesromani.org.
- Mithaug Dennis .E., 1996, Equal Opportunity Theory, SAGE Publications, London.
- Montesquieu, C. Despre spiritul legilor, Bucharest, Scientific Publishing House, 1964.
- Nozick Robert, 1977, *Anarchy, State and Utopia,* Basic Books, New York, web page.
- Platon, *Legile.* Bucharest, IRI Publishing House, 1995.
- Rawls, John, 1971, *A Theory of Justice*, MA: Belknap, Cambridge, web page.
- Rousseau J.J., *Contractul social*, Bucharest, Scientific Publishing House, Philosophical Library, 1957.
- Sfez L., *Leçons sur l'Egalité,* Presses de la Fondation Nationale des Sciences Politiques, 1984.
- Tănăsescu Simina Elena, *Principiul egalităţii în dreptul românesc*, All Beck Publishing House, Bucharest, 1999.
- Toader Toma, Aspecte constituţionale ale realizării ordinii juridice în statul de drept, Chisinau, 2005.

THE REGULATION. THE DECISION. THE DIRECTIVE. LEGISLATIVE DIFFFERENCES

GABRIEL ANDRONACHE*

Abstract
The article is set to establish the elements that determined the European legislator, within the Lisbon Treaty, to conclude that for certain regulatory domains a specific type of legislative act is to be used (regulation, directive or decision), as well as to define the juridical dissimilarities between the 3 types of secondary legal acts.

***Keywords**: regulation, decision, directive, Lisbon Treaty, Council and European Parliament*

I. Introduction

The entire European Union's legal creation included in institutive treaties could have remained a dead point of law if it didn't exist the juridical instruments to develop and generate its application in the Member States.

The juridical instruments that are held through institutive and modifying treaties, made available for the European co-legislators in order to fulfill their mission, are called legislation.

According to the provisions of the Treaties[1] the legislative acts include:

1.the Regulation;

2.the Decision;

3.the Directive.

II. Content

The differentiation of EU[2]'s legislative acts from non-legislative acts results from the legal force conferred to them. Thus, the legislative acts have a compulsory legal force, their direct or indirect application being imperative for all Member States. Non-legislative acts (opinions and recommendations) are not binding, Member States having the possibility not to apply in their national legislation the rules contained therein.

The regulation is the most powerful legislative act of the European co-legislators[3] made available through the EU treaties. Under the provisions of the TFEU "the regulation is a federal regulatory document with general application, binding in its entirety and directly applicable in all Member States. It is an integration instrument aiming at the unification of the applicable legislation within Member States".

The regulation has the following characteristics:

a)"It is general: it contains general requirements and impersonal, generally stating the same way the law into domestic law does"[4];

It is customary that regulations are seen as similar to primary or secondary legislation issued by Member States. The analogy is not entirely unsubstantiated, since there is this feature of the regulations that are meant to be generally applicable across Member States.

---

* Assistant Lecturer, PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: gabiandronache@yahoo.com).

[1] Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), adopted in Lisbon in 2007.

[2] The European Union.

[3] The Council and the European Parliament under Art. 14 and 16 of the TFEU.

[4] Fabian Gyula, Institutional law of the European Union, Ed. Hamangiu, Bucharest, 2012, p 121.

Moreover, the Court[5] concluded that the regulations are abstract normative measures that are not addressed to a particular person or group of persons[6]. These considerations confirm the similarity between the Regulation, as a European legal instrument, and legislation, especially the primary one, the national legislation.

In relation to the generality of the Regulation "it frequently happens that a natural or legal person to claim that a measure called regulation is actually a decision. This happens most often when the person seeks the annulment of a measure as art. 263 TFEU[7] limits the right of private individuals to arraign measures that take the form of regulation, ruling in this regard that << any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute the proceedings against any act which is of direct and individual concern and also against any legislative act which is of direct interest and does not entail implementing measures>>[8]. The criterion for determining whether a measure is a regulation or not is one of substance, not form"[9].

b) "It has a compulsory legal power", meaning that Regulation is compulsory in its entirety to all EU member states and union bodies, its non-compliance entailing the defying of obligations assumed by the States through the Treaties. The selective and incomplete application of the regulation is prohibited, respectively not enforcing the regulation by invoking national provisions or practices;

c)"It has a direct application, meaning that the regulation is automatically valid throughout the Union without the interposition of national legislative power, and is, therefore, apt to confer rights and impose obligations on Member States, their bodies and individuals, as national law does"[10]; "the term has a meaning connected to the manner in which international norms penetrate national legal systems. In some Member States, this happens by transforming the measure into a national law by the internal system or by a shorter enactment act of the international act. These methods would be cumbersome when more such international measures would have to be integrated into national legal systems. The European Union issues thousands of regulations. If each of them should be incorporated separately in each national legal system before they can be applied then it would reach a jam. The expression <<directly applicable >> removes this difficulty"[11]; "any form of transposition is, in fact, prohibited, because it would question the origin of the obligations provided by the Regulation same as the date of the enforcement". Direct applicability implies that the regulation immediately creates rights and obligations upon which individuals can build relationships with both national (vertical direct effect) and in relation to other individuals (horizontal direct effect)"[12].

d) "It is intended for states and individuals" (the rule is that it is addressed to Member States);

e) It has full legislative power as the union legislative authority can prescribe through the regulation not only an outcome, but enforce all the rules considered appropriate for the implementation and enforcement.

Two of these characteristics have generated discussion in the doctrine and especially generated jurisprudence. We refer here to the implementation of regulations and their direct applicability. The two issues are closely related to the concept of delegation of sovereignty. A close analysis shows that the regulation, by its direct applicability, appears as a supranational legal framework which, by contrary does not allow any national interference in changing the regulatory object, the desirable result to be achieved or even the provisions contained therein. From this

[5] Court of Justice of the European Union.
[6] Paul Craig, Grainne de Burca, EU Law, Fourth Edition, Hamangiu Publishing, Bucharest, 2009, p.104.
[7] Former Art. 230TCE.
[8] Treaty on European Union, art. 263, paragraph 4.
[9] Idem note 5.
[10] Gyula Fabian, op. cit., p. 122.
[11] Paul Craig, Grainne de Burca, op.cit., p. 104-105.
[12] Fuerea Augustin, European Community Law. The general, All Beck Publishing House, Bucharest, 2003, p.108.

perspective it was expressed in the doctrine[13] the idea that "in those sectors in which the legislating process is realized through regulations, one can talk about a real delegation of sovereignty from Member States to the European Union".

"The direct applicability means that the Regulation comes into force and is applicable for or in prejudice of the subjects of law without being necessary measures of taking-over national law. European Union's Member States are obliged to respect the direct application of the regulations. Scrupulous observance of this obligation is a prerequisite for the unitary and simultaneous application of regulations throughout the Union. By taking into national law, the Regulation will receive an uncertain status regarding the judicial body that is qualified to construe it. The legal acts whose enactment rules are requested by the regulation does not contravene the taking-over interdiction. For example, within the Romanian national legislation it was issued a Government Emergency Ordinance no. 122/20120 establishing penalties for violation of Regulation no. 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labeling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC and amending Regulation no. 1907/2006, published in Official Gazette no. 892 of 30 December 2010"[14].

There are, however, situations in which such take-over rules distort the original meaning of the Regulation settlements. In this case, the Court of Justice of the European Union immediately intervened to defend supremacy of the federal law in relation to the national law. For example 'Court in the case Tachograph, concluded that Great Britain has defied its obligations under the EEC Treaty[15] because, although the legislative power enacted implementing rules imposed by Regulation no. 1463/70 amended by Regulations no. 1787/73 and 2828/77 regarding the assembly of a tachograph on each truck, the implementing rules left the decision of assembling and of using control equipment at the exploiters choice, based on volunteering, thus practically neutralizing the provisions of the Regulation"[16]. The annunciation of national standards for the enforcement of the provisions of a European regulation is the only permissible situation of transposition. In all other cases the transposition is "unnecessary and is unlawful because it leads to the failure of a simultaneous and uniform application of rules across the European Union"[17].

Once again, the Court of Justice of the European Union intervened and confirmed the direct applicability of regulations and therefore, the prohibition of transposition, whenever there were violations of this character caused by national regulations.

We illustrate this through Case 34/73 Smallpox c. Amministrazione delle Finanze[18] when "the Court was asked by a national court whether the provisions of a regulation may be introduced into the legal order of a Member State national measures that reproduce the content of European standards to the extent that the rule's subject is brought under national law. The European Union's Court of Justice ruled that the direct applicability of the Regulation means that its enforcement and its application in favor or to the detriment of subjects of law happen independently of any measure of reception into national law. European Union Member States are committed, on the strength of the obligations that arise from the Treaty and assumed through its ratification, not to obstruct the direct effect inherent to the regulations and other community legal rules.

Strict adherence to this requirement is a prerequisite for the simultaneous and uniform regulations throughout the European Union. More specifically, Member States are not allowed to take measures that might affect the Court's jurisdiction to rule on any question of interpretation of

[13] Iordan George Barbulescu, Decision-making in the European Union, Polirom, Science, 2008, p.153.
[14] Gyula Fabian, op.cit., p.122-123.
[15] Now TUE.
[16] Gyula Fabian, op.cit., p.123.
[17] Gyula Fabian, op.cit., p.122.
[18] Judgment of 10 October 1973, due 34/73, Fratelli Smallpox Spa / Ammistrazione dello stato delle Finanze, ECR 1973, p.1981 (see also Fabian Gyula, op. Cit., P 122).

federal law or validity of a European Union act, which means that no proceeding that would hide the community nature of a legal rule is admissible. The Court remains fully competent, despite national provisions aimed at transforming a national standard into a European one"[19].

"The field of application of the regulation is very vast, starting with the harmonization of national laws in order to create the internal market, up to the establishment of mechanisms concerning the formation of agricultural markets or of the provisions on competition rules"[20].

Regulations can take many forms:

a) Basic regulations or

b) Implementing regulations usually enacted in order to detail a basic regulation or a directive's provisions.

The decision is the legislative act of the European Union which can be considered a pseudo-regulation because it has all the characters of a regulation apart from the field of application which is restricted to concrete recipients (individuals or legal entities, states or groups of states).

"The decision is governed by art. 288 TFEU[21]. Under these regulations, the decision is binding in its entirety. Whenever the recipients are indicated, the decision is binding only to them. Decisions are characterized by the following features:

a) They are not of general application; they are addressed to precise recipients, designated or identified, usually in the final article. Decisions may apply to different legal subjects other than states, especially when they refer to competition, which is of particular interest for traders.

These decisions might require certain obligations or impose sanctions to subjects to whom they are addressed. They do not have to be completed with implementing measures taken by the state[22]. Furthermore, "decisions could be the chosen method to introduce a new federal policy[23] area or to establish general procedures, such as the case of the decision regarding comitology "[24].

b) "For their enforcement, decisions must be notified to the addressee; the absence of the addressee deters the enforcement of the decision. The fact that they cannot be notified does not lead to their invalidity, but to the situation that they are not opposable, even if they were published in the Official Journal of the European Union.

c) The decisions must be reasoned clear and valid, and those that rely on a constant practice can be summarily justified;

d) Decisions are compulsory in their entirety for all their recipients.

Decisions taken by the Council and Parliament, through the ordinary legislative procedure take effect on the date fixed by the enactment or in 12 days after publication.

According to the Functioning of the European Union European Treaty the Central Bank has the right to take decisions and publish them"[25]. Considering these decisions one can wonder whether they have the characteristics of a legal act or not. Our opinion is that decisions taken by the European Central Bank have a legal character because the Treaty makes available to this institution almost all the legal instruments necessary to enact legal rules. This way the European Central Bank may enact, dependent on the considered situation, regulations, decisions, opinions or recommendations strictly in the banking field. The only tool that is not available to the European Central Bank is the directive due to reasons that regard the indirect character of directive's regulation.

Another aspect that should be detailed refers to the decisions adopted by the European Council or the Council in the field of security and defense policy and also foreign policy. These decisions are not laws as expressly provided in article 31 TEU. Therefore, we consider that they have

[19] Paul Craig, Grainne de Burca, op. cit., p.10.
[20] Nicoleta Diaconu, European Unioin's Law, second revised edition, ed. Lumina Lex, Bucharest, 2009, p.85.
[21] Ex. Art.249,paragraph 4. TCE.
[22] Idem, note 19, p. 87.
[23] Socrates program established by Decision 819/95, published in OJ L 87, 1995, p.10.
[24] Paul Craig, Grainne de Burca, op. cit., p.107.
[25] Nicoleta Diaconu, op.cit., p.87.

primary legal power through their own regulation in the treaty, but they do not follow the procedures that a legislative act does so they cannot be arraigned or contested.

Moreover, the Treaties provide that such decisions are to be enacted with unanimous consent. Exceptions are allowed but are specifically regulated.

Those decisions are enacted in situations governed by:

a) Art. TUE 22 of the European Council decision on the EU's relations with other countries than the European Union's member states;

b) Article 27. (3) TEU decision on the organization and functioning of the European External Action Service;

c) Article 28 par. (1) TEU - Council decision on a EU's operative action if the international situation requires;

d) Article 29 TEU - EU Council decision on defining positions on external issues a geographical or thematic nature;

e) Article 31 par. (2) TEU - European Council or the Council decision on the definition of an action or EU external positions;

f) Article 39[26] - Council decision on the establishment of rules on the protection of individuals with regard to the processing of personal data by the Member States (notwithstanding the ordinary procedure provided for in Art. 16 line (2) TFEU);

g) Article 41. (2) and (3)[27] - decision of the Council relating to expenditure on the activity of foreign policy and security policy of the European Union;

h) Article 42 par. (4) TEU - Council decision on launching joint missions of EU Member States;

i) Paragraph 43. (2) TEU - Council decision on the common mission objectives;

j) Article 45 par. (2) TEU - Council decision on defining the statute, seat and operational rules of the European Defense Agency;

k) Article 46 par. (3)[28] - Council Decision on the participation of Member States in cooperation in the defense;

l) Article 48 par. (6) - European Council decision amending treaties;

m) Article 48 par. (7) - European Council decision amending legislative procedure by the European Council in the special legislative procedure to the ordinary legislative procedure adopted legislative acts in the field of security and defense policy and foreign policy.

The directive is the legal instrument used by the European institutions. Testimony to this is the number of directives issued by the Commission, Council and Parliament in comparison with the number of regulations or decisions.

"Directives are different from regulation in two essential aspects. They must address to all Member States and they are compulsory as to the result to be achieved, whilst leaving Member States the choice of form and methods. Generally, European institutions have a considerable freedom of choice whether they legislate by regulation or directive. There are express provisions in the treaty[29] governing the use of directives. A careful study reveals that legislating through directive, imposed by the Treaty, is closely linked to special legislative procedure[30] while regulation is used as a binding legislative instrument for the ordinary procedure[31].

As R. Kovar[32] noted, "the directive intrigue, disturb. And the reason for all these is its uniqueness. "

---

[26] Treaty on European Union (TEU), adopted in Lisbon in 2007.
[27] Idem.
[28] Ibidem.
[29] Treaty on the Functioning of the European Union, signed in Lisbon in 2007.
[30] Article 29 of the Treaty on the Functioning of the European Union.
[31] Art.14 from TFEU.
[32] Observations sur l`intensite normative des directives – 1987.

"In order to try to elucidate the real reasons that explain the difficulties posed by this original legal instrument, we must analyze ... the characters and functions of the Directive within the European law"[33].

"Unlike union regulation, which is an integration tool, the directive is more of a tool for harmonization"[34]. "The Directive appears as a tool used at a union level to harmonize national laws, to overcome the differences, the contradictions, most of the time substantial, in internal regulations of the various EU member states"[35].

In this respect, the European legislator states that without prejudicing the article 114, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, enacts directives for the approach of laws, regulations and administrative provisions of Member States which directly affect the establishment or the functioning of the internal market[36]. "The Directive is a compromise between the existing need within the European Union for regulation and state sovereignty. The Directive creates an enactment obligation for the receiver states.

This obligation results from art. 288 under TFEU and also from the loyalty clause provided by art. 4 under TEU which stipulates that "under the principle of sincere cooperation, the Union and the Member States respect each other, assist each other in carrying out tasks which flow from the Treaties or resulting from those institutions of the Union. Member States facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of its objectives"[37].

The most important legal characters of the Directive are the following:

a) "It is compulsory in the aim that it appoints[38] "'from the analysis of the directive's definition in the Treaty[39] one can see that it is considered a two-story legislative method: at a union level it establishes the policy guidelines and the legislative model, it is then for the Member States to transpose this model, pliers second level is therefore the national level. As such, the directive is compulsory only regarding the ultimate goal, which is set at European level ..."[40]

b) "It has general content";

c) "It is intended for a State or several Member States";

d) "It has an incomplete normative character, since it requires national legislative power, the means and form needed to achieve the target set at the sovereign discretion of each state; by means one must understand the legal institutions likely to achieve the stated objective[41]; from this perspective one can say that "a directive is a rule that follow the framework law's technique rounded by the infliction decrees. Thus, unlike regulation the directive is more flexible, given the realities in the Member States. As such, receiving states retain some judicial discretion in the transposition of directives. However, the directive retains its normative character. Therefore, theoretically, the directive can contain only an obligation of result, not one of means, and states have absolute freedom regarding legal act transposing and designation of responsible institutions to implement these rules. It can be noted however, that in time, the directive's normative intensity experienced a major advance and the judicial discretion of States has declined accordingly, withdrawing, due to the fact that the objective to be achieved was precisely defined.

[33] Augustin Fuerea, op. cit., p.109.
[34] Gyula Fabian, op. cit., p.124.
[35] Augustin Fuerea, idem note 32.
[36] Article 115 of the Treaty on the Functioning of the European Union.
[37] Gyula Fabian, op. cit., p.124.
[38] Idem.
[39] Art 288 din TFEU (former 249 TCE).
[40] Augustin Fuerea, op.cit., p.111.
[41] Idem note 36.

This legislative technique has been questioned especially by doctrine and, in some cases, by states, being considered that the letter and spirit of the Treaty's[42] provisions are violated, and the Directive aims to be an alter ego of regulation. The Court of Justice of the European Communities[43] dismissed through a decision rendered in the Enka[44] case this point of view, stating that a directive may have a variable regulatory intensity, and this variability depends by the outcome that the Council and the Commission want to achieve. Therefore, we cannot discuss about a single scope established by the treaty[45], it rather fluctuates from very large to very small or even inexistent, so it all depends on union-wide target. This practice lead to the reduction of the differences between the directive and the regulation, as the Court recognized that the directive can also be binding in its entirety (objectives and means to achieve them), the same way the regulation is, if this is necessary to achieve the goal set at union level. The regulatory technique in question has not met strong opposition from the Member States, as the situation is likely to beneficial for them. States themselves are interested in such directives since the reduction of national judicial discretion diminishes the risk of removal from the European objectives and proportionally decrease the danger of assuming the liability of a state for ignoring EU rules"[46].

e) "It is indirectly applicable because the receiving State must transpose the directive within a certain period (usually between 1 and 3 years) until it creates rights and obligations for refugees. But the state is obliged not to take action that would contravene the Directive, even before absorbing it into national law. The Directive have to be transposed or implemented (through national measures[47]) within the specified period"[48]. "It should be mentioned that these national measures don't intend to introduce the directive into national law as it is understood in the dualistic theory which considers that an act of an international character cannot be applied in the domestic law unless it is <<nationalized>> thus, transformed in a domestic law by processing the act by the latter. Under European Union's law there even exist a ban against any type dual process. Transposition is merely the implementation of this act through internal measures, the process being similar to the situation in which the government decides to apply a law or ordinance.

The first condition of national transposition measures is its existence. The demonstration of its uselessness comes to the state which cannot claim any legal impediments such as national contrary provisions, be they constitutional or materials.

In addition, states cannot invoke the direct effect of the Directive to exempt the adoption of an accordingly internal act. The only situation when the lack of transposition is not sanctioned is when there are already national provisions similar to those of the Directive. On the contrary, a state can assume liability before the Court of Justice of the European Union's on the ground of non-fulfillment of the union obligations.

When a directive is only the synthesis of previous directives already enacted, the so-called consolidation directives, it doesn't have to be implemented if those directives whose synthesis represent have been already implemented. Regarding the internal document's characteristics Court[49] ruled in the 1976 Royar decision that Member States are obliged to choose between the means at their disposal those that lead to the aims of the Directive, so the state must choose the most appropriate forms and methods to ensure the effectiveness of the Directive. According to the equivalence theory[50] "the transposition of the directive must be equivalent to an act that would have

[42] TFEU.
[43] Nowadays the Court of Justice of the European Union.
[44] C. 38/77, ENKA BV, 23.11.1977.
[45] TFEU.
[46] Augustin Fuerea, op. cit., p.112-113.
[47] Author's note.
[48] Gyula Fabian, op. cit., p. 124.
[49] Court of Justice of the European Union.
[50] ECJ decision (cur CJEU) in 1986 Commission v. Belgium.

been normally adopted in the internal law for achieving the same result"[51]. Returning to the transposition's deadline, we mention that it is extremely important because "until its completion the State cannot be held liable for the transposition's delay". For example, in the case Kolpinghuis Nijmegen[52], a coffee house owner has been indicted for selling an assortment of mineral water containing a supplement banned by Directive no. 777/1980, but which had not been taken over by Dutch law and had not been published. Court held that such a directive cannot take effect.

However, there is an exception from the indirect applicability rule, namely the direct application of the directive when the following conditions are met:

1) the State did not respect the terms of acquisition or wrongly implemented the Directive; 2) the content of the directive is sufficiently precise and unconditional to create rights for individuals; 3) the Directive creates benefits for the union citizen;

4) can be invoked by an individual up against the state, meaning in relation with the state's institutions "[53](so-called direct effect).

The Directive comes into force within 20 days after the publication in the Official Journal of the European Union "when enacted through the ordinary legislative procedure and is addressed to all States". The directives that address only to some member states don't always have to be published, but just brought into notice to the receivers. We emphasize that it is important to make a distinction between the term "come into force" and "implementation deadline"[54].

III. Conclusions

Through founding treaties, the European Union have a number of legal instruments which help it realizes its goal of generating an accelerated integration at a legal level between Member States. These instruments have been described in the article's content. It is clear that the regulation is the representative instrument of the union integration concept and of the application of the supremacy of the European law towards national law of the member states principle. In this context the Directive can be considered as a method of harmonization of legislation in the fields that carry a national sovereignty. We should appreciate the strive of the treaties authors'[55] to strengthen the principle of mutual control between European institutions in the matter of enactment in which supranational enactment is most often established through ordinary legislative procedure, while indirect legislating (through Directive) is established often via special legislative procedure. As a proposition of law ferenda, we consider necessary to indicate the legal instrument to use in all areas of regulations (regulation, decision or directive), the dismissing of unnamed acts from the treaties and clarifying the legislative procedures applicable to the European Council or Council decisions which currently do not comply with legal proceeding

References

- Courses. Treaties. Studies
- Bărbulescu George Iordan, The European Union decisional process, Polirom, Science, 2008.
- Craig Paul, Burca Grainne, EU Law, edition, IV, Bucharest Publishing House, 2009.
- Diaconu Nicoleta, European Union law, treaty, second edition, revised, Lumina Lex Publishing House, Bucharest, 2011.
- Dragos Cosmin Dacian, European Union. Institutions. Mechanisms, Issue 3, CHBeck Publishing, Bucharest, 2007.

[51] Augustin Fuerea, op.cit., p.114.
[52] Case 80/86, Kolpinghuis Nijmegen, collection 1987, p.3969.
[53] Gyula Fabian, op. cit., p.126.
[54] Idem p.128.
[55] Lisbon TEU and TFEU adopted in 2007.

- Fabian Gyula, Institutional law of the European Union, publisher Hamangiu, Bucharest, 2012.
- Fuerea Augustin, European Community Law. The General, All Beck Publishing House, Bucharest, 2003.
- Fuerea Augustin, EU Manual Edition V Legal Universe Publishing, 2011.
- Gornig Gilbert, Ioana Rusu Eleonora, European Union Law, 2nd edition, publisher CHBeck, 2007.
- Liviu Gabriel Ispas European Union. Evolution. Institutions. Mechanisms Legal Universe Publishing, Bucharest, 2011.
- Tancu Davies, General Law, Lumina Lex Publishing House, Bucharest, 2007.
- Other references.
- www.europa.eu.
- www.infoeuropa.ro.
- www.eur-lex.europa.eu.
- http://ue.eu.int.
- http://curia.europa.eu.
- www.wikipedia.org.

REFLECTIONS ON THE JURIDICAL SYSTEM

ELENA ANGHEL[*]

Abstract
It is professor Ion Craiovan`s opinion that law is an inherent condition of social life, fact of culture and civilization, expression of legal thinking, specific normative system, entity in the world of values or contemporary reality[1].
In this study, we aim to highlight the systemic nature of law. Related to the societal system, the juridical phenomenon is a subsystem, interdependent to other subsystems: the moral, economic, political, religious and scientific phenomenon. In his turn, law is only a part of the juridical phenomenon, which evolves depending on the other components: legal conscience and juridical relations.
If defining law by relating it to its essence implies "to find what is permanent, stable and defining for the reality named law", in terms of descovering „an universal underlying of juridical, an universal law concept, arising from the very nature of things by means of a meta-historical vision"[2], *we believe that the unity of the whole law system, its clarity, coherence, consistency and completeness are due to the general juridical principles.*
In our opinion, the whole law system is held by this assembly of guiding ideas which, having a privileged position in the positive juridical order, direct both the legislator and the law practitioner.

Key words*: juridical system, essence, juridical principle, unity of the law system, completeness of the law system.*

Introduction

The aim of this article is to emphasize the law's systemic character, detect the influences it sustains from some external factors and emphasize the features of the law system by analyzing them from the perspective of general legal theory. Following the research's line we will notice on a spatial axis the existence of not just a single law system but that of variable law systems that occasionally are consistent in certain common aspects. These we shall name the constants of law. The analysis of juridical systems reveals a community of sources, principles and institutions that mask their apparent diversity.

Through its origin, evolution and features, the Romanian positive law is part of the Romano-Germanic law system (meta-system). In specialized literature it has been highlighted that the Romanian positive law "has the same mode of expression, universal for the contemporary Elder law: law inscribed in normative acts and unwritten, customary, stipulated through oral tradition law"[3]. The formal origins of Romanian positive law are the normative act, normative contract and, as we will notice, the controversial jurisprudence.

In the first analysis we can observe that the law principles are not included in the origins' hierarchy through which the law is expressed. They are considered guiding law regulations that give the system's measure and have as subordinates the structure as well as the system of law's development[4]. It is unanimously admitted that the principles are those that insure the unity, cohesion, equilibrium and development of the law's system. However, are the principles formal origins of law?

---

[*] Lecturer, PhD, The Faculty of Juridical Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[1] Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, Foreword.

[2] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2006, page 22.

[3] Gheorghe Mihai, *Fundamentele dreptului,* vol. I - II, All Beck Publishing House, Bucharest, 2003, page 204.

[4] Nicolae Popa, *Teoria generală a dreptului,* 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, page 90.

Are they exterior to the positive juridical order? Should we place them in the "given" of law? And what is hiding behind the principles of law? We are aware that behind law and jurisprudence exist institutions and people; behind doctrine, savants and law schools; behind common law lays the entire society; behind the Muslim law's revelation is the prophet or church. How about behind law's principles? Are they autonomous origins of law or do they result from the other origins already assigned? Are they premises or extensions of formal origins?

These questions constitute in fact an invitation to continue reflecting on the law's formal origins because, as Hayek said, "it is the great lesson which science has taught us that we must resort to the abstract where we cannot master the concrete".

Content

The idea of a system exists since Greek and Roman antiquity, its wording being, however, tributary to modernity. In general, it is considered that the system designates an ensemble of methods organized in the base of a methodology or a complex of interacting elements, these interactions having an organized character. Society itself is a complex and progressive system that self-organizes the structures, components and functions under the influence of internal and external factors. Multiple connections exist between the components of any system.

The systemic analysis is being used even on the level of law by emphasizing law's specificity, the ensemble's coherency, its logic and finalities as well as the subsystems that compose it and the realities to which is gives expression. The juridical norm, law's basic cell, cannot be conceived isolated; law is a system of conduct rules detached from the juridical conscience through the mean of the state's will. In the law system we notice other two subsystems: the objective and subjective law. The objective law is also a system composed of juridical branches, sub-branches and institutions. Among the objective law it is also distinguished, from a diachronically perspective, between the "out-of-date law" and the actual law. The present objective law is called positive law.

Law's systemic character was detected by Pierre Pescatore in the following way: going from simple to complex the individual regulations are reunited in institutions which are reunited in branches, among which some have been codified; the branches, in their turn, are coordinated in a national juridical system which in its turn is integrated in a universal juridical order whose expressions are the nations' law and the legislations conflicts' law, the private international law[5] especially.

The law's system is defined as the totality of juridical norms existing at a given moment, bounded between each other by common features made to point out their unity and relatively separated by some particularities in rapport to the object and method of juridical regulation[6].

Other definitions emphasize the fact that juridical norms are assembled in an organic way by forming a unit that is not reduced to its component parts, thus conferring an internal coherency to the system that ensures its functionality and applicability; simultaneously, the multiple interdependencies that exist between juridical norms are highlighted[7].

Also, our attention is drawn towards the fact that the law's system does not constitute the arithmetic, mechanical, static and constant sum of the present juridical norms but the unity and ensemble of the norms that are structured, juridical and systemically organized based on certain

---

[5] Pierre Pescatore, *Introduction à la science du droit*, Luxemburg, 1960, page 255, *Apud* Alexandrina Şerban, *European integration – consequences on the unity and diversity of law systems,* in Studii de Drept Românesc, year 15 (48), no. 3-4/2003, pages 255-264.

[6] Dumitru Mazilu, *Teoria generală a dreptului,* 2nd edition, All Beck Publishing House, Bucharest, 2000, page 253.

[7] Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului,* All Publishing House, Bucharest, 1992, page 105.

criteria and principles[8]. The law's system cohesion is assured through the interdependency of the elements that compose it.

Depending on the influences supported from some external factors, Alexandrina Şerban distinguishes between the closed systems, which are insensible to the outside pressures, and the open systems, that accept the confrontation with other competitive systems, under the conditions of social life's complexity. The author shows that Kelsen as well as Luhmann imagined juridical systems closed from a normative point of view: for Kelsen the juridical system is purged by any ideological, political, sociological influence, and for Luhmann, the juridical system represents a self-organized and self-determined system that produces its own structures and frontiers through its own mechanisms and without accepting any external determination[9]. In the author's opinion "the juridical system must be in relation to the exterior thus it cannot be completely closed".

As far as ***the features of law's system*** are concerned, these have been analyzed from the branch juridical sciences' position as well as from the perspective of the general legal theory.

Ion Deleanu considers that in the law's system the juridical norms behave as parts in relation to the whole but also as subsystems in relation to their own structure. Law's system is an open and dynamic system that support the influence of social environment and influences, in its turn, the development of social relations; it arises as a complex of interactions with all the other phenomena of the superstructures, conditioned by it through the possibility of resorting to the state's constraining force. On the other hand, interactions are also established between its composing parts and the branches of law as well as between these and the whole. Simultaneously, the author points the law's system characteristic as being an organizing ensemble through the mean of normative activities developed by the state's bodies[10].

Dan Claudiu Dănişor, Ion Dogaru şi Gheorghe Dănişor extract from the systemic character of law two consequences: no juridical norm can be understood while isolated since it is necessary to refer to the juridical order's coherency in its ensemble and, on the other hand, reports of formal classification exist between the juridical norms, hence, with the exception of the Constitution, each norm must be supported on a superior norm[11]. In the opinion of the said authors, the law's system should be defined through *clarity, coherence, consistency and completeness*.

Clarity presumes the system's feature of being logical, axiomatic and formalized. Given that juridical thinking implies and requires valuable judgments, the perspective of a perfectly logical law is purely "enticing". "What matters is not the logical beauty of laws, but the social value of the result. If the law is defective, misfit, anti-economic or even unjust, a perfectly logical reasoning will only serve by amplifying the premises' or the initial rule's defect. Consequently the material criterion prevails in law in relation to the formal one". Therefore, the law's logical character remains to be desired.

The coherency of law's system is translated by the non-contradiction of its internal elements. Seeing as the law is not missing antinomies, it intervenes itself by creating certain "conflict rules that will repair these incoherencies".

The consistency implies the existence of a system based on correct deductions. However, the law is full of inconsistent areas caused by its linguistic nature, but also of the reality's complexity to which it must answer. Some concepts are imprecise, susceptible to multiple and even divergent interpretations. Nevertheless, the law requires a certain dose of inconsistency and flexibility thus often deliberately creating imprecise notions that will lead to flexible precautions.

---

[8] Sofia Popescu, *Teoria generală a dreptului,* Lumina Lex Publishing House, Bucharest, 2000, page 210.

[9] Alexandrina Şerban, *Integrarea europeană – consecinţe asupra unităţii şi diversităţii sistemelor de drept* in Studii de Drept Românesc, year 15 (48), no. 3-4/2003, page 255-264.

[10] Ion Deleanu, *Drept constituţional şi instituţii politice,* vol. I, Europa Nova Publishing House, Bucharest, page 25

[11] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului,* C. H. Beck Publishing House, Bucharest, 2006, page 34.

The completeness of a system is translated through the lack of gaps. In our law system the laws oblige the judge to statute even in the absence of some dispositions applicable in the species (speţă) under the sanction of justice denegation. Thus it is considered that the law cannot have gaps, and in the absence of regulations the judge must resolve the cause under the light of general principles of law.

For the reason that a "system of law can be assimilated to a three-dimensional plan, with a temporal, spatial and infinite cote axis"[12], we will distinguish, on a temporal axis, between *the "non-elderly" and elderly law.* Although the savage man had the quality of human, a rational creature, he "did not have the values guide marks, he did not coexist, instead he lived in herds". Consequently, the first form of social organization is considered to be the tribe, in which people led themselves under an ensemble of rules; nevertheless, "the old rules did not have the purely juridical, moral or religious character but a syncretic, moral-juridical-religious one". The state did not invent community, however it related to the past by creating new forms of organization and using everything that seemed useful from the unorganized society.

"Society's history is that of the law's historical systems included in the history of social juridical phenomenon"[13]. In society's history the following forms of elderly law succeeded themselves: the positive law of slavery, the feudal positive law, the bourgeois positive law and the socialist positive law. The right of a society is a historical phenomenon, meaning that on every step of evolution its structural elements gained a certain configuration, certain specific features.

On the spatial axis we have shown at the beginning of this paper that not just one system is submitted, but variable law systems that sometimes are in accordance in certain common points. These we have mentioned to be the constants of law. The analysis of juridical systems reveals a community of principles and institutions that mask their apparent diversity. Through its origin, evolution and features, the Romanian positive law is part of the Roman-Germanic law system (meta-system).

When we analyzed the form of law we evoked the opinion of professor Nicolae Popa, according to which a double possibility of formulating the origin of law exists[14]. The genetic conception aims at discovering the factors that stand at the basis of the juridical norm's emergence and existence, and the gnosiological conception proposes to put into value the indications through which the juridical character of norms of conduct can be recognized.

Regularly, the distinction is made between ***real origins of law***, a "given" of law and ***the formal origins of law***, under the meaning of legal criteria of validity that are respected by the said juridical system.

The picture for law's formal origins includes the juridical habit, judicial practice and the judicial precedent, doctrine, normative contract and normative act (the law). All these form "a systemic virtual unity: it is that which is named the origins' law"[15]. Given the historical-spatial diversity of law, these formal origins are converted on the level of each law system. Furthermore, the form-content dialectics specific to law has determined and continues to generate modifications in the structure of these origins from one historical phase to another in the same law system.

As far as the Romanian positive law is concerned, "it has the same forms of expression which are universal for the contemporary elderly law: the law inscribed in normative acts and the unwritten,

---

[12] *Idem,* page 190.

[13] *Idem*, pages 190 and the following.

[14] Nicolae Popa, *Cu privire la conceptul de formă a dreptului,* in Analele Universităţii Bucureşti. Filosofie. Istorie. Drept, year XXV-1976, pages 105-109.

[15] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedia juridică),* All Publishing House, Bucharest, 1995, page 463.

customary and stipulated through oral tradition law"[16]. The formal origins of the Romanian positive law are the normative act, normative contract and as we will notice, the controversial jurisprudence.

In the first analysis we can observe that the law principles are not included in the origins' hierarchy through which law is expressed. They are considered guiding law regulations that give the system's measure and have as subordinates the structure as well as the system of law's development[17]. It is unanimously admitted that the principles are those that insure the unity, cohesion, equilibrium and development of the law's system, but including them in the picture of formal origins of law is avoided. Other times they are defined as super-legislative formal origins.

Law's principles still have an ambigous statute. Are the principles formal origins of law? Are they exterior to the positive juridical order? Should we place them in the "given" of law because they are "a permanent and universal inspiration for law"[18]? What is hiding behind the principles of law? We are aware that behind law and jurisprudence exist institutions and people; behind doctrine, savants and law schools; behind common law lays the entire society; behind the Muslim law's revelation is the prophet or church. How about behind law's principles? Are they autonomous origins of law or do they result from the other origins already assigned? Are they premises or extensions of formal origins?

Upon analyzing the report between origins' law and positive law, Mircea Djuvara has raised a very interesting problem: **can we say that the effective law practiced in a country coincides in a necessary and absolute manner to the law formulated through its origins?** In his opinion the answer can only by negative. A country's positive law can only be the law put into practice, regardless of the legal prescriptions left unapplied. A state's real constitutional law is not "the one solemnly inscribed on paper but the law practiced effectively by the recognized political organs in their efforts to order and lead the interests of that specific society". The author shows that the real positive law, the "live" law, is the jurisprudential law[19].

Moreover, throughout his research Djuvara was led by an important distinction of law in rational and positive law. The rational law is that "live" law which needs to correspond entirely to society's real life; it is not a universally and eternal rational law as the natural law School thought would find, but a rational law variable in time and place. The rational law exists under the form of principles which are logically ahead of the positive law they are founding; they constitute a "substratum of positive law". Thus, the positive law, as an ensemble of norms expressed through formal origins that apply at a certain time in a society, must develop and apply the rational law's principles.

Conclusions

A state's totality of juridical norms is integrated in a system whose unity, clarity, coherency, consistency and completeness are owed to the general principles of law. The entire law system is sustained by an ensemble of directing ideas which constitute reference points for the legislator as well as for the practitioner. However the following question arises: does the law science create these principles or does it only discover and formulate them?

From the ensemble of opinions expressed in specialized literature result the following ideas for configuring the place that the principles occupy in the system of law:

1.Law's principles cannot be dissociated by the evolution of human society.

The existence of law principles is strongly connected to the existence of a society

[16] Gheorge Mihai, *Fundamentele dreptului,* volumes I - II, All Beck Publishing House, Bucharest, 2003, page 204.

[17] Nicolae Popa, *Teoria generală a dreptului,* 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, page 90.

[18] Jean louis Bergel, quoted paper, page 114.

[19] Mircea Djuvara, quoted paper, page 470.

system. With the role of its subsystem, the law permanently interacts with the other components of society: moral, religion, politics, economic. Law cannot restrain the laws of evolution and neither can it ignore the traditions and social reality. Law's principles thus evolve strongly connected with the general principles that govern the human activity.

Law and society cannot be separated: *ubi societas, ibi jus.* If law is society's creation, as Durkheim affirmed, and society is a nature *given,* law's principles should exist since society started to exist as well. Gheorghe Mihail considers that "to assert the contrary implies asserting that society can exist outside the normative order, in anarchy to be more exact"[20]. The archaic society was led by a complex of rules founded on juridical, moral and religious values; these incipient rules were transmitted through tradition and influenced, in a certain manner, the following elderly laws. Even if the state instituted its own organizational forms and more adequate instruments for regulating social relations, the essential values have been kept and constitute a permanence in society's evolution.

In general the evolution of law "does not reside in legislation, jurisprudence or doctrine, but in society itself". Consequently, a part of the social order that is regulated by the official legislation exists, nevertheless a spontaneous social order exists as well, which is regulated by "live norms" and represents the creation of society's juridical conscience[21].

2.The principles compose the substratum of positive law.

Objective law is universal. Nevertheless, within social reality, the objective law is distributed in systems of positive law, relative normative orders, which are conditioned by the vigor of time factor. The principles are not subjected to this sort of conditioning, instead they are situated in the universal space of objective law: the principles precede and establish positive law.

The principles of law's origin, which are universal concepts with an axiological dimension, is *extra legem*; their source of inspiration was searched in natural law, in moral, equity and in the political history of civilization. Despite the statute ambiguity, the principles represent the keystone of the juridical edifice. The principles are directives, logical premises of elaboration of positive law, they are situated upstream the norms built by positive law. Because they impose as mandatory for the juridical norms, a normative character is attributed to the principles in report not only with the social reality but with the positive juridical system as well[22]

3.Law's principles constitute "the spirit" of laws.

Law must carry within equilibrium between the letter and spirit of laws. The entire official legislation, instituted or sanctioned by the state, in other words "the letter of the law", must be went through by the "spirit" of law's principles. The necessity of overcoming the rigidity of the law's text application has been felt even since the time of the Romans since the law was seen as an art of equity.

The principles constitute reference points for the legislator, as well as for the practitioner, in the process of elaborating and applying the norms of positive law. They assume the function of harmonizing the positive law system. The law's support orientates the legislator's will: "the normative act's text acknowledges about that certain will the legislator has, resonant with the law's spirit, itself configured in the value principle of justice and, on a wider scale, in the century's spirit"[23]. It is emphasized that the law's spirit, in its universal meaning, is situated above the legislator's spirit; such an abstract spirit has a metaphysical character[24]. Law is creation, not invention, and the creation belongs to the spirit. Thus, we were saying that the general theory of law only *discovers and formulates the principles* which belong to law's spirit.

---

[20] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv,* vol. III, All Beck Publishing House, Bucharest, 2004, page 138.

[21] *Apud* Dumitru Mazilu, *Teoria generală a dreptului,* All Beck Publishing House, Bucharest, 2000, page 119.

[22] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *quoted paper*, page 156.

[23] Ioan Humă, *Probleme controversate privind tehnica istorică în interpretarea dreptului,* in Revista Română de Filosofie a Dreptului şi Filosofie Socială, issue 2/2005, pages 68-72.

[24] Gheorghe Mihai, *Fundamentele dreptului,* vol. I - II, All Beck Publishing House, Bucharest, 2003, page 489.

4. The principles ensure the normative system's unity

Granted that the principles have a normative character in report to the positive law system, we must identify the place it occupies in the hierarchy of this system. However, can the principles be formed on the hierarchical system? The principles proclaim values; could we consider these values to be more important and others less important? In doctrine, the opinions vary from including the law principles in the category of formal origins of law until they are considered to be super-legislative sources, super-constitutional, forgoing and superior to the positive constitution.

In the field of juridical norms, the hierarchy is established through the norms' report to one another, in order to make possible the analysis of validity, conformity and the possibility to depart from them. Such a hierarchy is possible because of the necessity to establish law in a logical and systematic manner.

As far as the hierarchy of law's principles is concerned, such an operation is difficult and, in my opinion, voided of practical reason. Most of the times, the justice ideal is considered to be the ultimate principle from which all the others derive. But what is a justice outside its equity or, worse, legality? As far as I am concerned, I consider that the general principles of law, universal real cause of the judicial, occupy together the same floor within the juridical top of the pyramid, from which it is transmitted and gains specificity on the positive law's level.

The general theory of law is the synthesis of all principles that dominate law. The entire law science consists in reality of "emitting from the multiplicity of law dispositions in their essence, namely these exact ultimate principles of justice from which all the other dispositions derive. Thus, the entire legislation becomes intensely cleared and is caught in what is called juridical spirit"[25].

References

- Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *General Law Theory, (*C. H. Beck Publishing House, Bucharest, 2006).
- Dimitrie Alexandresco, *Romanian civil law principles*, volume I, (Graphic Workshops SOCEC, Bucharest, 1926).
- Dumitru Mazilu, *General Theory of Law,* 2nd edition, (All Beck Publishing House, Bucharest, 2000).
- Gheorghe Mihai, *Law foundations,* volumes I – II, (All Beck Publishing House, Bucharest, 2003).
- Gheorghe Mihai, *The Foundations of Law. The Theory on the Beginning of Objective Law*, volume III, (All Beck Publishing House, Bucharest, 2004).
- Ioan Humă, *Controversial problems regarding historical tehnique in interpreting law,* in Romanian Magazine of Law Philosophy and Social Philosophy no. 2/2005.
- Ion Craiovan, , *General Theory of Law (*Universul Juridic Publishing House, Bucharest, 2007).
- Jean – Louis Bergel, *Théorie générale du droit,* 4th edition, (Dalloz Publishing House).
- Jean - Pierre Gridel, *Le rôle de la Cour de Cassation Française dans l'élaboration et la consécration des principes généraux du droit privé*, in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, (Bruylant Bruxelles, 2005).
- Mircea Djuvara, *General Law Theory (Legal Encyclopedia),* All Publishing House, Bucharest, 1995.
- Nicolae Popa, *General Law Theory*, 3rd edition, (C. H. Beck Publishing House, Bucharest, 2008).
- Nicolae Popa, *Regarding the Concept and Role of General Principles in Law,* in the Public Law Magazine no. 1-2/1996.
- Sofia Popescu, *General theory of law,* (Lumina Lex Publishing House, Bucharest, 2000).
- Sofia Popescu, *General Law Principles – again under our attention,* in Romanian Law Studies, 12th year *(*45), no. 1-2/2000.
- Sofia Popescu, *Research of legal methodology for the support of law's elaboration activiy,* in Romanian Law Studies, year 11 (44), no. 1-2/1999.

[25] Mircea Djuvara, *op. cit.*, pag. 214.

THE RECONFIGURATION OF THE JUDGE`S ROLE IN THE ROMANO-GERMANIC LAW SYSTEM

ELENA ANGHEL[*]

Abstract

The role assigned to the judge varies from one legal system to another. In the Anglo-Saxon legal systems, in the context of the absence of an independent legislative body, judge is the one who creates law; his mission consists in solving a specific case, given the existing judicial precedents; if he can not find an appropriate rule of law, the judge has to create one and to apply it. On the other hand, in the continental system, creation of law is the mission of the legislator. Evolving under the influence of Roman law, the continental law systems differ from the Anglo-Saxons by: the assuming of Corpus iuris civilis; the tendency to abstraction, leading to the creation of a rational law; the rule of law, with the consequence of blurring the role of jurisprudence.

In spite of these essential differences, the last decades of the twentieth century have found out the convergence of the written coded system and the common law system. Thus, the increasing of the legislature`s role in common law system is accompanied by the reconsideration of the judge`s role in the Roman-Germanic legal system. While Anglo-Saxons accept the "compromise" of coding, Continentals shyly step towards rethinking the status of law source of the jurisprudence. History has shown that, one by one, law and jurisprudence have disputed the the role of prime creator of law.

Emphasizing the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains in its essence abstract, but the appreciation of the jurisprudence makes it alive, as the judge, understanding the law, examining the interests of parties and taking inspiration from equity, ensures the ultimate purpose of the law: suum cuique tribuere"[1].

However, as we shall see below, in the Roman-Germanic law system, the creative role of jurisprudence still raises controversy.

***Key words**: creative role of jurisprudence, controversy, common law system, continental system, judicial precedents.*

Introduction

By analyzing several opinions of academic commentators on the expansion of the role of continental jurisprudence in postmodernism, we notice that the phenomenon is often qualified as a danger threatening the rule of law. Thus, amongst the symptoms of the crisis of the current juridical universe, Ioan Vida also includes the government by judges, who transfer their own decision in legal precedents, creating legal regulations (norms established by way of appeal in the interest of the law) or removing from the legal system certain norms declared as unconstitutional. All these, shows the author, "undermine the fundamental architectonics of the law and its enforceable nature" and render the reconstruction of the law, "the rebuilding of the legal universe", necessary[2].

Dana Apostol Tofan notices that the interpretation of legal texts, with such confuse and imprecise renditions, has become difficult, and blames the judges for an increased consideration margin, which also increases their discretionary power[3]. In the same train of thought, Sofia Popescu

[*] Lecturer, PhD, The Faculty of Juridical Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[1] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, pag. 80.

[2] Ioan Vida, *Orientări post-moderniste în procesul de creare a dreptului*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, page 28.

[3] Dana Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice*, All Beck Publishing House, Bucharest, 1999, page 350.

deems the current role of judges as paradoxical, considering that, sometimes, they must settle cases "near the limit of the mandate granted to them by the position they fill"[4].

From the above considerations, it would result that the Romano-Germanic legal system is still anchored under the domination of the law, and any additional consideration given to judges seems to open the way to their discretionary power. Within this orientation, an "abusive" nature seems to be ascribed to jurisprudence.

However, as one will further notice, this theory does not constitute *communis opinio doctorum*. The postmodernist law is a controversial law. Today, an extensive part of the doctrine considers that jurisprudence can no longer be denied the nature of formal sources in the Romano-Germanic legal system. Since the purpose of law resides in aligning the aspirations to fairness with society's exigencies, the presence of judges in the legal order is absolutely necessary. While the moral relation unfolds within an individual's innermost self, and the religious relation involves two entities, man and God, the legal relation is triangular in nature: it requires the presence of a judge[5]. Thus, the judge has evolved from a mere servant of the law to that "impartial and detached" servant, authorized to construe the law in a creative sense.

Content

The ***formalist school*** founded by Kelsen placed law in a strictly normative area, the only entity which may be associated with law being the State. The reduction of law to a system of hierarchized norms, within which each norm draws its compulsory force from its compliance with the next higher norm, resulted in the exclusion of jurisprudence and common law from the sources of law.

In the 19th century, the so-called "interpreters" of the French Civil Code raised against the normative formalism, creating, however, a theory as formalist as the Kelsian one. They believed that the law is the only source of law, thus, neither the common law, nor jurisprudence can introduce in the legal order new regulations, derogating from the legal provisions. All the other sources, which didn't derive from the law, were ignored. By exaggerating the importance of codification, these jurists claimed that the entire civil law could be found in the Napoleonic Code, which succeeded in covering all legal situations. By identifying the law with the statute, a perfect, complete, faultless statute, the role of the judge was exclusively limited to interpreting the statute. However, interpretation was seen as a purely logical action, beyond any political or moral considerations, the only duty of a judge being that of extracting legal consequences from legal texts.

In time, the exegetic interpretation proved to be overpowered by the practical necessities: Paul Roubier asks himself what purpose could an interpretation which, although it is in harmony with the lawmaker's view, is in complete disagreement with the judicial practice, serve?[6]

The first steps to freeing the judge from the strict letter of the law were taken by the ***School of Free Will***. In the paper *Méthodes d'interprétation et sources en droit positif*, Gény reacted against the doctrine at that time, which considered the law as the sole source of law. Through its scientific works, Gény wished to put an end to the "fetishism of written law" and to the belief in its sufficiency, considering that it is incomplete and that "no matter how much sharpness we assign to it, the mind of an individual is not able to completely grasp the image of the world in which it moves"[7]. Thus, the lawmaker must examine the given, in order to create the construct. The given of law means that reality external to the positive law, which confers upon it the substantiality need to exist. The given

---

[4] Sofia Popescu, *Continuitate şi discontinuitate, din perspectiva integrării europene în domeniul dreptului*, in Studii de Drept Românesc, year 15 (48), no. 1-2/2003, page 19.

[5] François Terré, *Introduction générale au droit,* 7th edition, Dalloz Publishing House, 2006, page 45.

[6] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition, Dalloz Publishing House, 2005, page 69.

[7] *Apud* Philippe Malaurie, *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, 1996, page 316.

must "phrase the legal norm as it results from the nature of things and as much as possible in rough form".

The school of free will explained the sources of law from a sociological perspective, in complete opposition to the Kelsian normative school. The formal sources of law, the law and jurisprudence, are only means of ascertaining the law. They are static in nature because the law precedes them. The law is, first of all, that living, spontaneous, dynamic law, product of social forces. It is the work of society and not of the state[8]. It stems from the social reality, hence, it cannot be deemed as being the creation of certain state authorities. The state holds the monopoly of coercion due to its superior public power. However, it does not hold monopoly over the creation of the rules of law.

The law cannot satisfy all the requirements of the social life. It cannot keep up with the dynamics of society. Therefore, when the law fails to offer any solutions, the judge, helped by the doctrine, must discover them through a free scientific research, in custom and in what Gény called "la nature des choses positives". Philippe Malaurie writes about Gény: "No work and no author symbolized an intellectual revolution so profound in the existence of law. From the Revolution and until him, the law represented exclusively the statute; according to him, the law no longer represented only the statute"[9].

In the free will doctrine, there are several alluring aspects, shows Paul Roubier, especially the reaction against "this outrageous fiction" according to which the judge is a mere interpreter compelled to abide by the law[10]. This school overstates, however, the role of a judge, assigning to it as main duty a real work of creation of law and establishing that this is the rule and not the exception. If it were to be accepted that the judge is entitled to thrust aside the law and jurisprudence, for the mere reason that such sources are static, the notion of rule of law itself would be altered. Therefore, the author concludes that we cannot believe that the law may be completely free, because the need of security, which commands the entire social order, requires, to some extent, that the normative power of a judge be restricted.

According to Paul Roubier, the law expresses itself through formal and informal norms. The authority of the formal norms stems either from the legislation or from jurisprudence. Informal norms are divided into two categories: customary rules based on experience and rules "based on rationality, which correspond to a certain ideal of justice"; the latter are the general principles of law, rules which Roubier calls "doctrine rules", since they are discovered by doctrine[11]. The system of legal norms founded on formal sources is, to some extent, virtual in nature; there can't be an absolute overlapping between the law of the sources and the actual practiced law. The real sources exist behind the formal sources of law, and the validity of the formal sources of law depends on their compliance with the real sources[12].

A judge's main duty consists in applying the formal sources. At the same time, a creative role must be given to the judge, if there is no rule of law applicable to the dispute pending settlement: "he/she must find the best solution and, thus, to release a rule of law which may constitute the principle of a new jurisprudence"; this issue, shows Roubier, is not a subject up for debate, since the law itself forces him/her to adjudicate the case, regardless of its silence or insufficiency. The difficulty occurs when the law of formal sources, being static in nature, no longer meets the needs of society or the ideal of justice of that era. How is the renewal of the law possible, when a greater freedom of consideration is not granted to a judge?[13]

---

[8] *Apud* Paul Roubier, *op. cit.*, page 76.
[9] Philippe Malaurie, *op. cit.*, page 315.
[10] Paul Roubier, *op. cit.*, page 80.
[11] *Idem*, page 12.
[12] *Idem*, page 76 and the following pages.
[13] *Idem*, page 85.

William Dross proposes the examination of the sources of law from a Jusnaturalist perspective as well, as manifestations of the law and not causes thereof[14]. From a philosophical point of view, the law cannot be a source of law, but a manifestation thereof, thus, the true source of law is found way upstream. Since any source of law is essentially an authority which constructs legal phrases, the author analyzes the sources of law based on the authority which creates them. The main issue here is finding an answer to the question: **which authorities are legitimately authorized to create law**? The real source of law, reveals Dross, is the sovereign, i.e. the Nation. Behind the apparent trilogy of the sources of law, law, jurisprudence and custom, comes into prominence the monist ideology of the sovereignty of the Nation, the only one authorized to create the law. In this light, the law is undoubtedly the source of law, since it derives from the sovereign, expressing the general will of the nation.

But the time of exegetic interpretation has ended in the era of Gény, says the author. Today, no professor can teach civil liability, without taking into account the decisions delivered by the Court of Cassation. Jurisprudence protrudes *in fact* as a source of law, and those who qualify it as "abusive" may criticizes its legitimacy, but not its nature of formal source of law.

Therefore, if the normative power of jurisprudence is undisputable, its legitimacy gives rise to controversy. Certain authors consider that the principle of separation of powers in the state transforms the judge into a mere "servant" of the law, the creation of law being the exclusive preserve of the Parliament and Government. In this light, the creation of law by a judge would represent usurpation. Other authors believe that, pursuant to the principle of delegation of powers, the judicial power, being a key element of a state's organization, is legitimated to create law.

In the same train of thought, François Terré notices that debates on the status of jurisprudence of formal source of law have outlined two orientations[15]. As a first mindset, based on the revolutionary ideologies and on the principle of separation of powers in the state, it is believed that a judge cannot participate in the act of creating law, since it would acquire a power which pertains only to the nation's chosen ones. Since the written law is able to foresee all situations, the judge must only apply it. To this effect, the Court of Cassation was established for the purposes of protecting the law against the usurpations of judges, and not of imposing the law interpretation unit.

As another mindset, the opposite is revealed. The law cannot cover all legal situations, sometimes being obscure, at other times incomplete or even obsolete. Portalis is one of the people who emphasized the undisputable role of a judge, consisting in interpreting, supplementing and adapting the law: "When the law is clear, it must be followed, when it is obscure, its provisions must be further refined. If there is no law, one must turn to custom and equity. Equity is a return to natural law, in the silence, obscurity or opposition of the laws".

For that matter, the lawmaker expressly admits the possibility of the law's insufficiency and implicitly acknowledges the power of the judge of supplementing the law, of extensively interpreting it and even of changing its meaning, when this is required for dispute settlement. The obligation imposed on the judge by Article 4 of the French Civil Code, reveals the author, has a general scope; it is not set forth only in the interest of the litigant, nor to fill in the voids of the law or to characterize the legal system as being closed or open; this obligation contributes to the definition of the law: "this obligation to adjudicate certifies, as concerns the judge, the presence of an immediate given of the law"[16].

As concerns us, we believe that the interpretation given by a judge does not consist in the mechanical application of certain methods and procedures; it is an act of creation, within which the interpreter lays the entire extent of its creative spirit. A judge cannot be restricted to the literal

[14] William Dross, *Retour aux sources*, in Pandectele Române no. 2/March 2007, pages 183 and the following pages.

[15] François Terré, *op. cit.*, page 283 and the following pages.

[16] *Idem*, page 48.

application of the law. He/she must reveal its spirit. Each case is unique and requires innovative solutions, and the judge must possess the art of distinguishing the meanings of the objective law. He/she must feel the law, so that he/she may resort to general principles, to mysterious presumptions and fictions, to other regulations referring to similar cases and last, but not least, to the values he/she introduces into the rule of law, because any interpretation implies an objective consideration, a valorization.

The judge interprets the law and applies it to real cases. This is his/her key purpose. However, by way of interpretation, the judge does not accomplish a mechanical action, in fact, he/she reveals the truth, adapts and particularizes the law, shapes it according to needs, fills in its voids, remedies its various obscurities, so that the law becomes more supple. When the texts no longer meet the requirements of a particular time, the judge attempts to elude the law and to apply the solutions imposed by the new circumstances of social life. When interpreting the laws, the judge must refer not only to the meaning of words and the intention of the lawmaker, but also to the spirit of the law. Otherwise, supreme justice would only be a supreme injustice: *summum jus, summa injuria*. Since the Roman age, one knew the principle according to which "it infringes the law to remove its spirit, only by considering the words used by the lawmaker", principle included in the *Code of Justinian*.

Jurisprudence is, undoubtedly, the formal source of law. However, its creative nature sparked many disputes. Terré emphasizes the fact that jurisprudence exercises an overwhelming influence on creation in law, however, it cannot be self-legitimating. Although it offers innovative solutions to various law issues, jurisprudence cannot directly create rules of law, fact which clearly differentiates the judge's power from the lawmaker's power. Therefore, jurisprudence remains subordinated to the law.

We notice that one of the arguments underlying the theory of those who refuse to designate jurisprudence as a source of law, is the principle of separation of powers in the state, developed by Montesquieu in its work *L`ésprit des lois*, published in 1748. Montesquieu was distrustful of judges, with "their frightful power over people", insomuch as it chose to subordinate them to the law: judges are only "the mouth that speaks the words of the law, lifeless beings who cannot temper its force or its severity"[17]. After the French Revolution, pursuant to the principle of separation of powers, the law was predominantly asserted as stemming from the Nation and the right of judges to deliver decisions by way of general and regulatory orders denied.

The exegetic approach, identifying the law with the statute, the revolutionary theory of the separation of powers, as well as the codification phenomenon, have minimized the role and natural evolution of jurisprudence in the Romano-Germanic legal system. By postulating on the uniqueness of the law as a source of law and its completeness, the law was kept on hold, and the creative role of jurisprudence denied. According to Robespierre, "the word jurisprudence must be removed from the language set; in the new regime, it stands for nothing. In a state which holds a Constitution, a legislation, jurisprudence is none other than the law itself"[18].

We believe that the separation of powers cannot be brought up as an argument today, since the lawmaker itself understood to implicitly empower the judge to interpret the law in a creative manner, when the law is silent, obscure or insufficient. For the authors of the French Civil Law, the law is not infallible, perfect, on the contrary, it is a human creation, imperfect by definition. Therefore, custom and jurisprudence will cover the gaps of the law. The idea of the authors of the Code is expressed in the preliminary Book, which was suppressed: the judge, in the absence of a precise text of law, is a "minister of equity", hence, his/her power to supplement the law, by resorting to customs and equity, is acknowledged[19].

---

[17] *Apud* Philippe Malaurie, *op. cit.*, page 123.

[18] *Apud* Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, page 166.

[19] Quote from Alexandru Vălimărescu, *op. cit.*, page 364.

On the European continent, we also find such "empowerment" in the Italian, Belgian, Austrian, and, of course, Romanian Civil Code. Complete freedom of consideration is granted to judges by Article 1 of the Swiss Civil Code, according to which: "The law determines all matters to which the letter or spirit of one of its provisions refers. In the absence of applicable legal provisions, judges issue a decision based on the customary law and, in the absence of a customary law, based on the rules they would establish, if they were to act as a lawmaker. They draw upon the solutions established by the doctrine and jurisprudence". Acknowledging the imperfection of the legislative work, the Swiss Code expressly proclaims the creative role of judges. In spite of this generous regulation, which was applied in the first 30-40 years upon their drafting, the federal court of law found it convenient to considerably reduce the creative power of the Swiss judges, placed under the continuous pressure of the doctrine.

Another argument, whereby it was attempted to discourage jurisprudence as a creative source of law, was that, given the principle of separation of powers, only the Parliament represents the nation, hence, judges, not being empowered to this effect, have no legitimacy in creating laws. This argument was argued against in the specialized literature through the fact that: justice presents a certain form of representativeness, since the judges of supreme courts of law, as well as those of constitutional jurisdictions, are appointed by a court established through vote, fact which grants them a certain degree of legitimacy; by ensuring free access to justice and by the publicizing of hearings, the courts ensure the representation of the interests of the citizens, a minority class from a political point of view; through the control of the constitutionality of laws, exercised *a posteriori*, justice guarantees the "participation" of citizens to the law-making process[20].

"In theory, one may easily discuss the legitimacy of the actions of the courts of law, when they drift away from the sources of law", writes Mircea Djuvara. However, "to the extent that such debate is not effective and a difference remains between the *proposed* law and the *practiced* law, surely only the law applied to real life is the positive law. The order of sources remains a mere desideratum. If it is not listened, it remains only at a theoretical level until it succeeds in asserting itself: until then it is yet to be a real law"[21].

J.L. Bergel believes that, today, the creative role in law of judges can no longer be denied[22]. Beyond the application, interpretation and filling out of legislative voids, a judge's mission also consists in adapting, animating or obscuring it, sometimes being able to ignore or argue against it. Even if judges must remain subordinate to law, they must also ensure its effectiveness. Although court orders contain rules of law only binding upon the parties participating in a trial, nevertheless, given the hierarchy of courts of law, precedents "may have a certain authority and, in fact, cannot be ruled against by lower courts".

Conclusions

In the Roman-Germanic system, the pursuit of knowing to what extent jurisprudence contributes or does not contribute to the creation of law, still sparks controversy. History has shown that, successively, law and jurisprudence have fought over the role of first creator of law. Those who acknowledged the creative force of jurisprudence have based their opinion on its more receptive nature compared to the law. While, as Ihering noticed, "in the field of law, as anywhere else, history never stops", jurisprudence has the ability to promptly meet the needs of social life, while the law has a slower rhythm, disconnected from the evolution of law.

[20] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, page 151.

[21] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedia juridică)*, All Publishing House, Bucharest, 1995, page 473.

[22] Jean - Louis Bergel, *op. cit.*, page 311.

From the matters discussed above, it results that jurisprudence is undoubtedly a formal source of law, the debates being about its creative nature. By emphasizing the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains essentially abstract, but the consideration of jurisprudence makes it a natural law, because judges, by understanding the law, taking into account the interests of the parties and taking inspiration from equity, ensures the final purposes of the law: suum cuique tribuere"[23].

In our opinion, the paradox of post-modernism does not reside in the creative power of the continental judges, in full expansion. The paradox consists in the fact that judges is trapped between the obligation to pass judgments in strict compliance with the letter of the law, on the one hand, and the absolute requirement to settle the case, under the penalty of denial of justice, irrespective of its insufficiency. It would seem that we would rather hide behind certain theoretical and traditional rigors, instead of attempting to expand our horizons to a free drafting of the law, by means of jurisprudence. Similarly, judges, meeting the needs of the age, also maintain the appearance of fully abiding by the letter of the law. However, in reality, they depart from it or create new legal norms. For these reasons, the doctrine rightfully places continental jurisprudence, in terms of creative role, between two limits: ***de jure* denial** and ***de facto* acknowledgement**[24].

References

- Alexandru Vălimărescu, Treaty of Law Encyclopedia, (Lumina Lex Publising House, Bucharest, 1999).
- Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *General Law Theory, (*C. H. Beck Publishing House, Bucharest, 2006).
- Dimitrie Alexandresco, *Romanian civil law principles*, volume I, (Graphic Workshops SOCEC, Bucharest, 1926).
- Dumitru Mazilu, *General Theory of Law,* 2nd edition, (All Beck Publishing House, Bucharest, 2000).
- Gheorghe Mihai, *Law foundations,* volumes I – II, (All Beck Publishing House, Bucharest, 2003).
- Gheorghe Mihai, *The Foundations of Law. The Theory on the Beginning of Objective Law*, volume III, (All Beck Publishing House, Bucharest, 2004).
- Jean – Louis Bergel, *Théorie générale du droit,* 4th edition, (Dalloz Publishing House).
- Jean - Pierre Gridel, *Le rôle de la Cour de Cassation Française dans l'élaboration et la consécration des.*
- Philippe Malaurie, *Anthology of legal thinking* (Humanitas Publishing House, Bucharest, 1996).
- Mircea Djuvara, *General Law Theory (Legal Encyclopedia), (*All Publishing House, Bucharest, 1995).
- Nicolae Popa, *General Law Theory*, 3rd edition, (C. H. Beck Publishing House, Bucharest, 2008).
- Nicolae Popa, Mihail C. Eremia, Simona Cristea, *General theory of law,* 2nd edition, (All Beck Publishing House, Bucharest, 2005).
- Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition (Dalloz Publishing House, 2005).
- Sofia Popescu, *General theory of law*, (Lumina Lex Publishing House, Bucharest, 2000).
- Sofia Popescu, *General Law Principles – again under our attention,* in Romanian Law Studies, 12th year *(*45), no. 1-2/2000.
- Sofia Popescu, *Research of legal methodology for the support of law's elaboration activiy,* in Romanian Law Studies, year 11 (44), no. 1-2/1999.
- François Terré, *Introduction générale au droit,* 7th edition, (Dalloz Publishing House, 2006).

[23] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, page 80.

[24] Steluţa Ionescu, *Justiţie şi jurisprudenţă în statul de drept*, Universul Juridic Publishing House, Bucharest, 2008, page 115.

SHORT COMMENTARY ON THE RECOMMENDATION CM/REC(2010)1 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE COUNCIL OF EUROPE PROBATION RULES[1]

SILVIU GABRIEL BARBU[*]
LORENA EPURE[**]
GOGA ALEXANDRU SILVIU[***]

Abstract
The present paper has the purpose to analyze the Recommendation of the Committee of Ministers to member states on the Council of Europe Probation Rules adopted in the 1075th gathering on the 20th of January 2010. This recommendation has a very important role in the construction of the probation systems in the European states, having a great contribution in the harmonization of the legislation of the member states in the field of criminal sanctions. Its goal is to better criminal justice and strengthen public safety by deterring and reducing criminal behavior.
In the present paper we will analyze more than 100 rules introduced by this Recommendation, outlining the frequently used terminology and the most important regulations.
The objectives of the paper are to make a summary of the new regulations within this Recommendation, to make a comparative analysis with all the existing laws and rules in this field, the paper also giving some conclusions on the matter.

Key-words: *recommendation, Council of Europe, probation rules, criminal justice, reoffending*

1. Introduction

The field covered by the present study is represented by a the provisions, regulations and content of the Recommendation mentioned in order to give a better understanding of the European understanding and application of sed legal act.

The importance of this study can be understood from different point of views. First of all it can be regarded important by the scientific community that can benefit from an authorized commentary of a Recommendation. Another point of view can be regarded from the view of legal practitioners, and authorities that have to enforce the laws regarding criminal offences and probation. And last, but not least, another way in which the study can be significant is that of the students that have to study criminal executional law in Law Faculties, Police Academies and so on, or the future agents in probation agencies that have to be very knowledgeable with the subject.

Some of the objectives of the present paper are to make a short outline of every rule in the Recommendation, analyze them, explain them in a brief paragraph, and give comparisons if any to the current status in our country. Other secondary objectives are that of creating an instrument that can work together with the Recommendation to be easily used by any interested person. In the end, the study will make some conclusions and recommendation upon the subject.

We, the authors, have analyzed the recommendation and other commentaries and we will pursue the challenge to give every rule a short explanation or just mention an important aspect important to remember or relevant to discuss.

---

[1] Adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers' Deputies.

[*] Lecturer, PhD, "Transilvania" University of Braşov, Faculty of Law (silbarg@hotmail.com); judge.
[**] Lawyer in Brasov Bar Association.
[***] LLM, legal counsel, "Transilvania" University of Braşov, Faculty of Law (alexandrugoga@gmail.com).

There have been other commentaries done by NGOs that work in the field, and also by other practitioners, but these have been done right exactly after the enactment of the recommendation or in a very exhaustive manner.

It is clear that the phenomenon of criminal offences is a constant in human history, with periods of increase and decrease, but the very existence of criminal behavior requires of us to take institutional and regulatory measures to ensure public safety. It is mandatory to establish a balance between the coercive force of the state through its institutions on the one hand, and the protection of individual human rights. Thus, the fundamental rule is that of guaranteeing individual freedom and the development of personality, in the sense that freedom cannot be taken away only in exceptional cases, and even after that we have to take into consideration special provision such as probation in order to make the criminal justice system be functional and humane.

2. Content

Firstly we have to address the structure, the role and the place of probation agencies in the European justice systems. The term "probation" should be defined as broadly as possible.

While *probation* is not easy to define simply or precisely, it is a familiar term understood widely and internationally to refer to arrangements for the supervision of offenders in the community and to the organizations (probation agencies, probation services) responsible for this work. In many countries, the ***statutory supervision of offenders*** in the community is the main characteristic of probation.

If people offend or commit crime again or fail to comply with certain conditions, they may be taken back to court and be liable for punishment. The definition adopted in the Recommendation we are analyzing puts an emphasis on especially the *statutory* basis of probation in the implementation of sanctions and measures in response to criminal offences; *supervision,* which involves guidance and support as well as control in appropriate cases; and the *purpose* of its work, which is to enhance both the social inclusion of offenders and community safety.

We have noticed and it is mentioned in other commentaries that the EU has adopted the broad term *probation* to encompass the diverse range of work undertaken by probation agencies across Europe, taking account of different probation traditions, institutions and practices across the continent, not only in those countries where probation is well-established, but also new services are emerging and being developed.

It is important to mention that the notion of "Probation agencies" includes probation services and criminal justice social work services, whether organized at national, regional or local level. These rules apply to other organizations in their performance of the tasks covered in these rules, including other state organizations, non-governmental and commercial organizations.

Probation agencies are here defined with reference to their responsibilities and the tasks they have to accomplish.

It has been noticed that all around Europe, probation agencies perform a wide and diverse range of tasks, reflecting the various origins and developments of probation practice in different countries, as well as legal, social and cultural differences. We understand that this definition refers explicitly to the most common encountered tasks in the national legislations. These and other tasks are discussed in more detail later in the rules and the present and others commentaries. While most probation agencies were originally established to work with offenders, in many countries the responsibility to work with victims as well has been assigned to these agencies. [2]

[2] The general duties of states to victims of crime are set out in Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims and in many countries probation agencies make an important contribution to fulfilling those duties.

2.1. Basic principles

1. It is a general fact that probation agencies work as part of a system of criminal justice. They have to implement the decisions of the courts and other authorities and work with other agencies to try to reduce crime. Probation agencies can be distinguished by their emphasis on assistance, guidance and persuasion in working with offenders.

Probation agencies do all they can to reduce reoffending and, where interventions providing help and support are insufficient to protect the public or are rejected by the offender, measures of control may also be necessary and are applied. In the meantime, probation agencies also deliver monitoring and control.

Taking into consideration the belief that people can change, probation aims to achieve rehabilitation through working with offenders to help them and to encourage them to lead law-abiding lives. This has to include the creation of opportunities that are meant to help them acquire the skills they need to make good use of these opportunities and motivating them to do so. Social inclusion is a requirement of justice and is a key objective of probation practice. Probation's commitment to promoting social inclusion can contribute to reducing offending.

2. Probation staff must always have regard to the human rights of offenders. A principle of *minimum intervention* should apply.

The human rights should not be jeopardized simply because of their offending behaviour. In the attempt to reduce the risks of reoffending and in particular any risk of serious harm, offenders' rights may sometimes have to be constrained. In particular, there are circumstances in which the right of *freedom of movement* may be limited and the *right to privacy* may also have to be curtailed. It is understand at a European level that the respect for the rights of offenders is also a necessary condition for their social inclusion and supports their rehabilitation.

3. It is noted that in some European states probation agencies offer services directly to victims of crime. In others, they often work in co-operation with other organizations or individuals who offer support to the victim. We note that this rule requires probation agencies to protect the human rights of actual and potential victims and also respect their interests in all their work. [3]

4. The same services are not appropriate to everyone. For example, supervision arrangements that are thought to be suitable for men may not always be suitable for women. Unfair discrimination may also be based on other considerations, including sex, race, colour, disability, language, religion, sexual orientation, political or other opinion, nationality, social origin, association with a national minority, property, birth or other status. The recommendation states that in order to ensure that everyone is dealt with appropriately and equitably, services must take full account of **individual** circumstances and needs.

5. Rights may be restricted as punishment for offences and / or to protect the public. Where rights are restricted in order to protect the public from future offending, this must be guided by a proper and rigorous assessment of the risks that offenders pose, by making use of the best available methods of assessment[4]. *While giving effect to a judicial decision, the probation agency must not restrict the rights of offenders beyond the necessary consequences and implications of the lawfully imposed sanctions or measures.*

6. Wherever the offender's formal consent to probation involvement is required, probation staff must ensure that offenders understand their rights and the full implications of granting (or withholding) consent. This must be explained clearly to offenders and care must be taken to make sure that they understand. Even where consent is not formally required, probation staff shall do all they can to secure the offender's understanding of and, so far as possible, consent to any decisions that affect them. While the duty of probation staff to prevent offending will sometimes require them

[3] The responsibilities of probation agencies towards victims are set out in Part VI of these rules.

[4] See Rule 66and Commentary on that Rule.

to take action against the offenders' wishes, this must be explained to offenders and the attempt made to gain their acceptance of the legitimacy of the decision.

7. Although probation's involvement before guilt has been established is limited in some jurisdictions, in other jurisdictions the judicial authorities may instruct the probation agency to become involved *before* or *instead of* prosecution and trial. This principle states that defendants must be presumed innocent and therefore any probation intervention in such circumstances must depend upon their informed consent.

8. The agencies' responsibilities and tasks must be founded on a sound legal basis to establish their authority and their accountability, in order to be able to alter even human rights.

9. In some jurisdictions probation tasks are delivered by other agencies, including other public authorities, independent, charitable or non-governmental organizations. Commercial companies also sometimes participate in such work by hiring people that have been given the punishment to do community work, or hire prisoners as cheap workforce. Others have mentioned, and we agree there have to be robust and adequate systems of scrutiny and accountability.

10. According to all the opinions in classic criminal legal doctrine and more modern commentary probation work should be recognized as a key element in a just and humane criminal justice system. Such work requires considerable knowledge and skills and must be accorded a status that recognizes its value and the expertise of practitioners. Probation too can be "overcrowded" such as prisons and this constrains its potential to protect the public and to work to rehabilitate offenders successfully.

11. The deciding authorities should recognize and value the knowledge and skills of probation staff which can help them take just and effective decisions. Rule 11 requests the deciding authorities to respect the expertise and experience of probation agencies and to consider attentively the advice they offer. We have to note that in many jurisdictions probation staff can and sometimes must report back to the competent authorities on the progress of their work and may, in some circumstances, seek further guidance or instruction from these authorities.

12. This rule mentions if the social inclusion of offenders is to be achieved, probation must work in close co-operation with a wide range of other agencies, such as Workforce Placement Agents, Re-qualifications centers. We have to understand that the complex needs of many offenders also require a coordinated and complementary inter-disciplinary work.

13. Probation agencies have to appraise their work whilst respecting the regulations, principles and standards from their national law. It is important to mention that the international community, especially through the UN, EU and Council of Europe, sets standards, respective to human rights, which gives the possibilities to countries to compare their own practices with those of other countries and to use this as a check against disproportionate or otherwise unethical intervention.[5]

14. It is an imperative that probation agencies can be held accountable not only by the public authorities, but also by the former offender or others that use their services. Everyone should be informed about how to complain and straightforward and impartial procedures should be made available. [6]

15. We look at this rule in correlation with Rules 8 and 9. We can have independent monitoring, and agencies must be open to question and scrutiny through independent inquiry. This monitoring can be done with the help of an Ombudsman or human rights defendants are among the ways in which this may be achieved. There have to be 'progress reports' on individuals under supervision.

---

[5] Recommendation No. R (97) 12 *on staff concerned with the implementation of sanctions and measures* in its Appendix II sets out many of these ethical standards.

[6] This is considered more fully in Part VII of these rules.

16. It is believed and we have to concur with this belief that the best probation practice should be evidence-led. Research should investigate all consequences of policies and practices, some of which may be unintended. Research should be rigorous and impartial and the participation of universities and other centres of research can ensure impartiality and give authority to such inquiries. The findings of research should be made public as it is essential that research findings are used to guide the development of policy and practice.

17. Other NGOs have found it to be quite common, in a great number of countries that the public has little knowledge or understanding of what probation agencies do. Usually prisons attract public attention. In order for the media to be interested probation should be imaginative and creative to enhance public understanding of and confidence in probation work.

2.2. Organization and staff

18. We have to note that Rule 18 affirms that a well-ordered and adequately resourced organization is required if the importance and value of probation are to be recognized.

19. It is important to mention that service delivery is managed in different ways in different countries. Instructions and the delivery of them based on clear rules should be reviewed and updated as necessary.

20. While many probation agencies are part of the public sector, this Rule recognizes that there are private agencies (non-governmental, charitable and commercial) involved in the administration and delivery of probation tasks and services in many countries.

21. Just as the work of the probation agencies in general[7] is poorly understood, other professionals and members of the public often have an insufficient understanding of the distinctive expertise of probation staff.

22. It is important that all recruitment and selection procedures to be fair and rigorous and in all other ways respect the principles of good employment practice. Probation agencies should be as clear as possible about what qualities and characteristics are required and it is these that should be tested in the selection process. We believe that is very important to have intellectual abilities and appropriate educational level selection procedures. Recruitment and selection should respect the best principles of equality of opportunity. Equality of opportunity has many criteria that have to be upheld.

23. Different staff has different roles to play in probation and therefore different levels of education and training would be required. Access to education and training at different stages of their career should be made available to all staff in order to ensure the best quality of service provided. It should be linked to their tasks and responsibilities and useful for their professional development.

24. When starting the training there should be a curriculum. This must be based on a clear understanding of the skills, knowledge and values required to do the work. Attendance at training events or 'on the job' training, while often are very important they are definitely not enough: staff must be assessed to determine that they have achieved the standards required. It is also important that staff have access to qualifications that confirm the level of competence achieved.

25. Initial training should prepare staff to work reliably in their new professional role. In-service training should also be available to all staff. This is needed to take account of new legislation, policy, practices and other relevant developments. At the same time, there should be training to enable staff to move into new roles as the agency may require and to develop their own continuous professional development.

26. Probation work involves making judgments and taking decisions. While the actions of staff are circumscribed by law and by agency policy, staff shall be trained and encouraged to exercise their professional judgment to take valid decisions whilst recognizing the need for accountability.

[7] See comment on Rule 10.

27. This Rule deals with the particular case of offenders who tend to commit particular kinds of offences (for example, sexual offences, violent offences) and / or whose offending behaviour is associated with persistent difficulties (for example, drug or alcohol misuse, offenders with mental health problems). The extent to which work is devolved to specialized sections of the agency will vary from country to country.

28. This Rule is in relation with the Rule 4 and recognizes that training must attend to diversity and individualization. Initial training should prepare all staff to work with diverse offenders and to take account of the distinctive skills needed to work with particular offenders or victims. For example, to work effectively with young people may require rather different skills from those needed to work with adults. Women may have particular needs as well.

29. An adequate staff complement is essential to the agency's effectiveness and efficiency. If staff workloads are too large, then the probation agency will not be able to work as it should. Workloads should be assessed in a holistic way with an assessment made of the demands of individual cases and not simply on the number of cases or offenders under supervision. An overall shortage of resources constrains an organization's potential and excessive workloads will prevent individual members of staff from achieving their best practice.

30. It is essential that management staff provide leadership and guidance. Regular meetings between individual members of staff and their line managers should take place for supervision/ detailed case discussion. They also allow the line manager to consider what the organization needs to do to support staff in what is often extremely demanding and complex work.

Just as the probation agency is accountable to public authorities[8], individual members of staff must be in a position to account to their managers for their practice. One important part of this is keeping and updating records – a record of contact with the offender, of significant communications and decisions relating to their case. This will be retained on the case file and will be drawn upon as and when the agency reports back on progress to the judicial authority. Case records must be accurate and up-to-date and available for inspection by line managers. Case records will be subject to monitoring and may be used as evidence in the investigation of complaints.[9].

31. This Rule states that, while all members of staff play a part in inter-agency work, managers have a distinctive responsibility to establish these working partnerships and to ensure that they are set on a sound basis.

32. Some issues are appropriately dealt with in individual meetings[10], but consultation with the staff group is a critical responsibility for managers. Professional associations, trade unions and more informal arrangements may all have a contribution to make here in the effective liaison between staff and their managers. As well as consultation about conditions of work and employment, there must be opportunities for staff to influence the agency's policies in other respects as well: staff are uniquely placed to inform policy makers about the results of putting policies into practice and their experience is a large part of the evidence that should lead policy and practice[11].

33. This Rule affirms that salary and conditions of service should reflect the standing of the profession (Rule 21), the particular set of tasks and responsibilities they are entrusted with and the expertise of managers and practitioners.

34. This Rule applies to volunteers who work on behalf of probation agencies and not to those who, independently or in other organizations, work as volunteers with offenders. In many countries, probation evolved from voluntary work and volunteers still make an invaluable contribution to the work of the agency and to helping and supporting victims and offenders.

---

[8] Rules 8 and 15.

[9] These matters are discussed more fully in Rules 88 – 92, in Part VII and in the associated commentary

[10] see Rule 30 above.

[11] Rule 16.

Volunteers, just like probation staff, have a duty to protect the public and their relationship with offenders therefore may not be completely confidential.[12] Offenders themselves, as well as staff and volunteers, must understand the rights and responsibilities involved in the working relationships.

2.3. Accountability and relations with other agencies

35. Rule 35 refers to specific account to and liaison with the judicial authorities in respect of particular cases. These authorities are entitled to receive such information and only in this way will they be enabled to have confidence in probation.

36. Probation agencies should produce regular reports providing information on their work. These reports should be published and be made available to judicial authorities, other authorities making decisions on offenders and the general public. The scope of the information to be provided should be defined by national law (see basic principle contained in Rule 8) in accordance with regulations concerning professional confidentiality. The reports should enable the competent authorities and the general public to make judgments about the overall performance of the probation agencies in achieving their aims.

37. Offenders often have complex needs associated with their offending. Rather than trying to create or deliver all services to meet these needs, probation agencies should work in co-operation with other organizations which have the relevant expertise and resources. This includes not only agencies of criminal justice and law enforcement, but organizations of the wider civil society. Enabling fair access to services is a key component of social inclusion. This approach also allows probation agencies to concentrate their resources on their principal tasks.

38. Probation agencies shall encourage and support community agencies to undertake their inherent responsibilities regarding taking care of offenders as members of society. This Rule should not be interpreted as imposing an obligation on probation agencies to sponsor private associations, but rather to help, advise and assist them in their work with offenders and, as appropriate, with victims of crime.

39. In some countries, prison and probation form part of a single organization. Even where this is not the case, the work of probation inevitably calls for close working relationships with the prison service. Probation staff in some countries deals with prisoners while in prison and not only for preparing their release. Probation is often responsible for supervision after release and probation staff should be actively involved in preparing prisoners for their release and in working towards their resettlement[13].

40. Partner agencies need a general framework to be set and agreed in order to achieve an appropriately high standard of intervention with offenders.

Where probation is commissioning work to another organization, it incurs a responsibility to make sure that this organization works effectively and justly. Accountability for the results achieved and, if appropriate, for the money spent is a minimum prerequisite of such relations.

41. Rule 41 stipulates that inter-agency agreements should include protocols about the exchange of information, based on the relevant national data protection legislation. .

2.4. Probation work

We have to take into consideration every national legal system and we can determine that all the probation agencies may be entrusted with one or more of the following tasks split into two categories:

a) tasks involving supervision and guidance to offenders

[12] General principles of confidentiality and information exchange are set out in Rules 41, 88 – 92 and explained in the associated commentary.

[13] see also Rule 7, the European Prison Rules and Recommendation Rec(2003)22 on conditional release (parole).

b) Tasks without supervisory element

42. Any work relating to the preparation and presentation of pre-sentence reports must fully respect the procedural rights and safeguards provided by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms the presumption of innocence.

This Rule also requires probation agencies to communicate regularly with the judicial authorities about the circumstances in which reports are to be prepared. A report is neither possible nor necessary in every case. Where the court is likely to impose an immediate custodial sentence, but is willing to consider alternatives, a report would be of particular value.

43. The report shall be as up-to-date and accurate as possible. Reports are written in respect of specific offences and old reports that may have been retained on file should not normally be submitted again. Although interview(s) with the offender are an important source of information, report writers should use other sources as well to try to corroborate information.

44. The offender's *involvement* here means that the purpose of the report, its significance and consequences must be fully explained to the offender. There may be circumstances in which the offender is unwilling to cooperate and this may have to be accepted.

45. As well as pre-sentence reports, probation staff prepare other reports, especially in connection with proposals for early release from prison or other forms of detention. These reports will be based on a careful assessment in each individual case. Their distinctive contribution here will be to inform the authorities of the community context to which the prisoner will be returning, the risks and protective factors to be taken into account and how these will be managed, and the need to impose any particular conditions on the terms of release.

Where there has been contact with the victim(s) of the original offence, their views should be reflected in the report. When their views are being sought, it is important that they should be made aware that while their views may be one important consideration, they will not be decisive[14].

46. As before, the offender's *involvement* here means that the purpose of the report, its significance and consequences must be fully explained to the offender. There may be circumstances in which the offender is unwilling to cooperate and this may have to be accepted. The member of staff responsible for the report should make sure that the offender understands the consequences of withholding co-operation and that this will be made clear to the deciding authority. The offender should be given an opportunity to express an opinion about the content of the report, although it is for the author of the report to decide on its final content. Offenders or their legal representatives have a right to challenge the content of the report.

47. Community service involves undertaking unpaid work for the benefit of the community as a response to an offence. In some countries, this sanction may only be imposed with the offender's consent; while in other countries it is for the court alone to decide upon this and the offender has to follow the judicial decision.

48. Since community service constitutes real and/or symbolic reparation, work undertaken must be of genuine benefit to the community. Agencies shall seek out tasks in the community and shall strive to ensure that all community members have an opportunity to nominate appropriate tasks. In no circumstances shall this work be used for the profit of agencies or individual members of staff or for commercial profit. Although the position may vary in different jurisdictions, so far as possible community service must not displace people from gainful employment.

49. Community service workers shall be subject to risk assessment like all others under probation supervision[15]. Minimizing risk to the community will be paramount in determining an appropriate work placement.

---

[14] see Rule 95.

[15] see Rules 66-71 and associated commentary.

50. Probation agencies have a responsibility to safeguard the health and safety of community service workers. General safety regulations should be respected and public liability insurance schemes should be arranged to indemnify offenders assigned to community work. Probation agencies and their staff should also be adequately insured in order to be able to address compensation claims in case of accident.

51. Community service tasks can take many forms and agencies should be imaginative in identifying suitable work. Differences of ability and of personal circumstances should be taken fully into account to make sure that the scheme can accommodate anyone for whom this is considered to be an appropriate sanction or measure. In some jurisdictions, community service may be used as a direct alternative to custody and no one should be sent to prison solely because appropriate work tasks have not been found.

52. As with other aspects of offender consultation, Rule 52 does not mean that offenders take the decision about the work they will undertake. Community service is widely recognized by offenders, as well as by the public, as a fair penalty and one aspect of this is that offenders should be consulted about it. Offenders should be asked about their experience of the work they are undertaking and this should form part of the periodic assessment.

53. Community supervision takes place in a number of different circumstances. While there are differences in the legal basis of these modes of supervision and, for example, in the consequences of non-compliance, the following rules prescribe general standards of supervision.

54. The nature and intensity of the supervision[16] should depend on the individual offender and be subject to revision depending on changes in the offender's the personal circumstances and in progress towards the objectives of supervision. Probation agencies shall do all they can to promote compliance with the formal requirements of supervision. This includes taking full account of personal circumstances that might make compliance more difficult and working with the offender to see how such difficulties can be overcome. For example, so far as possible, people should not be required to attend appointments that may conflict with their responsibilities as carers (including, but not only, parents of young children) or as employees. People who are homeless or itinerant may also face particular challenges in complying with some of the formal requirements.

55. This Rule recognizes that probation should arrange for relevant interventions to take place. These may be provided not only by probation staff, but by other agencies and individuals as well. The Rule offers some examples – educational or skills-related training and treatment, such as may be provided for people who need psychiatric help or treatment for misuse of alcohol or other drugs.

56. Sanctions and measures affect not only offenders, but also their families and dependents. This is especially likely where a custodial sentence has been imposed, but also in the case of other sanctions or measures. Where this is provided for in law, probation agencies should offer support, information, advice and assistance to families affected by the offender's crime and punishment.

57. While traditionally probation has worked through personal relationships to bring about change, many jurisdictions in Europe are making increasing use of newer technologies. Electronic surveillance – especially the 'tagging' that can monitor the presence of an individual at particular times and places and the 'tracking' made possible through global positioning system technology - has a strong political appeal. It seems to dispense with any need for the offender's consent or active co-operation and suggests a possibility of comprehensive and up-to-the-minute information.

58. Some methods of surveillance, including electronic monitoring, have the potential to intrude significantly on people's rights of privacy and perhaps other rights as well. Not only offenders, but in some circumstances their families and friends may be affected as well. This Rule insists on a level of surveillance and personal intrusion that is proportionate to the seriousness of the offence(s) and to the need for community safety.

[16] for example, the frequency of required reporting to the supervising officer.

59. Basic principle 6 of the European Prison Rules[17] states *"All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty."* In many countries, probation agencies are responsible for supervision of offenders after release. This Rule requires agencies who will be undertaking this role to work actively during the term of detention to prepare for release. This is likely to involve contact with the offender, by letter, visits, video conferences; liaison with the prison authorities; contact with friends or family to whom the offender might be returning; and approaches to community agencies that may need to offer services and support after release.

We believe that successful resettlement work requires a case-management approach to ensure that the contributions of all responsible agencies are properly coordinated and managed. Positive changes and achievements made during the term of imprisonment are at risk of getting lost at the time of release and the need for continuity is paramount.

Resettlement work should not be confined to the assessment and management of risks and offending-related needs.

In many circumstances, release is subject to one or more formal conditions and the supervising agency, often probation, has a responsibility to ensure that the offender complies with these conditions.

60,61 As already stated in the commentary to Rule 59 above consistent finding of research in many countries shows that constructive work undertaken in prison is often lost on release. For example, learning from treatment programmes is not followed up and any benefits soon disappear.

62. Desistance from offending has been described as a *process* rather than as an event and offenders may need continuing support and encouragement long after release. This Rule recognizes that, once the formal period of post-release supervision has ended, the offender has no formal obligation to keep in touch with the probation agency. At the same time, where national law provides for this and where resources permit, probation agencies should offer support for as long as they can so that no one commits an offence because they feel they have nowhere to go for help. Provision should also be made where possible for the very large number of prisoners who are released from prison without any formal resettlement obligations, but who are often likely to need advice, assistance and encouragement.

63. For a number of social, economic and political reasons, there has been an increase in the movement of people across the European continent. People arriving in other countries may be 'in crisis', having few resources and few or no contacts when they arrive in the country. Probation agencies have a strong ethical obligation to make sure that such vulnerable people are dealt with fairly and well. In some countries, however, non-nationals lack many of the legal rights of nationals and find themselves excluded from the services they need. This is a prominent challenge for many countries.

Probation's main objectives – for example, community integration, social inclusion, resettlement – have a quite different significance to people who have few or no connections within the country and, indeed, may be required to leave it because of their offence(s).

64. For member states of the EU, a Framework Decision has been adopted that allows for the transfer, in certain circumstances, of probation supervision from one jurisdiction to another – typically where offenders convicted in another country are returned to their own country for supervision[18].

65. This Rule addresses the exact same problems as Rules 63 and 64, but from the point of view of the state to which offenders are to return. Offenders and ex-offenders returning to their country of origin are also likely to be poorly supported and vulnerable and agencies must ensure that their needs are met.

---

[17] Recommendation Rec. (2006) 2 of the Committee of Ministers to the member states.

[18] Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

2.5. Process of supervision

66. We acknowledge that his Rule does not interfere with the criteria provided by national law related to judging the need of carrying out assessments of offenders at different stages of the criminal procedure. It is there to guide the probation services themselves in their everyday work with offenders. The efficiency of the implementation of community sanctions and measures is greatly enhanced by prior assessment of each individual case. The Rule brings to the attention of the probation agencies some important principles in carrying out good assessment.

It is important to remember that assessment must also include a review of the resources that might be available to tackle the identified problems.

67. The process of assessment – *how* it is undertaken – is as important as the outcome. The member of staff may have a very clear idea of the offender's problems, but offenders must be enabled to make the discovery for themselves. There are skills – for example, motivational interviewing – that may be used to help offenders recognize some of their difficulties. But supervision will not be successful unless there is sufficient agreement between the supervisor and the offender.

68. Assessment should be the product of discussion and exploration between staff and the offender. Where there is disagreement between them, this should be noted and may in itself be a focus of work, as we have seen in the commentary to Rule 67.

69. Assessment should be undertaken periodically to check progress and to ensure its continuing accuracy and relevance. Supervisors also need to be alert to the possibility of changes in offenders' lives that make a difference. Since community safety is a priority for probation agencies, changes in the level and nature of risk should particularly be emphasized here.

70. We have to note that there are some important 'milestones' during supervision when assessment needs to be reviewed. These are specified in this Rule.

71. Modes of risk assessment are usually distinguished as either 'clinical' (individual, person-by-person) assessment or 'actuarial' assessment, based on statistical techniques for assessing probability, where a probability 'score' (of re-offending, or of the risk of harm) is usually produced. Actuarial techniques, using 'static' factors (e.g. age, type of offence, criminal record, which cannot be changed) are said to be more reliable, but these are based on aggregates and have limitations in predicting the risk-levels of individuals.

72. Supervision should be put into effect in a planned way. Once assessment has taken place, the supervisor, in discussion with the offender, must decide how the identified problems are to be tackled. Objectives should be specific and measurable (so that progress can be monitored). They must also be achievable and have a clear time frame.

73. As with assessment, a work plan that the offender does not understand or (does not understand sufficiently well) agree with is unlikely to be implemented. We should try to make the process of planning to be negotiated as far as possible and explained in a way that the offender can understand.

74. There must be a strong and natural connection between the assessment and the plan, as the commentary on Rule 72 explains.

75. Rules 69 and 70 emphasize the importance of regular reviews of assessment.

76. Interventions are structured and planned pieces of work with offenders aimed at their rehabilitation and their desistance from offending. The nature of the interventions by probation agencies shall depend on and be limited by the sanction or measure and the conditions imposed by the deciding authority. Interventions thus will often aim at social and family support through employment schemes, educational programmes, vocational training, budget management training and regular contact with probation staff, or will include o*ffending behaviour programmes*, often based on the principles of cognitive behavioural psychology.

77. Other skills will be deployed by probation staff themselves and Rule 27 refers to the specialized training that some staff will need.

78. Offenders must be prepared by their supervising staff member for the interventions in which they are to participate. Sometimes offenders will be unsure or even unwilling to attend and the supervisor will need to work hard to enhance their motivation. An offender who understands the reason for the intervention is very much more likely to attend and to gain from the experience.

79. This is a corollary of Rules 37 and 77. Engaging services based in the community promotes social inclusion and also allows offenders to benefit from a broad range of expertise.

80. This is an important principle of working with offenders. An inter-agency and multi-modal approach is most effective, but the involvement of different agencies – and often several staff within the same agency – can lead to confusion of roles. This Rule commends that there should be a single responsible member of staff who undertakes assessment, decides on the work plan and coordinates the interventions. Research has shown that the offender's experience of involvement with probation should be characterized by continuity, consistency, providing opportunities for consolidation and staff commitment. Without such coordination, the experience of supervision can be fragmented, disorganized and confusing for everyone – especially the offender. This case manager or offender manager, as the role is often called, will also be responsible for ensuring that the terms of the sanction or measure are fulfilled and for taking action in response to noncompliance. *Evaluation*

81. We believe that the evaluation of the progress by the individual offender is a continuing process throughout the period of supervision. The supervisor's and the offender's view of the period of supervision should be summarized, recorded and retained on the records of the agency. In some countries, reporting to the deciding authority on this progress must be done periodically, in others probation agencies only report at the end of the supervision or in case of a breach of conditions

82. It is important to note that this Rule refers to the need for legal possibilities for staff to apply to the judicial authority to change the conditions of supervision. Where good progress has been made, where a condition no longer seems relevant or has proved impracticable, or where assessment indicates that a lower level of supervision may be used, the probation agency should be able to make application for the conditions to be amended or for the order to be ended early. This is partly a question of resources – resources should be focused on those offenders most in need of supervision – but it is also important to recognize and acknowledge formally that offenders have often made significant achievements during their supervision.

83. The offender's experience of the value of the service received should be an important part of the (periodic and final) evaluation. Probation agencies should consider collating information from these evaluations to see if any general themes emerge, suggesting the agency's particular strengths and ways in which they might improve the quality of their services.

84. We know that any kind of supervision during probation must be concluded with a full review and evaluation of what has been achieved, what has been less successfully managed and what might have been done differently, whether by any party.

85. This Rule mentions that probation agencies have a responsibility to give effect to the sanctions and measures ordered by the judicial or other deciding authorities. Fairness is very important also. It is a known fact that people are much more likely to cooperate when they feel they are being dealt with fairly.

86. It is the nature of the sanction or measure that must be fully explained to offenders: they must know what is expected of them. Even our probation agencies have understood that supervisors should not rely solely on threat of further sanction to gain compliance. There are occasions when supervisors will offer advice to offenders – which they may choose to accept or not.

87. Non-compliance must always be taken seriously and professional judgment exercised within the standards set by national law. Non-compliance is unacceptable; the supervisor shall discuss with the offender what shall be done to bring about compliance in the future.

One must remember that probation hopes to encourage and enable changes in people's lives. Some of the changes we have to mention– notably obtaining regular employment – are likely to make a significant difference to the individual's future behaviour.

An offender who is at work all day may find it difficult to report to the probation officer.[19]

88. We understand the importance of keeping records. Keeping these is a significant part of the work of probation agencies. Records also communicate information between the agencies and authorities to whom they must give account. Records typically include personal and other important information. The file also retains information about an offender's previous convictions and earlier experiences of supervision or imprisonment.

89. Principles of confidentiality must be renounced for the need to share information among responsible agencies, particularly where there is a high risk. The basis of information exchange must be clear and confidentiality must be respected as far as this is consistent with the need to ensure community safety.

90. It is important for records to be scrutinized in used in monitoring and inspecting.

91. Rule 35 refers to the responsibility of the probation agency to give account to judicial and other deciding authorities in particular cases.

92. Obviously offenders have a right of access to their records. Should one offender dispute the accuracy of the record, there shall be an exact procedure in place to respond to their concerns.

2.6. Other work of probation agencies

93. There are very many instances in which victims of crime often report that they not feel well supported by the agencies of criminal justice, which typically give priority to detection and prosecution and, in general, focus their work on the offender rather than the victim. It is mentioned in other commentaries that some probation agencies are involved directly in offering support to victims;

Take into consideration that principles of non-discrimination and individualization (see Rule 4) have to apply as much to victims as to offenders.

94. In some countries and in even in ours, NGOs, have been established to offer support to victims. Some national law provides, probation agencies shall do all they can to support this work and respond positively and cooperatively to approaches from victim support organizations.

95. In some jurisdictions, probation agencies contact victims of serious crimes and keep them informed about the circumstances of the offender. We should remember always that probation staff must be aware of the offender's right to confidentiality and recognize that some information need not and should not be divulged. A victim may prefer, for example, that an offender should not be permitted to live in the same neighbourhood. But the desire of victim is not necessarily that of the probation agency.

96. We have to mention that this Rule recognizes that rehabilitation requires offenders to take responsibility for their own behaviour and this includes their recognition of the harm they have done. There is work to be done to enhance victim awareness allows them to be assured that their distress will be recognized and respected in the work that probation agencies undertake with offenders.

97. We have to mention that rule 97 refers to *restorative justice* interventions which typically involve work with offenders, victims and the community. We acknowledge that restorative practices can take many different forms. A United Nations Handbook explains *"Restorative justice approaches and programmes are based on several underlying assumptions: (a) that the response to crime should repair as much as possible the harm suffered by the victim; (b) that offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences*

[19] Rule 10 of Recommendation No. R (92) 16 of the Committee of Ministers to the member states on the European rules on community sanctions and measures states *"No provision shall be made in law for the automatic conversion to imprisonment of a community sanction or measure in case of failure to follow any condition or obligation attached to such a sanction or measure."*

for the victim and community; (c) that offenders can and should accept responsibility for their action; (d) that victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and (e) that the community has a responsibility to contribute to this process."[20]

Restorative approaches include **mediation services** – for example, mediation between victim and offender to explore how amends can be made and how those affected can manage the consequences of the crime. Mediation can also be used to prevent crime – for example by working to reduce neighbourhood disputes before they lead to crime. Recommendation Rec (99) 19 on mediation in penal matters sets out standards for mediation. This is not yet applicable in Romania.

Restorative justice approaches call for distinctive skills and probation agencies should ensure that staff are trained to undertake such work appropriately.

98. This Rule refers to the need for probation agencies to share their experience and knowledge and to participate in partnerships with other organizations to reduce offending and make the community safer.[21] Probation agencies should participate actively in such endeavours.

2.7. Complaint procedures, inspection and monitoring

99. It is a clear fact that due to the nature of probation work, it can lead to disagreement and dispute between staff and offenders. Sometimes disagreement can give rise to formal complaint.

There must be a clear procedure available for offenders and other service users who wish to complain. There have to be several levels of resolving a complaint.

100. Those investigating complaints should be impartial and should avoid any assumptions that might prejudge the outcome of their inquiry. In some cases, it will be sufficient for the line manager of the member of staff who is subject to the complaint to undertake the investigation. There is a role too for an independent authority[22] to respond to complaints, but normally this process should be invoked only when other mechanisms have failed to bring a satisfactory resolution. The procedure is always checked to be fair and impartial. It is also important to distinguish between complaints against members of staff and, on the other hand, dissatisfaction with the agency's policy.[23] 101. Any complaint must be duly investigated and given a solution. It is important to mention that probation agencies should respond undefensively to complaints.

102. We acknowledge there has to be a system to be able to check performance against the required professional standards. All the internal audits should focus not only on individual performance, but should also take into consideration if staff are adequately trained and have all the necessary support and resources to do their work. Statistics are very important also.

103. We have to mention that monitoring from various independent monitoring bodies is very important for ensuring high quality of professional standards of probation work. In other countries this is done by the ombudsman, in others national supervising committee such as the case of Romania, etc. Any competent authority, should also take the opportunity to learn more about the realities of probation practice and to advocate as necessary on the agency's behalf for changes in policy or in levels of resourcing.

---

[20] Handbook of Restorative Justice programmes, Criminal Justice Handbook series, United Nations, 2006.

[21] If, for example, probation staff become aware that many of the offenders under supervision are drug-users, this should prompt them to encourage other authorities (perhaps, in this case, the health service) to see if educational or treatment services could be devised to prevent offending – not only to reduce re-offending by offenders under supervision, but to prevent or discourage people from starting to offend in the first place.

[22] Usually the Ombudsman or another institution.

[23] For example, an offender may wish to complain about a decision to recall him to prison, but, if the agency is satisfied that this decision was taken and implemented properly, it should be prepared to support its members of staff.

2.8. Research, evaluation, work with the media and the public

104. We believe that the most important criterion of effectiveness is the *reducement of reoffending*. Different countries apply different probations methodologies, such as strengthbased approaches or social work approaches. Any probation methodology should always be open to change and reconsideration. Established methods of intervention may need to be revised. There are always new methods that are likely to emerge and their effects should be investigated. We and other commentators of this Recommendation have analysed this Rule and we have found that it recognises the value of research and recognises that resources must be made available for this to take place as an investment in the improvement of services.

105. It is a fact that politicians in many countries are under considerable pressure to introduce effective measures to reduce crime. All policies created by politicians should be supported by research, reason and argument.

106. Probation agencies should work actively to explain their work to the public. Examples of the achievements and successes of probation should be announced through the media such as television, radio and especially Internet.

107. This Rule is a corollary of the last one. Probation policy and practice develop and these developments should be explained to the public. It is also important that the public sees a probation agency as an active, responsive organization which is always keen to enhance the quality of its work.

108. We have to have for probation clear and realistic statements of its purposes and real transparency. This Rule further emphasis the value of international exchange of ideas and practices.

3. Conclusions

The present article tries to do as complete as possible an analysis and commentary of the Recommendation. The results we have accomplished is to have a tool in the form of this present that can help any person in relation with probation, even if it is an offender, a victim or a probation worker. Practically, this present paper can be used alongside with the Recommendation to clarify all the rules and to give a short glimpse on the exact application of sed rules.

The desired impact of this paper is to be a starting point for further analysis and commentary, and also to determine other scientific minds to create such commentaries, and give even more insight on these aspects. Also we believe that we have to create a paper of a more considerable dimension that can take into consideration other recommendations also.

Probation is actually very important and necessary for the proper function of the criminal justice system and in the absence of such rules and regulations it cannot give the necessary support and aid to courts, victims, offenders and eventually society.

We can suggest and give indication that future papers should take into account the legislation from other countries also. Countries can learn from one another's experience – not only from successes, but also from mistakes.

This present paper is also a starting point for any person that desires to study and begin an understanding of probation and probation services. One should first read the recommendation then the present commentaries and after that we can happily say that a minor understanding of the european perspective of probation has been achieved.

References

1. Silviu Gabriel Barbu, Alexandru Şerban, *Drept execuţional penal*, ediţia 2, Edit.C.H.Beck, Bucureşti 2008.
2. SG Barbu, Al. Şerban, *Drept execuţional penal*, Editura ALL Beck, 2005.
3. SG Barbu, Drept executional penal – partea generala, Editura Sitech, Craiova 2012.

4. European Committee on Crime Problems (CDPC) – d. Commentary to Recommendation CM/Rec (2010) 1 of the Committee of Ministers to member states on the Council of Europe probation rules - http://www.cepprobation.org/uploaded_files/CommantaryRec_2010_1_E.pdf Accesed February 2013.
5. Gheorghe Florian, *Penitenciary dynamics,* Oscar Print, Bucureşti, 1999.
6. Ilie Pascu, et al., *New criminal code - commented*, vol.I, General part, Universul Juridic, Bucureşti 2012.
7. Ion Rusu, *The individualisation of punishments*, Universul Juridic, Bucureşti 2011.
8. Law no.83 of the 13th of May 2010 for the modification of Law 275 of 2006 regarding punishments.
9. Recommendation (2006)2 european prison rules.
10. Recommendation R(87)3.
11. Rob Canton, David Hancock, *Dictionary of Probation and Offender Management*, Cullompton: Willan.
12. The Statute of Probation Officers issued by the Romanian Ministry of Justice and other relevant documents, http://www.just.ro/Sectiuni/Direc%C5%A3ii/Direc%C5%A3iadeProba%C5%A3iune/tabid/172/Default.aspx , Accesed February 2013.
13. Walmsley R., *Penitenciary sistems from Central and Eastern Europe*, HEUNI Publication Series nr. 29, HEUNI, Helsinki.

THE ACTION IN TIME OF THE CONSTITUTIONAL COURTS' DECISIONS

VALENTINA BĂRBĂŢEANU[*]

Abstract
The effects of the decisions of the constitutional jurisdictions may sometime disturb the balance of the normative system. This is the reason why, in different countries, the constitutional courts have modulated in time the impact of their decisions. In some cases, they are postponing the effects of their decisions (e.g. Italy) or they are establishing a precise moment in time up until the legislative power has the duty to change the normative provision declared inconsistent with the Basic Law (e.g. Germany, Austria). In other cases, they point out the way their decisions affect different juridical situations (e.g. Romania). This study intends to analyze the action in time of the decisions of some European constitutional jurisdiction.

Keywords: *Constitutional review, constitutional jurisdictions, effects of the decisions, action in time, retroactivity (retrospective laws).*

1. Introduction

The normative system of every state is influenced by a multitude of elements. One of them consists in the effect of the decisions rendered by the authorities of constitutional review. They have the main power to check the compatibility of various normative acts with the provisions and principles enshrined in the Basic Laws. Whenever they detect a deviation from the observance and the respect owed to the constitutional values, they sanction the respective normative act by eliminating it from the legal order.

Each state has provided a specific mechanism in this regard. Usually, the annulment takes its effects as from the day the decision is officially published. In some other cases, the Basic laws have established an interval of time that has to flow until the annulment starts producing its effect. There are also several constitutional jurisdictions that are entitled to determine by themselves this moment in time. In this manner, the annulment is postponed and the effects of the unconstitutional normative act are prolonged even after the declaration of its unconstitutionality. The authorities of constitutional review can also impose to the legislative power a term within which it has to adopt a new regulation.

This issue made the object of some studies[1] and also was briefly taken into discussion, among many other major topics, on the occasion of the XV[th] Congress of the Conference of European Constitutional Courts[2]. However, a comparative view of the way some of the most representative authorities of constitutional justice are dealing with the entrance into force of their annulment decisions may be helpful for understanding the benefits or the shortcoming of the diverse mechanisms chosen by the national legislators.

---

[*] PhD candidate, research assistant, Faculty of Law, "Nicolae Titulescu" University of Bucharest (valentina_barbateanu@yahoo.com).

[1] See, for instance, referring to the Belgian case, Geraldine Rousoux, „Le maintien des «effets» des dispositions annulées par la Cour d'arbitrage : théorie et pratique", *Liber Amicorum P. Martens*, (Bruxelles: Larcier, 2007).

[2] Organized by the Constitutional Court of Romania and held in Bucharest, on 23th-25th of May 2011, with the theme „Constitutional Justice: Functions And Relationship With The Other Public Authorities". All the national reports, along with the General Report, were published in the book of the Congress: *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012).

2. General considerations regarding the constitutional review of normative acts

The constitutional review of normative acts is an essential dimension of the States which are governed by the rule of law. Its purpose is to ensure and grant the supremacy of the Constitution as basic, fundamental law of the State, placed on the very top of the normative hierarchy established within the juridical system of the State[3]. This task was entrusted by the legislative power to different authorities of constitutional review which were created in most countries. These authorities reveal their contribution in defending the democratic values enshrined in the constitutional provisions and they help increasing the level of protection offered by the Basic laws to human rights and freedoms.

The supremacy of the constitutional norms over the entire normative ensemble is the central idea that triggers the mechanism of constitutional review. The acknowledgement of the prevalence of the Basic law over every normative act represented a dramatic evolution towards authentic democracy[4]. The constitutional justice has gained its position when the absolute sovereignty of the Parliament has been balanced and confined to the requirements imposed by the Basic laws regulations[5].

The constitutional review is performed in the so-called 'European model' by special authorities that are empowered by the constitutional legislator itself to ensure the constitutional review. They are usually especially created authorities, independent and separated of any other public authority, which are not subject to any influence coming from any of the state's branches of power – nor the legislative, the executive or judicial authority[6]. They can be called 'constitutional council', like in France, or 'constitutional court', as it is in Germany, Austria or Romania or 'constitutional tribunal', as Spain has, for instance. They can also be the highest courts in the judicial hierarchy in the state, situation met in Estonia or Greece. In all these cases the review is 'centralized' or 'concentrated'. On the contrary, the 'American model'[7] is characterized by a 'diffuse' judicial review, fulfilled by every ordinary court whenever it is confronted with an alleged un-constitutionality of a legal provision which may determine the result of the judicial trial[8].

Regardless of their appellation and the classifications offered by the scholars, the fore-mentioned authorities have the main prerogative to check whether the lower level norms comply with the provisions of the Basic laws of each respective State. The authorities of constitutional review have consolidated over the time their role of grantors of the supremacy of the Basic law, becoming essential pillars of the primacy of law in the democratic States.

Their functions, regulated and assigned by the Basic laws and specific normative acts, vary from one state to another, due to the different historical circumstances and ideological tendencies that have marked out their creation.

There are two important categories of constitutional review that one can meet in most countries endowed with such a review. There is the **preventive constitutional review**, which is also

---

[3] According to Hans Kelsen, the reason of validity of every legal norm resides in a so-called *Grundnorm*, which is a hypothetical fundamental norm considered to be the foundation of the entire legal system. See Hans Kelsen, *Doctrina pură a dreptului*, (Bucureşti: Humanitas, 2000), 272.

[4] For theoretical and historical details regarding the developing of the constitutional supremacy, see Ioan Deleanu, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat*, (Bucharest: C.H. Beck, 2006), 227-257.

[5] In the context of the amendment of the French Constitution in 2008, with the aftermath of the consecration of the *a posteriori* review of constitutionality of the statutes which are already in force, professor Guillame Tusseau noted that that moment represented the end of what have been called the ‚rousseauist legicentrism' that governed the French legal order for a very long time. See Guillame Tusseau, „La fin d'une exception française ?", *Pouvoirs* 137 (2011), 5.

[6] Louis Favoreu, *Les cours constitutionnelles*, coll. „Que sais-je?", la 2eme edition, (Paris: Press Universitaires de France, 1992), 3.

[7] Florin Bucur Vasilescu, *Constituţionalitate şi constituţionalism*, (Bucureşti: Naţional, 1997), 40-42.

[8] The so-called 'American model' has been invented in the United States of America, but it is not specific exclusively to the American Federation. It has been adopted also by South American states and even some European countries, like Greece and Cyprus.

called preliminary or *a priori* review and regards the statutes before their entrance into force. Such a preventive review is performed by most of the constitutional authorities[9]. The aftermath of the *a priori* review is the fact that the normative act declared inconsistent with the Basic Law will not enter into force, thus avoiding the occurrence of unconstitutional provisions in the legislative system.

There is also a **repressive constitutional review** that concerns the normative acts which are already in force. It can be both abstract and concrete. This distinction is based on the origin of the alleged unconstitutionality. When the conformity of a normative act with the constitutional provision has been questioned by a political subject, like the members of the parliaments, the chief of the state or the chief of the government or other high authorities, like the general prosecutor, the president of the Supreme Court or the Ombudsman, we talk about an abstract constitutional review. It is considered to be an **abstract review** because it has no connection with a real conflict. On the contrary, the so-called **concrete constitutional review** has its roots into a judicial trial pending in front of a judicial court. A preliminary question of unconstitutionality can be raised whenever the interest of the justice requires that. The right to refer a question of unconstitutionality to the constitutional courts is given to the parties in a trial as an expression of the right to free access to a court and the right to a fair trial, but also as a testimony of the principle of rule of law. That's because the purpose intended to be touched is the resolution of the lawsuit on the basis of regulations whose constitutionality is beyond any doubt and the removal from legislation of the provisions infringing upon the texts or principles inscribed in the Basic Law[10].

The concrete (or incidental) review of constitutionality is specific to those states that have a diffuse system of judicial review, as it is, for instance, in the Unites States of America[11] or Portugal[12].

The procedural means are different in those countries where it has been adopted the centralized system of constitutional review. The question of unconstitutionality is referred by the ordinary courts to the constitutional authority entitled to perform the review of constitutionality. Romania, Italy[13], Lithuania[14] and Turkey[15] are some of the countries that have regulated such a mechanism.

Some constitutional courts have the ability to review the constitutionality of existent normative acts or of the acts which are about to enter into force, but also the unconstitutional legislative omissions[16]. The disregard of the provisions or the principles enshrined in the Basic Laws

---

[9] Up until the constitutional amendment in 2008, the French Constitutional Council was often considered representative for this kind of review, taking into consideration the fact that it controlled only the constitutionality of the laws prior to their promulgation by the President of the French Republic.

[10] Valentina Bărbăţeanu, "Peculiar Aspects Regarding The Reiteration Of The Exception Of Unconstitutionality", *Constitutional Court's Bulletin* 2 (2001): 103, also available at the Internet address http://193.226.121.81/publications/buletin/13/barbateanuen.pdf.

[11] Article VI Section 2 of the United States Constitution provides as follows: *'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding'*. The full text of the American Constitution is available at http://www.senate.gov/civics/constitution_item/constitution.htm.

[12] Article 280 of the Constitution of Portugal. The full text of the Constitution is available at the Internet address http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaofrances.pdf.

[13] Section 23 of the Law No 87 of 11 March 1953 on the composition and procedures of the Constitutional Court, published in the Official Gazette No. 62, 14 March 1953. The full text is available at http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/ita?fn=document-frame.htm$f=templates$3.0

[14] Articles 106 paragraph 1 of the Constitution and Article 67 of the Law on the Constitutional Court.

[15] Article 152 of the Turkish Constitution. The full text is available at http://www.codices.coe.int/NXT/gateway.dll/CODICES/constitutions/ENG/EUR/TUR?f=templates&fn=default.htm

[16] This issue was the main theme of the XIVth Congress of the Conference of European Constitutional Courts held in Vilnius in 2008. The national reports on this subject were gathered in the collection *Problems of Legislative Omission in Constitutional Jurisprudence*, published by the Constitutional Court of Republic of Lithuania, Vilnius, 2008.

can be entailed by the lack of regulation where the Constitution provides the obligation of the legislator to enact certain rules. The most illustrative example in this regard is offered by the German Federal Constitutional Court[17].

3. Brief presentation of the other powers of constitutional authorities

Beside the constitutional review of normative acts, the authorities of constitutional justice are assigned to perform a wide range of powers that highlights their important role played in granting the supremacy of the Constitution.

Many constitutional courts are asked to decide on legal disputes of a constitutional nature between public authorities. Such a distinctive power is especially significant in what concerns the federal or regional states[18]. There are also states that have empowered the constitutional courts to settle the conflicts between the central and the local or regional authorities[19].

In Romania, this power is limited at the conflicts raised between the central authorities of the state[20]. Inspired by the experience of other States in what concerns the problems generated by this kind of conflicts, the delegated constituent legislator in Romania has amended the Basic Law in 2003 and has enlarged the powers of the Constitutional Court of Romania. From that moment on, in some of the most critical moments of the social and political life, the Romanian authority of constitutional justice has been asked to resolute intricate and delicate conflicts. It turned into a referee that had to deal with intense clashes of vanities and tried to reconcile strong and stubborn ambitions[21].

The authorities of constitutional justice - constitutional courts or other equivalent bodies – are also entitled to solve the appeals introduced in the electoral matters[22].

The compliance of the political parties with the constitutional standards is, in some states[23], assessed as well by the constitutional courts, which decide consequently on the dissolution or even banning of the political party that was proven that conducts contrary to the constitutional values.

There are also other multiple powers that are given in the constitutional courts competence in different states, but a complete overview would exceed the theme of the present study which, from this point of view, intended to highlight some of the most important functions of the authorities of constitutional jurisdiction.

4. The effects of the constitutional jurisdictions' decisions

The Romanian Constitution is one of the few basic laws in Europe that firmly and explicitly regulates the effects of the Constitutional Courts decisions. Article 147 par.1 of the Constitution stipulates that the provisions of the laws and ordinances in force, as well as any of the regulations

---

[17] See Article 93(1),(3) and (4)(a) of the German Basic Law.

[18] Like Austria (Article 138 of the Constitution), Germany (Article 93(1)(1)(4) and (4)(b) of the Constitution) or Italy (Article 37 of Law N^{o} 87 of 11 March 1953).

[19] This is the case of the constitutional courts from Bulgaria (Article 149(1)(3) of the Constitution), Czech Republic (Article 87(1)(c) of the Constitution) or Hungary (Article 1(f) of the Law on the Constitutional Court).

[20] Article 147 letter e) of the Romanian Basic Law provides that the Constitutional Court decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the Superior Council of Magistracy.

[21] See, in this regard, Mihai Constantinescu, Ioan Muraru, *Constituţia României revizuită - comentarii şi explicaţii*, (Bucureşti: All Beck, 2004), 232.

[22] France (Articles 58-60 of the Constitution), Austria (Article 141 of the Constitution), Lithuania (Article 105 par.3 subpar. 1 of the Constitution), Greece (Articles 58 and Article 100 paragraph 1 letter (a) – (b) of the Constitution), Bulgaria (Article 149(1)(6)-(7) of the Constitution), Italy (Article 33 of Law N^{o} 352 of 25 May 1970), Portugal (Article 225(2)(f) of the Constitution), Hungary and Romania.

[23] Czech Republic (Article 87(1)(j) of the Constitution), Germany (Article 21(2) of the Constitution), Poland (Article 188(4) of the Constitution), Portugal (Article 225(2)(e) of the Constitution), Slovak Republic (Article 129 (4) of the Constitution), Slovenia (Article 160(1)(10) of the Constitution), Turkey (Article 69(6) of the Constitution) or Romania (Article 146 Letter (k) of the Constitution).

which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

A similar provision can be found in the Constitution of the Slovak Republic[24]. Article 125 Paragraph 3 of the mentioned Basic law affirms that whenever the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued those legal regulations shall be obliged to harmonize with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and in cases stipulated by the Constitution also with other laws, governmental regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If they fail to do so, those regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

Prior to the constitutional amendment in 2003[25], the Romanian Basic law adopted in 1991, the effects of the Constitutional Court's decision has been disputed, due to the fact that the initial formulation of the constitutional norm was vague and equivoque. The Constitutional Court itself had to underline in its case law the generally binding effect of its decisions that declare the inconsistency with the Constitution of the normative acts[26]. It has noted that if one accepts the idea that the Court's decisions of unconstitutionality do not produce *erga omnes* effects, it would be unacceptable the possibility that a certain legal provision which has been declared incompatible with the Constitution to be, on one hand, un-applicable within the judicial trial that was the framework of the objection of unconstitutionality solved by the Constitutional Court, and in the same time, on the other hand, to be unimpeded applicable in any other judicial trial. The Constitutional Court stated that this kind of consequences would be un-doubtfully contrary to the principle of the equality in front of the law and of the public authorities enshrined in the Article 16 paragraph 1 of the Romanian Basic Law and it would also ignore the duty to observe the Constitution, enshrined in the Article 51 of the Basic Law.

The Court also highlighted that the Parliament has the liability to take necessary action in order to amend or abrogate the normative act or the legal provision declared unconstitutional. Still, even if the legislator remains passive, the Constitutional Court's decision will, nevertheless, produce its abrogative effects[27].

---

[24] The full text of the Slovak Republic's Constitution can be found at http://portal.concourt.sk/download/attachments/3604914/ustava_a.pdf.

[25] The Constitution of Romania was amended and supplemented by the Law on Revision of the Constitution of Romania, No. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003; republished, with updated designations and new successive numbers for the texts, in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. The Law on Revision of the Constitution of Romania, No. 429/2003, was approved by the national referendum of 18-19 October 2003 and came into force on 29 October 2003, the date of publication in the Official Gazette of Romania, Part I, of the Constitutional Court Ruling no. 3 of 22 October 2003, confirming the results of the referendum held on 18-19 October 2003 as to the Law on Revision of the Constitution of Romania. The Constitution of Romania, in its initial form, was published in the Official Gazette of Romania.

[26] Decision no.98 of the 5th of April 2001, published in the Official Gazette of Romania, Part I, no. 256 of the 18th of May 2001, Decision no.169 of the 2nd of November 1999, published in the Official Gazette of Romania, Part I, no. 151 of the 12th of April 2000.

[27] The Constitutional Court has stated that the declaration of unconstitutionality is a sanction more severe that the abrogation of the norm. See Decision no.1039 of the 5th of December 2012, published in the Official Gazette of Romania, Part I, no.61 of 29th of January 2013.

The Court has stated that it hasn't got the power to abrogate a legal provision, but the effect of its decisions that declare the inconsistency with the Basic Law is similar to the effect of a genuine abrogation performed by the Parliament[28].

5. The *ex nunc* or *ex tunc* effect of various constitutional courts' decisions

According to Article 147 paragraph 4 of the Romanian Constitution, as from the publication of the Constitutional Courts' decisions in the Official Gazette of Romania, they shall be generally binding and take effect only for the future. In its case law, the Constitutional Court has stated that this *pro futuro* effect of its decisions owes its consecration to the respect of the non-retroactivity principle, which is enshrined in the Article 15 par.2 of the Basic Law. This fundamental rule is a powerful safeguard of the legal certainty and an effective way to strengthen the citizens' confidence in the legal system. It also can be seen as a major prerequisite of the observance of the check and balance rules of the states' powers, concurring at the reinforcement of the essential character of the Romanian State as a state governed by the rule of law.

As a proof of the diversity of the legislative choices within the European model of constitutional review, the effects of the decisions of some other constitutional courts have been regulated from a different point of view. Thus, the decisions of some constitutional courts are governed by the principle of retroactive application. The most representative examples in this regard are offered by the German and Belgian system of constitutional review.

According to the tradition of the German public law, a provision which violates higher-ranking law shall be null and void *ipso jure* and *ex tunc*[29].

In Belgium, the annulled legal provision will be erased from the legal order, as if it had never been adopted[30]. The idea on which is based such a solution derives from the fact that the annulled provision has been unconstitutional from the very beginning, meaning from the moment it has been adopted by the legislative body. Accordingly, the legal provision will be abolished *ex tunc*. In order to temper the drastic effects of retroactive application of its decisions, the Constitutional Court of Belgium indicates the effects of invalidated provisions that shall be considered final and those that shall be temporarily maintained for a period of time which is expressly specified[31].

There is a mixture of retroactive and non-retroactive application of the decisions of annulment in Austria. In most of the cases, the decisions of the Austrian Constitutional Court take effects only for the future, but, in some cases, the Court may choose to declare inapplicable a general normative act with retroactive effect[32].

It has to be noted that, in any situation, the retroactive application of the annulment of the normative acts jeopardies the legal stability and puts under question the authority of *res judicata* of the decisions that have been rendered by the ordinary courts.

---

[28] Decision no.98 of the 5th of April 2001.

[29] Valentin Zoltan Puskás, Károly Benke, "Enforcement Of Constitutional Court's Decisions", part of the *General report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Constitutional Court of Romania* with the theme „Constitutional Justice: Functions And Relationship With The Other Public Authorities". All the national reports, along with the General Report were published in the book of the Congress: *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012): 81, (further on referred to as *Justiţia constituţională…).*

[30] G. Rosoux, F. Tulkens, "Considérations théoriques et pratiques sur la portée des arrêts de la Cour d'Arbitrage", *La Cour d'Arbitrage : un juge comme les autres?*, (Liège, 2004): 105 and 134, cited by Marc Bossuyt and Riet Leysen in the National Report of the Constitutional Court of Belgium, in *Justiţia constituţională*…, 155.

[31] According to Article 8 paragraph 2 of the Special Act of the 6th of January 1989 on the Constitutional Court, published in the Official Gazette of Belgium of the 7th of January 1989, *"Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court"*.

[32] Valentin Zoltan Puskás, Károly Benke, op.cit., 82.

6. The ability of the constitutional courts to modulate in time the effects of their decisions

In **Belgium**, the annulled legal norm can be still applied in some certain situations[33]. The Court will use this legal possibility on the basis of opportunity, in the virtue of its sovereign power[34]. When the Court decides to maintain the effects of an annulled legal provision, it takes into consideration not only the interests of the plaintiff, but also the requirements of the needs of the whole justice system.

Preservation of the effects of the annulled norms can be final, or temporary, for a certain period of time, established by the Court. In this situation, the Court can decide to keep the effects of the annulled legal norms up to a precise moment in time, which can be either prior or subsequent to the decision of annulment[35].

In **Italy**, the situation is different, because the temporal effects of the decisions of unconstitutionality are rigidly fixed[36]. Article 136 of the Italian Constitution states that when the Constitutional Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision[37]. The loss of effectiveness of the measures affects all pending cases, which means that the Court's decisions have retroactive effect, since they apply to events which materialized previously too, with the exception of those circumstances which are part of legal relationships that have already been conclusively settled[38].

Nevertheless, the Italian Constitutional Court can limit the retrospective effects of unconstitutionality by the means of decisions pronouncing a so-called "intervening unconstitutionality". Typical for this kind of decisions is the fact that the Court declares that a particular legal provision which was compatible with the Constitution upon its entry into force became unconstitutional only later, when certain events arose[39]. In other words, the norm is not nullified *ab initio*, but only from the moment at which it becomes defective. An illustrative example would be the occurrence of a change in the economical or financial environment, in social attitudes or a more general change in conditions that leaves a norm incompatible with the Constitution[40].

Another technique that allows the Constitutional Court of Italy to modulate in time the effects of a declaration of unconstitutionality is to postpone them. Eloquent in this regard would be the case of those judgments that lead to expenses for the public treasury. The Court offers the legislature a fixed amount of time to act before the statute is nullified. The decisions of this kind are called decisions of 'deferred unconstitutionality'. The Court itself, based on the balancing of various constitutional values, pinpoints the date on which the law is nullified[41].

---

[33] Due to the provisions of the Article 8 paragraph 2 of the Special Act on the Constitutional Court.

[34] Marc Bossuyt and Riet Leysen, op.cit., 155.

[35] G. ROSOUX, „Le maintien des «effets» des dispositions annulées par la Cour d'arbitrage : théorie et pratique", *Liber Amicorum P. Martens*, (Bruxelles: Larcier, 2007): 444-445, cited by Marc Bossuyt and Riet Leysen, op.cit.155.

[36] Groppi, Tania, "The relationship between constitutional courts, legislators and judicial power in the european system of judicial review. towards a decentralized system as an alternative to judicial activism?" (further on referred to as "The relationship…", report presented at the Conference "Judicial activism and restraint theory and practice of constitutional rights", held in Batumi, Georgia, 13-14 July 2010, by the European Commission For the Democraxy Through Law (The Venice Commission) and the Constitutional Court of Georgia, published in CDL-JU(2010)012, Strasbourg, the 7th of July 2010, available at the Internet address http://www.venice.coe.int/docs/2010/CDL-JU(2010)012-e.asp?MenuL=RUS.

[37] The full text of the Italian Constitution can be found at http://www.senato.it/.

[38] National Report of the Constitutional Court of Italy, in *Justiţia constituţională*…, 331.

[39] Ibidem, 331.

[40] Groppi, Tania, op.cit., 8.

[41] Ibidem.

In case of judgments affirming 'established, but not declared unconstitutionality', no deadline for Parliamentary intervention is fixed. The assumption is, however, that such intervention shall take place as soon as possible. Certain cases do arise in which the Court sets a deadline; this happens when it is possible to identify a specific moment in which the situation of incoherence with the Constitution will become so serious as to be intolerable (for example, the deadline set for implementation of an European directive may be relevant in this sense)[42].

It has been said that „the highly political nature of some issues, combined with the need to balance the defense of social rights against the state's financial crisis, have obliged the Constitutional Court to modulate the temporal effects of its decisions that strike down laws as unconstitutional. In this way, the Court tries both to assure that the Government and Parliament have the time needed to fill the gap created by its nullification of a statute, and to strike a balance between the constitutional rights central to the social welfare state and the scarcity of economic resources"[43].

Actually, there are several other constitutional courts that have the possibility to postpone the entry into force of their decisions of unconstitutionality and to set a deadline for the law-maker in order to bring the normative act into line with the Constitution. As for the terms established by the decisions of Constitutional Courts, their purpose is, in most cases, to grant the legislator the time necessary to take the measures required for eliminating a legislative gap or to regulate a specific issue in accordance with the Constitution[44]. It is also important to note that the principle of separation of powers prevents the constitutional court to force the legislator to adopt a law or to set terms for this purpose.

Germany is one of the countries that use this mechanism in order to modulate in time the effects of its decisions. The Federal Constitutional Court[45] sets a deadline in the event of a mere declaration of incompatibility for the temporary further application of the provision. The Court can also fix a date up until the legislature has to create a new regulation within a certain period. The length of the said period is set according to aspects like the gravity of the violation or other urgencies, the complexity of the necessary new provision and special requirements of the matter[46].

These deadlines vary from one to two years. But sometimes they can be even longer[47]. For instance, the legislator was given a deadline of almost three years to adopt a new regulation regarding the election scrutiny procedure consecutive to the declaration of unconstitutionality of one of the provisions of electoral law[48]. Deadlines of less than one year are also sometimes set. Thus, the legislature was set a deadline of less than eleven months for the new regulation of social benefit provisions which the Court declared to be unconstitutional because the envisioned amounts for safeguarding the subsistence minimum required by the Constitution had not been ascertained in a procedure that was transparent and expedient[49].

In a case of a law regarding the property tax, the Federal Constitutional Court ordered its continued application, avoiding in this manner the unwanted legal consequences that could occur if the legislature failed to comply with the demand to create provisions or did not do so within the deadline set for it. The Court had explicitly ordered that the Property Tax Act should continue to

---

[42] National Report of the Constitutional Court of Italy, in *Justiţia constituţională*…, 333.

[43] Groppi, Tania, op.cit.7.

[44] Tudorel Toader, Marieta Safta, General Report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Constitutional Court of Romania, *Justiţia constituţională*…, 45.

[45] Bundesverfassungsgericht.

[46] Gertrude Lübbe-Wolff, "The Constitutional Court's Relationship To Parliament And Government", National report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany, *Justiţia constituţională*…, 285.

[47] Ibidem.

[48] See The Federal Constitutional Court's Collection of Decisions (Entscheidungen des Bundesverfassungsgerichts – BVerfGE) BVerfGE 121, 266 <316>.

[49] BVerfG, judgment of the First Senate of 9 February 2010 – 1 BvL 1/09 et al. – www.bverfg.de.

apply until 31 December 1996 "at most"[50]. Had no new provision been created by then, it was clear that on expiry of this deadline the provisions of the Property Tax Act in question could no longer apply and that this tax could no longer be levied[51].

Still, it has to be mentioned that there is no explicit constitutional or statutory provision to ascertain the possibility of the Court to set this kind of deadlines. However, the Court is entitled to impose deadlines to the legislator on the basis of and in the context of its power to review the constitutionality of statutes[52] and it is customary for the legislature to comply with such a mandate to create provisions in a timely fashion[53].

The French Constitutional Council also has got the possibility to determine the moment that represents the starting line for the effects of its decisions. There has to be made a necessary distinction between the *a priori* and the *a posteriori* review of constitutionality.

In what concerns the constitutional review of the laws before their promulgation, this ability was very seldom used. The Council has postponed the effects of the decision of unconstitutionality, for instance, in the case of the Law regarding the genetically modified organisms[54]. The law has been promulgated and it has entered into force, but the Council has set an interval of time of six months in order to give the Parliament the chance to redress the constitutionality of the law. The Parliament has very soon fulfilled this obligation, adopting the law in accordance with the constitutional requirements[55].

The constitutional amendment in 2008 has opened the path to the *a posteriori* review of constitutionality[56]. This kind of review concerns the laws that are already in force. It has been described as a true revolution in comparison with juridical traditions of the French Republic[57]. Beginning from the 1st of March 2010, the French Constitutional Council has entered into a new era of evolution. In this context, Article 62 Paragraph 2 of the French Constitution[58] states that a provision declared unconstitutional following the *a posteriori* review shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

Thus, a decision of unconstitutionality entails the abrogation of the legal provision declared inconsistent with the Constitution. On the basis of the fore-mentioned constitutional norm, the Constitutional Council can decide to alter in time the effects of this abrogation[59].

The Constitutional Council has already make use of this ability and, in several occasions, has established a future moment in time up until the norm remained in force. In this way, the Council offered the Parliament the opportunity to modify the legal provision and to avoid, in this manner, a legislative vacuum. Only if the legislative power does not fulfill this duty within the fixed deadline the legal provision ceases its effects.

For example, regarding the legal provisions that regulate the pensions paid to the former combatants who have lost the French citizenship due to the decolonization, the Council has stated[60]

---

[50] BVerfGE 93, 121 <122>.

[51] Reinhard Gaier, Enforcement Of Constitutional Court's Decisions, in National report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany, *Justiţia constituţională*…,.307.

[52] Reinhard Gaier, op.cit, 306.

[53] Ibidem.

[54] Decision 2008-564 DC of the 19th of June 2008.

[55] Law no. 2008-757 of the 1st of August 2008.

[56] Guy Carcassonne, "Le Parlament et la question prioritaire de constitutionnalité", *Pouvoirs* 137 (2011): 74.

[57] Emmanuel Piwnica, „L'appropriation de la question prioritaire de constitutionnalité par ses acteurs", *Pouvoirs* 137 (2011): 109.

[58] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleVII .

[59] Dominique Rousseau, "Le process constitutionnel", *Pouvoirs* 137 (2011): 54.

[60] In the Decision 2010-1 QPC of the 28th of May 2010. The so-called "crystallization of the pensions" decision is the first decision rendered by the French Constitutional Council on the basis of its new power.

that they have to be abrogated starting from the 1st of January 2011. By another decision[61], the Council has postponed up until the 1st of July 2011 the abrogation of the legal provisions regarding the preventive custody.

Unlike the fore-mentioned states, there are also some other states where the constitutional courts do not have the legal habilitation to postpone the moment when the norm declared unconstitutional cease its effects. This is the case of Portugal or Romania.

In the dawn of the **Romanian Constitutional Court**'s activity, there was a situation[62] when it has been imposed a deadline to the Parliament for adopting a new regulation regarding the protection of the public property. The legal provision at stake was comprised in the Criminal code and offered a superior protection to the public property of the State in comparison with the private property of natural or legal persons. The legislator was urged to bring the regulation in accordance with the new constitutional regime which granted an equal protection and contrasted with the former communist manner of property protection. The panel of three constitutional judges[63] has fixed a deadline to which the Parliament, as the sole legislative power, to regulate in a proper way this unconstitutional aspect.

This solution was considered adequate at that moment, taking into consideration the fact that the decision stating the inconsistency with the Basic law provisions produced its abrogative effects from the very moment of their publication in the Official Gazette. Such a rule entailed sometime undesired consequences like the occurrence of a legislative void generated by the passive attitude of the legislative power. Nor the Parliament or the Government had any expressly mentioned obligation to elaborate a new regulation when the Constitutional Court declared the unconstitutionality of various legal provisions. On that occasion, the Court stated that if the Parliament did not proceed at the modification of the unconstitutional legal provisions by the date of the 30th of November 1993, the abrogation would have taken effect beginning from the 1st of December 1993 and, along with it, all the negative consequences intended to be avoided in the interest of the society and of the rule of law. Thus, the Court has decided to maintain in the legal system unconstitutional norms, until the mentioned deadline established for the Parliament.

It has to be underlined that this solution was strongly criticized and, eventually, appealed. The same solution regarding he deadline was adopted once again[64], but based on a very fragile majority within the panel of five judges. It's been said, in this concern, that such a solution raised serious question marks regarding its constitutional grounds.

The contradiction was finally resolved by the Plenum of the Constitutional Court[65] which has decided that the Parliament cannot be pushed to action in a certain manner and, consequently, the Constitutional Court is not entitled to establish any deadline until when the legislative power has to fulfill the duty to change the unconstitutional norm. In addition, the decision was blamed for the fact that it would abusively confer to the Constitutional Court the power to prolong the effects of abrogated legal provisions, disregarding in this way the requirements of the principle of the separation of powers in the State. Taking into consideration the fact that the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country, it's been also said that the Constitutional court cannot force it to carry on any activity, no matter how important would be the issue at stake.

---

[61] Decision 2010-14/22 QPC of the 30th of July 2010.

[62] Decision no.31 of the 26th of May 1993, published in the Official Gazette of Romania, Part I, no. 13 of the 19th of January 1994.

[63] Which decided in the first instance according to the provisons of the Law 47/1992 in the initial formulation.

[64] Decision no.38 of the 7th of July 1993, published in the Official Gazette of Romania, Part I, no.176 of 26 of July 1993.

[65] Plenum Decision no.1 of the 7th of September 1993, published in the Official Gazette of Romania, Part I, no.232 of the 27th of September 1993.

Thanks to the constitutional revision in 2003, the problem has been clarified through the Article 147 of the Basic law, as it has previously shown.

7. Conclusions

This comparative approach proves that the constitutional authorities in some countries have reached the conclusion that it is appropriate to offer some flexibility to the temporal effects of their decisions that affect the existence of normative acts or legal provisions. The final goal would be a more efficient legislative activity. That is because the constitutional judge could offer the legislative branch a margin of appreciation and an adequate period of time to adopt a new regulation instead of the one that has been declared contrary to the Basic Law. Such a delay of entering into force of the abrogative effects of constitutional courts' decisions can sometime be used when a smoothly redress of the unconstitutionality is preferable to a sudden abrogation. Situations like this are preferable if in the absence of a gradual transition from an unconstitutional state of law to a constitutional one a situation even less constitutional would be created. The constitutional courts that practice this postponement of the effects of their decisions are taking into consideration the possible risk that might appear along with the annulment of the unconstitutional norms. The balance that has to be kept between various constitutional values is always taken into consideration and the preservation of legal stability with the aftermath of the enforcement of the human rights and freedoms safeguards is a constant and permanent goal of the constitutional jurisdictions.

References

- Marc Bossuyt, Riet Leysen "The National Report of the Constitutional Court of Belgium prepared for the XVth Congress of the Conference of European Constitutional Courts", *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012).
- Valentina Bărbăţeanu, "Peculiar Aspects Regarding The Reiteration Of The Exception Of Unconstitutionality", *Constitutional Court's Bulletin* 2 (2001).
- Mihai Constantinescu, Ioan Muraru, *Constituţia României revizuită - comentarii şi explicaţii*, (Bucureşti: All Beck, 2004).
- Guy Carcassonne, "Le Parlament et la question prioritaire de constitutionnalité", *Pouvoirs* 137 (2011).
- Ioan Deleanu, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat*, (Bucharest: C.H. Beck, 2006).
- Louis Favoreu, *Les cours constitutionnelles*, coll. „Que sais-je?", la 2eme edition, (Paris: Press Universitaires de France, 1992).
- Reinhard Gaier, "Enforcement Of Constitutional Court's Decisions", *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012).
- Tania Groppi, "The relationship between constitutional courts, legislators and judicial power in the European system of judicial review. towards a decentralized system as an alternative to judicial activism?" *CDL-JU(2010)012*, (Strasbourg, the 7th of July 2010).
- Hans Kelsen, *Doctrina pură a dreptului*, (Bucureşti: Humanitas, 2000).
- Gertrude Lübbe-Wolff, "The Constitutional Court's Relationship To Parliament And Government", *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012).
- Emmanuel Piwnica, „L'appropriation de la question prioritaire de constitutionnalité par ses acteurs", *Pouvoirs* 137 (2011).
- Valentin Zoltan Puskás, Károly Benke, "Enforcement Of Constitutional Court's Decisions", *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012).
- Dominique Rousseau, "Le process constitutionnel", *Pouvoirs* 137 (2011).
- Geraldine Rousoux, „Le maintien des «effets» des dispositions annulées par la Cour d'arbitrage: théorie et pratique", *Liber Amicorum P. Martens*, (Bruxelles: Larcier, 2007).

- Geraldine Rosoux, Françoise Tulkens, "Considérations théoriques et pratiques sur la portée des arrêts de la Cour d'Arbitrage", *La Cour d'Arbitrage : un juge comme les autres?*, (Liège, 2004).
- Tudorel Toader, Marieta Safta, General Report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Constitutional Court of Romania, *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012).
- Guillame Tusseau, „La fin d'une exception française ?", *Pouvoirs* 137 (2011).
- Florin Bucur Vasilescu, *Constituţionalitate şi constituţionalism*, (Bucureşti: Naţional, 1997).

- Decision no.31 of the 26th of May 1993, published in the Official Gazette of Romania, Part I, no. 13 of the 19th of January 1994.
- Decision no.38 of the 7th of July 1993, published in the Official Gazette of Romania, Part I, no.176 of 26 of July 1993.
- Plenum Decision no.1 of the 7th of September 1993, published in the Official Gazette of Romania, Part I, no.232 of the 27th of September 1993.
- Decision no.169 of the 2nd of November 1999, published in the Official Gazette of Romania, Part I, no. 151 of the 12th of April 2000.
- Decision no.98 of the 5th of April 2001, published in the Official Gazette of Romania, Part I, no. 256 of the 18th of May 2001.
- Decision no.1039 of the 5th of December 2012, published in the Official Gazette of Romania, Part I, no.61 of 29th of January 2013.
- Decision 2008-564 DC of the 19th of June 2008.
- Decision 2010-1 QPC of the 28th of May 2010.
- Decision 2010-14/22 QPC of the 30th of July 2010.

- www.senate.gov.
- www.tribunalconstitucional.pt.
- www.codices.coe.int.
- http://portal.concourt.sk.
- www.senato.it.
- www.conseil-constitutionnel.fr.

THE RIGHT TO KNOW ONE'S BIOLOGICAL IDENTITY

VERONICA DOBOZI*

Abstract
In the last decade, European Court of Human Right case-law evolution revealed a new component of the right to private life, protected by the Human Rights Convention, Article 8. Existence and limits of the right to know one's biological identity were set out in a long line of cases, starting with Mikulic c. Croatie (2002) until the very recent Godelli c. Italie (2012). The Court jurisprudence established that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. Having regard to the margin of appreciation left to the member states, the Court sticks between taking priority over the third parties' right to privacy – for example, mothers in the cases of X births, donors sperm, unknown fathers – to recognition of the child' right to know his/her biological roots and identity. Following the bioethics and bio-law progress, case-law evolution had influence member states legislation and disseminated progressive ideas, as the recent official United Kingdom legislative modifications which remove anonymity for sperm, egg and embryo donors. In view of the above, future analysis of private life respect throughout Europe should include this new element, the right of any person to know his/her biological identity, not only for medical aims.

Keywords: *biological identity, human rights, filiation, paternity, maternity*

Introduction

In the last decade, the European Court of Human Rights (ECHR) case-law developed in appliance of art. 8 of the European Convention on human rights (the Convention) which consecrates the right to respect for one's private and family life, revealed a new component of private life concept. The European court's research report named "Bioethics and case law of the Court" describes the case law concerning this aspect under the title "The right to know one's biological identity?", keeping a question mark which seems to rise certain questions regarding the birth of a new human right.

This particular aspect of the right protected by art. 8 of the Convention is a concrete result of the intersection of concerns in Europe in the domain of the child's rights protection, on one side, and the prevalence of the legal biologic reality, on the other side.

In its law case, ECHR addressed the issue similarly both in the cases concerning descendants wishing to find the identity of genitors, and in the situations when the fathers contested or requested the establishment of paternity[1], consequence of the revealing of the biologic truth.

Even if they were placed in a common basket, which was called by the doctrine *freedom to develop one's own identity*[2], we find that the right to know the biologic identity should be treated separately.

First, the identity, both in the common meaning of the term, and in the one explained by the ECHR's case law, includes the biologic identity, but is not reduced to it. From this perspective, the

* Lawyer, Bucharest Bar; Ph.D. candidate, Faculty of Law, University of Bucharest (email:vdobozi@stoica-asociatii.ro).

[1] This is also the case in the ECHR report concerning the "Bioethics and the Court's case law".

[2] Jacobs, White, Ovey, The European Convention on Human Rights, ed. a 5-a, Oxford University Press, pp. 377-379.

plaintiffs who complained to the Court of the infringement of their rights in the context of the legal impossibility to establish the filiation according to the biologic truth revealed under various forms, even if they invoked the right to private or family life, were not searching their biologic identity. They only followed the legal recognition of a truth, they did not live in incertitude regarding their origin.

On the contrary, the plaintiffs who intend to obtain information on their origin, their genitors and their genetic inheritance, are motivated by the real will to answer to certain tormenting questions which weighted significantly on them during the childhood, teenage years and sometimes their adult period, considering that these answers are many times capable to sketch an important part of one's personality, helping to the identification to the cultural and moral values of their predecessors or of the population to which one belongs .

The Court recognized that there is a direct relationship between the establishment of the filiation and the private life of these plaintiffs[3], as it recognized, *de plano*, also the existence of certain long term moral and psychical sufferings in the case of the plaintiffs who wish to discover the identity of their genitors[4]. Moreover, the European Court exempts these plaintiffs from the charge of proving the interest of the request, presuming that it exists as component element of the constitution of an individual identity, socially integrated, notion protected by the Convention[5], art. 8.

Even if the interruption of the biologic relation between the parents and the children and its substitution with relations created artificially by the law – for example the adoption – is very old, the interest for the establishment of the biologic truth increased progressively during the last decades, enhanced by the progress of the biomedicine, which allows the accurate establishment of the blood relation, other times almost impossible to detect. ECHR vacillated during the case law to catalogue this aspect of the right guaranteed by art. 8, considering it either a component of the private life, either one of the family life[6].

I. The Court's case law in this topic

In the last case in which it used this aspect, Godelli c. Italie, ECHR clarified the issue, mentioning that the right to know one's own biologic identity enters in the domain of the private life notion, as long as between the child searching the truth of its blood relation and its genitor/s were not already established the specific relations of the family life, logical conclusion in the light of the current case law of the European court, which considers that art. 8 protect the continuity of the family life, only if its existence is previously demonstrated.

The DNA test allows now the establishment of the maternity and paternity relation with a 99.99% precision. As regards the need to find the truth on the biologic ascendance or lineage, ECHR gave priority to the reality. Simply, people wish to know where they come from, biologically speaking, and not knowing his aspect can cause psychological suffering, with important impact on the normal development of a child.

The first step in the recognition of the right to know one's biological identity was made in the case Mikulić c. Croatie. The case starts from a classical factual situation, the plaintiff being a child born outside the marriage, wishing the establishment of the paternity to the man she considers genitor. She complains, among others, of the infringement of her right to private life, in lack of a court decision in her file, which leaves her with an incertitude regarding the identity of the father. To establish if there was or not an infringement of the plaintiff's private life, ECHR considered her right to know her biological identity and the supposed father's right to refuse to be subject of the DNA

[3] Decision of July 3, 2003, case Jäggi v. Switzerland, request no. 58757/00, par. 26.
[4] Jäggi v. Switzerland, par. 40.
[5] Decision of February 7, 2002, case Mikulić c. Croatie, request no. 53176/99, par. 46.
[6] Jacobs, White, Ovey, op. cit., p. 377.

test[7], right which is also protected by the Convention, art. 8, which protects one's physical integrity against the state's arbitrary interferences. Establishing that the Croatian state infringed the plaintiff's right provided by art. 8 by not keeping a just equilibrium between the two rights analysed – implementing procedural measures which allow the settlement of the case and the surpassing of the impasse of the refusal of the DNA test – ECHR sketched the grounds of the plaintiff's right, re-used subsequently in all the decisions of the Court on the same aspect.

The court considered that the persons in the plaintiff's situation have a vital interest, protected by the Convention, to obtain the information needed to discover the truth concerning an important aspect of their personal identity, the one of knowing their genitors[8].

Subsequently, in case Odièvre v. France[9], the High Chamber decided[10] that art. 8 of the Convention were not infringed, in a similar case, but which opposed other interests. Thus, the plaintiff complained that she could not obtain the communication of the identity elements of her natural family and of the impossibility to know, as a consequence, her own personal history. Although in the grounds ECHR reminds elements of its prior case law which highlight the legitimacy of the right to know one's biologic identity, as the fact that art. 8 protects a right to identity and personal development, right which could not be effectively practiced without protecting the mental stability[11], as well as the vital interest to obtain information regarding the genitors[12], the plaintiff's request was rejected.

In the case, the issue being a birth on which the mother's anonymity was kept, at her request, the Court's analysis had in view, on one side, the child's interest to know the true identity of the mother, and, on the other side, the public interest to maintain this form of renouncing to the parental rights[13], which is at the same level as the mother's interest to do not divulge her identity[14]. The just equilibrium between the two interests was considered by most of the judges of the High Chamber as being complied with by the French state, since the plaintiff was allowed access to certain information on her family[15], even though it were not identification information.

The French state specified that starting with 2002[16], it has a new law regulating the issue, which institutes a National Council for access to personal origins, independent organism, formed of magistrates, representatives of the associations concerned by these aspects, as well as professionals with good practical knowledge of these aspects. It is difficult to believe that this legislative modification did not have importance when most of the judges decided the lack of infringement in the case of art. 8.

Few months later, on July 3, 2003, ECHR issued another decision in the case Jäggi v. Switzerland[17], noting an infringement of art. 8 by the defendant state, in a case similar to Mikulić case. The plaintiff complained to the Court that he could not perform a DNA analysis on a defunct

[7] Since the defendant refused to subject to the DNA test requested to the Croatian courts, and they did not have a legal mean to compel him to do so, the case could not be settled by elucidation of the blood relation between the daughter and the defendant.

[8] Mikulić c. Croatie, par. 64.

[9] Decision of 13.02.2003, case Odièvre v. France, request no. 42326/98.

[10] With a very tight vote, 10 votes against the infringement of art. 8 and 7 votes for the infringement of the article.

[11] Decision of February 6, 2001, case Bensaid c. Royaume-Uni, request no. 44599/98.

[12] Mikulić c. Croatie.

[13] The anonymity of birth, existing especially in the countries with catholic tradition, intends to stop the mothers who do not want to undertake the responsibility of motherhood from radical actions, as the killing of the new born.

[14] In France, as well as in Italy, the declaration signed by the mother at birth through which she requests to remain anonymous, constitutes a perpetual inability cause for the disclosure of her identity to the child thus born.

[15] The plaintiff found out in this manner only that she has three brothers.

[16] The new law entered into force on January 22, 2002.

[17] Decision of July 3, 2003, case Jäggi v. Switzerland, request no. 58757/00.

person, his assumed father, to establish the biologic truth. The Court reminded that is in the charge of the state, by virtue of the appreciation margin they enjoy, to establish the adequate measures for the guarantee of the compliance with the provisions of art. 8 of the Convention in the individual relationships, there are various manners to insure the respect one's private life, and the nature of the state's obligation depends on the aspect of private life implicated in the case.

Consequence of the Mikulić, the Court re-stated the existence in the analysis of two interests protected by art.8, respectively the vital interest of any person to know its biologic identity, as opposed to the interest to preserve the intangibility of the defunct person's body and the respect for the dead persons, both menaced by the idea of certain forced DNA tests. The Court took in consideration also the public interest of the legal security, menaced by the possibility of change of the filiation.

Removing the government's arguments, ECHR noted that, although the plaintiff has 67 years and is obviously to have constructed a personality even in lack of certitude regarding his biologic father, his long term steps to find out the blood relation reveal that he has a real interest in this regard, and the lack of certitude caused him moral and physical suffering, even if they cannot be medically ascertained.

As regards the interest regarding the intangibility of the defunct person's body and the untroubled rest of the dead, the Court notes the lack of any religious or philosophical interest of the family members of the defunct person who opposed to the obtaining of the sample needed for the DNA test, as well as that the exhumation of the defunct will be compelling in 2016 when expires the free use of the grave, thus, the peace of the defunct, invoked by the family is anyway a temporary issue.

Analysing the obtaining of this sample also from the perspective of the private life protection – the defunct person's one – ECHR also notes that this aspect would have been complied with by taking the sample in order to find the truth in the case, making reference to its case law, respectively the decision in the case Succession Kresten Filtenborg Mortensen c. Denmark[18], in which it decided that the defunct person whose DNA should have been taken could not have been affected in his right to private life by such operation.

A new case Odievre, this time from Italy, gave ECHR the possibility to rephrase discreetly its prior case law, keeping differentiation arguments between the situations of the two plaintiffs. Thus, in the case Godelli c. Italie[19], ECHR noted an infringement by the defendant state of the provisions of art. 8. The plaintiff, who was subject to an anonymity birth and was subsequently adopted, complained to the Court that the Italian authorities refuse her access to information regarding the identity of her mother, giving priority, without respecting an equilibrium, to her mother's right to conceal her identity.

ECHR starts its analysis by explaining that the protection offered by art. 8 of the Convention regards both the child and the mother, on one side existing the child's right to know his biologic identity, on the other side, the interest of the women who gave birth in anonymity to protect her health thus giving birth under adequate medical conditions[20]. On the same part of the barricade, ECHR notes that there is also a public interest, if the Italian law governing these aspects is in line with the state's obligation to protect the mothers and the children during the pregnancy and birth, in order to avoid clandestine abortions or "savage" abandonment".

---

[18] Decision of May 15, 2006, case Succession Kresten Filtenborg Mortensen c. Danemark, request no. 1338/03.

[19] Decision of September 25, 2012, case Godelli c. Italie, request no. 33783/09.

[20] In a dissident opinion, the Hungarian judge expressed a different opinion on the interests under discussion. According to his grounding, the anonymity of the mother is related to the right to life, which is an absolute right. Even if its protection is indirect by the guarantee of the anonymity of births, it should prevail, therefore in the case would not exist an infringement of art. 8 of the convention.

The facts which leaded to favouring the plaintiff were determined by the lack of any possibility in the Italian legislation to annul the mother's decision regarding the keeping of the anonymity, which infringed the rule of keeping a just equilibrium between the interference of the measure and the interest protected by the Convention, which is over the margin of consideration of the states, in ECHR's opinion.

II.A modern vision in favour of children's rights

People donating sperm and eggs will no longer have the right to remain anonymous, under the law which came into force on March 2005. Children conceived in this way will now be able to identify their genetic parents once they reach 18. The new rules will not be retrospective, so people who have already donated will not be affected[21].

Some experts in genetics and human fertilization are concerned that the removal of anonymity will deter donors from coming forward in the future and the British Fertility Society has warned that couples who do want eggs or sperm from anonymous donors may choose to go to unlicensed "backstreet" clinics, or travel abroad to countries with less strict regulations. The change in the rules means that children conceived using donor eggs or sperm will be able to trace their biological parent in the same way as children who are adopted[22]. So forth, the UK legislation seems to be a national image of the general principles setting out in the above mentioned case-law evolution.

While children will be able to access more information about the donor's genetic origins, they will have no financial or legal claim. The first time children born in this way will have the option to ask for the identity of their donor will be when they turn 18 in 2023.

Following the Odièvre case instructions from European Court of Human Rights, an official authority - the Human Fertilisation and Embryology Authority – is entitled to release the specific information.

The donor will not be able to trace a child, a "natural" option in the context of ECHR jurisprudence. Recognizing the priority of child interest is a natural choice to let in a secondary plan the rights of the biological parents.

The situation is similar in other European countries: Sweden, Switzerland, Norway, Netherlands and Germany.

UK legislative evolution in the area of third party reproduction is a very good example of ECHR case law influence and efficacy, integrating the right of any person to know his/her biological identity into the previous legal context.

Basically, positive obligations of member states, described in Odièvre and Mikulić cases, i.e. maintaining a fair balance between confidentiality of third party and applicant interests, in the first place, than assuring an official and independent view of the request for information regarding the biological origins, in the second place, determined a new political and legal approach of genetic and biomedical cases regarding third party reproduction. The legal anonymity for sperm and eggs donors' era ends, and a new era of everyone right to know his/her biological origins begins.

Conclusions

As a conclusion, from the analysis of all these aspects, we can determine the limits, influence and importance of this right.

Outlined in ECHR jurisprudence as a new aspect of the right to privacy protected by Article 8 of the Convention and strengthened over the last decade by the European judges, the right to know his/her biological identity imposed changes in the laws of European countries, causing even changes in state policies regarding genetics and biomedicine. Future approach of private life violation in the

[21] Information available on the website www.genethique.org.
[22] Ibidem.

frame of national law throughout Europe should include this new element, the right of any person to know his/her biological identity.

One of the notable and sinuous effects of ECHR jurisprudence at the national level of implementation was the end of anonymity for biological material donors in the reproductive process with third donor.

References

- Books
- Bîrsan, Corneliu, The European Convention on Human Rights (Bucharest: All Beck, 2010).
- Janis, Mark W., European Human Rights Law: Text and Materials (Oxford University Press, 2000).
- Jacobs, Francis Geoffrey, White, Robin C.A. and Ovey, Clare, The European Convention on Human Rights (Oxford University Press, 2010).
- Janis, Mark W., Kay, Richard S., Bradley, Anthony W., European human rights law: text and materials (Oxford University Press, 2008).
- Harris, D.J., O' Boyle, M., Bates, E.P., Buckley, C.M., Law of the European Convention on Human Rights (Oxford University Press, 2009).
- Journal Articles
- Sommerville, Margaret, Children's human rights to natural biological origins and family structure, Symposium: The Jurisprudence of the Family: Foundations and Principles, (2010).
- Dobozi, Veronica, The right to know one's biological identity, Juridice.ro, (2013).
- Reports
- European Court of Human Rights, Research report – bioethics and the case-law of the Court, May 2012, available at http://www.coe.int/t/dg3/healthbioethic/texts_and_documents, visited on February 3, 2012.
- Courts decisions
- Gaskin v United Kingdom, (App. 10454/83), 7 July 1989, Series A No 160, (1990).
- Odievre v France, (App. 42326/98), 13 February 2003 GC, (2004).
- Mikulic v Croatia, (App. 53176/99), 4 September 2002 GC, (2003).
- Jaggi v Switzerland, (App. 58757/00), 3 July 2003, (2004).
- Godelli v Italy, (App. 33783/09), 25 September 2012.
- MG v United Kingdom, (App. 39393/98), 24 September 2002, (2003).

BRIEF CONSIDERATIONS ON ESTABLISHING OBJECTIVES IN LAW-MAKING

RAMONA DUMINICĂ[*]
ANDRA PURAN[**]

Abstract
Society is quickly developing, but this process warrants the appearance of new laws, thereby putting the lawmaker under the pressure of regulating ever more diverse social aspects such as economic, political, cultural or ideological. The fast changes in society lead to shifts in social relations and even institutional modifications, which require regularization.
Establishing objectives in law-making involves the participation not only of jurists specialized in this field but also defines a broader outlook including significant interventions from the political class. The law is the product of a compromise between the various political tendencies which clash in order to obtain a parliamentary majority. Starting with these main points, the present article seeks to stress the relation between legal policy, law-making policy, the legislative programme as well as the role of public policies in law-making.

Keywords: *law-making, legal policy, law-making policy, the legislative programme, public policies.*

Introduction

Law-making has been a constant topic for debates of a doctrinal nature and a field of continuous study for political and legal sciences, because it constantly poses new and complex questions. This same subject is always tackled for a different reason or seen from different points of view, therefore making it of permanent interest.

The literature presents law-making as a complex activity of the legislative bodies of the state. Through a series of scientific methods, they discover the social realities that require regulation, which they do afterwards, by using specific rules, and which they adopt in the form of a law, in accordance with a preset procedure.

However, at present, within our own legal system, the law and law-making are going through a difficult period, a time of crisis created firstly by neglecting to follow the essential rules of a sound legislation – a good knowledge of social realities and the reality reflected in the content of the law. By having an unsound foundation, neglecting the social realities and imposing his own realities, the lawmaker creates an unstable, incomplete law, over-technical and quite often impractical.

In this context, it has become necessary to reclaim the specific and essential qualities of the law, which it has lacked for so long. For this precise reason, in our present study we seek to analyse the principles to which the lawmaker must adhere in his activity. This must be scientifically grounded, in the sense that, it must determine first of all the necessity and purpose of the law.

1. The role of politics in establishing the legislative objectives

In establishing the objectives of law-making involves the participation of more than jurists specialised in this field. Its scope is larger, including the politicians as well.

[*] Assistant Lecturer, PhD, Faculty of Law and Administrative Sciences, University of Pitesti (e-mail: duminica.ramona@yahoo.com).
[**] Assistant Lecturer, PhD candidate, Faculty of Law and Administrative Sciences, University of Pitesti (e-mail: andradascalu@yahoo.com).

In principle, it is the politicians who make the law[1]. In current society, the law is the result of a compromise between the various political tendencies which clash to form the parliamentary majority. In these conditions, the relation between law and politics appears extremely complex, given the tendency of the political authority to use the law for its own ends and that of the state to limit their authority. Although the political class is subject to the law, this only partially resolves the matter of that the law depends on the priorities of the political party or parties in power. This is made clear by the fact that only a part of the political institutions are sufficiently regulated.

Law-making does not represent a spontaneous activity which randomly comes about. On the contrary, it is a conscious, well organised activity, the purposes of which correspond to certain well established political goals. It consists of building a system of socially recognised legal norms, which have certainly been influenced by cognitive, informational, axiological factors. Therefore, law-making is integrated in the political system governing society[2].

The act of governing represents a social process that takes place in a social-organisational framework, the structure of which is built to fulfill certain objectives. This government is political in essence because of its objectives and is defined as the line of action (the direction, the principle) and the forms of putting these into practice (the political dimension of the action), carried out in an, organised and structured framework[3].

The literature[4] has shown that "this definition is perfectly applicable in legal policy, since the objectives of law-making is to assimilate the political ones and since the notion of objectives is common to all organisations and its members. Objectives represent a defining element of any organised system by which the desiderata, meaning the desired purposes which must be attained in a certain period, are outlined"[5].

Therefore, the concepts of "legal policy", "juridical policy" and "legislative programmes" are part of the political system governing society, and the way in which legal policy is understood depends on the evolution of the legal system.

Legal policy is made up of all the guiding ideas that determine the direction of the law in the process of its development and practice, ideas which are integrated in the system of political concepts within society, based on which the social forces in power govern society. Legal policy is seen as both an art and a science, that the capacity to come up with and formulate leading ideas which determine the direction of the law[6]. This is made evident by all the public authorities that take part in shaping, applying and developing the law. Therefore, legal policy is also made by the courts, less visibly perhaps, but real nonetheless, especially in the current period when jurisprudential law has developed considerably. The social or economic conceptions and ideologies outlined by this kind of law are subsequently reflected in the legislation. The indirect intervention of an apolitical public authority entrusted with serving the public can only have a positive effect, given that the tendency of the public power to divert political policy is tempered.

A part of the general policy and implicitly of the juridical policy, legal policy represents a complete system of ideas and concepts, with a higher degree of stability, based on which the legal norms are elaborated or in other words, it is the lawmaker's representation of the social purposes of the law as well as of the forms and specific methods of expressing it. E. Zitterman correctly states

---

[1] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 222.

[2] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 294.

[3] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 211.

[4] A. J. Arnaud, „La contribution du sociologue juriste", in *Le recours aux objectifs de la loi dans son application* (Bruxelles, 1990), 209.

[5] H. Heyvaert and F. Martou, „*La direction génerale*", in *L'Entreprise Moderne* (Paris: Hachette, 1972), 116.

[6] I. Craiovan, *Tratat de teoria generală a dreptului* (Bucureşti: Ed. Universul Juridic, 2009), 409; I. Craiovan, *Metodologie juridică* (Bucureşti: Ed. Universul Juridic, 2005), 185; V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 294-295 ş.a.

that a century ago "law-making was a part of politics, appearing as an art form which had two sides: the content and the technical side. The content involves the matter of purpose, aspirations, since the law-making had to relate to true values of culture. The relation between legal policy and positive law represents a point of compromise between law and life. Within its framework, all intellectual human aspects must be considered in order to find the solution considered as most suitable." Therefore, legal policy is the one that ensures the end purposes of legislation, by establishing its guidelines, objectives, whereas legislative technique is used to shape the law in accordance with the points set out by the legal policy. Conceived as an ensemble of technical procedures and methods whereby laws are created, the legislative technique therefore differs from legal policy.

The exact instrument of legal policy is the legislative programme, which is used to establish the priorities in law-making, selecting and spreading a number of legislative projects or sets, during a period of time, which were conceived of course to fit a certain political agenda[7]. In a state under the rule of law, there is a variety of legislative programmes imposed or not at a given time depending on the democratic machinations. The legislative programme includes a set of objectives, priorities and options of certain political parties and it is put into practice only if these parties form a majority in parliament. Obviously, if the majority is lost, the new political formations who gain power will back up their own legislative programme.

Legislative programmes are not only mandatory but they maintain a certain amount of uncertainty. Not even when the projects are marked down in the order of the day of the legal authority, there is no certainty that they will be debated. Quite often there are legislative emergencies which modify the established order. Therefore, the legislative programme, a document which categorically has a particular importance towards outlining the legislative policy, can never have a mandatory character[8].

Consequently, legislative policy and programmes are parts of governmental policies which pertain to state authorities that have the right to legislative initiatives. Besides having to meet certain other conditions, this initiative belongs equally to political parties, the population as well as to other initiators. Law-making involves a set of complex activities which cannot be overlooked, of a political, economic, social, moral, historic, national and international nature.

2. Respecting the general principles of legislative policy – a condition of carrying out the specific objectives of the law through legislature: unity, stability and legal security

Besides combining the legal, political and organisational, we must keep in mind the series of objectives or final goals specific to the law and which must be legislated and which are legal unity, stability and security.

Therefore, "the activity of law-making must meet with the contradictory demands which fall in certain broad categories: legislation must ensure the security and certainty of those answerable before the law, which means going into details and may indirectly lead to a decline of the law; the lawmaker has the task of contributing to the foundation of a new society (to its permanent renewal), therefore a creative activity, which apparently goes against the conditions of stability and durability. These conditions are dependent on acquiring a certain amount of experience in law-making as well as on the wisdom of those that use it; legislation must be in accordance with the constitution, political objectives (public policies), but in the same time it must keep its autonomy (be it a relative one); even if they must be identified, respected and included into the juridical system and the rules and regulations representing a guarantee of stability, since at the same time they must be reunited or

[7] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 295.

[8] V. D. Zlătescu, *Introducere în legistica formală* (Bucureşti: Ed. Rompit, 1995), 31; M. Grigore, *Tehnica normativă* (Bucureşti: Ed. C.H. Beck, 2009), 31.

assembled in a whole unit."[9] Therefore, law-making has the difficult role of solving this system of united equations[10].

The development of legal policy which can solve these equations involves the respect of general principles, known under the name of legislative political principles and considered "the natural laws of law-making"[11]. These principles are as follows: the law must pursue the attainment of the common good, law-making seeks to regulate only the external behaviour of individuals, the law must only intervene when the common good requires so and the scientific foundation of law-making and the guarantee of balance between dynamics and the lack of dynamics in the law.

2.1. *The objective of the law is to guarantee the common good*

Pursuing the "common good" or "the social purpose" as it has been called, is a vague demand, given the imprecise nature of this notion. Today it is considered a purely theoretic ideal, even though it does not manage to actually limit political power throughout the course of outlining legal policy, it nonetheless succeeds in establishing certain moral limits. The common good which we have mentioned is not a purpose onto itself and it does not refer to the creation of an ideal society, as imagined by communist sympathisers, for example, who promoted the creation of a new man and of a multilateral developed society, while ignoring the realities of the times. In fact it refers to all that can be accomplished "in a precise time and space, in a social environment and depending on the means and elements they actually have at their disposal."[12]The literature has shown that "this common good is oriented towards the development of civil society, the state being an instrument for the fulfilment of this goal. On the other hand, the progress of civil society must ultimately seek the wellbeing of individuals. Law-making must not be practiced randomly, like a work of art, but firmly keeping in mind the principles of reason. It is a work done with prudence with one practical goal in mind – organising the social relations as suitably as possible given the times."[13] Sadly, nowadays this "common good" which should help guide the legislator, and before him, all those involved in formulating legal policy, is quite often overlooked. Sometimes, it is used in elaborate political speeches, but only with the clear intention of impressing the voters. The laws will no doubt become ineffective if they conform to certain lesser rules of the existing morality in the collective conscience. The neglecting of this natural precept of law-making is one of the causes for the "crisis" of law and law-making currently facing Romanian society.

2.2. *The law must only regulate the external behaviours of individuals*

Another rule not to stray from while determining legal policy is that the law regulates only the conduct of individuals, since only the relations between the subjects of law are of interest in the social life and therefore, in legal order: "Law-making must not try to regulate only the external behaviours of individuals, barring any attempt at regulating a person's private thoughts, feelings and desires."[14]

2.3. *The law must intervene only if the social reality requires it and to guarantee a balance between the dynamics and the lack of dynamics in the law*

The development of a law is required only if the social reality warrants it. However, nowadays, law-making is less and less often the result of a real necessity, but rather is used to increase the political capital of their initiators. Each political group in power wants to impose their

---

[9] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 217.

[10] In this sense: Fr. Ewald, „Rapport philosophique: une politique du droit", in *Le Code civil 1804-2004. Livre du bicentenaire* (Paris: Dalloz), 84.

[11] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 222-225.

[12] J. Renauld, *Cours d'encyclopedie du droit* (Louvain, 1966), 83.

[13] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 223.

[14] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 223.

own legal programme, each member of the lower or upper house of parliament seeks to tie their name to a normative act. Therefore, legislation has become more of a media spectacle used in acquiring popularity among the voters, and neglecting the true needs of law-making

Then again, society is evolving quickly, and it is for this reason that new laws are adopted. The lawmaker is facing various social pressures, economic, political, cultural or ideological. Quick changes intervening in society lead to shifts in social relations and even institutional transformations that require regulation. The legislative bodies cannot proceed to normative changes too often because frequent adaptations of the legislation affect their effectiveness, and consequently the efficiency and stability of the law. They must not forget J.J. Rousseau's statement which is valid no matter the nation or times, "the people will come to despise laws that change daily"[15] or even Montesquieu's idea that "Useless laws weaken the authority of necessary laws."[16] In this way, P.C. Vachide noted that "Inflexible laws separated from real life pose a danger. However, this does not mean they must change since an instable democracy could be more damaging than helpful, given the lack of stability of the legislative system which can decrease the value, prestige and confidence that the law should inspire. If the change too fast, they betray the uselessness of their role. The law can stay in force indefinitely on the condition that they gain in necessary flexibility through serious legal practice and doctrine paves the way for new scientific perspectives."[17] Therefore, "the lawmaker must maintain the balance within the law, ensuring through legal policy the natural stability of social relations regulated by the law. For this reason, the relation between the dynamics and the lack of dynamics of the law poses not only a question of legal policy, it pertains to the raison d'être of the law, its social purposes."[18]

2.4. *The elaboration of normative solutions must be scientifically founded*

In order to maintain the balance between the dynamics and the lack of dynamics of the law, it is necessary that the lawmaker start developing by acquiring knowledge of social realities with scientific precision. As such, a good legislative policy must have a starting point for its sound research of social realities, then identify the effects of the future law, estimate its acceptability by the public and the concrete possibilities of implementing this law. The scientific foundation of law-making constitutes a basic requirement in order to sanction the systematic preoccupation made up of scientifically motivated solutions for the new law. Since the lawmaker's decisions are backed up by the results of this research, they are then in accordance with the objective requirements of social evolution and the subjective requirements that form in the collective conscience. In this way, doctrine has shown that "legislative work must be inspired out of a deep and precise knowledge of social and national needs and out of a clear perspicacity capable of seizing the real facts, and only after all these steps have been performed, will normative solutions be formulated through the lawmaker's creativity."[19]Although scientific possibilities of discovering the social realities are extremely varied today, we are not seeing a regulated reality but a constrained one through the law. In many cases, the law is no longer capable of reflecting the social reality and therefore creates a parallel reality. Obviously, in consequence the law is unable to protect and guarantee the real rights of individuals which should form the true purpose of any law.

3. The importance of public policies in law-making

Taking into consideration the need for scientifically precise knowledge of the social reality, which involves preliminary economic, sociological and psycho-social investigations, the legal policy

[15] J.J. Rousseau, *Contractul social* (Prahova: Ed. Antet XX Press, 2005), 42.
[16] Ch. Montesquieu, *Despre spiritul legilor* (Prahova: Ed. Antet XX Press, 2011), 9.
[17] P. C. Vlachide, *Repetiţia principiilor de drept civil*, vol. 1 (Bucureşti: Ed. Europa Nova, 1994), 125.
[18] N. Popa, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 174.
[19] N. Popa, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 173.

cannot be the result of only one legislative body. For this reason, "administrations of all types supply the facts that the lawmaker requires to reach a decision. To transmit the information means to select it and therefore to decide. The administration therefore acquires an essential role in orientating legal policy."[20]

Nowadays, the socio-political contextualisation is observed more and more closely, meaning the sets of acts and measures which the public authorities decide to implement in different fields of activity. Whether in establishing objectives or the methods employed to reach them, the core of this idea is the attention given to "public policy".[21]

Pursuant to article 1 paragraph 3 from Law 24/2000 in its current form "the activity of law-making represents the main means of implementing public policies, to ensure the necessary tools to apply the solutions for economic and social development, as well as to exercise public authority", and article 6 paragraph 4 stipulates that "Normative acts that impact society, economy and environment, the consolidated general budget voted by the parliament or the government. The government defines the types and structure of public policy documents". Considering these aspects, the use of public policies in law-making is more than favourable.

Lato sensu, we understand by "public policies" all the actions aimed at solving problems of public interest[22]. The concept of "public policies" appeared and quickly instilled itself as a result of society becoming more conscious of its fast development, increasing complexity and their development improves the decision-making process. The meaning of "public policies" must not be confused with "politics", since public policies refer to concrete programmes and not to political ideology. Indeed, the strategy is established through political ideology, however the technical methods by which the strategy is implemented strictly pertain to public policies.

Contemporary society demands that politicians and crisis-managers find more effective ways of establishing objectives, in order to improve the quality of decisions and selections, as well as to optimize the use of human resources and materials meant for these actions. As a scientific discipline, public policies use theory and specific concepts of social sciences, economy, sociology and psychology etc., in general, offering politicians and jurists large volumes of specialised and structured scientific knowledge referring to a large variety of matters, from education and health, to urbanism and international relations as well as offering information concerning the concrete impact of the different types of public intervention.

Conclusions

By using public policies in developing the law, the lawmaker, the government's activity and the activities of public administration in applying the law are interconnected to ensure a better and quicker way to obtain knowledge of changes in society, at shorter or longer intervals of time, meaning the sources of evolution in society.

Scientifically obtained knowledge is nowadays closer to being "a science of action", since there is the possibility of offering a wide array of options to public authorities, politicians, jurists and administrators (policy sciences). Social sciences do not limit themselves to stipulating through rational sciences, what must happen, but what concerns the prior formulation of the best options for setting the objectives and what must be done in order to reach them[23].

In law-making, legal policy is an important part in establishing objectives, meaning the totality of guiding ideas influencing the direction of the law in its development and application which

---

[20] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 224.

[21] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 212.

[22] Consult also: E. Young and L. Quinn, *Cum se scrie un Studiu de Politici publice efectiv. Ghid pentru consilierii de politici publice din Europa Centrală şi de Est* (Budapesta: Institutul pentru o Societate Deschisă, 2002), 13-14.

[23] Consult: V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 213.

materialize through the activity of all public institutions involved in developing and applying the law. Legal policy is understood in a way, which depends on the evolution of the legal system.

In its turn, legislative policy as a part of legal policy coincides with the representation that the lawmaker creates for himself with respect to the social goals of the regulation as well as with respect to specific forms of expression, given its higher degree of materialization. The concrete instrument of legal policy whereby priorities are set in law-making is the legislative programme. Moreover, through legislative technique the objectives set by legislative policy acquire a certain form.

In conclusion, legal policy and legislative programmes are components of the government's policy and they belong to state authorities who have the right to legislative initiative. As such, law-making involves a set of complex activities whose key factors include those of a political, economic, social, moral, historical, national and international nature.

However, in order to reform the law it is not enough to simply improve the activity of the lawmaker by using public policies and respecting the aforementioned principles of legal policy, what is necessary is a strong political will and constant efforts from all three national powers - legislative, executive and judicial.

References

- Arnaud, A. J., „La contribution du sociologue juriste", in *Le recours aux objectifs de la loi dans son application*. Bruxelles, 1990.
- Craiovan, I., „*Tratat de teoria generală a dreptului*", Bucureşti: Ed. Universul Juridic, 2009. Craiovan, I., *Metodologie juridică*. Bucureşti: Ed. Universul Juridic, 2005.
- Dănişor, D. C., Dogaru, I. and Dănişor, Gh., "*Teoria generală a dreptului*", Bucureşti: Ed. C.H. Beck, 2008.
- Ewald, Fr., „Rapport philosophique: une politique du droit", in *Le Code civil 1804-2004. Livre du bicentenaire*. Paris: Dalloz.
- Grigore, M., "*Tehnica normative*" Bucureşti: Ed. C.H. Beck, 2009.
- Heyvaert, H. and Martou, F., „*La direction génerale*", in *L'Entreprise Moderne*. Paris: Hachette, 1972.
- Montesquieu, Ch, „*Despre spiritul legilor*", Prahova: Ed. Antet XX Press, 2011.
- Pătulea, V., „*Tratat de management juridic şi jurisdicţional*", Bucureşti: Ed. I.R.D.O., 2010.
- Popa, N., "*Teoria generală a dreptului",* Bucureşti: Ed. C.H. Beck, 2008.
- Renauld, J., *„Cours d'encyclopedie du droit*", Louvain, 1966.
- Rousseau, J.J., „*Contractul social*" Prahova: Ed. Antet XX Press, 2005.
- Vlachide, P. C., "*Repetiţia principiilor de drept civil"*, vol. 1. Bucureşti: Ed. Europa Nova, 1994.
- Young, E. and Quinn, L., "*Cum se scrie un Studiu de Politici publice efectiv. Ghid pentru consilierii de politici publice din Europa Centrală şi de Est*", Budapesta: Institutul pentru o Societate Deschisă, 2002.

GENERAL REMARKS REGARDING THE LAWYER PROFESSION WITHIN THE EUROPEAN UNION

AUGUSTIN FUEREA*

Abstract

Legal professions are generally regulated at national level. Although there may be natural similarities between them, these national regulations differ quite substantially from one country to another. The effective exercise by lawyers of the freedom to provide services is governed by the provisions of Directive 77/249/EEC. Lawyers established in the EU may offer their services on a temporary basis in any EU country. However, they must retain their home-country professional title, expressed in the language (or one of the languages) of that country.

Keywords: *European Union; EU law; European lawyer; lawyer profession; freedom of establishment for lawyers.*

1. Introductory aspects

One consequence with direct effects on short, medium and long term, of the recent accession of Romania to the EU is the freedom of movement. More specifically, it refers to the correct knowledge, understanding and application of principles and rules governing goods, persons, services, capital and payments in free movement from January 1st, 2007, inclusively on the territory of our country, but also the acquiring, or engaging in a number of mechanisms, not at all simple, which can give rise to exceptions, limitations, restrictions from the freedoms in question. Therefore, in terms of freedoms, the following aspects: norms, rules, knowledge, understanding and, above all, compliance, enforcement are extremely important. Why? Because in Europe too, freedom is seen as constituting what philosophers call "understood necessity", and not as chaos, chance, disorder. Freedom is for all, not just for some of us, under conditions of equal opportunities, but also of involvement in capitalizing, by assimilating a large amount of information in a time, why not recognize it, relatively short and, not least under conditions of competence, professionalism and competition, conditions specific to a market economy that we are already in.

The most important step of the moment/current (phase), for the field theorists and practitioners (lawyers, economists, philologists, and others) is that of scouring carefully, but above all understanding, assimilating and enforcing the legal instrument that connects directly Romania to EU, meaning the Treaty of Accession[1].

From the perspective of our rights and obligations deriving from the Treaty of Accession to the European Union, as European citizens, "one of the consequences that generates direct effects, including legal effects, on short, medium and long term [...], is the highlighting of the four freedoms of movement"[2]. Among these, a special place, as shown both in theory and in the field practice, is occupied by the free movement of people, with positive or negative influence on all the other freedoms of movement. The rule is, as we shall further see, that according to which, this freedom is analyzed together with the free movement of services. We shall operate with an exception to this

* Professor, PhD, "Nicolae Titulescu" University of Bucharest, Faculty of Law (augustinfuerea@yahoo.com).

[1] The EU Treaty of Accession is the legal act of accession of a State to the European Union.

[2] The freedom of movement of: goods, persons, services, capital and payments (the latter two are considered together). In this sense, the work of the French doctrinaires Gavalda, Christian, Parleani, Gilbert, "*Droit des affaires de l'Union Européenne*" may be consulted, Litec Publishing House, Paris, 1999.

rule, on the one hand, for reasons related to the great importance of each of the two freedoms[3], and on the other hand, for causes referring to the complexity of such an approach.

In fact, such an analysis, extremely generous, cannot be achieved, because of the multitude of angles and variations of approach, before reiterating the legal force of the Treaty of Accession (as primary source of European Community law) on national law (of Romania), the power conferred on it, even by the fundamental law of our country, namely the revised Constitution of 2003, Constitution which, in Title VI ("Euro-Atlantic Integration"), article 148 ("Integration in the European Union"), paragraph (2) refers to the fact that "[...] as result of the accession, the provisions of EU constitutive treaties [...] and other binding Community regulations take precedence over the contrary provisions of national laws, by complying with the provisions of the Act of Accession"[4] (our underlining). In the third paragraph, the same article 148 states that "The provisions of paragraphs (1) and (2) shall apply accordingly, also for the accession to acts of revising the constituent treaties of the EU" (i.e. to modifying treaties, as primary sources, as they are called in the specialty doctrine).

For these reasons, the analysis of the free movement of persons is reported both to the primary instruments (sources) of European Community law (founding and modifying treaties, including the Treaty of Accession to the EU), highlighting also the issue of transitional periods with exceptions and safeguard clauses and the instruments (sources), derivatives of the same European Community law (Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004[5]).

Trying to define the concepts, we see that, from the wording of the Treaties, the free movement of persons "presupposes the absence of any discrimination based on nationality between workers of the Member States concerning the employment, remuneration and other conditions of work and employment. In this sense, rights are conferred on people and these rights can acquire value in justice, in any Member State. Limitations on grounds of public order, public security or public health are, obviously, regulated"[6].

"The free movement of persons […] is a reality in the European Union"[7].

The free movement of persons is reflected, among other things, also in the free movement aiming at workers, in general, and lawyers in particular. Bernard Teyssié believes about this freedom that "it is a fundamental right that national courts must protect"[8].

2. The exercise of the freedom to provide services by lawyers

A. Directive 77/249/EEC relating to the facilitation of exercising the freedom to provide services by lawyers

The effective exercise by lawyers of the freedom to provide services is governed by the provisions of Directive 77/249/EEC[9].

---

[3] These are freedoms that condition (favouring or disfavouring) the recovery of the others, as already noticed. These were the first freedoms that generated a rich case law, including for states that recently joined the EU, Romania making no exception.

[4] Our underlining.

[5] Directive 2004/38/EC of the European Parliament and of the Council on the right to move and reside freely within the territory of Member States for Union citizens and their members, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[6] Andrei Popescu, Nicolae Voiculescu, *"Drept social european"*, Publishing House of Romania of Tomorrow Foundation, Bucharest, 2003, p. 211.

[7] Andrei Popescu, Nicolae Voiculescu, *op. cit*., p. 211.

[8] Bernard Teyssié, *"Droit Europeen du travail"*, Litec, 2001, p. 74 (taken also by Ovidiu Ţinca in his work *"Drept comunitar material"*, Lumina Lex Publishing House, Bucharest, 2003, p. 92).

[9] Council Directive of 22 March 1977 on the facilitation of exercising the freedom to provide services by lawyers.

The Directive applies, "within limits and conditions contained therein, to the activities of lawyers exercised when providing services"[10]. Notwithstanding the provisions of this Directive, Member States may hinder certain categories of lawyers from issuing authentic acts, empowering them to administer assets of deceased persons or whose object is the creation or transfer of real estate rights. The activities of representation and defence of a client in legal proceedings or before public authorities shall be exercised in accordance with provisions of the Directive, in each receiver Member State under the conditions provided for lawyers established in that State, excluding any condition of residence or registration in a professional organization of that state.

It should be noted the fact that the Directive establishes to art. 4 paragraph (2), the concept of double deontology. Thus, the lawyer must comply with the rules of professional practice in the host country, remaining, however, bound by the rules of the Bar of his/her country.

Under art. 5, for exercising activities of representation and defence of a client in legal proceedings, each Member State may require lawyers to be introduced to the President of jurisdiction or to act in agreement with a lawyer who carries his activity under the Court of Justice applied to. Also, the competent authority of the Member State may require the service provider to prove his statute of lawyer.

The Directive of 1977 envisages both the lawyers employed, as well as the non-salaried lawyers. This aspect emerges from the content of art. 6, which provides that "each Member State may prohibit to lawyers employed, bound by an employment contract with a public or private company, to pursue activities of legal representation and defence of this company only if lawyers established in this state are not allowed to exercise them".

While exercising the profession within the host country, the lawyer must follow the rules of this state, regardless of their source of origin: incompatibility between the pursuit of the profession of lawyer and other activities in that State, professional secrecy, relations with peers, prohibiting the assistance by the same lawyer of parties with opposite interests, and advertising.

B. Directive 98/5/EC[11]

The Directive is intended, according to art. 1, "to facilitate the exercise of the legal profession with independent or remunerative title in a Member State, other than that where the professional qualification was obtained". Paragraph 2 of the same article provides a range of qualifications, such as: "lawyer" means any person who is a national of a Member State entitled to exercise professional activities under one of the titles mentioned[12]; "home Member State" means the Member State where the lawyer received the qualification; "the host State" is the Member State in which the lawyer is practicing in accordance with the provisions of this Directive etc.

Article 2 provides that any lawyer has the right to exercise under permanent title, in any Member State, under his original professional title, the following activities: he can offer legal consultancy in legal matters of the origin Member State, in Community law, international law and in the host Member State law.

A lawyer who wishes to exercise his activity in a Member State other than that, in which he obtained his professional qualification, is required to register with the competent authority of that Member State[13].

---

[10] Article 1 of the Directive.

[11] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, aims at facilitating the permanent practice of the profession of lawyer in a Member State, other than that in which the qualification was obtained.

[12] In Belgium -Avocat/Advocaat/Rechtsanwalt, in Denmark – Advokat; in Germany – Rechtsanwalt; in Spain - Abogada / Avocat / Avocado / Abokatu; in France – Avocat; in Ireland - Barrister / Solicitor; in Italy – Avvocato; in Luxembourg - Avocat, in the Netherlands – Avocaat; in Austria – Rechtsanwalt; in Portugal – Advogado; in Finland - Asianajaja / Advokat; in Sweden – Advokat; in the United Kingdom - Advocate / Barrister / Solicitor;

[13] Article 3 paragraph 1.

The lawyer performing activities on the territory of a Member State, other than that in which he acquired his qualification, must, irrespectively of professional and deontological rules that he is subject to in his home State, to obey the professional rules of the host Member State for all the activities that he pursues on its territory.

The host State may require the lawyer in question to bring proof for an insurance of professional liability or to join a professional guarantee fund on its territory.

The Directive of 1998, as the previous, provides that if the lawyer, practicing in a state other than that of origin, does not comply with the rules required by the state, may be subject to disciplinary proceedings by the host state.

3. Council of Bars and Law Societies of Europe (CCBE)

Currently, the Council of Bars and Law Societies of Europe carries out its activity within the European Union. The main objectives of the Council are: promoting - through dialogue and discussions with the European Union - a progressive liberalization of lawyers' rights to establish and perform their activity similarly to that of Member States, other than their countries of origin and, as much as possible, a progressive harmonization of rules and conditions for the exercise of the lawyer profession in Europe.Over time, the CCBE was the one who has contributed to the total integration of lawyers appointed as full-fledged lawyers within the brother bar, and the recognition of the right to practice under the title obtained in their native country, with permanent statute in Member States, other than that in which they obtained their professional qualification.

To benefit from these advantages, the lawyer, among other provisions, must be registered by the competent authorities of that country and obey the rules of professional conduct of the host Member State, regarding all activities that he will pursue on its territory. Moreover, the lawyer must obey the rules of procedure, penalties and regulations to that effect, in the state that hosts him/ her. The Council plays an important role in the professional training of lawyers and is designed to provide a solid and intense professional training of European lawyers, in order to provide for clients, qualified legal assistance.

Lawyers in EU Member States have, currently, the right to provide legal services in all EU countries, almost freely.

Lawyers engaged in an activity outside the country whose citizens they are:

- cannot practice reserved activities, such as the drawing of documents for the administration of the deceased persons' businesses;
- must work with a local lawyer, only if the case does not require representation by a national lawyer;
- the asked lawyer uses his own title and complies with the ethics rules of his own Bar, while he also complies with those of the host state;
- if his visits become frequent, his statute under the Directive can be questioned and if the services provided continue from a job in the host country, then he will be considered as established, rather that providing occasional services;
- are subject to a "double deontology".

Lawyers from Bars and Lawyers' Associations who are members of the Council subscribe to some ordinary ethical rules and most of these Bars and Lawyers' Associations have implemented a code for the practice in foreign countries.

When Bars promulgate new internal rules, they are required to take into account the Council code and to make sure that any new provision does not preclude it.

Based on the provisions of Community Directives 77/249/EEC and 98/5CE, the Council has developed its own code. Thus, the following main ideas can be drawn from the Code[14]:

[14] For more details, see Cristiana I. Stoica, Janice H. Webster, *"The Romanian lawyer in the European legal system"*, All Publishing House, Bucharest, 1997.

a) Integrity and probity of the lawyer

All jurisdictions have rules that express the absolute necessity of personal integrity and probity. Thus, lawyers must submit, in most states, an oath before entering the Bar, which reflects this requirement.

The Code sets this rule under the name of "Trust and Integrity": *"Relationships of trust can only exist if the honour, honesty and personal integrity of a lawyer are undeniable. These traditional virtues are professional obligations of a lawyer"*.

b) Conflicts of interests

A lawyer should not work for both sides in a dispute at law or a transaction because their opposite interests might generate a conflict. If there is a conflict, the lawyer should withdraw and inform all his clients about the situation generated.

c) Service Quality and Competence

One of the essential obligations of lawyers is that no lawyer should engage in a work that he is not competent for, has not enough knowledge or experience for or for which he has not enough time to achieve.

The service that the lawyer provides, must be efficient and conscientiously achieved, paying special respect to the interests of the client who is entitled to expect a good service, performed in a reasonable time, at a fair retainer and being always rightly informed on all the details. BCEC code expresses this fact in art. 3.2.1 and 3.1.3.: *"A lawyer must advise and represent his client, promptly, thoroughly and in time. He will be directly responsible for the failure to follow instructions received and will always inform his client, in order to note the progress in the matter that has been entrusted to him. A lawyer shall not handle a matter of which he knows or should know that he is not competent to solve, without collaborating with a lawyer who is competent to do better.*

A lawyer should not accept instructions from a client if he cannot acquit for them on time, taking also into account the pressure exerted by performing another work".

d) Financial Issues

Level of retainers. In a number of jurisdictions, the retainers are established by law or regulations. Thus, for example Austria and Belgium have, for certain retainers, a fixed retainer system, and Germany and Italy have the same systems. Spain, however, has no mandatory system, but a system with character of recommendation;

In other countries, the so-called "rule of the market place" is functioning.

Free assistance. Regarding the free assistance, there are considerable variations across Europe on its availability, which represents the providing of legal services, free of charge or partially exempted, for those who are unable to pay retainer.

In jurisdictions where partnerships are allowed, retainers, profits and losses are shared between the partners, but sharing retainers with other persons than lawyers is not allowed. The Council Code provides it in art. 3.6.1 and 3.6.2, prohibiting a lawyer to share retainer with other persons than lawyers, but allowing the lawyer to pay a retainer, commission or other compensation to the heirs of a deceased or retired lawyer if their activity was taken over.

In relationships with their clients, lawyers must be liable for any funds deposited for them to keep, concerning any payment made for or on behalf of the client, and for any amount received. In some states, lawyers contribute with a sum of money, of which clients, who have suffered from the professional misconduct of a lawyer, can be compensated; this practice is known as the "guarantee fund" or "compensation fund".

e) Relations with the Court

The Code of conduct provides lawyers' relations with the court (including in art. 4:. Thus, lawyers should always have respect for the judge, act kindly and defend clients in a manner believed to be their good interest within limits prescribed by law and without giving false or tendentious information to the Court.

A lawyer pleading a case before the Court or Tribunal of a Member State must comply with the rules of conduct applied before that Court or that Tribunal.

f) Relationships and communication between lawyers

The Code deals with relationships between lawyers in art. 5, which refers to "the corporate spirit of the profession"; at section 5.1, it is provided: *"The corporate spirit of the profession requires a relationship of trust and cooperation between lawyers for the benefit of their clients, and avoiding unnecessary litigation. Placing professional interests against those of justice or of those concerned can never be justified".*

The rest of the article refers to correspondence, reference retainers, communication with opposing parties, lawyers' replacement, responsibility for other lawyers' retainers, training young lawyers, solving disputes between lawyers from different Member States.

g) Confidentiality/professional secrecy and privilege of the profession of lawyer

A lawyer's obligation is to keep the professional secrecy. This obligation is forever and is not interrupted with the disappearance of his client or after the mandate has ended;

The Code provides[15]:*The essence of a lawyer's function is that he can learn things from a client that he could not tell to other people and be the receiver of other information on a confidential basis. Without the certainty of confidentiality, there can be no trust. Confidentiality is, therefore, a primary right and a duty of the lawyer. A lawyer must, therefore, respect the confidentiality of all information entrusted to him by the client or received about the client or other persons, while providing services for him. The duty of confidentiality is not limited in time. A lawyer shall require his associates, his staff and any other employee in connection with his professional problems, to comply with the same obligation of confidentiality".*

h) Communication

The Code stipulates in art. 5.3: "*If a lawyer who sends a document to another lawyer from another Member State, wishes that this document remains confidential or without prejudice, then he should clearly express his intention at the same time when communicating the document."If the addressee of the communication is unable to provide its status of confidentiality or lack of prejudice, he should return the document to the sender without disclosing the content to other persons".*

i) Advertising

All Bars and Lawyers' Associations from Western Europe are favouring corporate advertising and promoting legal services. In the field of personal advertising, there are different views. Thus, in Denmark, the Netherlands and the United Kingdom, a liberal regime applies, while in Spain, Greece and Germany advertising is still highly censored, and France and Austria allow a degree of advertising which remains, however, quite limited.

The Code has tried to find a pragmatic solution, and the basic rule in this regard is "when you are in Rome, act like the Romans": If advertising is forbidden in the host state, then do not advertise.

4. Conclusions

This approach aims at clarifying some aspects, including of conceptual nature, but also at drawing attention to the fact that such freedom exists, that it must be respected, both in terms of rights and obligations, equally, regarding the regulation of limitations, restrictions or, even, exemptions which acquire the form and content of exceptions and safeguard clauses.

[15] 2.3.1.-2.3.4.

References

- GAVALDA, Christian, PARLEANI, Gilbert, "*Droit des affaires de l'Union Européenne*" may be consulted, Litec Publishing House, Paris, 1999.
- POPESCU, Andrei; VOICULESCU, Nicolae, *"Drept social european"*, Publishing House of Romania of Tomorrow Foundation, Bucharest, 2003.
- STOICA, Cristiana I.; WEBSTER, Janice H., *"The Romanian lawyer in the European legal system"*, All Publishing House, Bucharest, 1997.
- TEYSSIE, Bernard, *"Droit Europeen du travail"*, Litec, 2001.
- ŢINCA, Ovidiu *"Drept comunitar material"*, Lumina Lex Publishing House, Bucharest, 2003.
- Council Directive of 22 March 1977 on the facilitation of exercising the freedom to provide services by lawyers.
- Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, aims at facilitating the permanent practice of the profession of lawyer in a Member State, other than that in which the qualification was obtained.
- Directive 2004/38/EC of the European Parliament and of the Council on the right to move and reside freely within the territory of Member States for Union citizens and their members, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

THOUGHTS ON THE REGIONALIZATION PROCESS IN COMPARATIVE LAW

CLAUDIA GILIA[*]
ADRIAN ŢUŢUIANU[**]

Abstract
Regionalization is a complex and smooth process in terms of territorial organization of the states which chose this form of organization, but also from the perspective of how the regional systems understood to exercise their competences. The regionalization process did not only yield profit for the inhabitants of those administrative entities, but it also caused problems to national governors (e.g. demands for the federalization of the state in question, proposals to gain independence from the state they are part of, issues related to state security – terrorists attacks etc.).
Our paper shall conduct an assessment over two states which chose this form of regionalization: The United Kingdom of Great Britain and North Ireland and Spain. Given the context of the upcoming constitutional and legislative changes envisaged by the Romanian government, we consider that our research can be regarded as a useful tool, designed to develop certain constitutional directives, which are intended to acquire the best solutions from European experiences.

Keywords*: regionalization, state, devolution, administrative reform, tasks*

Introduction

The aim of our study is to analyze the administrative-territorial organization systems within two regional states, that is UK and Spain, as well as the problems they have to face given the independence actions coming from some local entities.

The following paper is relevant because it displays an interdisciplinary approach on the regionalization issue. It also highlights the recent course of the transition to independence process in those two countries. In this paper, we used both the analytical and comparative approach in our attempt to provide quality and relevant information for the researched area.

In our study, we stressed the fact that the initiatives took by Scotland and Catalonia in their search of independence represent constitutional challenges of high importance not only for the central governments, but also for the European Union, who would face a new political and judicial situation in case the citizens in these two regions will share a positive vote during the referendums in 2014.

The study also manifests interest from the perspective of the upcoming administrative reform in Romania, because the political decision-makers must take into consideration the administrative-organizational role models in the states that chose regionalization, and also to pay attention to the risks of a strong regionalization, that may lead either to state federalization or recession.

1. How regionalism is reflected in the organization of the United Kingdom and Spain

Regionalism – is associated with a geographical, political, administrative, linguistic and spiritual situation, with roots in the history of development of a unitary state. Due to this situation, the unitary state chooses to merge the sovereign attributes of a centralized administration with the

[*] Associate Professor, Ph.D., Faculty of Law and Political Sciences, "Valahia" University of Targoviste (claudiagilia@yahoo.fr).
[**] Lecturer, Ph.D., Faculty of Law and Political Sciences, "Valahia" University of Targoviste (adrian.tutuianu65@yahoo.com).

assignment of a large autonomy over some regional collectivities[1]. A type of regionalism is political regionalism. Regionalism becomes political when the competences of a region transcend those of an average administrative district with local autonomy. A territorial-administrative area provided with political regionalism holds the prerogative of self-government within a preset constitutional frame.

Concerning the local administration in the United Kingdom, its modern structure dates back to the 19th century, and to a large extent is the result of the new conditions triggered by the industrial and agricultural revolutions. The United Kingdom is a unitary regional state that acknowledges the existence of four regional nations across its territory: England, Scotland, Wales and Northern Ireland. All these nations have their own decentralized institutions and dispose of important political and administrative tools. Despite its name, the United Kingdom of Great Britain and Northern Ireland have always cherished diversity.

Terms such as: "United Kingdom", "Great Britain" or "England" are often used as synonyms. But the term "United Kingdom" marks the whole territory of the Kingdom, while "Great Britain" stands for the island which integrates England, Wales and Scotland. England and Wales were politically united in 1536. In 1707, the Act of Union led to the creation of Great Britain. In 1801, there was the Union of Great Britain and Ireland under the official name of the United Kingdom of Great Britain and Ireland. In 1922, the Republic of Ireland becomes an independent state, thus leading to the United Kingdom of Great Britain and Northern Ireland[2].

Up until May 1997, Great Britain didn't have a decentralized regional level. There was a state secretary in charge with the issues of Welsh, Scottish and Irish men. But soon as the labourist Tony Blair became the head of the Government, decentralization blossomed into a reeling process, at the same time with other major political events: the reform of the House of Lords, the suspension and restoration of the Northern Ireland Assembly, the agreement of the Treaty of Nice[3].

Decentralization of authority means, on one hand, devolution of the state central authority at regional level by means of developing local parliaments and governments, endowed with real legislative and executive competences, thus the assignment of responsibilities won't be an easy task. On the other hand, decentralization of authority means administrative decentralization, in the truest sense of the word, by the reestablishment of the local councils and the election of mayors in each town and city, London included[4].

Through *British devolution*, the state actually redefined its policy, administration, economy, while the authonomy of Welsh, Scottish and Irish people led to an unusual regionalization, but highly effective[5].

One specific thing for the United Kingdom is the regulations concerning the local territorial collectivities which differ from one region to another. Other differences occur when talking about the territorial-administrative organization of these regions[6].

In UK, the government system is *unitary*, meaning that sovereignty consists only of one central government. Being elected by the Parliament, the Central Government has a constitutional authority at the highest level, so the local government body rather acts like an agent of the central government. Local authorities are supposed to get involve only in activities up to their competences and they have to carry out only those tasks they are being charged with. Their authority is assigned through statutes or the General Act which is applied to all local authorities. Their competences can also be established by in-house acts, of local interest, that can be applied only to individuals or

---

[1] Cristian Ionescu, *Tratat de drept constituţional contemporan*, Second edition, (Bucharest : C.H. Beck Publishing House, 2008), 138.

[2] Frederique Roux, *La devolution en Grande Bretagne*, (Paris: Dalloz, 2009), 1.

[3] Check the website: http://www. open.gov.uk., accessed March 11, 2013.

[4] Ioan Alexandru, Claudia Gilia, Ivan Vasile Ivanoff, *Sisteme politico-administrative europene*, Second edition, (Bucharest: Hamangiu Publishing House, 2008), 453.

[5] For further details, please check: http:// www. open. gov. uk., accessed March 11, 2013.

[6] Liviu Coman Kund, *Sisteme administrative europene*, (Sibiu: „Tribuna" Publishing House, 2003), 112.

groups of individual authorities. Local authorities mainly consist of councils elected over a three years term of office, of which one third is annually reelected. Local councils must get together at least four times a year, but the number of meetings is usually higher. Local authorities are free to close their own agreements concerning the management of local problems. The cost control is exercised by the whole council, but there is also a professional control, exercised by the Finance and Treasury Board. At the fiscal year-end, the account control is carried out by the District Auditor, appointed by the Central Government. British specialists in political sciences notice there is a low interest in local elections and notes that the structure of the local system of administration is outdated because there are a lot of small authorities which develop light connections with modern economic and social units[7]. The evolution of the British local public administration is a historical process because well-organized local collectivities came in sight before the emergence of the central system. This explains why local government in England blossomed, especially after World War II, although there have been signs of reform inside this sector ever since 1834.

In the United Kingdom of Great Britain and Northern Ireland, the reforms that had been done over the century led to a slight connection between the citizens and the local structures. These local structures are perceived rather as a cluster of public services than certain elements of local democracy[8]. Despite having lots of debates over the upgrading of local administration, there haven't been drafted yet new organizational forms at local level designed to replace the already existing ones[9].

Devolution has been defined as *"an appointment of certain administrative responsibilities from central authority towards local authority, for the benefit of the elected representatives by the citizens of this province"*. Prime Minister Tony Blair considered the aim of the devolution process was to reinforce the state, not to undermine it. Devolution was a key element for the upgrading program of the constitutional system during the election campaign of the Labour Party led by Tony Blair. After winning the elections in September 1997, Tony Blair applied the program introduced during the campaign, holding referendums in Scotland and Wales. The laws regarding devolution have been voted by the Parliament in 1998 and the first elections for the Scottish and Welsh Parliament were held in 1999 for the first time. Devolution stood as a radical constitutional reform which led to a brand new form of government in the United Kingdom[10]. We are talking about the national entities who acknowledged the right to take part in the process of exercising authority on a free basis. Devolution thus created new constitutional relationships between different parts of the United Kingdom, looking pretty much alike those between member states of a federation. Devolution triggered a new balance between central and local authority. The first feature of devolution was its distinctiveness adapted to each nation. According to Tony Blair, Scotland was a proud historical *nation* of the United Kingdom, while Wales was appointed as a *region*.

Devolutive process has its own history. Wales, Scotland and Ireland have been gradually reunited with England, so that these three countries gave up their local parliaments by means of conventions which yet granted a remarkable autonomy of civil societies. This explains to a large extent the characteristics of the present judicial and educational system in Scotland, diversity of religion in Ireland, or the survival of dialects in almost all regions. Up until 70's, Great Britain acted as a strongly centralized state, that hardly appointed an Office for Scotland and one for Wales. But due to riots in Northern Ireland, its autonomy has been completely removed and the country was governed from London. In the early 80's, some reforms were made, but the conservative

[7] Ioan Alexandru, Claudia Gilia, Ivan Vasile Ivanoff, *Sisteme*, 453.
[8] Dana Apostol Tofan, *Instituţii administrative europene,* (Bucharest: C.H. Beck Publishing House, 2006), 135.
[9] Ioan Alexandru, Claudia Gilia, Ivan Vasile Ivanoff, *Sisteme,* 454.
[10] Except the Irish experience between 1921 and 1972. The Southern part of Ireland, following the succession in 1922, became the independent state of Ireland and adopted in 1937 the name of Republic of Ireland. The United Kingdom officially acknowledged the status as an independent republic through the Ireland Act in 1949.

governments at that time promised to appoint only a relative autonomy to historical regions of Great Britain. It was only back in late 90's when the first steps towards a genuine decentralization are taken, but in a different way in each province.

The legislative framework of devolution was regulated by the following documents:

1. Scotland Act 1998;
2. Government of Wales Act 1998;
3. Northern Ireland Act 1998.

The devolution system is different for each part of the United Kingdom of Great Britain and Northern Ireland. Devolutive process in Northern Ireland is linked with the peace process in this country, and the problems concerning this area triggered the suspension of the Northern Ireland Assembly on four occasions between 1999 and 2002.

In the framework legislation concerning devolution, the British Government clearly stated that the Scottish Parliament, the National Assembly of Wales and the Assembly of Northern Ireland are *subordinate to Westminster Parliament*. The parliaments of these parts of the Kingdom can only enact in the areas they were appointed to by the Parliament of Great Britain. This is the result of a basic principle that governs Great Britain for centuries: *the sovereignty of the Westminster Parliament*.

The Westminster Parliament extends exclusive competences in areas such as:

- constitutional issues;
- foreign policy, defense, the relationship of the United Kingdom with the European Union;
- macro-economic policy and taxes;
- overseas trading;
- labor legislation;
- social insurances;
- broadcasting etc.

When the Parliament issues norms for devolutive authorities, they have to take counsel with them beforehand.

Devolution is no longer just an institutional or organizational change. The new system appoints not only a mere decentralization process within a unitary state. Territorial entities have their own assemblies that hold deliberative authority, an executive body and they are enabled to adopt norms designed to govern people's businesses around those territories. The United Kingdom can be regarded as a *Union of Nations*, each one of them having its own identity and institutions[11].

It has been stated in the doctrine that "the Westminster Parliament became a federal parliament" [12] in terms of its organization and structure. Along with the devolutive process, Westminster experienced the extinction of certain areas from its legislative competence. In Scotland, all the areas that made the subject of the Scottish minister's competence are subject of the Scottish Parliament's competence since 1998. In Wales, the primary legislative power hasn't been transferred yet, but the delegated powers exercised before by the state secretary have been transferred to the Welsh National Assembly. Thus the majority of primary legislation that used to govern Scotland and the secondary legislation that used to govern Wales were no longer the responsibility of the Westminster Parliament.

Scotland and Welsh have their own national bodies and legislative and executive ways for self-governance. Although these nations understand to distinguish themselves from the "English partner", they are still members of the British Union and continue to be an integral part of the central decision-making process. Consequently these new relationships that emerged following the process of devolution have to be rearranged inside the multinational Parliament / the Westminster Parliament thus becoming the guardian of the Union.

---

[11] Frederique Roux, *La devolution*, 16.
[12] Frederique Roux, *La devolution,* 124.

As a guardian of the Constitution, the Westminster is the only one or at least the only legitimate one to represent the will of the Union of people or the Scottish, Welsh, Irish and English nation. In order to preserve this role, it has to turn into something else to become the Parliament of a Union that acknowledges territorial diversity of the United Kingdom and to take account of different territorial levels in the process of its reorganization.

Devolution involves redefining the powers of the British Parliament. By adopting the devolution laws in 1998 and the Welsh Act in 2006, the British Parliament has to revise its way of service in order to deal with the consequences that come out of this distribution of powers. From now on, its competences are limited and so is its influence on the Scottish legislation. From this point on, it has to enact in areas that belong to the British or English and/or Welsh resort.

The principle of absolute sovereignty, as it is provided by the laws concerning devolution, empowers the British Parliament to enact laws for Scotland and Wales as it think it proper. Thus the Parliament of Scotland and the National Assembly of Wales, from 2007 on, are able to enact laws in each area that is not intended for the British Parliament. The large diversity and quantity of areas intended for the British Parliament mirrors the power of the Westminster. Divided into two parts, the areas are classified on a tapering basis with respect to their importance. Thus:

Title I – *General reservations* – includes an image of the political responsibilities that are specific to a state. For instance: defense, foreign affairs, British Crown, the succession to the Throne and regency, the Parliament of the United Kingdom, the High Court of Justiciary etc.

Title II – *Specific reservations* – cover particular areas of transferred competences, listed under 11 "heads": economical, fiscal and budgetary policy, fiscal taxes, control over public expenditures in the United Kingdom, issues related to Bank of England, the energy field, transport, TV and broadcasting rules, the right to work, commercial right, trade, industry, the electoral system regarding the election of the House of Communes, the European parliament.

Although Scotland and Welsh have their own Parliaments, they are still represented by the houses of British Parliament.

On the last elections of 6th of May 2010, the representation of nations in the United Kingdom was as follows:

650 members of the House of Communes[13]			
England	Scotland	Wales	Northern Ireland
533	59	40	18

Devolution process also led to new relationships between the executives in Scotland, Welsh and the Central Government. Ever since the transfer of competences took place, the ministerial departments were those that kept in touch the devaluated institutions and the Central Government, while their secretaries act as territorial counselor in the British Cabinet. The Scotland Ministers – Scotland Office[14] - and the Welsh – Walles Office[15] - have been created to manage the governmental positions. The state secretaries are agents of the Central Government, in charge with keeping a direct representation bond inside the Scottish and Welsh territories of the Central Government. The Welsh and Scottish secretaries have become guardians and observers of the devolution process.

The United Kingdom has to preserve a common political structure, a common pedestal on which different theories should be grounded on and to preserve a certain political cohesion.

[13] Further details on: http://www.parliament.uk/mps-lords-and-offices/mps/, accessed March 13, 2013.

[14] *Scotland Office* has 50 employees.

[15] Wales Office consists of 48 members. Welsh ministers hold their office in 24 committees. They are in charge with introducing the primary legislation for Wales before the Parliament. As it is known, primary legislation is developed by the Westminster Parliament, and Wales Office is in charge with providing a bond between the British Department, on one hand, and the Welsh National Assembly, on the other hand.

Two governmental institutions have been charged to represent the interest of territories:

1. Joint Ministerial Committees – JMC
2. British/Irish Council

Joint Ministerial Committees – is made of ministers of the British government, Scottish ministers, members of the Cabinet of the Welsh National Assembly and ministers of the Executive Committee of Northern Ireland. The plenary meetings are chaired by the British minister in charge. JMC have been created to solve possible conflicts that may occur during intergovernmental negotiations. JMC convenes under three distinct formats:

1. The administrations meet once a year at least in a plenary meeting with the British Prime Minister, the Vice Prime Minister, the Scottish Prime Minister, a Scottish minister, Welsh Prime Minister, a Welsh minister, Prime Minister of Northern Ireland, Vice Premier and three territorial state secretary.

2. JMC's are also held under a functional form through the meetings between Ministers of Education, Health and Transport as well as the government from Scotland, Welsh and Northern Ireland.

3. Two JMC's have been created in order to put into practice an advice concerning the European matters. They are chaired by the minister of foreign affairs and the *Cabinet Office*[16].

The *Spanish regional state model* has been drafted for the first time in the Constitution of Spain of 1931, as an *integral statute*. The State is organized territorially into *municipalities*, *provinces* and the *Self-governing Communities* (Comunidades Autónomas)[17]. All these bodies shall enjoy self-government for the management of their respective interests.

Spanish Constitution recognize and guarantees the right *to self-government of the nationalities and regions of which it is composed and the solidarity among them all*[18].

Each Independent Community enjoys self-governing, having a Legislative Assembly, a Council for Government and a High Court of Justice. The Constitution appoints in each Self-governing Community, apart from its authorities, a delegate of the Government who is in charge with *running the state administration of those communities* and, whenever possible, he has *to synchronize* it with the administration of the Community itself. Self-governing communities are represented in the Senate of Spain[19], which consists of 250 members. Each province is assigned an equal number of offices, that is *4 senators*, no matter how many citizens does the province have[20].

The matters that are not clearly assigned to the State through Constitution can be assigned to self-governing communities, with the observance of their Statutes. The competence of the matters that haven't been committed through their Statutes of autonomy is assigned to the State, whose norms shall prevail in case of conflict over the norms of Self-governing Communities, in everything is not assigned to their exclusive competence. The state of law has, in all circumstances, a substitute nature comparing to the law of Self-governing Communities. The most important competences related to state governance are still in the hands of the central state. According to Section 149 of the Spanish Constitution, there are 32 fields that make the subject of the exclusive competence of the state. The State shall have *exclusive competence* over the following matters: regulation of basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties; nationality, immigration, emigration, status of aliens, and

[16] Frederique Roux, *La devolution,* 164.

[17] In Spain are: 17 Selfgoverning Communities, 50 provinces, 8089 Municipalities.

[18] Section 2 of the Spanish Constitution.

[19] Section 69. 1 of the Spanish Constitution: "*The Senate is the House of territorial representation".*

[20] In order to elect the Senate, there are two systems in use: *a) 208 senators* are *directly* elected in the 52 multinominal electoral circumscriptions (each one with 4 senators). The voting system is limited. Each elector votes a number of 3 candidates at most, not a list with candidates. b) the *other senators (51)* are *indirectly* elected. They are appointed by the legislative Assemblies of the Self-governing Communities.

right of asylum; international relations; defence and the Armed Forces; Administration of Justice; commercial, criminal and penitentiary legislation; procedural legislation; Labour legislation, without prejudice to its execution by bodies of the Self-governing Communities; Civil legislation, without prejudice to the preservation, modification and development by the Self-governing Communities of their civil law, foral or special, whenever these exist, and traditional charts; legislation on copyright and industrial property; customs and tariff regulations; foreign trade; Monetary system; General financial affairs and State Debt; External health measures, etc.

According to Section 148 of Spanish Constitution: "*The Self-governing Communities* may assume competences over the following matters: organization of their institutions of self-government; changes in municipal boundaries within their territory and, in general, functions appertaining to the State Administration regarding local Corporations, whose transfer may be authorized by legislation on local government; town and country planning and housing; public works of interest to the Self-governing Community, within its own territory; railways and roads whose routes lie exclusively within the territory of the Self-governing Community and transport by the above means or by cable fulfilling the same conditions; ports of haven, recreational ports and airports and, in general, those which are not engaged in commercial activities; agriculture and livestock raising, in accordance with general economic planning; woodlands and forestry; management of environmental protection; planning, construction and exploitation of hydraulic projects, canals and irrigation of interest to the Self-governing Community; mineral and thermal waters; inland water fishing, shellfish industry and fish-farming, hunting and river fishing; Local fairs; promotion of economic development of the Self-governing Community within the objectives set by national economic policy; handicrafts; museums, libraries and music conservatories of interest to the Self-governing Community; The Self-governing Community's monuments of interest; The promotion of culture and research and, where applicable, the teaching of the Self-governing Community's language; the promotion and planning of tourism within its territorial area; the promotion of sports and the proper use of leisure; Social assistance; health and hygiene; the supervision and protection of its buildings and installations. Coordination and other powers relating to local police forces under the terms to be laid down by an organic act".

The Self-governing Communities shall enjoy financial autonomy for the development and exercise of their powers, in conformity with the principles of coordination with the State Treasury and solidarity among all Spaniards[21].

The Constitutional Court has jurisdiction over the whole Spanish territory and is entitled to hear the *conflicts of jurisdiction* between the State and the Self-governing Communities or between the Self-governing Communities themselves.

Although Self-governing Communities are given the authority to apply self-governance, thus making Spain to get really close to the federal state type, the Constitution of Spain clearly states that: **„***Under no circumstances shall a federation of Self-governing Communities be allowed*".

Nevertheless, Spain had to deal over the years with secessionist movements, ending with terrorist attacks.

2. Scotland and Catalonia – new nations in Europe?

The large autonomy that has been given to territorial collectivities in the above mentioned states triggered a number of consequences at political and administrative level. In certain areas of the regional state, both the United Kingdom and Spain have lately encountered an increasing tendency towards the beginning of a process whose aim is to regain the independence.

Despite being the region with the greatest autonomy in the United Kingdom, *Scotland* still aims to gain *independence*. In 2011, the Scottish National Party (SNP) won the parliamentary elections with the promise to properly govern this region.

[21] Section 56. 1. of the Spanish Constitution.

On the 9 January 2011, Alex Salmond announced that referendum from independence of Scotland would be held in autumn 2014. Alex Salmond, the First Minister of Scotland and David Cameron, The UK Prime Minister sign the referendum agreement[22] in Edinburgh on 15 October 2012 which will enable a vote on Scottish independence to take place in 2014. The UK government has given ground by allowing the referendum to be held in 2014 – London had originally favoured next year – and not blocking Salmond from allowing 16- and 17-year-olds to vote.

The Scottish Government proposes asking Scots: "*Do you agree that Scotland should be an independent country*?"

The Scottish National Party leader said: "*It is right that our young people should have the chance to play their part in decisions about their community and their country. Independence, in essence, is based on a simple idea: the people who care most about Scotland, that is the people who live, work and bring up their families in Scotland, should be the ones taking the decisions about our nation's future. No-one else is going to do a better job of making Scotland a success. No-one else has the same stake in our future. The people of Scotland should be in charge*."[23]

The opposition parties, except the Green Party, reject the idea of a referendum and believe the top priority in Scotland is to relaunch the economy after the financial crisis, not to set up popular debates.

In order to meet the targets appointed by the Edinburgh Agreement, there have been set the following steps:

- *February 2013* - The section 30 order, which amends the Scotland Act 1998 that originally set up the Scottish parliament in Edinburgh, will be agreed by the Privy Council in London, formally conferring that temporary power to stage the referendum to Holyrood.

- *Spring 2013* - The Scottish government will present a referendum bill to Holyrood, setting out the question, putting limits on campaign spending and confirming whether 16- and 17-year-olds will be allowed to vote.

- *November 2013* - After a final vote expected in October 2013, the Queen is expected to give royal assent to the referendum bill. The Scottish government will publish a white paper finally detailing its "prospectus for independence", setting out the Scottish National party's vision for an independent Scotland.

- *June 2014* - The final 16-week referendum campaign is expected to start, when both pro-independence and pro-UK campaigns will intensify.

- *Autumn 2014* - The Scottish independence referendum takes place, probably in October[24].

Spain, in its turn, had to deal over the years with several movements for independence coming from autonomous Communities, such as the Basque Country or Catalonia. In recent years, the loudest voice for separatism came from Catalonia. The question is: *Could Catalonia be the bonding agent for a new wave of separatism in the European Union?*

Spain is not facing only a major economic crisis, but also the perspective of a constitutional crisis. It is a constitutional crisis at large scale, with the survival of the Spanish state-nation within its present boundaries at stake. This situation occurs in the context of the problems and financial crisis in

---

[22] "*Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*" was signed by: The Rt. Hon. David Cameron MP Prime Minister, The Rt. Hon. Alex Salmond MSP First Minister of Scotland, The Rt. Hon. Michael Moore MP Secretary of State for Scotland, Nicola Sturgeon MSP Deputy First Minister of Scotland.

[23] "Vers la fin de l'Union anglo-écossaise en 2014?", *Le Monde*, octobre 16, 2012, accessed March 5, 2013, http://www.lemonde.fr/europe/article/2012/10/16/vers-la-fin-de-l-union-anglo-ecossaise-en-2014_1775948_3214.html.

[24] Severin Carrell, Nicholas Watt, "Alex Salmond hails historic day for Scotland after referendum deal", *The Guardian*, October 15, 2012, accessed 6 March, 2013, http://www.guardian.co.uk/politics/2012/oct/15/alex-salmond-scotland-referendum-deal. For more details: Severin Carrell, "Scottish independence: the essential guide", *The Guardian*, October 16, 2012, accessed 6 March, 2013, http://www.guardian.co.uk/politics/scottish-independence-essential-guide.

the Euro zone. The Catalan Government wants to have the right to collect its own taxes, something that is already taking place in the Basque Country and Navarra. With an economy the size of Portugal, Catalonia gathered the largest debt load among the Spanish regions. The Catalan officials and economists say that the economy could regain its solvability if it would have similar conditions with the citizens living in the Bosque Country and Navarra, who transfer to central fiscal authorities a poll tax ten times smaller.

The fiscal agreement suggested by Artur Mas, the governor of Catalonia, which was rejected by the center-right government led by Mariano Rajoy, was a tactic gantry designed to spark a large movement for independence[25]. The wide scope of this movement has been revealed to Spain on 11th September 2012, which was taken by surprise on the National Day of Catalonia, when over one million of separatist activists crowded the streets of Barcelona. The manifestants' slogan was "*Catalonia, the new state of Europe*". Artur Mas generated a shock wave in Spain and on the financial markets when he called for anticipate regional elections at the end of 2012. He also promised a referendum on the independence of Catalonia from Spain in 2014. But the center-right group – Convergence and Union alliance (CiU), led by Artur Mas, lost 12 Parliamentary offices during the elections on 25th November 2012. So Mas was forced to call for an alliance with ERC (Republican Left of Catalonia), despite sharing a different ideology. As political opponents, but allies for the emancipation of Spain, the two political leaders, Artur Mas and Oriol Juanqueras, signed on 18th December 2012 an agreement designed to prepare a referendum that would edge Spain to split-up in 2014. On 23rd January 2013, the Parliament of Catalonia (Parlament de Catalunya) adopted a resolution[26] which states that this Self-governing Community is a "sovereign political and judicial topic" [27].

The central government tries to reject the Catalan movement for independence using the law, saying that Catalan nationalists have to observe the Constitution of the country. And according to the Constitution, a referendum over the independence is illegal[28]. The conservative government led by Mariano Rajoy claimed that it will appeal this "unilateral initiative" at the Constitutional Court[29]. The Catalan nationalism is very present among everything that means life in Catalonia. A vote for the independence of Catalonia from Spain may be a boost for other Self-governing Communities as well, who want the same thing (for instance, the Bosque Country – ETA) and may open Pandora's Box inside the European Union, where more and more regions want to be independent from the central states, on ethnicity basis.

---

[25] David Gardner, „Artur Mas – omul care are viitorul Spaniei în propriile mâini", (http://www.presseurop.eu/ro/content/article/2793121-artur-mas-omul-care-are-viitorul-spaniei-propriile-maini - accessed March 11, 2013).

[26] The Resolution has been voted with 85 votes "for", 41 votes "against" and 2 refusals.

[27] Resolucion 5/X deth Parlament de Catalonha, pera quau s'apròve era Declaracion de sobeiranetat e deth dret a decidir deth pòble de Catalonha Tram. 250-00059/10 e 250-00060/10: *"(...) D'acòrd damb era volontat majoritària exprimida democraticaments peth pòble de Catalonha, eth Parlament de Catalonha acòrde iniciar eth procès entà hèr efectiu er exercici deth dret a decidir entà qu'es ciutadans e es ciutadanes de Catalonha poguen decidir eth sòn futur politic collectiu, d'acòrd damb es principis següents: Prumèr. Sobeiranetat. Eth pòble de Catalonha a, per arrasons de legitimitat democratica, caractèr de subjècte politic e juridic sobeiran (...)"* /("In accordance with the will democratically expressed by the majority of the people of Catalonia, the Parliament of Catalonia agrees to initiate the process to exercise the right to decide so that the citizens of Catalonia may decide their collective political future in accordance with the following principles: 1. *Sovereignty*. The people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject)." For details: http://www.parlament.cat, accessed March 12, 2013.

[28] Catalonia has 7,3 millions Spanish citizens among a population of 47 citizens – and it is one of the richest region in the country. Losing this region would be a great shock for Spain.

[29] Deputy Prime Minister Soraya Sáenz de Santamaría said that: *"the assertion of autonomy by Barcelona infringes the indissoluble unity of the Spanish nation, and the only nation acknowledged by the Constitution is Spain.*

Conclusions

The analysis we have made shows that both the United Kingdom and Spain are facing not only economic problems, but also new constitutional challenges. The issue concerning the independence of those two local entities, Scotland and Catalonia, cannot be analyzed given only the internal background, but also with respect to the European Union[30]. *What is going to happen with the two local entities if they will gain their independence from the central state? Will they become member states of the European Union or they will have to negotiate with EU their future statute as a member of the Union?*

Given these equations in the political games, we must not forget about the citizens of these two regions. The opinion polls conducted in Scotland in 2012, have shown that a quarter of the population is for independence. In Catalonia, although it seems to be a higher interest regarding independence, we'll see the real results on voting day. The assessments conducted by specialists clearly state that these regions make the most of them within the regional states, not separately. In order to stop the separatist trend, central governments should find solutions to solve the financial problems which generated the struggle between regions and center, and they have to put the constitutional relationships in a new light that shall fit the economic, social and cultural realities and to provide these regions with wider liberties to express themselves if they want the unity of the state.

For the Romanian state, which is going to perform a deep administrative reform by introducing a new administrative level – the region – the way these two European states have succeeded or failed to improve the relationship between regions and the central government should be some food for thought when tracing the regions' boundaries or when their competences and resources are going to be assigned.

References

- I. Books
- Alexandru Ioan, Gilia Claudia and Ivanoff Ivan Vasile, *Sisteme politico-administrative europene/ European Political-Administrative Systems*, Second edition, Bucharest: Hamangiu Publishing House, 2008.
- Apostol Tofan, Dana, *Instituţii administrative europene/European Administrative Institutions*, Bucharest: C.H. Beck Publishing House, Bucharest, 2006.
- Ionescu, Cristian, *Tratat de drept constituţional contemporan/ Contemporary constitutional law*, Second edition, Bucharest: C.H. Beck Publishing House, 2008.
- Kund, Liviu Coman Kund, *Sisteme administrative europene/European administrative systems*, Sibiu: „Tribuna" Publishing House, 2003.
- Roux, Frederique, *La devolution en Grande Bretagne/The Devolution in Great Britain*, Paris: Dalloz, 2009.

- II. Documents

- United Kigdom.
- *** Scotland Act 1998.
- *** Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland.

[30] We have to remind that other states also face the problem of independence of the regions, a real challenge for the central government. For instance, Belgium, that was more than once on the edge of split-up (the Flamands and Valons wanted the separation). Italy is another member state of the European Union that is fighting against separatism. The Northern League, one of the most influential Italian separatist movements, has recently given up to its claims regarding the independence of the industrialized North from the agricultural South. In France, the Corsican nationalist groups were extremely violent in their attempt to claim independence etc.

- Spain

- *** Constitution of Spain.
- *** Estatuto de Autonomía de Cataluña.
- *** Resolution 5/X of the Parliament of Catalonia, adopting the Declaration of sovereignty and right to decide of the people of Catalonia.

- III. Website

- *** http://www.parliament.uk - Parliament of United Kingdom.
- *** http:// www. open. gov. uk - Government of United Kingdom.
- *** http://www.gencat.cat/ - The Generalitat of Catalonia.
- *** http://www.parlament.cat/ - Parliament of Catalonia.

FROM THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION TO THE COURT OF JUSTICE OF EUROPEAN UNION – CASE C-81/12

CRISTIAN JURA*

Abstract
The scope of this research is to present and analyze national and European, jurisdictional-administrative procedural issues, if courts are notified related to certain discriminatory statements. The starting point of the research consists in some statements made during a radio show. During the research, the following are analyzed: notification of the National Council for Combating Discrimination (CNCD), decision of the National Council for Combating Discrimination, challenge of the resolution of the National Council for Combating Discrimination at the Court of Appeal Bucharest, notification of the Court of Justice of European Union by the Court of Appeal Bucharest and the beginning of the procedures before the Court of Justice of the European Union. The scientific demarche has as objectives a better understanding of the mechanisms of operation of every institution involved in this process, as well as the chronology of the terms necessary to settle this case.

Keywords*: discrimination related to sexual orientation, evidence task, national procedural norms, national sanctions, National Council for Combating Discrimination.*

Introduction

On February 13th 2010, Mr. GB made several declarations, during the show „*The League of Mitran*" broadcast on the Sport channel Total FM, deemed to be discriminatory based on sexual orientation. The declarations concerned a Bulgarian football player, considered to be gay. B. declared that he did not intend to bring a gay in his team.

On March 9th 2010, A. non-governmental association filed a complaint with the National Council for Combating Discrimination (NCCD), registered under the number 1811/09.03.2010 related to the discrimination in the field of labour and dignity right. The complaint was filed, both against GB, and against the football club, as employer.

The petitioner, A., declares that, during an interview related to a possible transfer of the Bulgarian football player, Ivan Ivanov and his potential sexual orientation, GB stated that, instead of buying a football player with another sexual orientation, he would prefer a player from junior team. "*I would not take a homosexual in my team not even if Steaua were dissolved. The rumours are rumours, but to write something like that if it isn't true and to publish it on the first page as well... Maybe it is a lie that he is homosexual. But what if it is true? –I said to an uncle of mine, who did not believe in Devil and in Christ. I told him: «Let's suppose that God does not exist. But what if He existed? What do you have to lose if you commune yourself? Wouldn't be good to go in Heaven?». And he agreed. One month before he died, he went to commune himself, to obtain the God's forgiveness. No gay is welcome in my family and Steaua is my family. We would better use a player from junior team than a gay,. In my case, this is not discrimination. I cannot be forced to work with someone. I have the right to work with whom I like, as they have rights as well*" (declaration made during the show "Mitran's League" from Sport Total FM).

From the National Council for Combating Discrimination to the Court of Justice of European Union – Case C-81/12

* State Secretary, Member of the Steering Board of The National Council for Combating Discrimination and Lecturer at "Dimitrie Cantemir" Christian University, member of GLCUE (EU Working Group on Litigation - Grupul de Lucru Contencios al Uniunii Europene); (cristianjura@yahoo.com).

The petitioner states that the journalistic suspicion appropriated by Mr. B. that this football player, included on the list of transfers were homosexual, determined a potential waiving to concluding a work contract with this player: "*I wouldn't take him not even for free*".

Considering the foregoing declarations, the petitioner claims that Mr. GB is discriminating directly based on the criteria of sexual orientation, breaching the principle of equality in the field of employment and affecting the dignity of the individuals with homosexual orientation from Romania. The sport practiced at S. Club cannot be for "*all*", definitely not for homosexuals, regardless their skills and professional capacity.

With respect to the introduction in the case of S. Club as plaintiff, the petitioners states that although the declarations were on the first pages of several journals, news websites, Sc Football Club S. did not deny not even form one moment such declarations. On the contrary, the lawyer of the company acknowledged the presence of this policy on the level of the company, in the field of employment at the football team, motivating that "*the team is a family*", the presence in the team of a homosexual "*would create tension in the team and public*". Also, the petitioner states that, on the date when Mr. GB made such declarations, he was still shareholder of Bucharest S. Club.

The plaintiffs state that the petitioner is confused since all Mr. B. did by his declarations was to exercise his right to free expression, these not confirming the existence of a constant rule or practice in the field of hiring the football players at S.C Football Club S., based on discriminatory criterion of the sexual orientation of players. Art. 10 of the European Convention for Human Rights guarantees to all the possibility of having and expressing an opinion, although it is in minority or shocking.

It is shown that, as long as, in fact, it was never considered to hire the player I. I. at S. Bucureşti SA, lacking any kind of negotiation between the player and the club, it cannot be appreciated that the declarations of Mr. B. were meant to breach the principle of non-discrimination stipulated on the level of European Union, these being related to the freedom of opinion, the construction and resistance of which being secured by the European Convention of Human Rights.

Also, the plaintiffs state that the declarations are given in the context of a journalistic demarche (issue noticed as well by petitioner), when the author of the interview approaches the issue of sexual orientation of such player and not the plaintiff, GB.

Simultaneously, it is shown that the declaration of Mr. GB. has to be regarded as well in relation to his deeply religious nature, being known that the Orthodox Church still criticises the homosexual relations, therefore the opinion of the plaintiff should be regarded as his right to exercise the freedom of thought, of consciousness and of religion.

With respect to the demand of the petitioner to introduce S.C. Fotbal S. in the case, it is shown that the burden of proof is incumbent upon the petitioner, and pursuant to analysing the contents of petition, by which it is demanded the introduction of the club in the case, the petitioner did not prove the existence of some constant rules or practices on the level of the club, adopted by its management, which refer to a discriminatory criterion based on sexual orientation.

Corroborated to the normative act which rules the prevention and combating of all forms of discrimination, as well as the duties and the field of activity of the National Council for Combating Discrimination (NCCD), the College of NCCD analyzed to what extent the object of petition is subject to the disposals of O.G. no.137/2000, republished, with subsequent amendments and completions. Thus, the College of NCCD analyses in close connection to what extent the object of a petition meets, in trial court, the elements stipulated by art.2 of O.G. no.137/2000[1], republished, included in Chapter I Principles and Definitions of Ordinance and, subsequently, the elements of the facts stipulated and sanctioned contraventionally in Chapter II Special Disposals, Section I-VI of Ordinance. If it is considered the meeting of discriminatory elements, as defined in art. 2, the conduct

[1] C. Jura, „*National legislation on combating discrimination"*, CH Beck Publishing House, Bucharest, 2003, p. 44.

in the case entails the contraventional liability, if the case, if the constitutive elements of contraventional facts stipulated and sanctioned by O.G. no. 137/2000, republished, are met.

The High Court of Cassation and Justice, by Decision no. 828 of February 16th 2009 considered in the economy of Ordinance no. 137/2000 the disposals of art. 2 which define that the discrimination forms (n.n.) are consecutive to those from article 1 par. (3), which determine the subject of the obligation to meet the principle of equality between citizens – secured by art. 1 par. (2) in exercising the constitutional rights of citizens: *„Any legal or national person has the obligation to meet the principles of equality and non-discrimination*". Pursuant to the corroboration of the same texts (art. 1-2) it results the object of discrimination: the holders of the constitutional rights enumerated mainly in art. 1 par. (2), tied or prevented in their exercise. Therefore, within the limits of its legal duties, the National Council for Combating Discrimination has the obligation to solve any complaint based on the disposals of art. 2 of O.G. no. 137/2000 by determining the existence of the three elements above mentioned.

From this point of view, the College of NCCD considered that the petitioner claims the breach of the rights of a community of individuals based on sexual orientation, related to the work field and personal dignity, correlatively to the disposals of art. 2 par.1 corroborated to art. 5 and art. 7 respectively art.15 of O.G. no. 137/2000 republished. In his opinion, the declarations of the plaintiff (Mr. GB) discriminate directly based on the criteria of sexual orientation breaching the principle of equality in the field of employment, affecting the dignity of individuals with homosexual orientation from Romania. The declarations in the case represent the expression of a discriminatory policy applied on employment at the football team S. Bucharest. The petitioner refers to the case of Bosman solved by the European Court of Justice, considering, by similarity, that the discriminatory policy of the club is presumed, in this case, through the declarations of the plaintiff, who is the manager of S. Club. In the opinion of the petitioner, S.C Football Club S. Bucharest S.A. did not reject such declarations and did not present clear explanations. In addition, the sexual orientation cannot be a specific occupational condition. The plaintiffs are liable, in the opinion of petitioner, for breaching the disposals of art. 15 considering the declarations made whereas the freedom of expression and religion is not meant to explain the prejudice of personal dignity.

The plaintiffs state that, for the existence of the offences ruled by art. 5 and art. 7 of O.G. no. 137/2000[2] republished, it is necessary to be met the constitutive elements which involve an action of effective conditioning of effective refusal based on sexual orientation. Similarly, the offence stipulated by art. 15 involves the material element, in the case the action with a chauvinistic nationalist propaganda character, the action with character of instigation to hate, actions having as scope or concerning the prejudice of dignity or creation of an intimidation, degrading, humiliating and insulting atmosphere. As for the burden of proof, in case of direct discrimination, it considers necessary to prove the existence of a rule or constant practice which refers to a criterion based on sexual orientation. Therefore, the declarations of the plaintiff stand for a simple exercising of the right to expression, in the context of a journalistic demarche when it was the author who approached the issue of sexual orientation and not the plaintiff. Between S. Club and the player referred to in the complaint, it was never discussed a potential employment, not being any kind of negotiation between the player and the club or any kind of practice appropriated by the management of the club related to the criterion of sexual orientation. The declarations of Mr. GB have to be regarded in relation with his deep religious nature, being known that Orthodox Church is still criticising the homosexual relations therefore they are correlative to exercising the right of free thinking, consciousness and religion.

In the analysis of this species, the College of the National Council for Combating Discrimination recorded the disposals of the Directive of European Union Council 2000/78/EC of

[2] C. Jura, *„National legislation on combating discrimination"*, CH Beck Publishing House, Bucharest, 2003, p. 44.

creating a general frame in favour of equal treatment related to the employment and recruitment of workforce. According to Art. 3 par.1, the Directive 2000/78/EC is applied to all individuals, both from the public and private sector, including the public bodies, with respect to: a) conditions of access to employment, to non-remunerated activities or to work, including the criteria of selection and the recruitment conditions, regardless the field of activity and on all levels of professional hierarchy, including in the field of promotion; b) access to all types and all levels of professional orientation and training, of perfection and changing the professional orientation, including the accumulation of a practical experience; c) conditions of employment and work, including the conditions of dismissal and waging; affiliation to and employment within an organization of workers or employers, or any organisation with members exercising o certain profession including the advantages obtained by this kind of organization.

According to Art.1 the scope of Directive 2000/78/CE consists in ruling the general frame for combating discrimination based on the criterion of religion or convictions, disability, age or sexual orientation in what concerns the field of work and recruitment, with a view to implement the principle of equal treatment in the member states of European Union. In conformity to art. 2 of the Directive 2000/78/CE the „*equality principle*" represents the absence of any direct or indirect discrimination based on one of the reasons stipulated by art. 1. According to par.2 lett. a of Art. 2: "*According to par. (1): a direct discrimination appears when an individual is treated less favourably that another individual is, was or will be treated in a similar situation, based on one of the reasons mentioned in art. 1*"(n.n. religion or convictions, handicap, age, sexual orientation). According to art. 2 par. (3) of Directive „*Harassment is considered a form of discrimination, based on paragraph (1), when it is manifested an undesired conduct related to one of the reasons stipulated by article 1, which has as scope or effect the prejudice of the dignity of an individual and creation of an environment of intimidation, hostile, degrading, humiliating or offending. In this context, the notion of harassment may be defined according to the national legislations and practices of the member states*".

The Romanian Labour Code[3] included as fundamental principle of work relations the principle of equal treatment of all employees and employers, forbidding any kind of direct or indirect discrimination (Art.5 of Labour Code). The disposals with principle value of Labour Code are approached in detail in the Government Ordinance no. 137/2000 related to the prevention and sanction of all forms of discrimination, republished, which provides, mainly, the transposing in the national law of the disposals of Directive 2000/78/EC and of Directive 2000/43/EC. According to art. 1 par.2 lett. i of O.G. no. 137/2000: „*The principles of equality of citizens, of exclusion of privileges and of discrimination are secured mainly in exercising the following rights: (i) right to work, to free selection of occupation, to fair and satisfactory work conditions, to protection against unemployment, to an equal wage for equal work, to a fair and satisfying remuneration*„ According to par.4 of art. 1: „*Any natural or legal person has the obligation to observe the principles stipulated by par. (2)". Also, „the disposals of the ... ordinance are applied to all natural or legal, public or private persons, as well as to the public institutions with responsibilities related to: a) employment conditions, criteria and conditions of recruitment, selection and promotion, access to all forms and levels of orientation, professional training and perfecting*" (art. 3 of O.G. no. 137/2000 republished).

According to art. 2 par.1 of O.G. no. 137/2000 republished: „*by discrimination is understood any difference, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, age, handicap, non-contagious chronic disease, infection with HIV, belonging to a disfavoured category, as well as any other criteria which has as scope or effect the restriction, removal of acknowledgement, use or exercising, under equality conditions, of human rights and fundamental liberties or of the rights acknowledged by law, in the*

[3] C. Jura, „*National legislation on combating discrimination"*, CH Beck Publishing House, Bucharest, 2003, p . 57.

political, economic, social and cultural field or in any other fields of public life". According to art. 2 par.5 of O.G. no. 137/2000, republished: „*It is a harassment act and it is punished contraventionally any conduct based on criterion of race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, belonging to a disfavoured category, age, handicap, status of refugee or asylee or any other criterion which leads to the creation of an intimidating, hostile, degrading and offensive environment*". It is also necessary to state that the Ordinance no. 137 institutes a special chapter including, in section I, the interdiction of discrimination in the economic activity and in the field of employment and profession.

Considering the contradictory assertions of parties and the object of complaint, as formulated, the College considers that it is necessary to determine whether this case is to be analysed as incident to a potential specific work report under the aspect of subjects correlative to such report and legal consequences resulted or to the incidence of a potential unwanted conduct which leads to the creation of an intimidating, hostile, degrading or offending environment based on a forbidden criterion (n.n. sexual orientation) stipulated by the law in the field of discrimination.

The College of NCCD considered that the petitioner submitted only writs, excerpts of the articles published in the sport press as well as audio-video registrations of the declarations of plaintiff during some sport shows, not contested by the plaintiffs. Analysing the writs and registrations in the case, the College takes into account the declarations of the plaintiff as being made as a reaction to certain information from Bulgarian press and taken over by Romanian press related to a Bulgarian football player, Mr. I.I. Considering this issue, it is considered that the sport press reported that the "*Rumour according to which the Bulgarian full-back I. I. , that S. wanted to transfer, is drunkard, brawler and even homosexual, intrigued the manager GB*" (published in Adevărul on www.adevarul.ro). Similarly, "*The Bulgarian journalists confessed in the Romanian press that the football player wanted by S. Club, I. I., would be homosexual*". (published in Adevărul on www.adevarul.ro). Also, "*After Gazeta Sporturilor revealed in the today's edition that the Bulgarian I. I., wanted by S. Club, has a drunkard and gay reputation, the manager of red-blue team, GB, had a tough reaction*" (published by Gazeta Sporturilor on www.gsp.ro). In the interview offered to Sport Total FM, the plaintiff states: "*The rumours are rumours, but to write something like this if not true and to publish it on the first page....It may be a lie that he is homosexual*".

In the interview offered to Sport Total FM on 13.02.2010, the plaintiff declared: "*I will not take a homosexual in the team not even if S. Club is dissolved. The rumours are rumours, but to write something like this if not true and to publish it on the first page... It may be a lie that he is homosexual. But what if it is true? I said to an uncle of mine, who did not believe in Devil and in Christ. I told him: «Let's suppose that God does not exist. But what if He existed? What do you have to lose if you commune yourself? Wouldn't be good to go in Heaven?». And he agreed. One month before he died, he went to commune himself, to obtain the God's forgiveness. No gay is welcome in my family and Steaua is my family. We would better use a player from junior team than a gay,. In my case, this is not discrimination. I cannot be forced to work with someone. I have the right to work with whom I like, as they have rights as well", declared GB, in the show "Mitran's League". Also, in the interview offered to GSP TV on 13.02.2010, he declared: "If they wrote on the first page that he is gay? However, if he isn't gay and God tells me 100% tonight … it is 100% that he isn't … if they wrote this on the first page…I was called was well by Sport Total FM …that he is gay… bye-bye…I will not take him not even for free…I know that he is a very good player but I am not interested not even S. Club is dissolved…*"

Therefore, it is obvious that in the context of a journalistic context related to the Bulgarian football player I. I. about whom the press and media wrote, including about his potential sexual orientation, the plaintiff expressed its position providing an opinion about such player. It appears thus the legitimate questions, whether the expression of such position may be correlated to the quality of employer related to the policy of the company it is representing in terms of the potential work reports that the football players may enter as workers. Subsequently, it is asked the question whether such

declarations are enough to presume the existence of a discriminatory employment policy based on the criteria of sexual orientation which would involve the obligation to prove that the employment practice does not correspond to such declarations.

By analyzing such issues, the College refers to the jurisprudence of the European Court of Justice. In the case C-415/93 claimed by the petitioner, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal Club Liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman, the national court turned to the Court of Justice, among others, with respect to the interpretation of compatibility of the Treaty of transfer rules that were inducing a discrimination based on the nationality criterion. As it results from the judgment passed by the European Court of Justice on December 15th 1995, in the case Bossman, several national football associations adopted rules that restricted the possibility to recruit or align in competition players of foreign nationality. On a certain moment, UEFA undertook to suspend the restrictions of the number of contracts concluded by every club with the players from other member states and, on the other hand, to establish on two the number of such players who may participate to every game. In 1991, UEFA adopted the rule called ”3+2”, providing the national associations the possibility to restrict to three the number of foreign players that a club may align in a first division game of national championships, plus two players who played, continuously for 5 years, in the country of such national association, out of which 3 years as juniors. This restriction is applied as well to the games from the competitions for club teams organized by UEFA. (See the Judgment dated December 15th 1995 in the case C-415/93, parag. 25-27) With respect to the rules determined by sport associations of football, the Court ordered that ”considering the objectives of Community, exercising sports concerns the communitarian law to the extent that it represents an economic activity" according to art.2 of the Treaty (see the Judgment dated December 12th 1974, Waleave c. Union Cycliste Internationale, 36/74, Rec.p.1405, pct.5) "*This is the case of professional or semi-professional football players, as long as they exercise a remunerated activity or render remunerated services*" (see Judgment July 14th 1976, Dona c. Mantero, 13/76, Rec.p.1333, pct.12). The application of Art. 48 of Treaty is not excluded by the fact that the rules related to transfers dominate rather the economic relations between clubs than the labour relations between clubs and players. Indeed, the circumstance that the employing clubs have the obligation to pay allowances when recruiting a player from another club affect the possibilities of players to encounter a job, as well as the conditions of offering such job.(see Judgement dated December 15th 1995, Bossman, C-415/93, parag.72 and 74) the European Court of Justice stated with respect to the nationality clauses that these may not be deemed in conformity to art. 48 of the Treaty, subject to the punishment of depriving such disposal of its useful effect and of not depriving the particulars from the fundamental right to access freely a job offered by the Community. (see Judgement dated December 15th 1995, Bossman, C-415/93, parag.128)

On the other hand, in the case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryin NV company, the national court turned to the Court of Justice to determine whether the public declaration of an employer represents direct discrimination after placing an ostensible job. Essentially, it referred to the public declarations of the manager of an enterprise, according to which, his enterprise was to recruit plumbers, but they wouldn’t hire „*allochthonous*”, due to the reticence of clients of allowing the access during the works in their private dwelling. In the Judgment dated 10.07.2008, the Court of Justice considered that "*the public declarations of employer about not having the intention to hire employees with a certain ethnic or race origin are meant to discourage seriously certain candidates to apply, being thus meant to prevent their access on the labour market and representing thus an employment discrimination*" (see the judgment dated 10.07.2008, parag. 25, device pct.1). On the other hand, on the question if such declaration is enough to presume a discriminatory policy, the answer of the Court was positive. The Court considered that in article 8 of Directive 2000/43 is stated that the defendant has the obligation to prove that the principle of equal treatment was not breached when certain facts allow to be

presumed the existence of a direct or indirect discrimination. The obligation to prove the contrary, incumbent thus upon the presumed author of a discrimination, does not depend but on finding a discrimination presumption, as long as it grounds of demonstrated facts. Such facts may be the public declarations by which an employer informs publicly that he does not intend to hire employees of a certain ethnic or race origin (see also judgment dated 10.07.2008, parag. 30, 31 device pct.2).

From the perspective of communitarian law, it is obvious that protection against discrimination based on the criteria of sexual orientation includes the sphere of work reports. The exercising of sports, mainly, in case of professional football players who are performing a remunerated activity or rendering remunerated services, concerns communitarian law, as long as it is an economic activity. In other words, the protection against discrimination covers this sphere of activity as well. However, Directive 2000/78/EC rules the general frame in favour of equality of treatment, with respect to employment and recruitment of work force, being transposed in the national legislation by O.G. no. 137/2000 concerning the prevention and sanction of all forms of discrimination republished.

Directive 2000/78/EC of Article 4 refers to the occupational conditions and rules that: "*Without breaching art. 2 par. (1) and (2), the member states may determine that a differentiated treatment based on a legal characteristic by one of the reasons indicated in art. 1 does not represent a discrimination when, considering the nature of a professional activity or the conditions to exercise it, such characteristic represents an essential and significant professional condition, so as the objective is legitimate, and the condition proportional. (2) The member states may maintain in their national legislation in force n the date of adopting such directive or may include in a future legislation (resuming the national practices existent on the date of adoption of this directive) disposals based on which, considering the professional activities of churches and other public or private organizations having a professional ethic based on religion or convictions, a differentiate treatment based on the religion or the convictions of an individual does not represent a discrimination when, based on the nature of such activities or in the context in which they are exercised, the religion or convictions represent an essential, legitimate and grounded professional condition concerning the ethics of organization*". This differentiate treatment has to be exercised by observing the constitutional disposals and principles of the member states as well as the general principles of communitarian law, and no discrimination based on another reason will be rightful. (3) Provided that the disposals are met in the other situations, this directive is the one which, without breaching the right of churches and of other public or private organizations having an ethic based on religion or convictions, acting in conformity to the national constitutional and legislative disposals, demands the staff working for them a good faith and loyal attitude towards the ethics of organization.

O.G. no. 137/2000, as amended by Law no. 324/2006, transposed the disposals of the two European Directives. From this point of view, the Ordinance stipulates in art. 9 that the disposals related to contravention in the field of employment and profession (art. 5-art. 8) „*cannot be construed in the sense of restricting the right of employer to refuse to hire an individual who does not correspond to the occupational conditions in such field, as long as the refusal does not represent an act of discrimination in terms of this ordinance and these measures are objectively explained by a legitimate scope whereas the methods of reaching such purpose are relevant and necessary*". Also, according to art. 11 par.5 of O.G. no. 137/2000 republished, the disposals related to the interdiction of discrimination in the access to education „*cannot be construed in the sense of restricting the right of the unit or institution to education for the training of the religion staff to refuse the enrolment of an individual with a confessional status which does not correspond to the conditions determined for the access in such institution*".

What concerns related to the case submitted for settlement is whether its object determines the materialisation of an actual or effective legal work report both in terms of subjects and consequences generated by such report. The College of NCCD took notice, based on the writs attached to the file by the petitioner and issued by the Trade Register Office that the Football Club S. Bucharest SA, by

the deed submitted under no. 48138 of 08.02.2010 registered with the Trade Register on 23.02.2010, based on the resolution no. 21980, operated some modifications with respect to the associates/shareholders, namely, Mr. GB withdrew from the company, his shares being assigned to a third shareholder. From this point of view, the College considers that, in the opinion of petitioner, the plaintiff was shareholder on the date of declarations, introducing himself as manager of the Club including after the date of sale of shares. On the other hand, on the hearing terms, the plaintiffs stated that Mr. GB is not manager, since such position does not exist in the company.

Beyond the contradictory assertions of parties, by referring to the jurisprudence of the European Court of Justice and the case submitted for settlement, the College considers a range of issues. For instance, in the case Feryn C-54/07 the active subject of declarations holds a specific capacity, being not only representative but also manager of the enterprise which brings into discussion an exercise of authority considering the role of such subject as employer. In the case Bossman C-414/93, the issue submitted to analysis is represented by an express rule existent on the level of football associations by which it is imposed a clause formulated sine qua non based on a nationality criterion. In the case Feryn, the Court considered that the declarations of the employer discourage the candidates to apply for the job, preventing their access on the labour market.

The College of NCCD considered that this case will be analysed beyond the sphere of application of a potential work report. The College considers that the declaration of the plaintiff couldn't be assimilated as coming from an employer/legal representative of employer or an individual in charge with employment although on the date of declaration he is manager of the Football Club S. Bucharest S.A. As for the consequences caused by the declaration in the case, unlike the case Feryn, this does not have the same reverberation over some potential candidates, since the recruitment process is not performed based on a public tender or direct negotiation, pursuant to a process of selection involving to apply for a job and presetting pursuant to analysis of it. As shown as well by the European Court of Justice, in case of professional football players, the recruitment process is atypical, since the possibilities of players to encounter a job and the tender conditions are correlative to some negotiations between the clubs and not to some negotiations between the player and the club. Similarly, considering the case Bossman, the burden of proof was assigned to the plaintiffs (defendants) with a view to provide objective explanations since the merits approached relied on demonstrated facts, in the case, the existence of some rules formulated sine qua non based on nationality. In this case submitted to settlement, it is discussed, essentially, the reaction of the plaintiff to the demarches of journalists related, among others, to the potential sexual orientation of a football player. Or, the potential material element of contravention stipulated by art. 5 (conditioning) or art. 7 (refusal) of O.G. no. 137/2000 is not circumstantiated in practice not materialised, it does not produce consequences over a community of individuals, as much as, if it had materialised, it would have concerned, indubitably, the particular situation of the player I. I. Or, if considered the object of complaint related to such fact, it would have been discussed the active legal standing of the petitioner, as long as it did not exist a petition of the individual deemed himself discriminated during the negotiation. On the other hand, as long as the subject of sexual orientation is indissolubly related to an issue of private life, it may appear the question whether a "*probatio diabolica*" had been assigned to the plaintiffs which would render impossible the burden of proof in demonstrating that employment does not interfere with the sexual orientation. On the other hand, however, the Football Club S. Bucharest S.A. declared that it did not initiate any negotiation procedure for recruitment therefore the employment was not discussed for any moment, related to the player I. I., which excludes the existence of some potential conditionings or of a potential discriminatory refusal.

The College of NCCD takes into account that according to art. 2 par. (3) of Directive 2000/78/CE „*Harassment is deemed a form of discrimination, when it is manifested an improper conduct related to some of the reasons stipulated in article 1 (n.n. religion or convictions, disability, age or sexual orientation) having as scope or effect the injury of dignity of an individual and the*

creation of an intimidation, hostile, degrading, humiliating or offending environment. In this context, the notion of harassment may be defined in conformity to the national legislations and practices of member". According to art. 2 par.5 of O.G. no. 137/2000 republished, which transposes Art. 2 par.3 of Directive 2000/78/EC „*It is an act of harassment and it is punished contraventionally any conduct based on criterion of race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, belonging to a disfavoured category, age, handicap, status of refugee or asylee or any other criterion which leads to the creation of an intimidating, hostile, degrading or offensive environment*".

In the field of non-discrimination legislation, as it is transposed the acquis communautaire, in order to be in a situation of harassment, it is necessary to meet cumulatively the constitutive elements thereof. Therefore, the harassment act is circumstantiated in a conduct which may have different forms. The text includes the syntagm of „*any conduct*". The syntagm „*any conduct*" denotes the intention of legislator to include a wide range of conducts and not a restrictive one which allows to consider some different qualifications in practice and which may vary from case to case, circumscribed under the form of some assertions expressed in words, gestures, acts, or facts, actions etc. The reason or cause of conduct is determined by an inherent criterion, expressly stipulated by legislator, in a non-exhaustive list, considering that the law text presents in a determined enumeration the criterion of "*race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, belonging to a disfavoured category, age, handicap, status of refugee or asylee*". The non-exhaustive character is provided by the syntagm itself "*or any other criterion*" attached to the criteria expressly enumerated in art. 2 par.5. The syntagm "*or any other criterion*", practically provides the possibility of withholding any other element not stated by law, but which it is materialized as determining fact in committing the form of discrimination called harassment.

The manifestation of conduct based on any of the criteria stipulated by law "*leads to the creation of an intimidating, hostile, degrading or offensive environment*". This constitutive element of harassment allows considering those conducts which, although not committed on purpose, produce the effect of performance of a definite environment as „*intimidating, hostile, degrading or offensive*". This issue is much obvious as the Directive of Council 2000/43/EC related to the application of the principle of equal treatment of individuals, regardless their race or ethnic origin, defines harassment in art. 2 par.3 as „*an unwanted conduct based on ethnicity or race which has as scope or effect the violation of the dignity of an individual and the creation of an intimidating, hostile, degrading or offensive environment*".

Including harassment as form of discrimination in the acquis communautaire and the transposition of it in the national legislation is extremely important. The discrimination does not manifest per se, but only as normative disposals or practices, as well as under the form of conducts which create an impact on the environment in general, ranging from physical violence and racist, sexist, xenophobe etc. remarks or assertions to general ostracism. This discrimination form affects psychically and emotionally the dignity of some individuals belonging to a minority or other[4].

The College of NCCD considered that, in the opinion of the plaintiff, his declarations have to be regarded related to his deep religious nature, as an act of exercising the freedom of thought, of consciousness and religion. From this point of view, the College notices that, indeed, the assertions assigned to him are placed within a context associated with the faith in God. During both the interview offered to Sport Total FM and to the channel GSP TV the declarations are rightful, to a great extent, based on reference to divinity and the importance of human-God relation. ("*I told him: «Let's pretend God does not exist. But what if it existed? What do you have to lose if you commune yourself? Wouldn't be better to go in Heaven?». And he agreed. One month before he died he had*

[4] See "A comparison between the EU Racial Equality Directive and the Starting Line" in I. Chopin and J. Niessen, "*The Starting line and the Incorporation of the Racial Equality Directive into National Laws of the EU Member States and Accession States*", 2001, pp.26- 27.

gone to commune himself, God forgive him. No gay is welcome in my family and Steaua is my family..."; "*And, although he is not gay and God tells me 100% this at night ... 100% he is not ... if this is written on the first page…and at Sport Total FM called me to say that …he is gay… bye-bye…I will no longer take him not even for free…I know that he is a very good player but he no longer interests me...* ")

In its jurisprudence[5], the College of NCCD took into account that, within the regional institutional system of protection of human rights, the European Convention of Human Rights ratified by Romania based on Law no. 30 of May 18th 1994, stipulates in Art.10 that: "*Every individual is entitled to freedom of expression. This right includes the freedom of opinion and the freedom of receiving or supplying information or ideas without the interference of public authority...*" however it determines expressly the limits of such right in paragraph 2 of the same article: "*exercising such liberties, (n.n. freedom of expression, of opinion and freedom of receiving or supplying information or ideas including duties and responsibilities), may be submitted to some formalities, conditions, restrictions or sanctions stipulated by law, which represent necessary measures in a democratic society, for ... protection of reputation or rights of others*". On the other hand, article 9 of European Convention stipulates that: „*Any individual has the right to freedom of thought, consciousness and religion; this right includes the liberty to change religion or conviction, as well as the liberty to manifest religion or conviction individually or collectively, in public or in particular, by religion, education, practices and accomplishment of rites. The liberty of manifesting religion or convictions cannot be subject to other restrictions than those which, stipulated by law, represent necessary measures, within a democratic society, for public safety, protection of order, health or public moral or for the protection of the rights and liberties of others*".

It has to be stated, first of all, that art. 10 of Convention secures as form of the liberty of expression the liberty of opinion, which is related, on its turn, by the liberty of thought, of consciousness and of religion, protected by art. 9. Any individual is entitled to form its own conceptions concerning social life, environment in general, as it may have a certain religious faith, to belong to a religion which it may practice. In other words, any individual is entitled to formulate an opinion on the phenomena among which he lives and which he analyses through the filter of its own thought[6].

Article 9 of Convention acknowledges to every individual the freedom of thought, religion and consciousness on the one hand, as well as the liberty to express convictions or religion on the other hand. We are in the presence of two components of the same right each having its own legal regime, natural consequence of the circumstance that such liberties have both internal character related to internal experiences of every individual and an external character represented by the external manifestations expressed as such or related to other similar rights and liberties secured by Convention[7].

On the other hand, the right to the freedom of expression is secured by Romanian Constitution[8] which stipulates in art. 30 par. (1) and (6) that *"(1)The freedom of expressing thoughts, opinions or faiths and the liberty of the creations of any kind, orally, in writing, by images, by sounds or by other means of communication in public, are inviolable*". However, the liberty of expression, in terms of par.1 of art. 30 has to be corroborated to par.2 of art. 30 which stipulates expressly that *„ (2) The freedom of expression cannot prejudice dignity, honour, particular life of an individual or the right to its own image*".

---

[5] C. Jura, "*Jurisprudence of National Council for Combating Discrimination*", CH Beck Publishing House, Bucharest, 2003.

[6] Corneliu Bârsan, "*European Convention of Human Rights*", Vol.I, rights and obligation, C.H. Beck Publishing House, Bucharest 2005, p.738.

[7] Corneliu Bârsan, *op.cit.,* 2005, p. 738.

[8] C. Jura, "*Jurisprudence of National Council for Combating Discrimination*", *op.cit.,* 2003, p. 1.

Considering the declarations of the plaintiff, the College noticed that, in its opinion, the explanation of the fact that he does not work with certain individuals, in this case *„homosexuals*" is related to a personal element *„In my family no Gay is welcome and Steaua is my family*" respectively a purely subjective element *„no one can force me to work with someone. I have the right as well to work with whom I like*".

Based on these assumptions, it has to be stated that the legislation of European Union interdicts discrimination based on the criteria of sexual orientation in the field of work relations, and such disposals are applicable to all individuals both in the public and private sector. The member states of European Union transposed the European directives in this field, the Ordinance no. 137/2000 ruling the prevention and punishment of all forms of discrimination including in the work relations. Directive 2000/78/EC stipulates that a differentiated treatment based on sexual orientation does not represent a discrimination when, considering the nature of a professional activity or the conditions to exercise it, such characteristic represents an essential and determining condition. On the other hand, it stipulates that for the professional activities of churches and other public or private organizations with a professional ethic based on religion and convictions, a differentiated treatment based on religion or convictions of an individual does not represent a discrimination when, by the nature of such activities or the context where they are exercised, the religion or convictions represent an essential, legitimate or rightful professional condition related to the ethics of organization. The Ordinance no. 137/2000 stipulates in art. 9 that the disposals related to contraventions in the field of employment and profession „*cannot be construed in the sense of restricting the right of employer to refuse to hire an individual who does not meet the occupational conditions in such field, as long as the refusal does not represent an act of discrimination based on this ordinance and such measures are explained objectively by a legitimate purpose and the methods of reaching such scope are relevant and necessary*".

Or, although if accredited the idea that a football club represents a certain family, in the wide sense, of sharing and promoting certain values, traditions or faiths which would entail a certain organizational ethic, the employment of a professional football player is determined sine qua non by the meeting of some conditions related to performance and not by an indissoluble element related to the right to intimate, familial and private life. The act of inducing the idea that the simple supposition related to the sexual orientation of an individual determines ab initio the rejection of it within a potential economic relation, denotes obviously the arbitrary. The assertions of the plaintiff are in this respect the following: *„Not even if Steaua is dissolved I shall bring a homosexual in the team... No one may force me to work with someone. I have the right to work with whom I like, as they have rights too*".

In the context when the only exceptions allowed on a potential difference of treatment are given by the specific nature of a professional activity or the conditions of exercising this professional activity and the refusal of working with an individual is determined by a potential inconformity in terms of occupational conditions, the College considers that the assertions of the plaintiff represent a conduct placed in close connection with sexual orientation and, by their nature, they entail a hostile, intimidating and offensive environment affecting particularly the community of individuals, in this case, the individuals with a sexual orientation different from heterosexual. From this point of view, the College considers that the assertions of the plaintiff, based on the effect created, were meant to breach the dignity right of homosexual individuals according to the disposals of art. 2 par.5 of O.G. no. 137/2000 republished.

Finding that such assertions meet the elements of a discrimination form, according to O.G. no.137/2000 republished, stipulated by art. 2 par.5, the College considers that they meet subsequently as well the elements of the fact stipulated by Art. 15 of O.G. no. 137/2000 republished. In the opinion of College of NCCD the discrimination form from communitarian law defined by the European legislator as harassment was transposed in the non-discrimination legislation in Art. 2 par.5 and it

was ruled in the special part of law, in 5th Section, Art. 15 by which it is provided in terminis the protection of the right to personal dignity.

In this respect, according to art. 15 of O.G. no. 137/2000 republished: „*It is a contravention, based on this ordinance, an act subject to criminal law, any conduct manifested in public, with a nationalist - chauvinist propaganda character, of instigation to racial or national hate, or such conduct which has as scope or concerns the prejudice of dignity or the creation of an intimidation, hostile, degrading, humiliating or offending atmosphere, directed against an individual, group of individuals, or community and related to them belonging to a certain race, nationality, ethnicity, religion, social category or other disfavoured category or to its convictions, sex or sexual orientation*".

The College of NCCD considered that art.15 interdicts a wide range of conducts committed in public and with a material object circumstantiated in different hypostases. The wide margin of appreciation of conducts is given by the syntagm used by legislator "*any conduct*" which induces the idea that it may manifest by words, gestures, actions etc. This manifestations are performed in public and are concretized in a conduct with a nationalist - chauvinist propaganda character, in a conduct of instigation to racial or national hate, or such conduct which has as scope or concerns the prejudice of dignity or the creation of a determining atmosphere (degrading, humiliating etc.) related to belonging to an interdicted criterion stipulated by legislator. Therefore, the material element of contravention stipulated by art. 15 may be concretized in different hypostases, not only as a propaganda-like conduct or conduct of instigation to hate but also a conduct that has as scope or concerns the prejudice of dignity or the creation of a humiliating atmosphere for a group or community of individuals based on an interdicted criterion.

Or, from this point of view, it is obvious that the assertions of the plaintiff represent a conduct stipulated by art. 15. The assertions were made in public and were consequently spread in the public space, both based on the fact that the assertions were made through mass media, radio and television channels and by subsequent broadcast and reporting of these by mass-media (written press, television, news channels etc.)

In the opinion of the College of NCCD, such assertions are not included in the plan of a potential propaganda conduct or conduct of instigation to hate, however, by their nature, it is obvious that it is constituted in the material elements ruled by legislator, in this case, a conduct related to the creation of an atmosphere at least humiliating or offending for a community of individuals. Pursuant to the analysis of the assertions, it is clear enough that they referred to sexual orientation, this issue not being contested, but in terms of resorting to the exercise of freedom of expression. Or, in the context of exercising the constitutional rights, the freedom of expression, in terms of par.1 of art. 30 of Constitution has to be corroborated to par.2 of art. 30 which stipulates expressly that „(2) *The freedom of expression cannot prejudice the dignity, honour, particular life of an individual or the right to its own image*." Similarly, article 1 of O.G: no. 137/2000 republished orders that: „*In Romania, rule of law, democratic and social state, the human dignity, the rights and liberties of citizens, the free development of human personality represent supreme values secured by law*".

The Directing College of NCCD decided that the issues notified are under the incidence of a potential work report based on Art. 2 par.1 corroborated to Art. 5 and Art. 7 of O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished; that the issues notified are under the incidence of the disposals of art. 2 par.5 and art. 15 of O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished; and to sanction the plaintiff GB with a warning, based on art.2 par.11 and art. 26 par.1 of Governmental Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination, republished.

The non-governmental association A. criticised, by an application in interpretation, the Resolution 276/October 13th 2010 of the National Council for Combating Discrimination at the Court of Appeal Bucharest and demanded the annulment of the administrative deeds, namely the Resolution 276/ October 13th 2010 of the National Council for Combating Discrimination. The

demand of A. non-governmental association was registered on December 21st 2010 at the Court of Appeal Bucharest.

On October 12th 2011 the Court of Appeal Bucharest ordered the notification of the Court of Justice with the preliminary questions drafted and ordered the suspension of the case until the settlement of the procedure.

Questions referred to the Court of Justice are:

1. Do the provisions of Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation apply when a shareholder of a football club who presents himself as, and is considered in the mass media as, the principal director (or 'manager') of that football club makes a statement to the mass media in the following terms:

"Not even if I had to close Steaua down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that if it's not true and, what's more, put it on the front page… Perhaps he's not a homosexual [X, a Bulgarian footballer] … But what if he is? … I said to an uncle of mine who didn't believe in Satan or in Christ. I said to him: "Let's say God doesn't exist. But suppose he does? What do you lose by taking communion? Wouldn't it be good to go to Heaven?" He said I was right. A month before he died he took communion. May God forgive him. There's no room for gays in my family, and S. Club is my family. It would be better to play with a junior rather than someone who was gay. That's not discrimination. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose.

Not even if I had to close S. Club down would I accept a homosexual on the team. … Perhaps he's not a homosexual, but what if he is? There's no room for gays in my family, and S. Club is my family. Rather than having a homosexual on the team, it would be better to play a junior. That's not discrimination. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn't a homosexual I still wouldn't take him! Too much has been written in the papers about his being a homosexual. Even if TSKA Club gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drunk … but if he's a homosexual I don't want to know about him'?

2. To what extent may the abovementioned statements be regarded as 'facts from which it may be presumed that there has been direct or indirect discrimination' within the meaning of Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as regards the defendant S.C. Football Club S. Bucharest S.A.?

3. To what extent would there be probatio diabolica if the burden of proof referred to in Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation were to be reversed in this case and the defendant S.C. Football Club S. Bucharest S.A. were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?

4. Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of Government Decree No 2/2001 on the legal regime for sanctions, conflict with Article 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?

Conclusion

The procedure of preliminary ruling is based on the Chapter 9 Preliminary Rulings and other References for Interpretation, art. 103 – 104 from Consolidated Version of the Rules of Procedure of

the Court of Justice (2010/C 177/01)[9] and on Information Note on References from National Courts for a Preliminary Ruling (2009/C 297/01)[10].

Under the preliminary ruling procedure, the Court's[11] role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

8. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

Under Article 267 TFEU[12], any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule refer a question to the Court of Justice for a preliminary ruling

All national courts must therefore refer a question to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that that act may be invalid.

The Hearings in the Case C-81/12 at the Court of Justice of the European Union took place on January 23rd 2013. All the parties involved in this case are waiting for the answers of the Court of Justice of the European Union.

References

- Consolidated Treaties, Charter of Fundamental Rights, Published by Publications Office of the European Union, Luxembourg, 2012.
- Corneliu Bârsan "*European Convention of Human Rights*", Vol. 1 & 2, Rights and obligations, C.H. Beck Publishing House, Bucharest, 2005.
- I.Chopin and J.Niessen, "*A comparison between the EU Racial Equality Directive and the Starting Line in The Starting line and the Incorporation of the Racial Equality Directive into National Laws of the EU Member States and Accession States",* 2001.
- C. Jura, „*Combating discrimination in Romania"*, CH Beck Publishing House, Bucharest, 2004
- C. Jura, „*Jurisprudence of National Council for Combating Discrimination*", CH Beck Publishing House, Bucharest, 2003.
- C. Jura, „*National legislation on combating discrimination*", CH Beck Publishing House, Bucharest, 2003.
- http://curia.europa.eu
- http://eur-lex.europa.eu

[9] Text available in OJ C177/1 from 02.07.2010.

[10] Text available in OJ C297/1 from 05.12.2009.

[11] See also http://curia.europa.eu/ (27th of January, 2012).

[12] Text of article 267 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, Published by Publications Office of the European Union, Luxembourg, 2012.

THE PROTECTION OF CULTURAL GOODS FROM THE ROERICH PACT TO THE HAGUE CONVENTION

MARIAN MIHĂILĂ*

Abstract

The study premises and objectives:
The idea found at the basis of the discovery of a real value of cultural goods is underlined by the knowledge of their origins and history and of an environmental frame in which these have been produced. This theory could also be applied in regulations provided with certain newly introduced elements as: the absolute interdiction of thefts; the interdiction of destruction and execution of enemy property; the warning of before a terrestrial bombing with naval forces of ports, cities, villages, buildings or houses which are not defended
The purpose on this paper *is based on the following question: "Which of the gaps of humanitarian international law regarding cultural goods are surfacing?"*
The research models *used are: the interpretative method, the structuralist-systematic method necessary for the knowledge of rules of organization and functioning of law as a system of social organization; the epistemological method, with an important role in the verification of an authentic meaning, fully manifesting the exigency regarding the protection of cultural property.*
The result of the study *is obtained by offering an answer which as argued in this paper, concluding on one side that the discrepancies appeared between provisions (or dispositions) of the Hague Convention of 1907 and the events of the First World War have led to an improved idea and to a completion of these norms.*
Conclusions*: The preoccupation for the protection of cultural goods, of the people's cultural patrimony, thus continues, even if, despite all acts adopted, we observe that certain states destroy willingly the treasures of other peoples. We have thus reached the conclusion that more drastic measures must be adopted more severe sanctions must be applied to states that neglect the norms of humanitarian international law and the existent gaps must be eliminated. For this reason the Second Protocol of The Hague Convention of 1954 has been promoted, regarding the protection of cultural goods in case of armed conflicts.*

Keywords: *cultural goods, protection, the Hague Convention, UNESCO patrimony, armed conflict.*

Introduction

The domain covered by the theme of this study refers to the judicial regime of cultural property, which represented since the 20th century an increasing preoccupation of the international society, while party states became more aware of the need of an universal production of culture and art, which represents the material expression of the cultural, spiritual and national identity of each people and at the same time, represents the sum of definite components of human civilization in its ensemble..

The importance of this study results from the general belief of states regarding the inseparable character between the notion of cultural and national identity and the patrimony notion, which separated gradually from a thinking school accepted by most, according to which cultural property represents the basic element of the peoples' spiritual personality and of the humanity's cultural patrimony.

The objectives of this study obey the idea of protection of the universal cultural patrimony, in times of peace and in times of armed conflicts, on the basis of international instruments that are sufficiently clear and through engagements assumed by party states, in order to make possible an efficient coordination of actions and measures to be taken.

These will be fulfilled by the use of research methods indicated in the abstract of this paper which will lead to the obtaining of assumed finalities.

* Professor, PhD, "Eftimie Murgu" University, Resita (e-mail: presedinte@uem.ro).

The protection of cultural property in the event of armed conflicts is insured nowadays by the following international documents:

1.The Hague Convention of 1907 (the 4th and the 9th);

2.The Roerich Pact – signed in Washington on 15th April 1935

3.The Hague Convention of 14 May 1954 for the protection of cultural property in the event of armed conflict;

4.a) The 1st Protocol of the Hague Convention of 14 May 1954;

b) The 2nd Protocol of the Hague Convention of 14 May 1954 (May 1999);

5.The 1st and the 2nd Protocol of Geneva of 8 June 1977.

These regulations are available for the other countries that do no represents parties to these conventions, because they have a customary character.

Preoccupation regarding the protection of cultural property in the event of armed conflicts have existed, in one measure or another, during all history ages, starting with the Antiquity and continuing until nowadays with the Hague Conventions of 1899 and 1907, in the regulation annexed to the Second Conference and, respectively the Fourth Conference regarding the laws and customs of terrestrial war, the firm law norms were elaborated to regulate the protection of cultural property in case of armed conflict..

1. THE PRESENT STATUTE OF CULTURAL PROPERTY

The history of culture started at the same time with the apparition of man, with the first tools which he build in order to live. From Antiquity until today, in all countries, works of culture and art were created. These have circulated and still do in the entire world, taking their message across borders. Of course, we are not speaking of a physical circulation, but a spiritual one. In time there have been preoccupations for the improvement of an international cultural collaboration.

According to the Romanian diplomat Mircea Malita "Culture represents not only an evening show, a TV show, a weekend museum, leisure reading… Without values there are no decisions. The culture is a place where values are created, preferences are elaborated and hierarchy is established."

Their real value is highlighted by the knowledge and recognition of origins and history, their ambient environment which produced them. From here we can draw the conclusion that every state has the duty to protect its national patrimony build from cultural goods found on their territory against theft, clandestine digging, of illicit export and in the event of armed conflict.

In the case of international law norms that refer to the protection of cultural property in case of armed conflict, new elements were introduced, as for example:

a) The categorical interdiction of theft;

b) The interdiction of destruction and distain of enemy property;

c) The authority advertisement before starting a terrestrial bombing and the interdiction of bombing with armed naval forces of ports, cities, villages, homes or buildings which are not defended;

d) The interdiction to attack or bomb, by any means, cities, villages, homes and buildings with are not protected;

e) The interdiction or pillaging any city of home, even the conquering of it.

In the text of the 1907 Hague Convention a difference is made between cultural goods situated in regions that aren't protected and those with military protection, the first ones being compulsory to being declared.[6] in the same manner, obligations and criminal sanctions have been introduced for the belligerent party which disobeyed this Regulation.

All these provisions were in fact trials to solve this problem of cultural properties.

The gaps which pressured the humanitarian international law regarding cultural property surface with the start of the First World War, in 1914. During this war, great value historical moments were destroyed with intent, as the Reims Cathedral and the central monuments from Louvain and art collections were robbed. Some states, in order to protect their goods from war risks,

have transferred them to treasuries of other states, which were no longer returned. The excuse given with this occasion was "military necessity"[1].

The discrepancies seen between the provisions (or dispositions) of the 1907 Hague Convention and the events of the First World War lead to the idea of improvement and completion of these norms. In these conditions, during the 1923 Washington Convention, a commission of legal advisers elaborated the "Rules of air war", which contain two norms regarding the protection of cultural property, these being listed in art. 25 and art. 26 of these regulations[2]. But these regulations haven't become international law norms, because these weren't accepted by the party states.

Before the Second World War another "Treaty regarding the protection or artistic and scientific institutions and historic monuments" (The Roerich Pact) was signed. It was signed in Washington on the 15th of April 1935. This is the first document consecrated especially to the problems of cultural goods, establishing a system of protection for the two situations: in peace and in the event of war. The pact had a regional character, referring only to the American continent. It was signed by 21 states, from which only 10 ratified it.

During the 2nd World War the rules provided by the Hague regulation of 1907, regarding open town and cities were obeyed. No other rule was obeyed, because some of the states weren't parties to the conventions, or just out of contempt for the regulation adopted.

The disinterest shown by the states involved in the war towards cultural properties of other states is proved by the fact that in Belgrade more public and cultural buildings were destroyed, together with the national library (thousands of books and manuscripts were burnt) and Russian monuments and work of arts were destroyed, which were the results of demolishing the Soviet Union culture: 427 museums, 1.670 orthodox churches, 237 Romano-catholic churches, 69 chapels, 532 synagogues and 258 other buildings were destroyed, 1.710 Soviet town, over 70.000 villages. Besides the property destroyed, a lot of goods were stolen, without ever being recovered (paintings of the Dutch, Italian, German schools, China collections etc.).

2. THE VIENA CONVENTION VERSUS THE HAGUE CONVENTION

In the content of the Vienna Convention the following are provided: "when a treaty provides that it is subordinated to an anterior or posterior treaty or that is mustn't be considered as being incompatible with the other treaty, its dispositions will apply mainly:

- when all states are parties of the anterior treaty and of the posterior one, without the first one being expired or his application being suspended, the anterior treaty is not applied but in the measure in which its dispositions are compatible to those of the posterior treaty.

When the parties to the anterior treaty are not all parties to the posterior one:

a) if two of the state are parties only in the Hague Convention, and the two are parties in the Protocol, the Protocol will be applied.

b) if the two states are both parties to the Protocol and to the Geneva Convention, the priority will be given to the latter one, as a result of the clause "without prejudice".

c) the states that aren't parties at either of the two documents, not to the 1907 Conventions, their provisions will prevail[3]."

---

[1] Andriţoi Claudia, "The alternative usage of law", Study published in "The 16th international scientific conference knowledge-based organization", 25-27.11.2010, Terrestrial Forces Academy, Sibiu, ISSN 1843-6722, http://www.ebscohost.com/titlelists/agh-journals.pdf, http://proquest.com.

[2] Cloşcă Ionel, Suceavă Ion, Drept internaţional al conflictelor armate, Documente, The publishing House and Press "Chance", Bucharest, 1993, pages 423-432.

[3] Idem.

The norms jus cogens have a special statute according to art. 53 of the Vienna Convention[4] which establishes that, no state can refer a practice or a treaty contrary to jus cogens even if it has an interest to do so[5].

The norms jus cogens have been perceived to be a part of positive law (the states practice). Thus, it is considered that if positive law represents the rules of a state then jus cogens is not positive law, but if, positive law represents law that are in force in the practice of international community, then jus cogens represents positive law.

In Prosecutor vs. Furundzija, International Criminal Tribunal or the Former Yugoslavia (ICTY) it has been declared that jus cogens cannot be violated by any state „*by international or local treaties or special customs or even general customary rules that are gifted with the same normative force*"[6].

Also, the Project of the International Law Commission (CIL) on the modifications of treaties through subsequent practices statute in art. 38 (which don't refer to jus cogens rules) that: „*a treaty can be modified through a subsequent practice in the application of the treaty with the approval of the parties to modify the provisions…*"[7] In *travaux préparatoires* CIL considered an implicit approval of the states which seems not to be an active practice but a silent approval. This article was erased by the Vienna Treaties Convention by art. 42[8] which confirm the possibility of treaty provisions that don't come from customs, and will become customs.

In the same manner, CIJ decided in the case *North See Continental* that it offers customary international law a prolonged and undisputed practice of the states. The frequency and the customary character are not enough to define customary international law, because "comity" also supposes frequent and repeated acts of courtesy (the same situation exists for international moral). The same case reappeared when CIJ decided in the *Lotus* case that the refrain to exercise a criminal jurisdiction on the actions realized on board of ships from international waters represented an international custom "*if such an except is based on the existence of their consciousness they have the duty to refrain*"[9].

In the Case Military *and Paramilitary Activities in and Against Nicaragua* (Nicaragua vs. U.S.)[10] CIJ established that there are other rules of international law than those accepted by the states. Besides the fact the role of state actors is growing in the forming process of international law, the states have remained the central subjects of this process, with their privileges in determining the fact that there is a new law[11].

The Committee of the International law Association regarding the realization of customary international law (general) has declared in its Final Report[12] a state superiority in determining

---

[4] Vienna Convention on the Law of Treaties, Article 53,1155 UNTS 331, 8 International Legal Materials 1969, p. 679.

[5] Andriţoi Claudia, Analysis of the new paradigm of rights in the globalisation era", Study published in Annals of DAAAM for 2009 & Proceedings of 20th DAAAM International Symposium Publishing of research/scientific report as paper in ISI Proceedings, p.259-261, ISSN 1726-9679.

[6] Prosecutor v. Furundzija, International Criminal Court or the Former Yugoslavia (ICTY), 2002, 121 International Law Reports (2002) p. 213.

7 ***Arthur Watts***, The International Law Commission 1949-1998, Volume II: The Treaties, ***Oxford University Press***, 1999, p. 717-718.

[8] Art. 42(2) of the Viena Convention provides that the abrogation of a treaty may take place "only as a result of applying the treaty provisions or the present Convention".

[9] P.C.I.J., Seriile A, Nr. 10, 1927, p. 28.

10 B.N. Patel, The World Court Reference Guide: Judgments, Advisory Opinions and Orders of The Permanent Court of International Justice and The International Court of Justice (1922-2000), ***Martinus Nijhoff Publishers***, 2002, p. 487.

[11] Andriţoi Claudia, „Exegesis of the legal interpretation", Study published „The 15th international scientific conference knowledge-based organization", 26-28 November 2009, Sibiu, p.57-61, ISSN 1843-6722.

[12] The Final Report of The Committee, London Conference (2000) seen on www. ila-hq.org.

customary rules but the condition of the state consent as general precondition of customary international law. It has been sustained only the fact that a consent is compulsory for a corresponding rule of customary international law regarding the principle *pacta sunt servanda* thus *"the consent obliges the state that consented"* (the principle of protecting good belief). The states consent is not an obligatory precondition because the common belief says that the respective practice is legally obligatory and sufficient to create international customary law. The belief represents a sufficient precondition but not necessary, while opinio juris can be proved by any means or methods.

The preoccupation for the protection of cultural property continued even after that period, reaching the conclusion those more drastic measures must be taken; punishments more severe must be applied to states that neglect norms of international humanitarian law and the gaps still existent must be eliminated[13].

3. THE PROTECTION SYSTEM OF CULTURAL PROPERTY AFTER THE HAGUE CONVENTION OF 14 MAY 1954

The Hague Convention of 1954 for the protection of cultural property in the event of armed conflict is the main international instrument for the protection of cultural goods in the event of armed conflicts.

Holland, during 1939, presents a Convention project, elaborated under the management of the International Office of Museums. In 1948 the project was presented to a UNESCO sub-committee. Afterwards it has been submitted to the general Conference of 1952, which transmitted it to government for study. Between 21st of April and 14th of May, the Hague Conference has been convoked, where 56 states were presented, including Romania. At the conference the following were adopted:

- The Convention for the protection of cultural property in the event of armed conflict;
- The Convention Implementing Regulation;
- The Additional Protocol (recognized as Protocol I of the Convention, after which in1999 the second Protocol has been adopted).

The Convention entered into force on 7 August 1956.

Unlike the regulation of the 1907 Convention, the 1954 one establishes a sole criterion according to which cultural property is protected, their importance for the peoples' cultural patrimony.

According to the provisions of the Convention, the property protected was that expressly provided, with the exception of natural beauty sites[14] and cult places.

According to international law in this domain, the protection of cultural property has in sight two elements: defence and respect. Defence refers to the parties' obligation "to do", and this "to do" supposes the parties' obligation to take the necessary measures for the protection of cultural property. If a state hasn't taken these protection measures, this does not empower another state to destroy its goods. The adversary state has the obligation to respect the property of the contracting (party) state.

The respect of a state property devolves the obligation of "not do", which represent:

- The interdiction of using this property, of their protection devices and those near it for purposes that will expose it to destruction or deterioration;
- The abstention of any act of hostility towards them;
- The interdiction, prevention and in need, the imposing of termination of any vandalism act;
- The interdiction of requisitioning cultural property;
- The interdiction of repressions against these goods.

---

[13] Stanislaw E. Nahlic, La protection internationale des biens culturels en cas de conflit arme, în Recueil des Cours de l'Academie de Droit intenational, vol. 120, I, 1967, pp. 77-78.

[14] For their protection UNESCO adopted a special Convention in 1972.

The idea that results from these provisions is that cultural property must be respected in times of peace and in the event of war, by its own citizens and by the citizens of other states.

In article 5 of the 1954 Convention we can see the obligation of occupation power to support, if it is possible, of national authorities of the conquered territory to insure the protection and the guarding of the cultural property found on this territory. From this provision it results the idea that the authorities of a state have the obligation of taking necessary measures for the protection of cultural property. If these don't have the possibility to take emergency measures, the conquering state will take preservation measures for the treasures of the conquered state.

The Convention provides in articles 16 and 17 the recognition sign for protected cultural property. "Article 16. Emblem of the convention

1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, persaltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).

2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

Article 17. Use of the emblem

1. The distinctive emblem repeated three times may be used only as a means of identification of:

(a) immovable cultural property under special protection;

(b) the transport of cultural property under the conditions provided for in Articles 12 and 13;

(c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.

2. The distinctive emblem may be used alone only as a means of identification of:

(a) cultural property not under special protection;

(b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;

(c) the personnel engaged in the protection of cultural property;

(d) the identity cards mentioned in the Regulations for the execution of the Convention.

3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party."

International law norms refer to the social protection of cultural property represented by: refugees that shelter movable cultural property, movable centres, movable property of great importance that need to fulfil a few conditions:

- are found at a sufficient distance from any important military objective (aerodrome, radio station, institutions that work for national defence, railway station of a certain importance and channel of communication);
- not to be used in military purposes (for personnel movements or military material, even in transit), activities directly connected to military operations: Cantons of military personnel or the production of war materials. The following are not considered to be used for military purposes: supervision realized by armed forces of cultural property, not the presence near this property of police forces with the task of insuring public order;
- to be listed in the "International Register of Cultural Property under Special Protection", Kept by the general manager of UNESCO.

The contracting parties have the obligation of insuring immunity for these goods which enjoy a special protection. Is a party violates its assumed obligations, the other party insures immunity of these goods, but only if this violation situation exists.

The immunity of a cultural property may be lifted in exceptional cases, of unavoidable military necessity. These cases may be observed by the chief of an equal formation of superior one as importance of a division.

The 1954 Hague Convention is an important judicial instrument which determines the agreement between states and contributes to the keeping of international peace. At present, the 1954 Convention is ratified by 95 states, but its importance results from the fact that the principles mentioned in its text have become norms of international customary law. But all these Convention provisions will not reach their purpose if the party states won't respect them constantly. Information also plays an important role, because it offers data regarding theory, but especially regarding the lacunar practice in the domain[15].

Today, there is a struggle between the discoveries of an international "cultural identity", which is so necessary for the birth of a "New Europe". This vision of a New Europe represents a new "challenge" for UNESCO and implicitly, for the protection of cultural property.

The idea is that historical monuments and cultural property in general, represent factors of education. These goods are in fact the pride of a state.

Regardless of all these provisions, cultural property has been destroyed and rubbed, on many occasions being the preferred target of attacks. Sustaining examples for this statement are: during the Second World War, Luftwaffe received the order to bomb England, with retaliation, all the buildings with the sign referring to cultural property protection, and in return, the British have done the same thing to Germany. A recent example is represented by the situation in Afghanistan (the destruction of Buddha statues by Taliban leaders). The international public opinion was alerted by roomers according to which objects found in the patrimony of National Museum of Afghanistan were systematically destroyed. The Kabul authorities denied all accusation, but didn't allow access to foreign journalists in the museum, which was closed to public from 1992. Through unofficial means, occidental journalists have found out that 2000 years old Buddha statue has been destroyed inside the museum. In march, in Kabul, a delegation arrived formed of ambassadors from Italy, the Greece ambassador in Pakistan, a French representative and members of the Society for the Protection of Cultural Patrimony in Afghanistan. These were stupefied when the official of Kabul informed them that the destruction of cultural patrimony has become a matter of state politics in Afghanistan.

The Taliban Militias conquered Kabul and have taken control over the greatest part of Afghanistan in 1996, instituting a regime of terror. "Theology students" sustain that they have transformed this state in the "purest" Islamic state in the world. They apply a super-strict interpretation of Sharia (the Koran laws) in a country where the photos of living beings, movies, television and music are forbidden.

In Bamiyan we can still see the two tallest statues of Buddha in the world.

At the base of Ghorband mountain, in niches that overpass the height of 50 meters, two gigantic statues of Buddha have been sculpted. These statues, dating from the late Kuşana period, stand at the origin of the Buddhist statues from the East Turkestan and China and are connected by Indian origins, but also proto-Iranian. Mount Ghorband also hosted the home of king Kaniska. In these surroundings, the rocky walls that delimit the valley are pierced by numerous caves; most of them natural caves, but extended by man, where Buddhist monasteries were installed. The niches and the caves are richly painted, most of the times in the Gandhana style of Cusani.

The question asked was "how these destructions could be stopped?" (monasteries were riddled with gun bullets and gutted by bomb hits or grenade towers).

---

[15] Emeric de Vattel, Le droit de gens ou principes de la loi naturelle appliquees a la conduite et aux affaires des nations et des souverains, Guillaumin et Cie, Paris, 1863, p. 168, 169.

In the project "Code of crimes against the peace and security of human kind", the International Law Commission gathered a list of offences that can be considered crimes against peace and security and demanded that those responsible of these crimes to be judged. Art. 22 mentions the terms "exceptional crimes of war", thus introducing here "deliberate attacks on goods of an exceptional religious, historical and cultural value." Unfortunately, Afghanistan is not a party of the 1954 Hague Convention, completed by the two Protocols and not of the Convention regarding the protection of cultural and natural world heritage[16].

The supreme leader of Afghan Taliban Mulla Mohammed Omar, considering that he hasn't done everything to create a "pure Islamic" state in the Middle Orient, gave a wicked order, that left no room for interpretation. "All the statues in the country will be destroyed, because these were used as idols by the unfaithful. The statues are still respected and could become in the future object of idolatry".

Taliban chef declared that "the keeping of these statues would contradict the Islam (…) while their destruction is a demand of Moslem law".

Taliban militia found in Bamiyan proved their "braveness" and their "initiative spirit" by attacking the gigantic Buddha statues with all their weapons: tanks, anti-tank missiles, grenades and even automatic weapons. There were no concrete data, but is has been estimated that at least two thirds of the entire number of statues have been destroyed.

On 9 March 2001 the Buddha statues were entirely destroyed. An eye witness stated that the two statues were blown up and "made into pieces". Regardless of all this, the press agency from the Islamic Afghan announced that on 7 March only the head of a statue was destroyed.

Despite the waves of international protests, the Buddha statues were destroyed entirely. Unfortunately these could not be saved.

But besides these negative examples there are also a few positive ones: USA interdicted during the war with Cambodia in 1973 the use of the B-52 plane in bombing at less than one kilometre from localities and monuments, temples, pagodas and cult places.

In the Preamble of the UNESCO Protocol the following words appear: "If wars take birth in the men's mind, peace must also take birth in their mind". If each of us would keep in mind these words, nothing would stand in the way of the protection of cultural property. Each of us must respect these goods, because there represent our image over borders.

Conclusions

Studying the representative doctrine of this century and the jurisprudence of states we observe that all great authors have identified the existence of customary norms regarding the immunity of private property, the interdiction of the right to rob cultural property, the bombing of this property etc.

In front of an explosion of preoccupations and idea, the law couldn't have remained passive. Through judicial norms, internal and international, we have tried to obtain the protection of cultural patrimony. In times of peace, through norms of international laws, we desire the protection of the integrity of national cultural patrimony and in the case of war; the same objective is desired through norms of humanitarian international law.

The arguments presented in this study suggest the conclusion that, on one side, a particular action may take birth from a customary law, despite the fact that states don't agree with it as legal obligation. On the other side, a particular action, capable of creating customary international law may be undetermined by the states contrary opinions.

From the intersection of both theories (the facultative character of the state consent and of the belief opinio juris) it would result that opinio juris compensates to the relative absence of practice

[16] Marcheggiano Arturo, Protecţia bunurilor culturale în conflictele neinternaţionale care comportă dezintegrarea statelor, in the Romanian Journal of Humanitarian Law, Year IV, 1996, no. 4 (14), pages 15-16.

and vice-versa. But what happens if, in the case of a putative international customary law, when the state is kept by a practice based on false conceptions and information regarding the existence of a particular legal obligation? The theory "*more practice, less of a need for a subjective element"* regarding customary law shows us how powerful and long must this practice of the states be in order to deduce opinio juris. But less practice may be replaced by a strong opinio juris to give birth to international customary rules.

References

- Andriţoi Claudia, *The alternative usage of law*, Study published in „The 16th international scientific conference knowledge-based organization", 25-27.11.2010, Terrestrial Forces Academy, Sibiu, ISSN 1843-6722, http://www.ebscohost.com/titlelists/agh-journals.pdf, http://proquest.com.
- Andriţoi Claudia, *Analysis of the new paradigm of rights in the globalisation era*", Study published in Annals of DAAAM for 2009 & Proceedings of 20th DAAAM International Symposium Publishing of research/scientific report as paper in ISI Proceedings, p.259-261, ISSN 1726-9679.
- Andriţoi Claudia, *Exegesis of the legal interpretation*, Study published „The 15th international scientific conference knowledge-based organization", 26-28 November 2009, Sibiu, p.57-61, ISSN 1843-6722.
- Arthur Watts, *The International Law Commission 1949-1998*, Volume II: The Treaties, Oxford University Press, 1999, p. 717-718.
- Cloşcă Ionel, Suceavă Ion, *Drept internaţional al conflictelor armate*, Documents, Publishing House and Press "Chance", Bucharest, 1993, pages 423-432.
- Cloşcă Ionel, *Conflicte şi combatanţi*, The Romanian Journal of Humanitarian Law year VIII, 2000, no. 1-2 (31-32), page 10.
- Marcheggiano Arturo, Protecţia bunurilor culturale în conflictele neinternaţionale care comportă dezintegrarea statelor, in The Romanian Journal of Humanitarian Law year IV, 1996, no. 4 (14), pages 15-16.
- Mihăilă Marian, Protecţia bunurilor culturale în dreptul internaţional public, LUMINA LEX Publishing House; Bucharest, I.S.B.N. 973-588-569-7; page 474; 2003.
- Patel B.N., The World Court Reference Guide: Judgments, Advisory Opinions and Orders of The Permanent Court of International Justice and The International Court of Justice (1922-2000), Martinus Nijhoff Publishers, 2002, p. 487.
- Stanislaw E. Nahlic, La protection internationale des biens culturels en cas de conflit arme, in Recueil des Cours de l'Academie de Droit intenational, vol. 120, I, 1967, pp. 77-78.
- Emeric de Vattel, *Le droit de gens ou principes de la loi naturelle appliquees a la conduite et aux affaires des nations et des sou*verains, Guillaumin et Cie, Paris, 1863, p. 168, 169.
- Vienna Convention on the Law of Treties, Article 53,1155 UNTS 331, 8 International Legal Materials 1969, p. 679.
- Prosecutor v. Furundzija, International Criminal Tribunal or the Former Yugoslavia (ICTY), 2002, 121 International Law Reports (2002) p. 213.
- P.C.I.J., Seriile A, Nr. 10, 1927, p. 28.
- The Final Report of The Committee, London Conference (2000) seen on www. ila-hq.org.

AMBIGUITY OF THE COLLOCATION "STATE SUBJECT TO THE RULE OF LAW"

IULIAN NEDELCU[*]

Abstract
This work has as purpose the analysis of the notion of "State Subject to the Rule of Law", considered within the doctrine as being ambiguous due to the fact that there are several methods to understand the base of state being subject to the rule of law, on one hand and on the other hand because, similarly to the concept of democracy, the abusive use of the concept to describe political and legal regimes which are completely different from one another voids it of any meaning.
The concept of state subject to the rule of law is a doctrinary creation. Although normativised by many current constitutions, its contents mostly remains uncertain, precisely due to its origin which makes it an incessant debate theme, a theme upon which a generalised agreement has not been possible up to presently.
The analysis of this notion shall approach the visions upon the state subject to the rule of law expressed within the doctrine: formalist, functionalist and material which provide three different types of organisation of the state subject to the rule of law which are complementary instead, not antagonistic ones.

Keywords: *stat subject to the rule of law, constitutionality, formalist vision, functionalist vision, material vision*

Introduction

The notion "*state subject to the rule of law*", within the doctrine, is appreciated to be ambiguous due to the fact that there are several ways of understanding the basis of subjecting the state to law, on one hand and on the other hand, because, as in the case of the concept of democracy, the abusive use of the concept to describe political and legal regimes which are radically different from one another, voids it of any meaning. Its symbolic charge renders its structure too fluid, and its contents too little determined. This is why we find it useful to very synthetically survey a few of the state subject to the rule of law theories, on this occasion shaping its features, so that subsequently we should see its functions.[1]

The state subject to the rule of law concept is a doctrinary creation. Although normativised by many current constitutions, its contents greatly stays uncertain, precisely due to its origin, which turns it into a continual them for debate, a theme upon which a generalised agreement has not rather been possible so far. Created in Germany, under the name of *"rechtsstaat"*, the concept has been taken over by the French doctrine under a critical but also constructive form under the name of *"l'etat* ***de droit"*** **and it has** penetrated even in the specific legal Anglo–Saxon world, even if the concept of *rule of law*, greatly stays distinct. We actually have three concepts, which although they seem to express the same thing, they are distinct in many regards, being tributary to a certain particularity of the legal culture using them.

If the objective of all theories which are the basis of these concepts is to enframe and limit the power of the state through law (this being the basic feature that we can find in all the theories), the manner to attain this objective is different, the state subject to the rule of law being for some people a state which acts through the law, that is under its legal form, for others a state which is subjected to law or, as a third category of doctrines considers, a state of which law shows certain inner traits. These three visions – formal, functional and material – provide three different methods of the state

[*] Professor PhD., Faculty of Law and Administrative Sciences, University of Craiova (e-mail: avocatnedelcu@yahoo.com).

[1] Dan Claudiu Dănişor, *Constitutional Law and Political Institutions*, Volume I – General Theory (Craiova: Sitech Publishing House, 2006), 170.

subject to the rule of law organisation, but which are complementary instead, not antagonistic. If for the formalist vision, the state subject to the rule of law is reduced to a hierarchisation of the legal order, which has as purpose to limit random due to the fact that the different state's bodies can act only based on a legal empowerment given by a higher legal standard in the normative hierarchy as compared to those that the respective body can adopt, if for the functionalist vision the state not only that it acts using the law but also, it is subjected to it, although the basis of this subjection of the state to a law which is superior to it, is conceived in very different manners, for the material vision upon the state subject to the rule of law the law contents becomes more important than the form of the controlled normative hierarchy, the idea on which this vision is focusing being the one of freedom, and not the one of authority asserting organisation.

1.The concept of state subject to the rule of law

The concept of state subject to the rule of law was elaborated and substantiated by the German doctrine from the second half of the XIth century. The idea of state subject to the rule of law represented, beginning with the VIIIth century, the pattern of fundamental guarantee for the citizens' rights and liberties. The philosophic and legal doctrine on the human natural and imprescriptible rights[2] represents the primordial source of the principles of the state subject to the rule of law.

The state subject to the rule of law means the subordination of the state to law, the approaching of this notion being made from two perspectives:

- the power of the state as coercive force;
- relation between normality and power.

With regard to the state's power as coercive force, what it is interesting is the freedom-power relation.

The feeling of freedom appeared simultaneously with the human kind. For the human kind, freedom has been and will remain as natural and as legitimate as his very existence. Relation between freedom and coercion must be rational. Freedom without authority is altered[3] as authority without freedom is degenerated. Law models, through behavioural rules expressing the general will, human tendency, which is a natural one for that matter, to complete, unconditional freedom. It is still law that institutes and legitimates coercion, enframing it within a system of means and proceedings.

Power and normality are in a mutual interconditioning relation, thus power creates the standards which limit power. The problem of defining state subject to the rule of law or the legality state seems simple at a first view. Most of authors claim that the state subject to the rule of law is characterised through the fact that it accomplishes law reigning in its whole activity, either through relationships with the citizens, and either with the different social organisations on its territory[4].

2.Formalist vision upon the state subject to the rule of law

Formalist vision upon the state subject to the rule of law was imposed in Germany in the XIXth century, even if initially it encountered a substantial vision due to a liberal perspective and was consolidated under the impulse of the Kelsenian Normativism. Thus, the state subject to the rule of law is opposed to the police state. "*The police state is that in which administrative authority can, in a discretionary way and with a freedom of decision making more or less complete, apply to citizens all the measures they consider useful on their own authority, to cope with circumstances and to attain each moment the purposes they propose*".[5] Unlike this type of state, the state subject to the rule of

[2] Universal Declaration of the Human and Citizen's Rights - 1789: "*The purpose of any political partnership is to preserve human's natural and imprescriptible rights: freedom, proprietorship and resistance to oppression*".

[3] John Locke, *Essay on Civil government*, Dalloz Publishing House, p.53

[4] To see German Constitution, Spain Constitution, Romania's Constitution.

[5] Rene Carré de Malberg, Contribution à la théorie générale de l'Etat, Tome II, Sirey, Paris, 1920-1922, p. 488. Jacques Chevallier, *L'Etat,* (Paris: Dalloz, 1999), 17-18.

law is "*a state which, in its relations with its subjects and in order to guarantee their individual status, it is subjected itself to a law regime, because it enframes its action upon them through rules, some of them determining the rights reserved to citizens, some others establishing in advance the methods and means which can be used to achieve state purposes*".[6] **Which is in the centre of this theory of the state subject to the rule of law is administration being subjected to the laws**. The administration cannot act but ***secundum legem***, that is based on a legislative empowerment and, certainly, it cannot act ***contra legem***. **This fact entails on one hand that any administrative coercion should be accepted by citizens, for they participate in the laws creation through Parliament elections and, on the other hand, it should be predictable, non arbitrary, for laws are not only general, abstract and impersonal, but also presumed to be known by everyone.** This vision upon the legal enframing of the administrative action is doubled in Germany by a material understanding of the law, which requires to the constitution "*to ask for any « material law», - that is any prescription regarding a rule of law applicable to citizens* - a *«formal law», which excludes ordinances based only on the monarch's will or only on the administrative regulating power*"[7]. Therefore, contrary to the French vision, the administration actually misses its own regulating power. This is one of the reasons for which theory could not be fully accepted in the French legal environment which is generally attached to a formal vision of law and which reserves to the administration an own normative power. Therefore *"Rechtsstaat" means that administration not only that it cannot impose by its own force legal duties to its subjects, but also that it must be limited to making that application specific and individual of the legal rules, being limited to the law application: to create norms, would mean, indeed, intromission upon the legislative function; despite all this*, ***a contrario***, *administration has available a decision making and initial action power with regard to its own affairs, its internal organisation – field in which it can take the specific or general required measures, without being necessary to be based on a law text. Through this it is manifested the political force of the* Rechtsstaat *theory which at the same time represents a barrier in the way of random, requiring an intervention of* ***Landtag*** *for everything that cause prejudice to individual rights and keeps the Administration prerogatives, placing the state itself outside the law application*"[8].

This vision upon the state subject to the rule of law starts from a trust out of principle in laws and in representation which is not at all unanimously shared. On the contrary, for some people "*normativism does not produce, essentially, but one result: it carries at the legislative level the dynamism of adaptation of Law which otherwise would have made the state to act in the administrative field*". Overall, there will not exist either more or less change, as we find ourselves within a state subject to the rule of law or within a «*random*» one; there is only one difference of state's bodies obliged to make the adjustment in the two cases. This is not the essence of the Rechtsstaat (the state subject to the rule of law) to guarantee the predictability through a normative immobilism. What a citizen grains before inosculated administration, he/she will lose because of a law maker which «*breaks out within the norms*».

This theory settles the relation *state – law*, which is addressed in terms of priority/primordiality, claiming that the *state precedes law*. Therefore there is no previous right which is also superior to the state. If the state is subjected to law, it will make it voluntarily. The theory is based on an overreaction of sovereignty doctrine. A sovereign state does not know other limits apart from those placed by itself. Only prescriptions punished or ordered by the state can have the status of legal norms. Precisely due to the fact that the state is the only holder of the coercion force, it is the ***«only source of law»***. The contents of the legal order, which is structured so as to be organised as a state subject to the rule of law, is determined by the state. This does not mean that the

[6] Idem.

[7] Jacky Hummel, Etat de droit, libéralisme et constitutionnalisme durant le Vormärz, in Figures de l'Etat de droit, p. 144.

[8] Jacques Chevallier, *L'Etat,* (Paris: Dalloz, 1999), 17-18.

state's power does not have any limits, but that the state establishes itself limits within which its power is asserted through legal norms. It can amend these norms, but as long as they are in force, it is held to strictly comply with. And yet, law represents for the state a true coercion, even if not an external one.

A first coercion results from the fact that state cannot suppress the very legal order, that it is obliged to act based on a legal title. A second one results from the social pressure asserted on behalf of the idea of law which substantiates the feeling of affiliation to a state. These barriers that the self-limitation theory places in the way of the state's power are yet fragile. State creates a limit of its power assertion, creating a legal order which is structured, hierarchised, stable and coherent, but the contents of this order is indifferent, which makes that the state subject to the rule of law should remain a mere form, of which contents is too handiest for the ruling power.

3. Functionalist vision upon the state subject to the rule of law

In the functionalist vision upon the state subject to the rule of law, the state not only will act through law, but it is subjected to it. The nuance is very important, for law becomes not only a means of the state's action, but an outer limit of this action. From an instrument of power, law turns into a guarantee of freedom. Not only administration is limited by law, but the very law maker who finds his/her action enframed by the existence of a law which escapes to a certain extent to its direct and exclusive control. Therefore, this time it is about a limiting from outside of the state's power. The basis of this subordination of the state to law is instead conceived in different manners depending upon the basis found for this right which in order to limit the state, should be anterior and superior to the latter*: God, Nature, Reasoning, Society*. But regardless of the basis, the state is held to comply with this right, not based on its own will, but based on a will which is superior to it. Since the creating fact of this right is found outside the state, it cannot modify it. Essentially, it is the idea transposed into the constitutional revision procedures which implies the direct intervention of the people or into the procedure of control of the constitution revision projects constitutionality.

The state subject to the rule of law becomes more complex from the formal perspective. If formalist theories of German origin instituted only a law priority before the administration, instituting a legal state, the state subject to the rule of law institutes a priority of law before the state overall, not only before its bodies and it cannot be conceived without the Constitution's supremacy in relation with the laws. Thus, the constitutionality control becomes mandatory for the existence of the state subject to the rule of law. But the very Constitution does not have an indifferent contents, it is not a mere postulate as in the normativist theories, which requires from law a certain contents. Thus, this vision tends to become material, but it remains inaccurate, for the contents of the natural law, of the objective law, of social consciousness is too vague, too difficult to be transpose in accurate legal terms.

4. Material vision upon the state subject to the rule of law

For the material vision upon the state subject to the rule of law, *"if the state subject to the rule of law would be only a technical device which made the laws be subjected to the Constitution and which manifested the triumph of the norms hierarchy, it would not have at all a different excellence but to provide the intellectual satisfaction of Hans Kelsen's disciples"*.[9] For this vision the notion upon which the state subject to the rule of law is focused is that of freedom, not the norm one. Fundamental rights are in the centre of this construction, which keeps the benefits of the normative hierarchy, of the jurisdictional control of its compliance with the latter, but it gives them a new purpose, requiring the laws of the state subject to the rule of law the qualities necessary to guarantee the individual freedom by providing the legal security of the law subjects.

[9] Dominique Colas, *L'Etat de droit*, (Paris: P.U.F., 1987), p. VIII.

Conclusions

In the context of the state subject to the rule of law, "the state must be a state governed by the law. The state must establish with accuracy the limits of its competences under the form of laws, as it does with regard to the citizens' liberties, it must not act more than its legal competence."[10]

Romania's Constitution revised in 2003, proclaims in art. 1 paragraph (3) that Romania is a state subject to the rule of law, opting for the collocation "state subject to the rule of law", the literal translation of the word "Rechstaat" proposed by the German doctrine, and not for that of "legal state", preferred by the French doctrine, being considered that the legal state is only one of the levels of the state subject to the rule of law, which does not provide enough guarantees as compared to the random, the law-marking remaining uncontrollable.[11]

The laws of the state subject to the rule of law must first of all not only be structured as an hierarchy, but it must be certain, which requires the public character of the legal norms, a certain clarity of prescriptions, their non-retroactivity and stability, that is the predictability of the amendments that might be operated, qualities which make law provide the legal security of the subjects and their legitimate trust in the continuity of the state's action. Subsequently, law must be based, so as to be in the presence of a state subject to the rule of law, on certain values inherent to the human person (dignity, freedom), inherent to the democratic society (participation, pluralism) and to the liberal society (justice, compliance with the individual's rights and liberties, the state's intervention subsidiary and proportional). This axiological law subordinates its state through contents, the formal means being subordinated to the achievement of the values founding the juridical order.

Reference

- Dominique Colas, L'Etat de droit, (Paris: P.U.F., 1987).
- Jacky Hummel, Etat de droit, libéralisme et constitutionnalisme durant le Vormärz, in Figures de l'Etat de droit.
- Jacques Chevallier, L'Etat, (Paris: Dalloz, 1999).
- Dan Claudiu Dănişor, Constitutional Law and Political Institutions, Volume I – General Theory (Craiova: Sitech Publishing House, 2006).
- Rene Carré de Malberg, Contribution à la théorie générale de l'Etat, Tome II, Sirey, Paris, 1920-1922.
- Universal Declaration of the Human and the Citizen's Rights - 1789: "The purpose of any political associations is to preserve the human natural and imprescriptible rights: freedom, proprietorship and resistance to oppression".
- John Locke, Essay on Civil government, Dalloz Publishing House.
- Romania's Constitution as amended and completed by the Law of revision of Romania's Constitution no. 429/2003, published in Romania's Official Journal, Part I, no. 758 of October 29th 2003, reissued by the Legislative Council, in the meaning of art. 152 of the Constitution, with the updating of the denominations and being given to the texts a new numbering (art. 152 a became, under its reissued form, art. 156).
- Jacques Ziller, Administrations compares - Les systemes politico-administratifs de L 'Europe des douze, Montchrestien, Paris, 1993.
- Ion Deleanu, M. Enache, State subject to the rule of law, in Law no. 7/1993.
- Marie Joelle Redor, de l'Etat legal a l'Etat de droit, Economica, PUF, 1982.
- Ioan Alexandru, Administrative Law in the European Union, Lumina Lex Publishing House, Bucharest, 2007.

[10] Ioan Alexandru, *Administrative Law in the European Union,* Lumina Lex Publishing House, Bucharest, 2007,p. 150

[11] Ion Deleanu, M. Enache, *State subject to the rule of law,* in the Law no. 7/1993, p. 10; Marie Joelle Redor, *de l,Etat legal a l'Etat de droit,* Economica, PUF, 1982, p. 14.

SCENARIOS REGARDING THE FUTURE OF THE EUROPEAN UNION

PAUL-IULIAN NEDELCU*

Abstract
This work has as purpose to argumentatively identify the future evolution of the European construction, identifying a potential scenario which would settle the current contradiction within the European Union, namely the existence of a true "economic federation" and of only a "political quasi-confederation" , being notorious the fact that in Europe, federalism is mainly known as a specific solution of power assignment between the institutions of a central power and those of the member states (for federal states) or as a potential model of transnational integration (for the European Union) and even for regionalism within certain states (Spain, Italy, France).
It shall be tried the decryption of the philosophical and legal base of federalism as a doctrine able to provide a solution of state's organisation in the conditions of the European integration.

Keywords: *federalism, European Union, federal states, personalist thinking, regionalism*

Introduction

The future of the evolution of a certain system cannot be certainly foretold. This is a truth that has been scientifically proved. It's exactly this lack of certainty regarding the future of the E. U. that determined the projections of several scenarios among which the one that would solve the current contradiction in the E.U., which is the existence of a real "*economic federation*" and only a "*quasi-political confederation*"[1].

In Europe, federalism is mainly known as a concrete solution to spread power between the institutions of a central force and the ones belonging to the member states (in the case of federal states) or as a potential transnational integration model (in the case of the European Union) and even for regionalism within some states (Spain, Italy, France).

Thus, federalism existed as a political and social model but also as a philosophy and methodology oriented towards a future determined by the inevitable globalisation.

But, so as to choose this kind of model, it is imperative that we know its genesis, evolution and the perspectives of its adoption in the conditions that are totally different of what truly represents concrete federal models throughout history until this moment.

The first to have developed such a global concept of federalism was **Pierre Joseph Proudhon**[2] whose theory about a federal society inspired the personalism movement at the beginning of the '30s and later the ones who called themselves *"Global or integral federalists"*, a school founded by **Alexandré Marc**.[3]

---

* Assistant Lecturer, PhD Candidate, Faculty of Social Sciences, University of Craiova (e-mail: paul_iulyan@yahoo.com).

[1] Ioan Alexandru, *Administrative Law in the European Union,* Lumina Lex Publishing House, Bucharest, 2007, p. 40.

[2] Pierre Joseph Proudhon (1809 – 1865), French publicist, economist, sociologist and socialist, primarily qualified as an anarchist.

[3] Alexandre Marc (1904 – 2000), French writer and philosopher.

1.Federalism as manner of organisation of a society

The archetype of the compound state is the federal state. The federal state is an association of states that freely decide, as per their sovereignty, to create joint bodies to which they grant a part of their competences, mostly in the military, diplomacy or financial field.

The federal state is formed of several state formations that have autonomy from the constitutional, legislative and legal point of view and are subordinated to it. In the international relationships, only the federal state has the quality of subject to the rule of law. The connection of association between the states is established with the Constitution. Thus, the federal state appears as an association of states that are subjected to a sole central power (the federal power) on one hand and, on the other hand, preserve a long constitutional, administrative and legal. The federal state preserved a multitude of constitutional frames subjected to the same superior constitutional frame (of the federal state).

In the speciality doctrine it is estimated that there are two ways to establish a federation: by integrating several states and constituting a state entity (the United States of America, Switzerland, and Germany) or by separating some regions of the unitary state and establishing a federation (Belgium).

The reasons to integrate some independent and sovereign states in a federal one are very different: common defence against an external threat; the preoccupation to insure (with the integration) a stable intern social order; the will to use economic resources more efficiently; the geographic context (it is the case of the European integration process).

Regarding the reasons to establish a federation by separating some provinces of the unitary state, they mostly consisted in trying to find a solution to conflict-like national problems. The federal state can be considered a synthesis between the unitary state – with its centripetal or centralising tendency and the co federal state – with its centrifugal tendency to push away its entities from the centre.

The federal state is different from the co federal one by its degree of integration of the federate entities, the Constitution being the one standing as grounds for its existence and not a Treaty. This is built of an assembly of states, federate states that transfer part of their primary sovereignty over to the entity formed of their grouping to the federal state. This sovereignty transfer can be considered a transfer of competences in the benefit of the federal state.

When the first federal constitution was elaborated in Philadelphia there had to be found a compromise between the two groups with the two apparently incompatible philosophies: the ones who wanted to replace the thirteen independent sovereignties with an American Government and Parliament and the ones who refused to replace any transfer of sovereignty to joint institutions and went for a confederation where joint institutions had no power at all over the sovereign member states.

The solution was found by Benjamin Franklin who suggested the bicameral federal system as a historical compromise: ***The Chamber*** – representing the people of the United States and the ***Senate*** – representing the interests of the member states.

Thus, federalism appears since the beginning as a combination between unity and diversity as seems to be the result of an integration process that tends to overcome autarchy without generating centralism and uniformity; it can be a process of decentralization without touching that specific autarchy we find today in the international society formed of the so called national sovereign states where some are actually "*more equal than others*".

Generally, federalism is associated to the historical experience of federal states. Nevertheless, the constitutional frame offered by the dualist split of power between the political federation and its member states can tolerate political regimes, social and economic systems, but also different philosophies such as the United States of America or the former Union of Soviet Socialist Republics, Switzerland or the former Yugoslavia, Brazil or Germany. We believe that the creation of the United States of Europe will not necessarily involve the option of a form named society even if the

reallocation of the authority, by splitting competences and transferring them to a European level, will contribute to great change.

Every state or any other federal-like type of organization have in common some principles that, even though in practice they are somehow unevenly or insufficiently applied, can be found in federalism and characterizes it: the political autonomy and self-government (self-management) of the federate states or member subgroups is insured with legal guarantees and adequate financial means; the litigations between federal autonomous states or member sub-groups are not solved with an illegal competition nor with the arbitrary decisions of an all-powerful centre, but with rules mutually agreed-upon or with conventions between the partners involved. This was called the principle of cooperative federalism; in a federal system, the power is split so that each level (both federal institutions and the ones belonging to the federate states or member sub-groups) require adequate means to solve their own problems.

The purpose of this principle called the subsidiarity is not only to obtain a higher efficiency but also for a higher degree of transparency and self-control; federalism aims to strengthen the democratic principle of participation not only for individuals but also for the member states or subgroups so as to take part to common decisions. The participation becomes efficient by also applying the other principles mentioned above. Some individual members of some small autonomous sub-groups know problems and people better and this is why they have greater possibilities to take part to decisions than the ones belonging to strongly centralized mass organizations. Solving conflicts with dialogue and agreements is more participative than a decision imposed authoritatively, by force.

2.Interpreting the philosophical and juridical fundament of federalism as a solution for state organisation

Founder federalism, but also father of anarchism and socialism, **Proudhon** describes in his latest work "*Du principe fédératif*", especially (but not only) the model of a society built of autonomous communities that are united (in a federation) according to some contracts freely complied with. The power must be split so that it can be as close as possible to the level of the problems that need to be solved. *"The power must be everywhere, even in the centre"*, **Alexandre Marc** states, interpreting Proudhon's federalist theory.

The grounds for Proudhon's society are the local communities, workshops and small plants; they are autonomous and are self-managed in a democratic way, then they unite in greater regions and production units which, at their turn, unite in federal nations (states) and, in the end, in a transnational federacy that includes everything. The basic principle of Proudhon's federal society is, thus, a sort of "*social contract*". Unlike **Rousseau**, applying this principle will not lead to the disappearance of the countless individualists in a collectivist mass of people.

Proudhon's social contract finds its expression in ***mutualism*** for instance, in the desire to truly limit and solve conflicts with understandings between the opposite groups of interests.

Proudhon's methodology is often described as "*an open dialectics*". In a federal structure, polarities, tensions and even conflicts are maintained but controlled. There is no need to dissolve regions in a centralized national state or nations in a centralized Europe: "*open dialectics*" is not a philosophy of "*either-or*" but of "*as well as*" (also)[4]. The essence of Proudhon's dialectic thinking consists in solving contradictions. The balance between all antagonisms must rely on justice, on righteousness – which Proudhon sees as a result of "*relativity and dialogue*", mutual recognition of opposite people and groups.[5]

Personalism, as a philosophy that pleaded for federalism and which might represent the basis of the European Union future configuration, developed and disseminated mostly, as we have shown at the beginning of this paragraph, in the '30 with the founders and partisans of the movement

[4] Alexandre Marc, *De la méthodologie à la dialectique*, Paris, 1970.
[5] Bernard Voyenne, *Le fédéralism de P.J. Proudhon*, Paris, 1973.

through the magazines *"L'ordre Nouveau"* and *"Espirit"*. Among the personalists of the '30s the can be included **Robert Aaron**, **Arnaud Dandieu**, **Alexandre Marc**, **Daniel Rops** and **Denis de Rougemont**[6], with us, **Constantin Rădulescu – Motru**[7]**.**

Synthesizing what we can remember is that personalists follow a certain doctrinal position which is the rejection both of individualism and of collectivism. Personalism opposes to individuals ideologies based on the idea that the sum of all selfish attitudes shall lead to general freedom and welfare. At the same time, personalism opposes the unilateral collectivist priority given to a society that controls everything in which the manipulated individuals are seen only as performers who must not build their own future but only contribute to the collective future.

A person's fulfilment firstly requires its autonomy and freedom but it can be reached only if the basic communities, groups of people (that allow personal relations) are also autonomous. On the other hand, one must notice that personalism does not aim to encourage the nostalgia of patriarchal isolationalism and that the principle of autonomy actually wants to mark the elimination of the aggressive centralism specific to great organisations, whether through a real decentralization of the power to take decisions, or even better by creating some new communities with human dimensions: neighbourhood organisations in the great city areas, regrouping autonomous team in plants, revalorizing trade union cells etc..

Each and one of these entities shall enjoy autonomy as long as it has its own statute and the necessary financial means to exert all its rights. But decentralization and creating new autonomous communities is limited by the need of autonomy from the neighbour groups, just as each person's freedom is limited by the others'. If somebody wants to avoid the atomization of an autarchic society, autonomy cannot mean absolute freedom and sovereignty.

The application of the autonomy principle objectively generates conflicts. The cooperation between independent centres to take decisions and restructure the entire society, both based on rules, laws and contracts freely accepted, constitutional, convenient, and generally agreed-upon, must lead to a civilisation of free and responsible people.

This restructuring on the vertical raises problems for the split of the political, economic, social and cultural power of all the European Union member states, as per real needs and requests. Thus, so as to follow the autonomy of the constituent communities, the federal power plays only an auxiliary part. When problems surpass the competence level of the "*subordinate*" levels, the autonomy of the federal communities is limited so that the management of the common interest problems is performed at the level of the federal authority.

The intervention of the individual in the society is insured with the principle of participation. The participation is conditioned by the need to follow the other principles of constitutional democracy, but in small communities a person can be knowingly totally fulfilled and can achieve his/ her goals in the community. Moreover, these communities must be capable to take part, at their turn, to solve the problems they share with others, whether by cooperating on the horizontal or with the relationships with the immediately superior level.

Conflicts and wars, hunger, sub-development, ethnic purification, ignorance and violence, radical nationalism, xenophobia and the lack of tolerance, tortures and other violations of the human rights, the destruction of the environment, etc. are only superficial manifestations of a deeper crisis currently affecting our world.

The nature of the crisis in this world can be described by the unbalanced relationships between man and nature, man and the technical world he created and with social relationships.

---

[6] J. L. Loubet de Bayle, *Les non-conformistes des anées trentes*, Paris, 1969 and Ferdinand Kinsky, *Fédéralisme et personnalisme*, Paris, 1976.

[7] C. Rădulescu – Motru, *Materialism and personalism in philosophy*, in the Romanian Academy Annals, series III, volume XIII, memoire May 04th 1947, very much commented upon by Corneliu Leu in *Studies, methods and hypotheses of personalist philosophy*, Realitatea Publishing House 2003, p. 65-68, 141-148, 221-298.

Our society is more and more dominated by organizations of greater dimensions, as, for instance, cities (megalopolis) with millions of people, corporations with hundreds of thousand employees, political parties, trade unions, public and private bureaucracies. Small groups like families, small enterprises or corporations, decayed beginning with the industrial revolution. Most of the people spend more and more of their lives in anonymous social structures lacking transparency.

The result of this *"massification"* is the more and more increased tendency towards individualism. The social commitment to the community becomes a rare virtue while the rule is represented by a selfish pursuit of individual goals. Beyond our acquaintances and friends, people appear only as globally labelled groups: we talk about women, Catholics, Muslims, orthodox, black, Chinese, Americans, workers, drivers, etc. as if they were all robots heading for a single direction and behaving in the same unique way. Actually, these labels describe only a dimension of a great group, neglecting all the others. By using one of these terms we ignore the high complexity of the real world.

Conclusions

Personalist thinking must not be seen as the final project of a perfect society that could rise within the European Union. The basic approach begins by recognising what in France is called "*la pluriapartenance de l'homme*" ("Man's pluri-partisanship). Each individual belongs to several groups and communities. Any limitation to only one of these different dimensions, nationality, social class, profession, etc. leads to the violation of freedom and the destruction of the great variety in the human life. E.U.'s integral federalism should acknowledge this variety by generally acknowledging self-government for all member states. Only that, if this condition is fulfilled, will it lead the unity to more freedom and solidarity? It would mean to go too far if we described in detail all the ideas of federalists, personalists and Proudhoniens. Nevertheless, we must mention some significant examples:

a) In the public field, the partial sovereignty transfer of the nation-state: within the territory, so as to allow a redefinition of the local authorities, also considering a loosening of urban centres that have become inadequate for being lodged; externally, by building a federal Europe and transforming the United Nations in a worldwide federation.

b) In the economic and social field, federalists have suggested a series of institutions meant to insure a person's autonomy and fulfilment. The most important is the minimum guaranteed wage to replace the current system. The excess of financial resources can be found in the civic service: each person should spend a year or two doing the work that is now left to a sub-proletariat formed of the emigrants in the third world[8].

c) In the cultural field nothing is more important for integral federalists that the respect for language and culture diversity forming the richness of the European inheritance. There is no "*raison d'Etat*" (State reason) justifying the enslavement of ethnical minorities whose fulfilment in autonomy does not oppose in any way to the unity of the federation. The case of Switzerland is convincing in this respect. The Swiss show that. If Berna applied the ideology of the unique and indivisible republic "*Republique une et indivisible*", Italian wouldn't be speaking in Lugano and French would be tolerated only as "*folkloric*" dialect at Geneva and Lausanne, with scarce radio programmes broadcast as a token of generosity[9]. The European culture has always had both unity and diversity.

If we see federalism as the ideological projection of an ideal society and not as a product of will but as a realistic orientation, it is legitimate to say that some of the major problems of the world will never find themselves adequate solutions without a federalist approach.

[8] Alexandre Marc, *Guaranteed social minimum (MSG) pour l'Europe*, L'Europe en formation, No. 268, p. 3-19, Nice -1987.

[9] Guy Heraud, *L'Europe des ethnics*, Paris - 1963.

But, despite some progresses as federalist solutions, federalism as manner of global approach of the world's problems remains a utopia. The reality is different. The first step towards federalization should be the acknowledgement of the difference between the current situation and the model. They will always be in terms of dialectic and conflict relations. It seems that our world will never be perfectly federalist. Still, we believe that the federal solutions, whether they are partial or global, are the best way to replace violence and oppression with freedom and responsibility, manipulation through participation. At the same time, realism means to partially accept pre-federalist solutions without losing the global objective out of sight. It also means to admit that partial solutions will never be enough. Realism cannot mean the simple acknowledgement of the *status-quo* and the naïve belief in its permanent continuation.

It is also good to know that federalists often contradicted themselves concerning the paths to follow. Some of them believe that administrations, parliaments and governments should be convinced, acting as a group of pressure – strategy generally known as ***lobby.*** Others want to create a mass move. A third group emphasizes on writing and speaking, meaning education.

Last but not least, one wonders if this concept about federalism will not complicate one of the simple ways for a united Europe and a united world. The answer could be that transnational unification cannot be a purpose itself. It is desirable if it protects diversity and if it contributes to solving transnational issues. Only then will people perceive the true transnational identity.

The reformation of the E.U. institutions is in current performance, but it is necessary that it continues until there will be found solutions so as to harmonize the structure and international mechanisms with the new E.U. formula extended to 27 states. There were and still exist a lot of issues that must be solved in the context of broadening and it was firstly necessary to considerably raise the E.U. budget so as to honour the additional obligations appeared as consequence of the countries in Central and East Europe adherence.

Thus, as it is described in the speciality doctrine, along the years many citizens in the member states have had a feeling of frustration not being able to understand or influence the procedure to adopt decisions within the E. U. the „*Democratic deficit*" seems to result mainly but not exclusively from the fact that the Council's decisional procedure is not made public. In the matter of decisional procedure, opinions were and still are different. European federalists generally accept an increase of the power of co-decision for the European Parliament, aim supported by Germany. The French and the British are in favour of a greater involvement of the national parliaments but some experts believe that this would complicate the procedures and it can be considered as a rebound of the current integration state.

The reformation of the E.U. states is a sine – qua - non condition regarding its broadening to 27 states and depending on "*open doors*" politics that seems to remain, even if not for the near future. This is why the debates about the political and juridical solutions that will be adopted for the complete integration of the E.U. member countries continue. Will federalisation be a solution?

References

- Alexandre Marc, *De la méthodologie à la dialectique*, Paris, 1970.
- Bernard Voyenne, *Le fédéralism de P.J. Proudhon*, Paris, 1973.
- J. L. Loubet de Bayle, *Les non-conformistes des anées trentes*, Paris, 1969.
- Ferdinand Kinsky, Fédéralisme et personnalisme, Paris, 1976.
- C. Rădulescu – Motru, *Materialism and personalism in philosophy*, in the Romanian Academy Annals, series III, volume XIII, memoire May 04th 1947.
- Corneliu Leu, *Studies, methods and hypotheses of personalist philosophy*, Realitatea Publishing House 2003.
- Ioan Alexandru, Administrative Law in the European Union, Lumina Lex Publishing House, Bucharest, 2007.

CONSTITUTIONAL LANDMARKS OF POLITICAL PLURALISM

ERHARD NICULESCU*

Abstract
In order for democracy to result from freedom, the citizens' participation in the creation and exercise of democratic power must be structured in a pluralist way. Art. 8(1) of the Romanian Constitution firstly imposes the organization of the company in parallel with the State's organic structure as an indispensable requisite for the existence of democracy. In other words, there is no democracy without a civil society, distinct from the State. The organization of the civil society is necessary because the individual alone cannot determine a certain attitude of the political power: structuring gives weight to the action; the organization of citizens contributes to rendering their political participation more efficient. But the organization, structuring limits the freedom of people adhering to the structure.

Keywords*: constitution, pluralism, political party, democracy, political will*

A. Introduction

Pluralism - a condition and guarantee of constitutional democracy

The core issue of power in democracy is how the individual can remain free from political point of view, being however subject to the power of the *demos*. H. Kelsen gives the following answer to this issue: *the subject of a legal order, which takes part in the creation of such order, is politically free ... Democracy means that the will expressed in the state's legal order is identical to its subjects' will*.[1] The freedom of the subjects of a rule of law has therefore limited necessities, but guaranteed by the equal participation in the creation of the rules that limit it. Four ideas are determined so that the democratic power results from freedom: (1) freedom must be necessarily limited; (2) subjects of the rule of law must take part in its creation; (3) this participation must be equal; (4) the participation must be structured in a pluralist way.

Art. 8 paragraph (1) of the Romanian Constitution is a materialization of the fourth condition that makes democracy result from freedom and guarantees it: *pluralism.*

In order for democracy to result from freedom, the citizens' participation in the creation and exercise of democratic power must be structured in a pluralist way. Art. 8 paragraph (1) of the Constitution firstly imposes the organization of the company in parallel with the State's organic structure as an indispensable requisite for the existence of democracy. In other words, *there is no democracy without a civil society, distinct from the State*. The organization of the civil society is necessary because the individual alone cannot determine a certain attitude of the political power: structuring gives weight to the action; the organization of citizens contributes to rendering their political participation more efficient. But the organization, structuring limits the freedom of people adhering to the structure.

One must give up on a part of his/her freedom as a citizen in order to be part of a political party, just as it was necessary to give up on part of one's natural freedom in order to be part of the society. Whereas organizations facilitate participation, they also restrict it. Democracy bears this way a constant tension between the need of structuring the civil society and the limitation of individual freedom, due to the increase of the role of the structure and oligarchic tendencies within them.

The relative way out of this tension is given by the pluralism of the structures of civil society. First, *categorial pluralism*: a civil society implies the existence of political parties, pressure groups,

* Assistant Lecturer, PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest - (erhard.niculescu@yahoo.de).

[1] Hans Kelsen, *Théorie générale du droit et de l'Etat*, Bruylant, L.G.D.J. Bruxelles, Paris, 1997, page 333.

media etc., as structures independent from each other and with regard to the State. Then, *intercategorial pluralism*, which implies the possibility to create many structures within each associative category: several competing parties, pluralism of the pressure groups, pluralism of information.

Pluralism is, as expressed in art. 8 of the Romanian Constitution, a requisite and guarantee of constitutional democracy. A requisite and guarantee because the freedom of individuals is guaranteed on one hand by the State power limitation, due to pluralism of influence centres and eligible elites and on the other hand by the limitation of the power of the structures of the civil society themselves through mutual controls between categories and infra-categorial ones. Pluralist structuring is therefore an essential characteristic of liberal democracy, a characteristic that makes it different from totalitarianism. Totalitarianism implies a people as a deconstructed mass of individuals. Destructuring ensures the domination of the State. In order for the State to be limited, the people must be structured; only this way it can be ***demos***.

Art. 8 uses in its first paragraph the notion of pluralism with a very wide meaning. Not a certain type of pluralism, but pluralism in general is a requisite and guarantee of constitutional democracy. Art. 8 paragraph (1) does not only guarantee political pluralism, even if paragraph (2) refers afterwards only to political parties, combining, as any times in the text of the Constitution, a principle disposition with a particularization that makes it problematic. The scope of pluralism is therefore general and it does not only refer to the existence of several political parties.

The exigency of pluralism, deriving from the democratic nature of the Romanian state stipulated in art. 1 paragraph (3) has an express nature established by art. 8 paragraph (1). The Constitution restricts the scope of pluralism when it refers to it as a supreme value, as only political pluralism has this quality according to art. 1 paragraph (3). This must not lead to a restriction of the scope of art. 8. It refers to all spheres of civil society: political, economic, information, cultural.

The signification of this pluralism is not too easy to clarify. "*Pluralism is a conception about political and legal order that privileges the diversity of opinions, interests and their grouping in a civil society and makes the guarantee of their plurality a requisite of freedom*."[2]

Democracy is in this vision a society that not only admits diversity, but makes it a constitutive requisite. As Joh Stuart Mill stated already, diversity is not a bad, but a good thing. The passage from this philosophy to its institutionalization at the level of the State organization is first transposed in the separation of powers and relativization of the State unity, either by different degrees of decentralization that go as far as regionalization, or by federalization. This institutional pluralism forbids both the accumulation of powers and their concentration into the hands of the central powers and the creation of an inequality between powers that would make one of them dominant.

As Ion Deleanu stated back in 1992, in a composite and competitive society – as all societies are in fact – *institutional pluralism is logical and necessary*.[3] On the other hand, this fact of pluralism implies that none of the State institutions may determine the moral, social, political or legal values that are mandatory in the society based on a single comprehensive doctrine hypothesized as a truth. On the contrary, democratic society implies the fact of pluralism, namely it implies that it is impossible for a single doctrine to obtain the approval of all citizens.

The Democracy implies this way the fact that the diversity of conflicting doctrines cannot be reduced in any way by acts of will of the State or one of its powers. Article 8 of the Constitution ensures this way an additional guarantee to the constitutional dispositions that impose the separation of powers and decentralization of the State. It guarantees the quality between the State powers as only this way pluralism and democracy and State's ideological neutrality can be maintained.

---

[2] P. Bouretz, *Pluralisme* in O. Duhamel, Y. Meny, *Dictionnaire constitutionnel*, P.U.F., Paris, 1992, page 756.

[3] M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Constituţia României comentată şi adnotată (Constitution of Romania commented and annotated)*, Regia Autonomă Monitorul Oficial, Bucharest, 1992, page 27.

Democracy seems therefore to be a society of conflict. Pluralism is its requisite because its guarantee preserves the contradiction within the structure of the civil society that feed the State institutions with social impulse. The contradiction is not overcome in a problematic general will or common interest, but is maintained by integrating the conflict in the political system. This means that the legislative system cannot cancel the social conflict by banning diversity.

What art. 8 imposes to the State is the obligation to preserve diversity by the implementation of conflict integration procedures. Basically this means that art. 8 paragraph (1) of the Constitution limits the type of consensus that is possible in the Romanian society. The main problem of the pluralist regime stipulated by art. 8 of the Constitution of Romania, is how to reach a balance between national approval and constant contestation. In other words, what are the restrictions of consensus that may be requested in a democracy and what are the limits of conflict so that it remains democratic?

The fundamental limits stipulated by art. 8 paragraph (1) to the State by the fact that it guarantees pluralism are given by the prohibition to transgress by the legislation of these limits of consensus. On the other hand, it has a positive obligation to ensure the procedures necessary for the integration of conflicts and their peaceful resolution.[4]

B. Paper content

Categorial pluralism

a. Categorial pluralism. The pluralism that the Constitution refers to, considering it a requisite and guarantee of constitutional democracy is first of all a categorical pluralism. The Romanian society must have a pluralist structure at all levels and all spheres of social relations. In principle any organization of citizens, created in order to carry out any activity, is allowed. The prohibition of a type of activity or a type of association must be express, made by law, according to the provisions of art. 53 of the Constitution without endangering pluralism. The pluralism that art. 8 refers to therefore, comprises political pluralism, economic pluralism, media pluralism, trade union pluralism, that of professional and employers' associations, cultural pluralism, religious pluralism and any other type of pluralism.

b.The associations' independence from each other. Categorial pluralism imposes the independence of these types of associations from each other. The first aspect of mutual independence of the associations is the *specialization of their purposes*. That is the reason why each type of association is restricted to exercise its own function. Thus, the parties contribute to the definition and expression of the *political will* of citizens, trade unions, employers' associations and professional associations contribute to the defense of the rights and promotion of the *professional, economic and social* interests of their members, the mass media ensure the *correct information* of the public opinion. It is prohibited to exceed the purpose that a type of association is authorized for. Parties cannot express the political will of a group, but of the citizens, trade unions, employers' associations and professional associations cannot defend the political interests of their members; the mass media cannot favour a political or social force against another, as information must be correct etc.

On the other hand, associations must be *functionally independent* among themselves. This means that their internal organization and their relations with other individuals or legal entities must be independent. Eventually, associations must be relatively independent from each other. That's why, for example, more and more systems build a mechanism of public funding of political parties or limit the level of their private funding.

c.The associations' independence from the State. Pluralism also imposes the independence of the associations of civil society with regard to the State. This implies the freedom of their creation. This freedom is not *absolute*, but the law imposes the framework without barring their creation apart

[4] Romanian Pandects, Wolters Kluwer Publishing, *Pluralismul şi partidele politice conform art. 8 din Constituţie (Pluralism and political parties according to art. 8 of the Constitution)*, no. 5 of June 2008, page 43.

from the reasons and limits established by art. 53 of the Constitution and art. 40 on the right of association. As a matter of fact, this right of association is the particularization of pluralism imposed by art. 8 paragraph (1). It stipulates that *citizens may associate freely into political* parties, trade unions, employers' organizations and other forms of association. This implies that in principle *any form of association is allowed, associations cannot be in principle subject to a prior* authorization *regime and no social sphere can be excluded from the domain of free association*.

Also, the independence of associations with regard to the State implies the *impossibility to suppress them for reasons different than the ones established by the Constitutions or the law within the constitutional limits*. Thus, the parties or organizations *are unconstitutional if they advocate against political pluralism*, the principles of the rule of law or sovereignty, integrity or independence of Romania [art. 40 paragraph (2)], and publications cannot be suppressed [art. 30 paragraph (4)]. The principle is however autonomous with regard to the applications enforced to it by the Constitution, having its own norms. This mains that in principle no type of association can be suppressed, even in absence of an express prohibition.

The possibility to suppress an association or another does not imply the possibility to suppress an associative category in its entirety. The suppression of a private association must then not be expressly banned by the Constitution and must be made for the reasons and within the limits of art. 53 of the Constitution. The independence with regard to the State implies that the latter cannot dissolve a legally incorporated association. Thus, the Constitutional Court decided that „the Government may not modify or invalidate by ordinance a Court resolution for the incorporation of an association, irrespective of its nature"[5].

According to the Decision of the Constitutional Court no. 33/2002 as well, the independence of the associations towards the State, also implies their *functional independence.* Thus, art. 9 stipulates that trade unions, employers' associations and professional associations carry out their activities according to their by-laws, art. 29 paragraph (3) stipulates that religions are organized according to their own by-laws, art. 30 stipulates the fact that all types of censorship are prohibited, and art. 32 paragraph (6) states that university autonomy is guaranteed.

But from the pluralism principle set forth in art. 8 results a general functional independence of any association within civil society, even in the lack of an express provision. The limitations of this functional independence can only be applied within the limits of art. 53 of the Constitution.

Intercategorial pluralism

a. Intercategorial pluralism. The pluralism imposed by the art. 8 is an *intercategorial* pluralism. This means that within each associative category several associations must exist. Sometimes, the Constitution imposes intercategorial pluralism expressly, as it does with political pluralism [art. 1 paragraph (2) and art. 152 paragraph (1)]. Some other times, this pluralism necessary inside each associative category does not expressly result from the constitutional provisions, but it is imposed in case of all associative categories directly by art. 8 of the Constitution as requisite of democracy. In principle, pursuant to art. 8 of the Constitution, the State may not create in a certain domain a single association under which it places the individuals or orders the mandatory membership of the individuals in one of the associations existing in a certain domain.

b.The banning of the creation or authorization of a single association in a certain sphere of social relations. The first rule imposed by intercategorial pluralism is the fact that the State cannot create nor authorize a single association in a certain sphere of social relations. This is the principle applied by the European Court of Human Rights in the case *Eglise Métropolitaine de Bassarabie et autres c. Moldova* when it shows that the measures of the State „meant to restrict the community or place part of it against its will under a single direction represents (...) a violation of the freedom or religion", in this case, Moldavia doing this by not recognizing the Metropolitan Church of Basarabia

[5] Decision no. 333/2002, published in the Official Gazette no. 95 of February 2003.

motivating the fact that there already is a church that gathers Orthodox believers recognized by the State.

The European Court shows that the freedom of religion can only be effective if „the right of the believers to the religious freedom that includes the right to express their religion collectively implies the fact that they can associate freely, without an arbitrary intrusion of the State" and this implies that the individuals are not forced to place themselves, against their will, under a single legal entity representing a religious faith, the State infringing the art. 9 of the European Convention of Human Rights as it deprives the Metropolitan Church of Bessarabia of moral personality.[6]

Extrapolating, we may say that any right exerted collectively, implies, in order not to infringe the European Convention of Human Rights or the Constitution of Romania, the freedom or organization of the individuals into several structures with legal personality, any limitation that would tend to create a single associative structure in a domain of free association, irrespective of the criterion, being unconventional and unconstitutional.

c. Banning of mandatory membership. Thus, article 8 bans the mandatory membership of the citizens in a single association, irrespective of its category. The association must result from the free adhesion of the citizen in any collective framework of exercise of the individual rights he/she wants. The mandatory membership in an association can only arise if the exercise of a profession is managed privately, but the profession also implies the exercise of a public service mission. The public service mission must not be mistaken for the public mission. The meaning of the notion is precise: it is a service of the State that it grants for exercise to individuals that do not hold a public function, being private-law individuals.

The Constitutional Court states that the public mission should not be confounded with the State mission[7]. Thus, political parties exert a public mission, not one of public service, as notaries public do, for example. The Court links the public mission to two criteria: the nature of the legal personality and nature of the interest of the association. Thus, the Court claims that as *„the party is a public legal entity – a fact not contested by the authors of the notifications – its mission can only be a public one, as it has public interest and its objective is to form a general political will that the representativeness and legitimacy necessary for the fulfillment of its political programme depend on*".

Conclusions

a. Pluralism - a requisite of democracy.

Pluralism is declared in art. 8 of the revised Constitution of Romania as a «requisite» of constitutional democracy. But democracy is a normative principle pursuant to art. 1 paragraph (3). This means that art. 8 does not only make a remark: it *imposes pluralism.* Without pluralism the democratic nature of the State is denied, consequently the disposition of art. 1 paragraph (3) is violated. Art. 8 paragraph (1) materializes the democracy principle, particularizing it as a «constitutional» democracy.

The meaning of pluralism in the constitutional law cannot be dissociated from the political sciences, as the principles of constitutional democracy, defined as substantiation of the democratic process on the Constitution or as a political regime in which the State serves the individual (Dominique Chagnollaud), gravitates around the idea of political, ideological, social pluralism, tolerance and mutual respect of the elements of the society. The life of democracy, substantiated on an essentially legal act, the Constitution, is however carried out mainly in the sphere of the political

[6] Pandectele române (Romanian pandects), Wolters Kluwer Publishing, *Pluralismul şi partidele politice conform art. 8 din Constituţie (Pluralism and political parties according to art. 8 of the Constitution)*, no. 5 of June 2008, page 45.

[7] Decision no. 35/1996, published in the Official Gazette no. 75 of April 11, 1996.

power and in the sphere of the political parties and groups, essential elements of any democratic society.[8]

b. Pluralism as a guarantee

The text of art. 8 paragraph (1) calls pluralism a «guarantee». It is not about stating the fact that without pluralism there is no democracy, but a right granted to the citizens to request pluralism. *The guarantee is granted to the citizens, not to democracy*. This means that pursuant to art. 8 citizens may request the notification of the Constitutional Court so that it imposes pluralism in case of possible abuses of the legislative power, even if no other fundamental right is directly involved. Article 8 of the Constitution therefore guarantees a different fundamental right: *a right to pluralism*.

Of course, this right is related to the freedom of association, but should not be confounded with it. For example, economic pluralism does not necessarily imply the right of association. A single person, as an individual, can invoke, if he/she wants to become a trader and the law unreasonably restricts this right, the violation of economic pluralism.

The true milestone for the democratization process is political pluralism. Political pluralism suggests the existence in the society of a plurality of parties or political groups created and acting in conditions of equal treatment form the State. Under these circumstances, *pluralism appears as a guarantee for each party or political force that another party will not be able to act secretly with illegal means, imposing its will and interests over the others*.

The coexistence between contrary political forces, tolerance, dialogue, competition to gain adepts represents the essence of pluralist societies, of constitutional democracy. Although art. 8 of the Constitution as a whole includes pluralism in its political side, namely in the activity of political parties, paragraph 1 of art. 8 contains the general conception of the constituent according to which *pluralism in Romanian society is a requisite and guarantee of constitutional democracy*.

c. Pluralism – a fundament and characteristic of constitutional democracy

Pluralism commonly means a variety of equivalent factors that cannot be reduced to a unity. In the social domain we often speak, in order to express pluralism, about "unity in diversity". Before representing anything else, pluralism represents the belief in the value of diversity, and in the diversity, dialectics is at the antipode of the confidence in the level conflict.[9] Consequently, what the democracy theory gains from the pluralist matrix is not and cannot be a praise of *conflict,* on the contrary, a dynamic processing based on the principle according to which anything meant to be fair or true must resist and be verified by criticisms and differences.

Liberal ambiance is indispensable for *constitutional democracy.* The reduction of the conceptions, ideas, opinions, options, aspirations, attitudes to the common denominator of a so-called *ideal,* prefabricated *model,* the standardization and therefore uniformization of the individualism in spite of the diversity of their opinions means totalitarianism. The spirit of democracy is first of all the *sense of dialogue.* Democracy is not compatible with monopoly, or with the privilege of a doctrine that by fact or by law, it tends to ensure its exclusivity and permanence. It refuses any form of ideological orthodoxy. Irrespective of the origin or quality of the opinion, it must enjoy the same opportunity; it must neither be labeled as irrepressible nor stigmatized. Equality, indispensable in the civil legal relations, can be interpreted in the sphere of the opinions, contradictory or just different, as obligations of the public authorities to ensure to all these opinions equality in fact.[10]

The majority principle is the generally-admitted rule regarding the adoption of the decisions in constitutional democracies. Another solution – compatible with democracy – does not exist. The

---

[8] Ioan Muraru, Elena Simina Tănăsescu, Dana Apostol Tofan, *Constituţia României Comentariu pe articole (Constitution of Romania Comment by articles)*, C.H. Beck Publishing, Bucharest 2008, page 358.

[9] Giovanni Sartori, *Teoria democraţiei reinterpretată (Theory of democracy reinterpreted)*, Polirom, 1999, page 104.

[10] Ion Deleanu, op. cit., page 398.

majority principle is the *pivot of democratic governance, an incontestable precept* deriving from pluralism, as essentially pluralism has tends to confer power to the many. For some of them the majority principle is therefore absolute, its application does not have restrictions or hesitations. There is here however the risk of a *majority dictatorship,* that cancels the meaning of pluralism. A more nuanced approach is therefore preferable. Majority must be formed in a climate of tolerance and respect towards the opinions of the minority that could virtually be tomorrow's majority. We may therefore consider that the majority rule is a conventionalism, it is rather an experiment than a solution, a temporary transaction formula, necessary but not arrogant and exclusivist.

The pluralism principle also opposes to the uniqueness of power, expressed – in totalitarian political regimes – by conferring the leading party in society to the single party. Institutions are only the background for the affirmation of the dictatorship of that party that subordinates all the other social structures. In a composite and competitive society – as all the societies are in fact – *institutional pluralism is logical and necessary*.[11]

References

- Bîrsan Corneliu, *Convenţia Europeană a drepturilor omului (European Convention of Human Rights)*, Comment by articles, Volume I. Drepturi şi libertăţi (Rights and liberties), C.H. Beck Publishing, Bucharest 2005.
- Bouretz P., *Pluralisme (Pluralisms)*, in O. Duhamel, Y. Meny, *Dictionnaire constitutionnel*, P.U.F., Paris 1992.
- Constantinescu Mihai, Deleanu Ion, Iorgovan Antonie, Muraru Ioan, Vasilescu Florin, Vida Ioan, *Constituţia României comentată şi adnotată (Constitution of Romania, commented and annotated)*, Regia Autonomă Monitorul Oficial, Bucharest, 1992.
- Deleanu Ion, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat (Constitutional institutions and procedures in the Romanian and compared law),* C.H. Beck Publishing Bucharest 2006.
- Drăganu Tudor, *Începuturile şi dezvoltarea regimului parlamentar în România până în 1916 (Beginnings and development of the Parliamentary regime in Romania until 1916)*, Dacia Publishing, Cluj 1991.
- Gusti Dimitrie, *Partidul politic – Sociologia unui sistem al partidului politic (Political party – Sociology of a political party system)*, Opere (Works), volume IV, Academiei Publishing, Bucharest 1970.
- 9. Kelsen Hans, *Théorie générale du droit et de l'Etat*, Bruylant, L.G.D.J. Bruxelles, Paris 1997.
- Muraru Ioan, Tănăsescu Elena Simina, *Drept Constituţional şi Instituţii Politice (Constitutional law and political institutions)*, 12th edition volume 1, All Beck Publishing, Bucharest 2005.
- Muraru Ioan, Tănăsescu Elena Simina, Apostol Tofan Dana, *Constituţia României Comentariu pe articole (Constitution of Romania Comment by articles)*, C.H. Beck Publishing, Bucharest 2008.
- Negulescu Paul P., *Partidele politice (Political parties)*, Garamond, Bucharest 1996.
- Sartori Giovanni, *Teoria democraţiei reinterpretată (Theory of democracy reinterpreted)*, Polirom 1999.
- *Geneza Constituţiei României (Genesis of the Constitution of Romania), 1991*, *Lucrarile Adunării Constituante (Works of the Constituent Assembly)*, no. 64 and 65, Regia Autonomă Monitorul Oficial, Bucharest, 1998.
- Romanian Pandects, Wolters Kluwer Publishing, Pluralismul şi partidele politice conform art. 8 din Constituţie (Pluralism and political parties according to art. 8 of the Constitution), no 5 June 2008.

[11] Ion Deleanu, op. cit., page 400.

MINISTERIAL LIABILITY IN THE ROMANIAN CONSTITUTIONAL SYSTEM

NICOLAE PAVEL*

Abstract

What seems relevant to us for highlighting in this study is the approach of the ministerial liability within the Romanian constitutional and legal system starting with the first document of constitutional value, namely the Developing Statute of the Paris Convention of 1858 until today, that is the Constitution of Romania, revised in 2003 and republished. Having in view that this is a generous study topic covering over 150 years of constitutional and legal evolution of ministerial liability in Romania, it is necessary to specify from the very beginning the need of a diachronic approach of this topic by identifying all Romanian Constitutions that have regulated the constitutional system during this period of time. Moreover, we have to specify that, during this period of time, Romania has experienced several forms of governance, namely monarchy, people's republic, socialist republic and semi-presidential republic. With this approach, the proposed study opens a complex and complete yet not exhaustive vision in the current scope of the ministerial liability. It is also the reason why the study begins with preliminary considerations in which the terminology used in the content of the study is justified. Following a key-scheme, there are successively examined the two major parts of the study, namely the general theory regarding the concepts of ministerial responsibility and liability and the Romanian constitutional, legal and doctrinaire milestones of the ministerial liability.

***Keywords**: liability, responsibility, constitution, statute, monarchy, republic.*

1. Introduction

The object of the scientific undertaking shall be circumscribed to the scientific analysis of its two major parts, namely: 1. responsibility and liability – the general theory; 2. Romanian constitutional, legal and doctrinaire milestones of the ministerial liability, which cover, in a doctrinaire, constitutional and legal approach, the scope of the study regarding the ministerial liability within the Romanian constitutional system.

In our opinion, the field under analysis is important for the constitutional doctrine, for the doctrine of Administrative Law and for the general theories of Law, because with this scientific undertaking, we intend to establish, through a diachronic and selective approach, a complex and complete yet not exhaustive reflection of the entire current scope of the ministerial liability. In order to entirely yet not exhaustively cover the scope of study, the relevant preliminary specifications shall be followed by the theorisation of the concepts of liability and responsibility from the point of view of the doctrines of the general theory of Law. This topic of the ministerial liability has been addressed in accordance with a logical scheme of the analysis of the contributions of Romanian and foreign authors in the field of the general theory of Law and with the contribution of the author and of other authors to the theorisation of the ministerial liability starting with the first document of constitutional value of 1858 until today.

From the point of view of the integral yet not exhaustive coverage of the scope of ministerial liability, a logical scheme has been introduced, regarding the diachronic and selective approach of the evolution of constitutional regulations on ministerial liability, including the indication of government forms specific to the Romanian State for each Constitution enacted in accordance with the particularities of each form of governance.

* PhD, Lecturer, Constitutional Law and Political Institutions, Bucharest Law and Public Administration Department of "Spiru Haret" University, Bucharest (e-mail address: nicolaepavel0@yahoo.com).

With this approach, we intend to identify the theoretical, constitutional and legal sources of Law regarding the ministerial liability within the Romanian constitutional system.

Even if the ministerial liability turns back to the enactment of the first Romanian Constitutions, the theoretical interest in resuming it results from the fact that, in the already existing dedicated literature, some theoretical aspects of the ministerial liability have not always been paid due attention.

Moreover, in the relevant literature under consideration, in our opinion, the complex and complete yet not exhaustive reflection of the entire Romanian constitutional evolution of the ministerial liability is not examined in a diachronic approach.

In addition, the study turns into a comparative value the evolution of constitutional and legal regulations in a diachronic approach regarding the ministerial liability, specific to the successive forms of governance covered by the Romanian State, namely monarchy, people's republic, socialist republic and semi-presidential republic.

2. Responsibility and liability – The general theory

2.1. Preliminary considerations

At the beginning of this study, some preliminary specifications appear as being necessary, given the fact that summarising the normative content of Art. 109 of the Romanian Constitution, as republished[1], established by the constituents, is entitled *Liability of the Members of Government*, and the same Art. 109 para. (3) includes the following specification: The cases of liability and the penalties applicable to the Members of Government are regulated *by a law on ministerial liability*. In our opinion, some terminological specifications are necessary as concerns the two terms, namely *responsibility* and *liability*.

2.2. Concept of responsibility

2.2.1. Addressed at general level by the Explanatory Dictionary of Romanian Language[2], the term „responsibility" has the following meanings: *the obligation to be responsible/accountable for something; conscience and responsibility; task, responsibility assumed by somebody*.

2.2.2. Addressing it *from the point of view of the general theory of Law*[3], we find the term *,responsibility"* examined *as a fundamental principle of Law.*

In supporting this theory, responsibility is regarded as a social phenomenon; *it expresses an action of commitment of the individual in the process of social integration*. Being closely related to a person's action, *responsibility appears as being intimately correlated with the ruling system*.

Although traditionally *the concept of responsibility* has been placed absolutely *in the area of Morals,* more recent research studies highlight *the need of outlining this concept also in the area of Law*.

It is also specified that social responsibility appears under various forms: *moral, religious, political, cultural, juridical responsibility*.

Starting from the idea that the *Law should not be regarded and assessed only from the point of view of the possibilities its has to intervene post festum, in the area of the bad things already done – a moment when a penalty is imposed*, the author mentions that it *has the possibility, through the content of its prescriptions, to contribute to the establishment of a cultural attitude of the individual*

---

[1] *** The Constitution of Romania, as revised in 2003, was published in the Official Gazette of Romania, Part I, No. 767, of the 31st of October 2003.

[2] Vasile Breban, *A Small Dictionary of Romanian Language*, (Bucharest: Enciclopedica, 1997), 568.

[3] Nicolae Popa, *The General Theory of Law*, (Bucharest: Actami, 1998), 123-125. The author *defines the Law* as being the assembly of rules assured and guaranteed by the State, aimed to organise and discipline the human behaviour in the main relations within the society, in an environment specific to the manifestation of the co-existence of freedoms, defence of essential human rights and establishment of the spirit of justice.

towards the law, an attitude that presupposes a concern assumed for the integrity of social values defended by legal ways, which implies the phenomenon of responsibility.

2.2.3. Addressing it also from *the point of view of the general theory of Law*[4], we mention that the term *"responsibility"* is examined as a *social phenomenon* and as *a fundamental principle of Law*. In author's opinion, the responsibility *appears as a social phenomenon*, since it expresses an action of commitment of the individual in the context of social relations and, eventually, responsibility *is assuming liability* for the outcome of the social action of a person.

Starting from these considerations, responsibility is defined as a fundamental principle of Law, which should be understood as being *the conscious linking of the individual to the values and norms of the society, because the degree of responsibility ultimately indicates the status of legality in a State and it is closely related to the overall progress of the society*. In addition, the author specifies that *the law may create the feeling of responsibility as a state of mind in the conscience of target individuals*.

2.2.4. Analysing the idea of responsibility from *the point of view of the positive Law*.[5]

As concerns the positive Law, they specify that, as it is usually understood, it comprises rules alleged as being Law, even when they do not always actually have this capacity. *These rules hence show what the target persons are entitled to do, or not*. Human actions are assessed from the point of view of the Justice. Juridical, general or individual rules are thus established. Their peculiarity is that *they do not automatically impose themselves as a law of the nature, they are breakable*; they therefore presuppose the character of rational beings of the target individuals and, consequently, their moral freedom.

Starting from these rational notions, they specify that the *idea of person* is thus established, in the form of a specific reality, to whom rights and obligations can be assigned.

The idea of subjective Law cannot be conceived further *than being correlative to the idea of obligation*, *a person's right meaning only the obligation of other person(s) to observe it*, and a person's obligation means only the right of other person(s) to demand its observance. *In its turn, the idea of obligations leads to the idea of responsibility*. Consequently, a right or an obligation includes the generic idea of object of a provision.

2.2.5. Analysing the idea of responsibility *from the point of view of the pure theory of Law.*[6]

We notice that the author examines *the responsibility* from the point of view of *the relation between juridical obligation and responsibility,* which, in our opinion coincides with the notion of *responsibility according to the Romanian Law*.

From the point of view of the pure theory of Law, the author *examines the concept of responsibility in close correlation with the juridical obligation*. This correlation is based on the idea that *the individuals are obliged to the conduct prescribed by the social order*. In other words, an individual *has the obligation to adopt a certain conduct* when it is prescribed by the social order. Saying that the conduct is prescribed, and saying that *an individual is compelled to such a conduct,* and *that s/he is compelled to behave that way, these are synonymous expressions*. It comes out that, since the juridical order is a social order, *the conduct to which an individual is compelled from juridical point of view is a conduct that must take place*, directly or indirectly in relation to another individual.

We are probably used to separate the juridical rule from the juridical obligation, and say that *a rule establishes a juridical obligation*. But we must understand well that *the juridical obligation*

[4] Ion Dogaru, *The General Theory of Law*, (Craiova: Sitech, 1998), 121.

[5] Mircea Djuvara, *Rational Law, Sources and Positive Law,* (Bucharest: ALL, 1995), 502-504. The author also specifies: the reasoning of the positive Law therefore appears in the form of a discursive thinking, which uses all special logical categories of the rational Law; these *categories derive from the ruling character of the logical idea of Justice*.

[6] Hans Kelsen, Théorie pure du droit, (Paris: Dalloz, 1962), 157-170.

related to a certain conduct, *far from being a juridical standard differing from the juridical rule imposing that conduct, is that juridical rule itself*.

The statement according to which *an individual is obliged from juridical point of view to a certain conduct* is identical with the statement according to which *a rule prescribes a defined conduct for a certain individual*. In addition, the juridical obligation has a general character as well as an individual character, just like the identical juridical rule.

2.2.6. Turning into value the above-mentioned issues, we retain the following components of the concept of responsibility, which we regard as essential in covering the scope of its content:

a) the concept of responsibility is studied, as it comes out from the issues presented above, from the general theory of Law, the theory of positive Law and the pure theory of Law.

b) the notion of responsibility is addressed as a fundamental principle of Law. However, starting from the premise that the Constitutional Law is a one of the branches of the unitary Romanian Law, as a main branch of the unitary Romanian Law, in our opinion, we can address the notion of *responsibility as a general principle of constitutional rank* established by the fundamental law of Romania. We support this analysis with the provisions of Art. 1 para. (5) of the Constitution of Romania, as republished, which proclaims: *In Romania, observing the Constitution, its supremacy and the laws is compulsory*. We have to mention that this general principle was introduced in the content of the fundamental law after the revision of 2003.

c) starting from the *definition of positive Law, which comprises all regulations in force within a State*, and from the *relation between the juridical obligation and the responsibility* established by positive Law, and mentioned above.

d) from the point of view of the general theory of Law, positive Law and pure theory of Law, the subject of Law is the subject of a juridical obligation or the subject of law. In this approach, it comes out that *a subject of law can only be a person entitled to rights and obligations*.

e) we will define the *responsibility as a general principle of constitutional rank, according to which observing the Constitution and all regulations in force in Romania is an obligation for all subjects of law, individuals and public authorities*.

2.3. The concept of liability

2.3.1. Addressed at general level by the Explanatory Dictionary of Romanian Language[7], the term "responsibility" has the following meanings: *a) the fact of being responsible; responsibility; the obligation to account (morally or materially) for the fulfilment or failure to fulfil actions. b) a consequence of the intentional failure to fulfil an obligation*.

2.3.2. Addressing it *from the point of view of the general theory of Law*[8], we find that the notion of *liability* is examined *in terms of juridical liability*.

Starting from the idea that *the Law could not act before the dangerous fact is done,* the author mentions the following: *in order to link the functioning of juridical liability*, as an institution specific to the Law, to the general purposes of the juridical system, there must be a belief that the law – the right law, the fair law - *may create the feeling of responsibility in the conscience of its targets, as a state of mind*.

At the same time however, the lawmaker pays attention every time also to the *possibility of breaching the rule by non-conform conduits*. Through his fact, the author specifies, *the person who breaches the provisions of juridical rules touches the rule of law, s/he disturbs the good and normal development of social relations, s/he affects the legitimate rights and interests of his community members, s/he endangers the co-existence of freedoms and social balance*.

Since those who break the rule of law can only be human beings, these are the reasons why they must be liable.

---

[7] Vasile Breban, *op. cit*. 551.

[8] Nicolae Popa, *op. cit*. 323-326.

In this regard, the focus is put on penalty, as a reparatory measure. From this point of view, the author specifies that *the juridical responsibility is a juridical constriction relation,* and *the penalty is the object if this relation*.

2.3.3. Addressing it also from *the point of view of the general theory of Law*[9], we notice that the notion of *responsibility* is examined in terms of *juridical liability*. The author highlights the fact that *responsibility in general and juridical liability in particular can only be understood when the individual is in a conscious relation with the values and norms of society since, eventually, the status of legality itself is a reflection of the degree of her/his liability*.

Underlining the fact that *juridical liability* and *penalty* are two faces of the same social phenomenon, they are different because the first – *the juridical liability* – is the juridical framework for the latter – *the penalty*. It is also considered that *the functioning of juridical liability*, as an institution specific to the Law, and the correlation of this institution with the general scope of the juridical system, are closely related to the belief that the law is right, it is fair.

2.3.4. Addressing it *from the point of view of the positive Law*[10], we retain that, in juridical terms, in our opinion, the author has in view the following hypotheses:

a) starting from the *notion of Law*, they consider that its rules *essentially comprise the idea of right and obligation*. Not all the rules of law so defined are included, in practice, in the positive Law. *The positive Law, namely the applied law*, comprises a very limited number of rules, as compared to all possibilities of juridical rules, which exist at a certain moment.

b) as concerns the *juridical relation*, we retain the following remarks: 1) among persons, by juridical action, regarding a certain object, *a certain specific relation is established*. This relation is essential and it is different from the other elements of the relationship. *The entire Law is therefore built on obligations, which are its simplest elements*. 2) since the juridical relation is normative, it represents a commandment, namely an order, moreover, they think all legal provisions represent such a commandment. 3) the juridical relation implies the idea of obligation. 4) the juridical commandment is breakable. 5) as concerns the right-obligation relation, they think it is absolute. 6) the idea of juridical relation leads to the idea of penalty. The penalty is applied by the State. 7) the juridical penalty is the second element of the positive Law.

2.3.5. Addressing it from *the point of view of the pure theory of Law*[11], we notice that the author examines *the juridical responsibility* in terms of *relation between juridical obligation and penalty,* which, in our opinion, coincides with *juridical liability in the Romanian Law*.

If we conceive the *Law as a restrictive order*, we cannot say that *a given conduct is objectively prescribed by Law* and that it can therefore be *regarded as being the object of a juridical obligation*, unless a juridical rule *attaches to the contrary conduct the penalty of a restrictive action*. Starting from the idea that *juridical obligation* is nothing but *the positive rule* that prescribes individual's conduct, by *attaching a penalty to the contrary conduct, u*nder these circumstances, the individual is *compelled* from juridical point of view *to the conduct so prescribed*, even when the representation of the rule does not *create in him/her any kind of impulse* towards that conduct.

Moreover, to the extent to which the positive Law consecrates *the principle according to which ignoring the law makes no exception as concerns the penalty established by Law*, individual's obligation exists even if s/he has no idea about the juridical rule aimed to oblige her/him, in other words, if s/he does not know it. In this context, the responsibility is for guilt and for outcome.

2.3.6. Turning into value the above paragraphs, we retain the following components of the concept of liability, which we regard as essential in covering the scope of its content:

a) as mentioned above: the lawmaker pays every time attention also to *the possibility of breaking the rule by non-compliant conducts*. As the author specifies, *the person who breaches the*

[9] Ion Dogaru, *op. cit*. 267-269.
[10] Mircea Djuvara, op. cit. 40-42, 213-224, 302.
[11] Hans Kelsen, op. cit. 157-170.

provisions of juridical rules by her/his action *affects the rule of law, disturbs the good and normal existence of social relationships, affects legitimate rights and interests of the people around her/him, endangers the co-existence of freedoms and the social balance*.

b) furthermore: if we conceive *the Law as a restrictive order*, we cannot say that *a given conduct is objectively prescribed de jure*, and that it therefore *be regarded as being the object of a juridical obligation*, unless a juridical rule *attaches the penalty of a restrictive action to the contrary conduct*. We start from the idea that *juridical obligation* is nothing but the *positive rule* that prescribes individual's conduct *by attaching a penalty to the contrary conduct*.

3. Romanian constitutional, legal and doctrinaire milestones of ministerial liability

3.1. *The developing statute of the Convention of 7/19 August 1858*[12]

From the systematic examination of the normative content of the Statute, we retain the following issues for this study: a) the Statute, in our opinion, can be regarded as a Constitution, given the provisions of Art. XVII, which stipulate that: All public officers, with no exception, upon their designation, *have to swear observance of the Constitution and laws of the country and faith to the God*. b) The Statute includes no provision on ministerial liability.

3.2. *Constitution of Romania of 1866*[13]

We have to mention right from the beginning that the Fundamental Law of Belgium of 1831 was a source of inspiration for the Constitution of Romania of 1866.

The systematic examination of the constitutional text reveals that the core of the ministerial liability is found in the normative content of the following articles:

a) Art. 92: *The person of the King is inviolable*. *His Ministers are accountable.* No act of the King can be enforced unless it is counter-signed by a Minister who consequently actually becomes liable for that act.

b) Art. 100: In no case *can a verbal or written order of the King exempt a Minister from liability*.

c) Art. 101: Each of *the two Assemblies as well as the King are entitled to accuse the Ministers and refer them to the High Court of Cassation and Justice*, who is the only one entitled to judge them in united Sections, except what will be stipulated by laws as concerns *the exercise of civil action and the offences committed by Ministers beyond the exercise of their powers*. Charges against the Ministers *can only be pressed by a majority of two thirds of the present Members*. *A law* introduced in the first session shall determine *the cases of responsibility, the penalties applicable to the Ministers and the manner of prosecution against them*, both as concerns the accusation admitted by the national representatives and as concerns the prosecution by the injured parties. The accusation initiated by the national representatives against the Ministers shall support itself. The prosecution initiated by the King shall be conducted through the public ministry.

d) Art. 102: Until the law mentioned in the previous Article is made, *The High Court of Cassation and Justice has the power to characterise the offence and determine the penalty*. However, the penalty cannot exceed detention, without prejudicing the special cases indicated by the penal laws.

e) Art. 103: The King can only forgive or reduce the penalty decided for Ministers by the High Court of Cassation and Justice *after the request of the Assembly who pressed charges*.

Turning into value the constitutional provisions mentioned in the Articles above, we retain mainly the following constitutional rules on ministerial liability:

---

[12] Ioan Muraru and Gheorghe Iancu, *Romanin Constitutions*, Texts. Notes. A comparative presentation, (Bucharest: Actami, 2000), 7-14.

[13] *Ibidem,* 31-59.

a) by proclaiming the inviolability of the person of the King, the liability is transferred to his Ministers, through the counter-signing of the official acts issued by him, acts that obtain a compulsory juridical power by being counter-signed.

b) verbal or written order of the King cannot exempt a Minister from liability.

c) either the King or the two Assemblies have the right to press charges against Ministers. Charges are pressed by vote of the 2/3 majority of the number of members of the two Assemblies. The prosecution initiated by the King shall be conducted through the public ministry. The High Court of Cassation and Justice has the competence to judge in reunited Sections.

d) A law introduced in the first session shall determine the cases of responsibility, the penalties applicable to the Ministers and the manner of prosecution against them.

e) The King can only forgive or reduce the penalty decided for Ministers by the High Court of Cassation and Justice after the request of the Assembly who pressed charges.

Regarding the ministerial responsibility, Professor Constantin Dissescu,[14] *contemporary with the Constitution of Romania of 1866, specifies the following*:

a) Ministerial responsibility is one of the bases of our constitutional system; it guarantees *King's inviolability*.

b) Ministerial responsibility is legitimate, right and necessary. It is *legitimate*, because there is nothing more rightful than the responsibility of each person for her/his actions within the State. The positive law, the entire social and political organisation is based on this idea, according to which the individual is free, and *the principle of human freedom leads us to the principle of responsibility*. It is *right*, because nobody can be compelled to be a Minister unwillingly. Since a minister counter-signs an act, s/he therefore acknowledges that s/he understands the utility and legality of that act. It is *necessary,* because only in this way we can ensure observance of the laws and Constitution. It is a natural fact against which nobody can complain.

3.2.1. *Law of the 2nd of May 1879 on ministerial responsibility* [15]

From the systematic examination of the normative content of the law, we retain mainly the following issues: a) the law comprises three parts: responsibility, judgment procedure, and rules on prescription. b) the first part, entitled *Responsibility* establishes the actions and facts for which the Ministers are responsible while exercising their mandate. According to the law, the responsibility can have a penal, civil or delictual nature. c) the judgement procedure comprises mainly the crimes and offences committed by a Minister and the previous authorisation of the Chambers and, if applicable, also of the King, for referral to the court and initiation of the penal instruction and preventive detention, also for civil liability towards the State. d) as concerns the prescriptions, the Common Law provisions are maintained.

3.3. *Constitution of Romania of 1923* [16]

The systematic examination of the constitutional text reveals that the core of ministerial liability is found in the normative content of the following articles:

a) Art. 87: The person of the King is *inviolable*. *His Ministers are accountable.* No act of the King *can be enforced unless it is counter-signed by a Minister who consequently actually becomes liable for that act*.

b) Art. 97: In no case *can a verbal or written order of the King exempt a Minister from liability*.

c) Art. 98: *Each of the two Assemblies as well as the King are entitled to request Ministers' prosecution and refer them to the High Court of Cassation and Justice*, who is the only one entitled

[14] Constantin Dissescu, *Constitutional Law*. (Bucharest: The printing house of SOCEC & Co. Bookstore, LTD, 1915), 826-842.

[15] *** Law of the 2nd of May 1879 on ministerial responsibility was published in „The Official Gazette - Journal of Romania", No. 98 of the 2nd of May 1879.

[16] Ioan Muraru and Gheorghe Iancu, op. cit., 63-91.

to judge them in united Sections, except what will be stipulated by laws as concerns the exercise of civil action of the injured party and as concerns the crimes and offences committed by Ministers beyond the exercise of their powers. *Charges against Ministers by the Lawmaking Bodies* can only be pressed by a majority of two thirds of the present Members. The instruction shall be conducted by a commission of the High Court of Cassation, consisting of five members randomly drawn in united Sections. This commission has also the power to qualify the facts and decide prosecution or non-prosecution. The defence before the High Court of Cassation and Justice *shall be conducted through the public ministry*. The law on ministerial responsibility determines the cases of liability and the penalties applicable to the Ministers.

d) Art. 99: *Any party affected by a decree or order signed or counter-signed by a Minister, which breaches an express text of the Constitution or of a law, may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered.* Either during the judgment or after the establishment of decision, the Minister may be summoned before the ordinary courts, upon the request of the State, following the vote of one of the Lawmaking Bodies, *for civil liability for the damage alleged or suffered by the State*. Minister's illegal action does not exempt from joint liability the public officer who counter-signed, unless s/he had warned the Minister in writing.

Turning into value the constitutional provisions mentioned in the Articles above, we retain mainly the following constitutional rules on ministerial liability:

a) the ministerial liability itself is comprised in Articles 98 and 99 of the Constitution of Romania of 1923, which, in our opinion, have undergone essential changes, as compared to Articles 101, 102 and 103 of the Constitution of Romania of 1866. These changes are as follows:

b) according to Art. 98, the penal instruction shall be conducted by a commission of the High Court of Cassation, consisting of five members randomly drawn in united Sections. This commission has also the power to qualify the facts and decide prosecution or non-prosecution. In addition, the defence before the High Court of Cassation and Justice *shall be conducted through the public ministry.*

c) in accordance with Art. 99, *any party affected by a decree or order signed or counter-signed by a Minister, which breaches an express text of the Constitution or of a law, may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered*. Under these circumstances, either during the judgment or after the establishment of decision, the Minister may be summoned before the ordinary courts, upon the request of the State, following the vote of one of the Lawmaking Bodies, *for civil liability for the damage alleged or suffered by the State*.

d) as concerns the joint civil liability, according to the same Article, Minister's illegal action does not exempt from joint liability the public officer who counter-signed, unless s/he had warned the Minister in writing.

3.4. *Constitution of Romania of 1938* [17]

The systematic examination of the constitutional text reveals that the core of ministerial liability is found in the normative content of the following articles:

a) Art. 44: The person of the King is *inviolable*. *His Ministers are accountable.* The Acts of State of the King shall be counter-signed by a Minister who *consequently becomes liable for those acts*. *The exception is the designation of the Prime Minister, which shall not be counter-signed.*

b) Art. 70: The King and any Assembly *may request Ministers' prosecution and referral to the High Court of Cassation and Justice*, who is the only one entitled to judge them in united sections. As concerns *the exercise of civil action by the injured party* and as concerns the crimes and offences committed by them beyond the exercise of their powers, they are subject to the Common Law rules. *Lawmaking Bodies' decision to prosecute Ministers* shall be made by a majority of two

[17] Ioan Muraru and Gheorghe Iancu, op. cit. 65-118.

thirds of the present members. *The instruction shall be conducted by a commission of the High Court of Cassation and Justice, consisting of five members* randomly drawn in united sections. This commission has also the power to qualify the facts and decide prosecution or non-prosecution. *The defence before the High Court of Cassation and Justice shall be conducted by the* Public Ministry. The Law on Ministerial Responsibility determines the cases of liability and the penalties applicable to the Ministers. *Ministers of Justice who have left the office* cannot act as lawyers for one year. *Out-of-office Ministers* cannot be members of the Managing Boards of a company with which they signed contracts during the next three years.

c) Art. 71: *Any party whose rights have been affected by a decree or order signed by a Minister, by breaching an express text of the Constitution or of the laws in force,* may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered.

Turning into value the constitutional provisions mentioned in the Articles above, we retain mainly the following constitutional rules on ministerial liability, which have undergone changes, as compared to the similar regulations in the Constitution of Romania of 1938:

a) according to Art. 44, the designation of the Prime Minister by the King is exempted from being counter-signed.

b) there are new rules included in the content of Art. 70, as follows:

b.1. as concerns the exercise of civil action by the injured party and as concerns the crimes and offences committed by them beyond the exercise of their powers, they are subject to the Common Law rules. b.2.) Ministers of Justice who have left the office cannot act as lawyers for one year. b.3.) Out-of-office Ministers cannot be members of the Managing Boards of a company with which they signed contracts during the next three years.

c) a new rule is included in the content of Art. 71, according to which: Any party whose rights have been affected by a decree or order signed by a Minister, by breaching an express text of the Constitution or of the laws in force, may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered.

3.5. *Constitutions of the People's Republic of Romania of 1948 and 1952* [18]

The systematic examination of the constitutional texts of the two Constitutions reveals the following: a) the core of ministerial responsibility is found in the normative content of Art. 73 of the Constitution of the People's Republic of Romania of 1948, in the following form: *The Ministers are liable for their penal facts committed while exercising their powers*. *A special law shall establish the manner of prosecution and judgement for Ministers.* b) The Constitution of the People's Republic of Romania of 1952 does not include constitutional rules on ministerial responsibility.

3.6. *The Constitution of the Socialist Republic of Romania of 1965, as subsequently re-published* [19]

The systematic examination of the constitutional texts reveals that the ministerial liability was formulated as follows: *The Ministers and the leaders of other central bodies of the State Administration are liable before the Council of Ministers for the activity of the bodies they lead*.

3.7. *Constitution of Romania of 2003*[20]

The systematic examination of the constitutional text reveals that the core of ministerial liability is found in the normative content of Art. 109, a content summarised under the title *Liability of the Members of Government*. The above-mentioned Article 109 establishes the following three relevant constitutional rules:

---

[18] Ioan Muraru and Gheorghe Iancu, op. cit., 123-138 şi 143-164.

[19] *Ibid*em, 169-198.

[20] *** The Constitution of Romania, as revised in 2003, was published in the Official Gazette of Romania, Part I, No. 767, of the 31st of October 2003.

Para. (1) The Government is politically liable only before the Parliament for their entire activity. Each Member of Government is politically liable together with the other Members for Government's activity and for their actions.

Para. (2) Only the Chamber of Deputies, the Senate and the President of Romania are entitled to demand penal prosecution for the Members of Government for facts committed while exercising their powers. When penal prosecution is requested, the President of Romania may order their suspension from office. Referral of a Member of Government leads to her/his suspension from office. Competent for judgement is the High Court of Cassation and Justice.

Para. (3) The cases of liability and the penalties applicable to the Members of Government are regulated by a law on ministerial responsibility.

Turning into value the above-mentioned constitutional provisions, we retain mainly the following constitutional rules regarding the liability of the Members of Government:

a) *As concerns the constitutional system of political liability*

a.1. we find out that, if the marginal title of the article under analysis is *Liability of the Members of Government,* the content of the text of Art. 109 para. (1) refers to the *political liability of the Government only before the Parliament* for their entire activity. Government's political liability only before the Parliament can be explained by taking into consideration the provisions of Art. 103 para. (3) of the Constitution, according to which *„Government's agenda and list are debated by the Chamber of Deputies and Senate, in a common sitting*. *The Parliament grants full confidence to the Government by the vote of the majority of Deputies and Senators",* and of Art. 85 para. (1) of the Constitution, according to which „*the President of Romania designates a candidate for the position of Prime Minister and appoints the Government based on the confidence vote granted by the Parliament"*. We notice that the appointment of the Government by the President of Romania is based on the confidence vote granted by the Parliament.

Also regarding Government's political liability, the second thesis of Art. 109 para. (1) of the Constitution establishes the rule according to which: *Each Member of Government is politically liable jointly with the other Members for Government's activity and actions*.

In our opinion, the joint liability is imposed since, in accordance with the provisions of Art. 103 para. (2) of the Constitution: „The candidate for the position of Prime Minister, within 10 days after designation, shall demand *Parliament's confidence vote for Government's agenda and entire list"*.

a.2. The political liability subsumes also the other manners of parliamentary control established by the Constitution, as part of the relations between Parliament and Government, as concerns: 1). the information provided to the Parliament (Art. 111), 2). The questions, inquiries and simple motions (Art. 112), 3). the censorship motion (Art. 113), 4). the commitment of Government liability (Art. 114).

The most severe penalty, established for Government's political liability, is *dismissal* under the circumstances established by the provisions of Art. 110 para. (2) of the Constitution, according to which: „*The Government is dismissed when the Parliament withdraws the confidence they granted or when the Prime Minister is in one of the cases stipulated at Article 106, except being revoked, or s/he finds it impossible for herself/himself to exert her/his powers for more than 45 days*".

b) *As concerns the constitutional system of penal liability*

b.1. the constitutional system of penal liability of the Members of Government is established by the normative content of Art. 109 para. (2) thesis I of the Constitution, which, as concerns *the penal liability* of the Members of Government, it specifies that: „*Only the Chamber of Deputies, the Senate and the President of Romania are entitled to request penal prosecution of the Members of Government for the facts committed while exercising their powers*".

b.2. according to Art. 109 para. (2) thesis II of the Constitution, „*When penal prosecution is requested*, *the President of Romania may order their suspension from office"*.

b.3. according to Art. 109 para. (2) thesis III of the Constitution, „*Referral to the court of a Member of Government incurs her/his suspension from office*".

b.4. according to Art. 109 para. (2) thesis IV of the Constitution „*The High Court of Cassation and Justice has the competence for judgement*".

3.7.1. *Law 115/1999 – Law on ministerial responsibility* [21]

In applying the constitutional provisions comprised in the normative content of Art. 109 para (3), which establish: „*The cases of liability and the penalties applicable to the Members of Government are regulated by a law on ministerial responsibility*", the Law 155/1999 was enacted, as amended, republished. The systematic analysis of the normative content of the law reveals that it is structured into four Chapters, from whose content we retain the following selective issues for this study:

a) Chapter I, entitled General Provisions, comprises the following general principles applicable to its entire normative content.

a.1. In our opinion, justified in the second section of the study on responsibility, Art. 1 of the Law *consecrates the principle of responsibility,* which establishes the following general juridical obligation for Government and its Members: *The Government, in its entirety, and each of its Members are compelled to fulfil their mandate by observing the Constitution and the laws of the country, as well as the Governing Plan accepted by the Parliament*.

This principle is an application and a development of *the constitutional principle of responsibility*, proclaimed in Art. 1 para (5) of the Constitution of Romania, republished, and it consecrates the following fundamental principle applicable within the Romanian State: „*In Romania, observing the Constitution, its supremacy and the laws is compulsory*".

As concerns observance of the Constitution and its supremacy, the constitutional doctrine specifies as follows: „*Observance of the Constitution and the other normative rules is a general obligation for all subjects of right, both public authorities and citizens*".[22]

a.2. enlarging on the constitutional principles from Art. 109 para (1) of the Constitution, it establishes the general principles regarding Government's political liability in the content of Art. 2, Art. 3 and Art. 4 of the law.

a.3. by extending the responsibility of the Members of Government, in accordance with Art. 5 of the law, a general principle is established, according to which: „Besides political liability, *the Members of Government may be also liable from civil, penalty-related, disciplinary or penal point of view*, as appropriate, according to the relevant Common Law, unless this law includes derogatory provisions".

a.4. in addition, in the content of Art. 6 of the law, *the understanding of the wording Members of Government* is established.

b) Chapter II of the law establishes the Penal Responsibility of the Members of Government.

c) Chapter III of the law establishes the Procedure for Penal Prosecution and Judgement of the Members of Government.

d) Chapter IV of the law, entitled Final Provisions, establishes additional procedure rules.

4. Conclusions

The main purpose of the study on ministerial liability within the Romanian constitutional and legal system, specific to the forms of governance covered by the Romanian State, namely monarchy, people's republic, socialist republic and semi-presidential republic, has been achieved. The main directions of study for achieving the proposed objective were as follows:

---

[21] ***Law 115/1999 - *Law on ministerial responsibility*, republished, in „The Official Gazette of Romania", Part I, No. 200 of the 23rd of March 2007.

[22] Coordinators Ioan Muraru and Elena Simina Tănăsescu, *The Constitution of Romania, Remarks by articles*, (Bucharest: C.H. Beck, 2008), 18.

1. Theorisation of the concepts of responsibility and liability from the point of view of the Explanatory Dictionary of Romanian Language and of various branches of Law having as an object of study the above-mentioned concepts. This section comprises two parts.

In the first part of the study, the constitutional regulations containing these two concepts are identified. The first part of the section is dedicated to the theorisation of the concept of responsibility.

The main Romanian and foreign documentation sources used for theorising the concept of responsibility were as follows: the Explanatory Dictionary of Romanian Language, the general theory of Law, the theory of positive Law, and the pure theory of Law.

The Explanatory Dictionary of Romanian Language defines the responsibility as an obligation to be accountable and as a liability assumed by a person. The general theory of Law examines the responsibility as a fundamental principle of Law, which is a social phenomenon that expresses an action of commitment of the individual in the process of social integration. The theory of positive Law examines the responsibility, as it is usually understood, namely as rules indicating what the target persons have the right to do, or not. The pure theory of Law examines the concept of responsibility in close correlation with the juridical obligation. This correlation is based on the idea that the individuals are compelled to have the conduct prescribed by the social order.

The second part of the section is dedicated to the theorisation of the concept of liability, using the same information sources as in the first section. The Explanatory Dictionary of Romanian Language defines the liability as an obligation to account for the fulfilment or failure to fulfil certain actions and as a responsibility. The general theory of Law examines the liability from the point of view of juridical liability.

The theory of positive Law examines the liability by starting from the idea of subjective Law that cannot be further conceived unless it is correlated with the idea of obligation, a person's right meaning only the obligation of other person(s) to observe it. In its turn, the idea of obligations leads to the idea of responsibility.

The pure theory of French Law examines the juridical responsibility from the point of view of the relation between juridical obligation and penalty, which, in our opinion, coincides with the juridical liability in the Romanian Law.

2. The Romanian constitutional, legal and doctrinaire milestones of ministerial liability comprise, in a diachronic and selective approach, the analysis of the entire scope of evolution of the concept of ministerial liability within the Romanian constitutional system.

The second part of this study begins with the identification of regulations on ministerial liability, in the normative content of the first document of constitutional value in Romania, namely the Developing Statute of the Paris Convention of 1858.

Following a pre-set scheme, there are identified all regulations on ministerial liability in the Romanian Constitutions enacted in Romania until nowadays, together with their revisions, as well as in the relevant secondary laws. In addition, the constitutional doctrine related to Romania's constitutional evolution during the mentioned period of time is quoted.

The two parts of the study can be regarded as a contribution to the extension of research studies on ministerial liability within the Romanian constitutional system, which cover over 150 years of constitutional and legal evolution in Romania.

Furthermore, we specify that the above-mentioned study opens a complex and complete yet not exhaustive vision on the area under analysis.

Given the selective approach of the ministerial liability, the key-scheme proposed may be multiplied and extended to other relevant subsequent studies, given the vastness of the area under analysis.

References

- Constituţia României, revizuită in anul 2003, a fost publicată în Monitorul Official al României, Partea I, nr. 767, din 31 octombrie 2003.
- Vasile Breban, *Mic dicţionar al limbii române*, (Bucureşti: Enciclopedică, 1997), 551, 568.
- Nicolae Popa, *Teoria generală a dreptului*, (Bucureşti: Actami, 1998), 123-125. Autorul *defineşte dreptul* ca ansamblul regulilor asigurate şi garantate de stat, care au ca scop organizarea şi disciplinarea comportamentului uman în principalele relaţii din societate, într-un climat specific manifestării coexistenţei libertăţilor, apărării drepturilor esenţiale ale omului şi statornicirii spiritului de dreptate. 323-326.
- Ion Dogaru, *Teoria generală a dreptului*, (Craiova: Sitech, 1998), 121, 40-42, 213-224, 267-269, 302.
- Mircea Djuvara, *Drept raţional, izvoare şi drept pozitiv,* (Bucureşti: ALL, 1995), 502-504.
- Hans Kelsen, Théorie pure du droit, (Paris: Dalloz, 1962), 157-170.
- Ioan Muraru şi Gheorghe Iancu, *Constituţiile Române*, Texte. Note. Prezentare comparativă, (Bucureşti: Actami, 2000), 7-14, 31-59, 63-91, 65-118, 123-138, 143-164.
- Legea nr. 115/1999-*Lege privind responsabilitatea ministerială*, republicată, în „Monitorul Oficial al României", partea I, nr. 200 din 23 martie 2007.
- Coordonatori Ioan Muraru, Elena Simina Tănăsescu, *Constituţia României, Comentariu pe articole*, (Bucureşti: C.H. Beck, 2008), 18.

THE ECONOMIC ANALYSIS OF LAW - WILL THE ROMANIAN DOCTRINE FINALLY CATCH UP WITH IT?

MONICA-FLORENTINA POPA*

Abstract
Although a well-established presence on the international legal scene, the economic analysis of law is still an unfamiliar concept to most Romanian scholars. While worldwide, prestigious universities offer special courses on this topic and an impressive body of legal studies continues to add up, only scant traces of this important legal school can be detected in some recent Romanian doctoral thesis and papers.
This article explores the main concepts of the economic analysis of law, the recent spin-offs of this theory, especially in the area of comparative law, as well as some of the critiques addressed in the legal doctrine, concerning the consequences on law of overemphasizing "efficiency" to the expense of less quantifiable, moral and social considerations. Some explanations on why the Romanian doctrine is lagging behind with respect to the economic analysis of law will also be attempted, together with a tentative answer to whether this major legal theory will ever make an impact on local doctrinal developments in the near future.

Key words: *economic analysis of law, efficiency, legal origins thesis, comparative law, legal reform*

Introduction

The economic analysis of law as developed by the Chicago school in the early 1960s can trace its origins to various preceding theories – like American realism and utilitarianism - that shaped the western legal thought long before concepts such as market economy, efficiency, transaction costs (terminology specific to this doctrine) and law as instrument for promotion of economic efficiency, could be coherently developed in one unifying theory. The impact of this doctrine that purports to measure the efficiency of legislation and court decisions with the conceptual tools provided by economics has not been negligible in common-law systems, mainly in USA, its country of origin, where traditionally positivism has held a preeminent place, with its emphasis on the autonomy of law and its legal phenomena. The latest spin-offs of the economic analysis of law can be found in the comparative law field, namely in the legal origins theories, that link economic performance to certain characteristics of a legal system, implying that some systems are better suited to economic development than others.

As stated in the abstract, this paper presents summarily the main concepts of the economic analysis of law, in order to better assess its today impact on the comparative law field. The paper also reviews the very few Romanian works that deal with the issue of law and economics (an alternative name for the economic analysis of law), even though two of these works are purely philosophical-speculative and hence have more to do with political economy than law. The scarcity of Romanian research on this topic highlights what we believe to be a certain cultural aversion towards such a realistic, harsh approach to law, aversion shared in fact by the many legal cultures from the continent.

Moreover, even our most comprehensive compendia on philosophy of law or jurisprudence[1] and its historical developments do not include the economic analysis of law in their presentation. Therefore, we consider that a research paper on this matter, that reviews not only the main theory, but also its current avatars in the legal field, will prove useful by the relative novelty of this theme in our

* Assistant Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: monica.popa@univnt.ro).

[1] One of the most notable contribution on this subject is made by "The Philosophy of Law: Major Legal Theories", ("*Filosofia dreptului. Marile curente*") by N. Popa, I. Dogaru, Gh. Dănişor, D.C. Dănişor, ed. ALLBECK, Bucharest, 2002.

legal doctrine, and will perhaps spur an interest in the economic analysis of law that will go beyond narrowly-focused research papers on tort liability and collateral securities or speculative doctoral thesis in philosophy and political economy.

1. Brief presentation of the economic analysis of the law theory

In introducing this topic, some authors formulate the issues this theory purports to answer, such as "should law be primarily concerned with promoting economic efficiency?"[2] This theory is not politically-neutral, so "the answer will depend upon the political leaning of the reader. The believer in the free market and *laissez-faire* economics will answer the affirmative, whereas the more left-leaning individual will counter that law should be more about justice, rights and redistribution.(…) despite the fact that judges, lawyers and individuals appear to view the law in terms of rights and justice, there is a school of legal thought which not only advocates that the law ought to be concerned with economic efficiency, but also claim to put forward a descriptive theory in which law is concerned with promotion of economic efficiency and the protection of wealth as a value"[3].

This theory originates with the publication in 1960 by the economist Ronald Coase of the now famous article "The problem of Social Costs"[4] and uses economic concepts such as "efficiency" and "transaction costs" in conjunction with socio-legal concepts, such as "distribution of wealth", "equity", "allocation of rights" to assess the consequences of legal rules in practice. In a widely quoted book on this subject, "An Introduction to Law and Economy"[5], A.M. Polinsky defines *efficiency* as the relationship between the aggregate benefits and the aggregate costs of a situation (viewed in simplified terms of monetary loss or gain), while the term *equity* concerns the distribution of income among individuals, or "in other words, efficiency corresponds to the "size of the pie", while equity has to do with how it is sliced"[6]. Another concept advanced by R.H. Coase refers to the *transaction costs*, that include the costs of identifying and getting together with the parties one has to negotiate a particular situation, the costs of the negotiation process itself and the costs of enforcing the result of such negotiation. Initially, in his article Coase dealt with a specific theme, that of assessing those activities of business firms which have harmful effects on others[7] and the allocation of liability damages, drawing on a number of tort and nuisance cases adjudicated by the English courts. Challenging the conventional economic and legal wisdom that polluter has to pay, Coase brings a different angle to the classic dilemma: if A has inflicted harm on B, how should one restrain A (one of the examples given is that of confectionery maker whose noisy operating machine disturbs a practicing doctor). In this example, the choice is whether the confectioner should not be allowed to operate a noisy machine to make confectionery or the doctor should not be allowed to carry on with his practice. Coase suggests that this situation involves reciprocity and that the real question is whether A should be allowed to harm B or B should be allowed to harm A. This means that the initial allocation of rights (by courts or by law) might produce a different economic result, in a real world where transaction costs are positive (are not zero). The answer to this dilemma, Coase

[2] H. McCoubrey & Nigel D. White, "Textbook on Jurisprudence", Oxford Univerity Press, 3rd ed., 1999, p. 275.

[3] Idem 3, p.275.

[4] R.H. Coase, "The Problem of Social Costs", Vol. 3 Journal of Law and Economics, p. 1-44. The article is available online at: http://www.colorado.edu/ibs/eb/alston/econ4504/readings/Coase,%20The%20Problem%20of%20Social%20Costs.pdf.

Ronald H. Coase is a 1991 Nobel Laureate in Economics "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy."

[5] A. M. Polinsky, "An Introduction to Law and Economy", Wolters Kluwer, Law & Business, 4th edition, New York, 2011.

[6] Idem 6, p. 7.

[7] Idem 5, p. 1.

contends, lies in a cost-benefit analysis that should be taken into account by judges when adjudicating allocation of rights (and implicitly allocation of income), the transaction costs for each party being evaluated against the increase/decrease in the value of production, i.e. against value maximization. In the example above, the problem was if it was worthwhile to secure more doctoring at the expense of the diminished production of confectionary. According to what is referred to as Coase Theorem, "if there are positive transaction costs, the efficient outcome may not occur under every legal rule. In these circumstances, the preferred legal rule is the rule that minimizes the effects of transaction costs"[8]. Consequently to the publication of this article, the concept of wealth maximization assumes a central role for all ensuing theories based on Coase's work.

The concepts outlined above have been developed by many a scholar, creating different approaches within the economic analysis of law. The contributions of Calabresi and Melamed[9] in the field of tort liability and that of Richard Posner are the most significant in this respect. Calabresi has addressed some of the shortcomings of the Coase's analysis by moving the discussion away from the efficient outcome of a dispute between two parties and steering it towards the decisions that society through it legislative bodies has to make as to the nature of a right (entitlement) and its distribution. According to Calabresi, "the first issue which must be faced by any legal system is one we call the problem of 'entitlement'. (…) Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail. The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breath clean air (…) these are first order legal decisions"[10]. Entitlements can be those protected by a simple property rule (negotiated by individuals), those bought and sold at a price determined by the state (governed by so-called liability rules) and entitlements that are inalienable or that can be sold only under specific conditions (governed by inalienability rules). The authors list three groups of reasons for deciding in favor of one entitlement over the other: "economic efficiency, distributional preferences, and other justice considerations"[11]. Calabresi and Melamed make the case for entitlements protected by liability rules rather than property rules on the basis of their economic efficiency and claim that their analysis is a working framework for legal decision in tort liability cases. Their theory does allow aspects of justice into their economic-based approach, in terms of distribution of entitlements and of their designation as to which are to be protected by liability or inalienability rules[12], but their analysis is still centered on the issue of economic efficiency in a functioning free market economy.

Richard Posner is perhaps the most well-known exponent of the law and economic movement. In his seminal works, "Economic Analysis of Law", "The Problems of Jurisprudence" and "The Economics of Justice", Posner links the common-law bias for promotion of efficiency to the free-market principles that govern the Western countries and thus explains the judicial tendency to arrive at conclusions that maximize wealth. Posner contends that common-law judges do tend to base their decisions on efficiency considerations and provides a list of subject-matters where such decisions are well documented, especially in the contract law, property law and tort law. How these considerations apply to other legal field it is less clear, though, and represents one of the vulnerabilities of his theory. Posner does not limit the economic analysis of law merely to a descriptive tool for evaluating law, but purports to impose a normative dimension as well, stating that a few economic principles can be applied as formulas to the legal field and that judicial decisions could be evaluated against the overriding aim of wealth maximization, conceptually based on the model of voluntary market transactions. As was noted in the beginning of this section, this theory is

[8] Idem 6, p.15.

[9] The most quoted article refers to "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" by G. Calabresi and A.D. Melamed, (1972),Vol. 85 Harvard Law Review, p. 1089-1128, available in pdf format at: www.amherst.edu/media/view/123372/original/CalabresiMelamed.PDF.

[10] Idem 10, p.1090.

[11] Idem 10, p.1093.

[12] Idem 3, p. 282.

not politically-neutral, being steeped in a particular economic model, that promotes a minimal state intervention in the economy, that "rewards the traditional 'Calvinist' or 'Protestant' virtues and capacities associated with economic progress"[13] and is based on an unflinching belief in the self-regulatory forces of the free market.

The economic analysis of law has drawn widespread criticism from the more traditional legal scholars. The issues raised against this theory range from its failure to explain (with the possible exception of Calabresi) the initial allocation of rights in society to its sweeping assumptions that men operate solely for the purpose of wealth maximization or that wealth is a social value by itself, unrestrained by other considerations. The contention by Posner that "common-law is best (not perfectly) explained as a system for maximizing the wealth of the society. Statutory or constitutional as distinct from common-law fields are less likely to promote efficiency (…)"[14] points to its preference for common-law rules over state regulation. His opinions on the common-law legal system as a system that maximizes wealth have been taken over by a new generation of economists and, to a lesser extent, by jurists enthralled by the simplicity of the main tenant of the economic analysis of law school, that law should promote economic efficiency. The ensuing theories have impacted law in many an unpredictable way, affecting even those disciplines that traditionally escaped the scrutiny of economists or the imposition of economic influences, such as the comparative law.

2. The "legal origins" thesis – a 21st century avatar of the economic analysis of law

As was the case with the economic analysis of law, the legal origins thesis was initiated by a couple of economists borrowing core concepts from the field of comparative law, such as the classification of legal systems in civil and common-law systems, legal transplants and the function of law, and applying them to their own economically-focused analysis. This theory, whose main tenant claims that the common-law fosters economic growth better than the civil law, has proved to impact not only legal studies, but political and economic decisions worldwide, through its incorporation in the highly influential *Doing Business* reports issued by the World Bank.

The legal origins thesis can trace its beginnings to the work of a small number of economists, whose research focused initially on investor protection, namely Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny, collectively referred to either as LLSV or LLS[15]. Believing in the transformational power of law as a tool to spur economic reform[16], LLSV set out to demonstrate the impact of good laws on development and in particular on economic growth. Since "good law" is not easily separated from the very fiber of society in which it operates so as to establish a causal link between good law and prosperity, and hence is not easily quantified, LLSV introduced a novel approach to this matter, analyzing those systems where the law was imposed exogenously, mainly through colonization by various European countries, and observing which country performed better in economic terms. This approach led them to the conclusion that legal origins matter[17], i.e. that countries with common-law systems performed better than those with civil law origins, due mainly to the fact that common-law systems are perceived to enjoy a greater degree of judicial independence from the executive compared to their civil law counterparts, and to its perceived adaptability to change, as a direct consequence of its limited reliance on codified law. In

[13] R. A. Posner, "The Economics of Justice", Harvard University Press, Cambridge, Massachusetts, 1981, p.68.

[14] R. A. Posner, "Economic Analysis of Law", 3rd ed., Little, Brown & Company, Boston, 1986, p.21.

[15] Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Comparative Law", vol. 57 The American Journal of Comparative Law, p.768.

[16] For some interesting historical insights on the idea that law is essential to economic development, see article by Curtis J. Milhaupt, "Beyond Legal Origins: Rethinking Law's Relationship to the Economy – Implications for Policy", vol. 57 The American Journal of Comparative Law, p. 831-832.

[17] Idem 16, p.769.

the wake of the enormous success this theory enjoyed, but also faced with a similar degree of criticism, the authors refined and expanded their theory beyond the investor protection field to encompass company law, bankruptcy law, labor laws and judicial independence. In essence, like its predecessor – the economic analysis of law, this theory is not politically-neutral, but is heavily influenced by the neoliberal political economy ideas prevalent in the decade spanning from the onset of the Asian crisis in 1998 to the 2008 global financial crisis (still influential, though to a lesser extent, today). It has been noted that countries hit by the global financial crises have all been given by international financial organizations a "fairly standard menu of legal reforms. The components of this menu, emphasizing shareholder rights and creditor protections and drawn predominantly from the US legal system, were influenced by the recent economics scholarship linking favorable economic outcomes to 'good' law. Since common-law regimes score well in this research, for many policy makers, 'good' has, not implausibly, meant Anglo-American (typically U.S.) law."[18]

As mentioned above, the main tenants of the legal origins thesis have made an impact on the international economic policies, through their incorporation by the World Bank in its *Doing Business* reports since 2002. "Beginning in 2004, the International Finance Group (IFC), a member of the World Bank Group, has been issuing reports that measure and compare the 'ease of doing business' in more than 130 countries worldwide. (…) the reports rely strongly (though not, of course, exclusively) on the legal origins thesis and its literature"[19]. Aimed at an international audience, these reports carry a different weight from the descriptive and analytical values of the legal origins thesis, introducing a quasi-normative perspective through its ranking of countries based on various benchmarks that purport to measure the attractiveness of a legal system for investment[20]. The main goal of these reports is to induce legal reforms in countries perceived to be deficient as to the ease of conducting business. Consistent with the legal origins theory, the top performers in this field belong to the common-law system, while civil law countries are lagging behind. Only Scandinavian countries and, lately, Germany, manage to make it to the top 10. In the 2012 report, for instance, the best performers were Singapore, Hong Kong and New Zealand, all countries with a common law system[21]. Since its first publications, countries engaged in a strong competition to improve their rankings, though the actual impact of the legal steps they took to make their business environment more investor-friendly is hard to evaluate in practice – perhaps by measuring the amount of new investment attracted by those reforms. Much criticism have been directed against these reports, ranging from its methodology and gathering of data, to the more substantive one "directed against perceived preferences for deregulation over other values – one being solidarity and justice, the other being culture"[22]. Another criticism have been directed towards the insufficient understanding of the law, either by misunderstanding or oversimplifying some traditional comparative law concepts, such as the division of legal families in civil and common law systems (selecting just two from all existing legal families) or by sheer ignorance as to the way legal transplants operate. The legal reform cannot be viewed in the simplistic terms of a legislation graft that will automatically induce economic growth.

The most vocal critique of the first *Doing Business* report have undoubtedly been voiced by the French legal profession, academics and leading practitioners alike, who joined forces in defending the values and merits of their civil law tradition, by establishing work groups, publishing

---

[18] Idem 17, p. 832-833.

[19] Idem 16, p.771.

[20] For the most recent *Doing Business* report and the ranking methodology, see http://www.doingbusiness.org/rankings. For Romania, the country profile, contributors to the report and other relevant information can be accessed at the following address: http://www.doingbusiness.org/~/media/giawb/doing%20business/documents/profiles/country/ROM.pdf

[21] Romania is ranked at 72 in the list (out of 185 countries), behind Trinidad and Tobago or the Kyrghiz Republic, but ahead of Italy. France is ranked at 34. For more information on the 2012 report, idem 21.

[22] Idem 16, p.773.

papers and making direct appeals to the World Bank institutions. The French reaction to the *Doing Business* reports with its implicit statement that common-law is better than civil should be, in our opinion, of great interest for the Romanian legal profession as well, and highlights some common issues. After the publication of the first *Doing Business* report, the president of the Cour de cassation has officially declared that "French law was thus brutally reminded of the requirement of efficiency by American schools of economic analysis of economic development factors"[23]. The discontent of the French with the assumptions and conclusions of the report have been explained as stemming from cultural factors, such as the difficulty for a country with a strong tradition of exporting law to accept legal transplants or by the unease with the values that underpinned the report, which seemed foreign to those on which French legal system is built[24]. The response of the French legal professions has been vigorous and constructive, with a mixture of well-argued critique against the reports and its underpinning legal foundations (i.e. the economic analysis of law and the legal origins thesis) and research projects centered on the economic efficiency of law. It has been noted that before the publication of the reports, these two theories were only marginally considered by the French academics, because the "idea of economic performance of law, which underpins an economic analysis, thus stands in contrast to the humanistic approach, characteristic of civil law systems"[25]. The French scholars and practitioners have so rapidly mobilized also in recognition of the increased global competition that unavoidably extends to the market for legal services and have benefitted from the support of leading politicians, including the former French president, Nicolas Sarkozy.

To summarize the main points of this incursion in the odyssey of the economic analysis of law and its modern avatar, the legal origins thesis, it seems that a consensus between legal scholars emerges on the deficiencies and on the benefits of these economic approaches. It would be undoubtedly useful if these approaches could be employed by comparatists in conjunction with the more traditional analysis of law, so as a broader, more comprehensive and accurate picture of a particular legal system could be generated and hence particular legal reforms could have a better chance of success.

3. The economic analysis of law and its reflection in the Romanian legal doctrine

The most accurate thing one could say about this subject is that the economic analysis of law is conspicuous by its absence, with the few exceptions of some recent doctoral thesis and articles, not all of them in the legal field. While researching this paper, I discovered very few Romanian sources, which will be mentioned below in a (hopefully) non-exhaustive manner.

A compendium of current political philosophy schools of the right side of the political spectrum contains two articles, on the economic analysis of law and, respectively, on the Austrian school of law and economics[26]. Another source would be the published doctoral thesis of one of the editors of the previously mentioned compendium, called "The Privatization of Justice"[27]. Its scope

[23] Bénédicte Fauvaque-Cosson and Anne-Julie Kerhuel, "Is Law and Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law", vol. 57 The American Journal of Comparative Law, p.812.

[24] Idem 24, p. 815.

[25] Idem 24, p. 826.

[26] "Dreapta Intelectuală.Teorii şi şcoli de gândire ale dreptei contemporane occidentale" (*The Intellectual Right Wing. Theories and Schools of the Contemporary Right wing of the Political Spectrum*), editors: Ionuţ Sterpan and Dragoş Paul Aligică, ed. Humanitas, Bucharest, 2011; the articles are "The Economic Analysis of Law", by Emanuel-Mihail Socaciu p. 279-291, and "The Austrian School of Law and Economics", by Mihai-Vladimir Topan and Tudor Smirna, p. 293-308. According to their résumés, none of these authors have legal training, and their articles do not go beyond the scope of the compendium, which is to broadly present current political theories.

[27] "Privatizarea justiţiei" (*The Privatization of Justice*) by Ionuţ Sterpan, ed. Ars Docendi, Bucharest University, 2012.

includes not only the economic analysis of law, but also extends to the theory of Robert Nozick on the role of the state and the extent of its legitimacy.

Finally, in the legal field, the economic analysis of law takes a central role in a fairly recent research paper on security interests in personal property[28], and - according to the author - is touched upon in some other Romanian works on property rights and contractual obligations[29]. It does not follow that the concepts of economic analysis of law were explicitly assumed by those legal scholars or, indeed, that the theory is even mentioned by them, but rather that the way they conducted their research agrees with the spirit of the economic analysis of law. In his article "*Security Interests in Personal Property: A Necessary Evil of a Useful Tool*?"[30], the author contends that economic analysis of law is no strange concept to the Romanian courts, which since the end of 1990s onwards chose to liberally interpret some legal provisions regarding secured interests and credit operations in order to help the banks recover non-performing debts more quickly and to extend them a better legal protection against fraudsters[31].

The most visible and uncontroversial application of the economic analysis of law in Romanian legal field is the creation of the (now repealed) legislation governing the secured interests in personal property, namely Law no. 99/1999. As noted by the author, the rationale behind its adoption was pure economic consideration. Moreover, the drafting of this legislation was entrusted to an American organization, called CEAL - Center for Economic Analysis of Law. "The drafting process was a particular one, whereas a private body (CEAL) from a foreign state (USA) has drafted the proposed Bill, which was later translated into Romanian language, hurriedly amended and passed through Parliament by the special procedure of Government assuming its political responsibility"[32]. The acknowledged aim of this legislation concerned the promotion of economic efficiency through simplified, less costly procedures for secured interests in personal property.

4. Conclusions

The sketchy section on the Romanian legal doctrine concerned with the economic analysis of law presented above mirrors closely the current lack of interest by the Romanian scholars in a legal development that has been around for several decades and continues to grow in influence due to the economic globalization. Unlike their French counterparts, our academics and practitioners do not have a tradition of legal export to defend, but rather a tradition of legal imports to assess. More often than not, the Romanian laws were a copy-paste (and sometimes a poorly translated copy-paste) of legal rules from other systems, than a coherent attempt to make the legal transplants successful.

The reasons behind this disinterest are manifold. On one hand, there is a cultural motivation, which can be traced to the legal origins of our law system – the French civil law, with its deeply held belief that law should be about justice, fairness, social harmony, and less about efficiency. On the other hand, efficiency cannot be pursued strictly in the legal field and court decisions alone, it has to permeate all aspects of society. An indicator of the efficiency of the legal rules and their impact on

---

[28] "Garanţiile reale mobiliare: un rău necesar sau un instrument util?" (*Security Interests in Personal Property: A Necessary Evil of a Useful Tool?*), by Radu Rizoiu, in Revista Română de Drept Privat nr. 3/2010, ed. Universul Juridic, Bucureşti.

[29] The author lists 2 such books: one on property rights - "Tratat de drept civil. Drepturi reale principale" (*Treatise on Civil Law. Property rights*), by O. Ungureanu, C. Munteanu, ed. Hamangiu, Bucureşti, p. 150-152, and the other on the general theory of contract – "Tratat de drept civil. Obligaţiile" (*Treatise on Civil Law. Obligations*), vol.II, by L. Pop, ed Universul Juridic, Bucureşti 2009, p. 379-381, "Garanţii reale mobiliare în dreptul comparat" (*Secured Interests in Personal Property – A Comparative View*), by Alandar Sebeni, doctoral thesis, University of Bucharest, 2005.

[30] Most of the ideas of this article were later included in his doctoral thesis on "Secured Interests in Personal Property", University of Bucharest, 2011.

[31] Idem 29, p. 166. Several court decisions are mentioned in this respect, such as Supreme Court of Justice (SCJ) decision no. 507/12.02.1998, SCJ decision no. 2536/16.06.1998, SCJ decision 5117/28.12.2005, etc.

[32] Idem 29, p. 237; translated from Romanian by the author of this paper.

economic development might lie in the stability/instability of a particular legal system. In fact, this would constitute an interesting application of the efficiency criterion to the Romanian law. Our legal system is characterized by a high degree of instability and our policy makers do not seem inclined to implement accurate measurement tools to assess the costs of this legislative instability on economic growth. Thus, the incentives for Romanian academics to engage locally in a meaningful debate on the economic theories are rather insignificant.

As to the question whether the economic analysis of law will ever make an impact on Romanian doctrine in the foreseeable future, my answer is moderately optimistic. The reason it might have an impact lies, in my opinion, on the external influences of the European Union, induced either through French or through German doctrinal prestige. One can only hope that the economic analysis of law leaves the niche of the secured interests and financial operations and becomes a meaningful tool in legal reform in our country. Predictability and efficiency are badly needed in our legal system, and hence academics and practitioners alike shoulder the responsibility to adapt these conceptual tools to foster economic development, without - of course - giving up the traditional approach to the law as a vehicle for justice and fairness. If the economists can make their voices count (overwhelmingly so, of late), so should jurists.

References

- M. Polinsky, "An Introduction to Law and Economy", Wolters Kluwer, Law & Business, 4th edition, New York, 2011.
- R.H. Coase, "The Problem of Social Costs", Vol. 3 Journal of Law and Economics.
- H. McCoubrey & Nigel D. White, "Textbook on Jurisprudence", Oxford Univerity Press, 3rd ed., 1999.
- G. Calabresi and A.D. Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" , (1972),Vol. 85 Harvard Law Review.
- Curtis J. Milhaupt, "Beyond Legal Origins: Rethinking Law's Relationship to the Economy – Implications for Policy", vol 57 The American Journal of Comparative Law.
- R. A. Posner, "The Economics of Justice", Harvard University Press, Cambridge, Massachusetts, 1981.
- R. A. Posner, "Economic Analysis of Law", 3rd ed., Little, Brown & Company, Boston, 1986.
- Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Comparative Law", vol. 57 The American Journal of Comparative Law.
- Bénédicte Fauvaque-Cosson and Anne-Julie Kerhuel, "Is Law and Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law", vol. 57 The American Journal of Comparative Law.
- "Dreapta Intelectuală.Teorii şi şcoli de gândire ale dreptei contemporane occidentale" (*The Intellectual Right Wing. Theories and Schools of the Contemporary Right wing of the Political Spectrum*), editors: Ionuţ Sterpan and Dragoş Paul Aligică, ed. Humanitas, Bucharest, 2011.
- Ionuţ Sterpan, "Privatizarea justiţiei" (*The Privatization of Justice*), ed. Ars Docendi, Bucharest University, 2012.
- Radu Rizoiu, "Garanţiile reale mobiliare: un rău necesar sau un instrument util?" (*Security Interests in Personal Property: A Necessary Evil of a Useful Tool?*), in Revista Română de Drept Privat nr. 3/2010, ed. Universul Juridic, Bucureşti.
- http://www.doingbusiness.org/rankings.
- http://www.doingbusiness.org/~/media/giawb/doing%20business/documents/profiles/country/ROM.pdf.

ILLEGAL MIGRATION-CONCEPTUAL DELIMITATIONS

CRISTINA FLORINA POPESCU (PANAIT)*

Abstract
Illegal migration is a mobile phenomenon, which ignores national borders, a threat that originates outside the community and extends to Western societies. This phenomenon is becoming larger and irregular migrants are often in a precarious situation and exposed to the criminals involved in various manifestations of organized crime. The future risk factors of the illegal migration are the demographic bomb, because the population is decreasing in European countries and increasing rapidly in poorer countries, droughts, floods, deforestation, that cause conflicts between climate refugees , extreme poverty, totalitarian regimes, epidemics, can trigger millions of people, the elderly and the working population imbalance which leads to the permanent import of immigrants
To combat this phenomenon, states must engage and cooperate with each other. Measures taken by states must balance their integration policy for immigrants, legally residents and asylum policy to comply with international conventions. Also, states must adopt anti-immigrant policies, consisting of subordination visa policy to the interests of international security and exchange of information and, not least, to continue the Schengen process, as a value of humanitarian law applied in the field. The aim of the research is to characterize this dangerous phenomenon for the society and the goal is to identify strategies to combat illegal migration.

***Key words**: migration, Schengen, European Union, human trafficking, strategy.*

Introduction

The domain of the study „Illegal migration'' is that of legal sciences and the branch is public law.

The importance of the study derives from the fact that nowadays, with the liberalization of borders, crime is evolving and its trends are influenced by numerous changes affecting the society, both in time and space. Disappearance of borders and the free movement of persons throughout the Community led to the emergence of clandestine migration issues.

The objective of the study is to discuss general aspects of illegal migration, which, along with economic causes and the ratio of free movement of persons, goods, capital and services, can increase crime in Europe. Crime is an inevitable product of any society and it is therefore necessary to consider the changes that have occurred in the world over the last decades in Europe. I could mention here, as an example, demographic imbalance, economic uncertainty and monetary distortions of rich and poor nations.

There are three factors that have clearly important influence in the development of cross-border crime in Europe: development of means of communication, increased mobility of people, goods and capital and the fall of the communism. Also, we must not forget that the growth of the criminality generally affects the cross-border crime.

The main threat is the illegal migration criminal organizations, such as guides and pimps who controlled directs immigrants and contribute to a demographic imbalance and generating crisis in the European space. That's why European Union should take measures by a strategy for preventing and fighting against illegal migration and human trafficking, so that to equilibrate the integration policy for the legal resident immigrants and the asylum policy in order to comply with the international conventions.

* PhD, "Alexandru Ioan Cuza" Police Academy (crystyle_16@yahoo.com).

The Spanish Felipe Vasquez Mateo defined migration as any conscious and voluntary movement of persons from one region or country to another, dictated by different reasons and for employment.[1]

Migration comes from the Latin word "migrare" and it is a term describing the population movement process within the frontiers of a State or beyond the frontier. The term used in order to describe the departure movement from a country in order to establish in other country is "emigration". Contrarily, when the movement is made in order to enter a country, the term used is "immigration".

The main characteristic of migration is the workforce exodus to economy attractive areas.

Forms of migration

International/internal

International migration refers to the movement of persons leaving their origin country in order to get established permanently or temporarily in another country. It implies crossing the State borders.

Internal migration takes place between different administrative units, but within the borders of the same national State.

Voluntary/Forced

Forced migration appears when the persons' movement takes place as a result of several external events, such as natural calamities, war etc. or in the context of pressures exerted by persons, institutions.[2]

Voluntary or economic migration has mainly material reasons.

Individual/mass

Persons' movement can be individual, when the movement is considered at the individual's level. It supposes that every person individually takes the migration decision and chooses the migration ways.

Permanent/temporary

Nations must respect and implement the principles of international law, of conventions they joined and the right to decide on ban of entry, expulsion, return or asylum, the migration control being of national interest and an attribute of sovereignty.

Permanent migration implies the definitive change of the country, while the temporary one implies only a residence present in other country than the country of permanent domicile (not later than 1-2 years or seasonal).

Uncontrolled or controlled, as the EEC situation, on a legal framework base.

Spontaneous/speculative designates the absence of any preparation form of the migratory process and especially of the integration process.

Masked

Masked migration means hiding the real aim of the travel in the destination country by misleading the authorities responsible for issuing and controlling the travelling documents and verifying the compliance with the legal terms, followed by the exceeding of the stay legal term.

Intercontinental/intracontinental

Intercontinental migration, between countries of different continents, for instance migration of the European and Asian countries to USA etc. and the intracontinental migration, between the countries of the same continent, such as migration between the European countries.

Legal/illegal

In the case of legal migration, the migrants comply with all the legal rigours[3] imposed by the migration process and the different aspects of integration within the societies they immigrate to[4].

---

[1] Spanish Institute of Imigration, Introduction al derecho migratorio, Madrid, 1976, p.14.l.

[2] Distinction can be made between the extreme forms of forced migration, slavery, Holocaust, Gulag, war refugees (Sudan, former-Yugoslavia refugees) and economic migrations.

Illegal migration is the migration which does not comply with the legal regulations of the States implied in migration[5]; it is continuously increasing and has no definition because the irregularity of migratory movements may be seen from different angles. This is seen from the destination countries point of view.

Migration factors

- economic factors, because of starvation, poverty, unemployment etc.

After the Romania integration with the EU, a workforce exodus is noticed, given the much lower standard of living than in the West-European countries, which provide higher work revenues. Work national market cannot keep the necessary workforce, being at a disadvantage in comparison with the EU market.

- demographic factors

The population of the developing countries will try on legal or illegal ways to move to industrialised countries.

- political factors

The political causes of some totalitarian States and regimes, which make several parts of the population to be menaced, migrate to other countries offering them security warranties.

Other factors refer to religious totalitarianism (e.g. Islam), where people's rights and liberties are seriously affected in the name of fundamentalism.

Migration is in the public limelight in the context of political, economic and social changes. The consequences of illegal migration have a negative impact; on one hand they oblige the State to additional costs caused by the social needs of immigrants, affecting the social life and the internal economy, and on the other hand they supply criminality, stimulating under the table work, illegal affairs and enhance transnational criminality. Illegal migration is also the source of conflict between the foreigners' communities with antagonist positions generated by material interests or misunderstandings between ethnic groups, for example between the Iraqi and the Iranians.

European cooperation in penal justice matters extended at present also over migration. Immigration, organised crime and terrorism was the subject of the EU third pillar activity. Since 1 December 2009, police and judicial cooperation in criminal matters (third pillar of the EU) is an area of intergovernmental cooperation, but to elaborate, with pillar (now Community pillar) a supranational domain.

The migrants issue must be approached by all the 27 Member States, both in the common framework and horizontally.

There are four economic theories announcing the main causes of the voluntary migrations:[6]

- classic economy, focusing on the revenues differences and on working conditions between the countries; it concerns a personal decision on the maximum revenue increasing

- new migration economy, highlighting the terms of different tendencies, not only conventions of work; it concerns migration as a decision taken by the family in order to reduce the family revenue related risks

- dual labour market theory does not consider decision evolution at micro-economic level; it connects immigration to structural needs of economies of modern industrial countries. According to this theory, modern economies are aware of a permanent demand of emigrant workers. There are four factors here, as follows: the officials are not disposed to increase the salaries of lower level persons, because the superior qualification workers may expect to increases, it is difficult to motivate

---

[3] Passports and visas regime.

[4] Residence and legal integration regime of foreigners on the workforce local markets.

[5] PhD Thesis, Regimul juridic al străinilor şi fenomenul migraţiei în contextul integrării României în Uniunea Europeană , PhD advisor Prof. PhD Dumitru Mazilu, PhD student Florin Viorel Virtici, Bucharest, 2005, p. 86.

[6] US Commission for the Study of International Migration and Cooperative Economic Development (1990). Unauthorized Migration: An Economic Development Response. Washington, DC: Government Printing Office.

the nationals to accept inferior jobs in the hierarchy because of mobility absence on the superior stage, this duality creates permanent well paid jobs in the primary sector and unstable and worse paid jobs in the secondary sector.

- world-systems theory, considering immigration as a natural consequence of globalisation and of markets penetration. According to this theory, modern capitalism penetrated all the world economies and creates mobile workforce, being able to immigrate in order to benefit of the best jobs possibilities.[7]

There are 3 modalities permitting the common consideration of immigration and the asylum right, as follows: the first one is ideological: the European agencies redefined the threats related to internal security; the second one is instrumental, consisting of organised crime and imported terrorism: the ministries of justice and home affairs of the EU Member States negotiated the institution of compensatory measures and of control instruments, for example the visa issuing system, SIS. The third one consists of an institutional fusion; Trevi Group and Ad Hoc Group on Immigration were founded under the auspices of the coordination committee.

One of the most efficient police strategies of criminality prevention and fighting within immigrants was that of reducing the traditional differences between immigrants and refugees, process made by the difference between asylum applicants searching to enter a Member State territory for political reasons and the other arriving here for economic reasons. European Commission estimated that immigrants for economic reasons using the asylum right as alternative emigration source constitute a large category of persons.

The emigration specific crimes – extended stays beyond the dates allowed were very frequent, causing more serious punishments and consequences on the work permit. The criminologists analysing the organised crime phenomenon within the ethnic communities are confronting with a very big dilemma: they are aware of the fact that with no analysis between criminality and migration, their efforts will be incomplete; on the other hand, they would make an analysis between criminality and ethnicity.

The emigrants are very frequently perceived as enemies of social, political and economic stability of industrialised societies.

In a group of nations such as EU, which reunites various languages and cultures, the highlighting of security may act as a unification item against the other one.

In order to explain international organised criminality, there are used several concepts, noticing 5 relationships:

- the first one is the relationship between the origin country and the residence country and between illegal and legal;
- the second relationship is that between profit and investment, the former being realised in the residence country and the latter in the origin country
- the third one relationship is the mobility between the origin country and the residence country, the family relationships being in fact a screen for trafficking
- the fourth one consists in the social and economic integration absence in the residence countries, which provides possibilities for developing extremely profitable criminal activities;
- the fifth one supposes that an organised criminality is facilitates by a sub economy which is not joined by the autochthonous population.

The laws on immigration can be infringed only by foreigners. In some EU Member States, there are statistics showing a disproportioned participation of foreigners to the criminal activities. There are several delicate aspects which are specific only to foreigners:

- the former category includes for example the residence in a country after the expiration of the staying or work permit, the illegitimate complaint of the social benefits received by illegal immigrants, the under the table work or the accommodation of foreigners without valid permit.

[7] Sassen, S, Globalization and its Discontents. New York, New Press, 1998.

- the latter category includes the fraud related crimes of the marital status regime (identity documents, formal marriages)

These two groups of crimes are more and more numerous. The marital status crimes are perceived as connected to the human movements. In 1993, in Germany, it was estimated that 80% of the certificates showing the single status of a person were produces by third world citizens, being false. In the Netherlands, it was estimated that 30% of the marriages where at least one of the spouses was foreigner were fraudulent. Thus, the marital status crimes belong to organised crime, since there were specialised intermediaries in producing false documents or in arranging formal marriages. The third category of human trafficking was registered in the agenda monitored by Europol.

Immigration and crime share three characteristics: they are mobile phenomena, ignoring borders; they are seen as threats coming from outside the community, the third characteristic being their extension to the occidental societies.

EU issued restrictive laws on asylum right, decreasing considerably the number of applicants, but still persists though a crisis feeling. In the field of the judicial and police cooperation, there were institutionalised the legal instruments which do not need approval in the Member States Parliaments. There were enhanced the internal controls and the international control instruments.

The immigrant population within the EU Member States in 2001 goes up to 20.2 million of people. Almost 14.3 million of them were resident of an EU State, but they did not beneficiate of the citizenship of any EU State, representing 3.8% of the Union's total population at that moment in comparison to the 6 million citizens of one of the Member States and 1.6% residents of another State.[8]

The internal controls suppose the introduction of the identity card and the obligatory identification in certain situations, the introduction of hotel registration liability, enhancement of controls and modern detection equipment, such as heat detectors, night view devices etc., cooperation and information exchange between agencies, and introduction of police charges in the extended internal controls system. International control instruments provide the introduction of digital data systems: SIS and European Information System, taking digital prints, which are stored and centralised in EURODAC, the introduction of penalties to transporters, the cooperation between agencies and Member States in order to fight against illegal immigration, creation of a special police unit for supervising the human traffickers, bimonthly seminars on false documents etc.

Criminal documents, legislation infringement related to foreigners, crime can be used in order to justify an expulsion.

The immigration services, the customs and the frontier controlling agencies, as well as the police are also implied all in order to control immigration, from the first line control, when immigrants enter, to the others, after the arrival of persons in the country. The police officers have an administrative component (of registration) and a cooperation role (enhancing the laws on immigration in the residence area and in the area of workforce use) with the immigration services.

UE strategy for preventing and fighting against illegal migration and human trafficking

The measures taken must equilibrate the integration policy for the legal resident immigrants and the asylum policy in order to comply with the international conventions, especially with the Geneva Convention of 1951.

Future risk factors for illegal migration:

- demographic bomb: population is decreasing in the European countries and is solidly increasing in the poorer countries (for example, India will arrive to send on the work market 335 millions of workers, which means the gathered population of UE and US)

- the droughts, floods, deforestations of the recent years, which determine the increase of the climate refugees

[8] V. Drăgoi, Corneliu Alexandru, Migraţia şi azilul, Publishing Ministry of Interior, Bucharest, 2004, p. 43.

- conflicts, extreme poverty, totalitarian regimes, epidemic diseases may cause the movement of millions of people

- disequilibrium between old people and active population, which causes the "import" of permanent immigrants

- reception spaces are getting limited

UE action in this area is based on the following principles:[9]

- legitimate aspiration to a better life must be reconcilable with the EU and Member States' capacity of reception, and immigration must be performed in legal ways; the integration of the emigrants which are legally present on the EU territory supposes both the rights and obligations related to the fundamental rights recognised by the EU, the racism and xenophobia fighting being very important at this point.

- according to the Geneva Convention of 1951, it is important to provide to refugees efficient protection, taking into account the prevention of abuses and insuring that the persons with rejected asylum demands are repatriated as soon as possible.

The return is a complex measure which may be achieved by the cooperation between the destination areas, the transit countries and the origin countries of the migrants, in order not to affect or obstruction the persons' dignity and takes place when:

- the related persons resided in a State and are found with illegal stay on the territory of other States and in EU

- the stateless persons, the former citizens of another State, if they want to return in that respective State.

The readmission agreements do not solve the more and more acute issues created by the citizens' immigration of third States from the Central and Eastern Europe. Practically, it is experienced the need of support by the developed countries of the efforts made by the EU newly members in order to share the market economy.

The Commission's conclusions of June 2003 related to immigration, integration and work indicated the following aspects[10]

- within 2010-2030, it is expected that the number of persons employed to decrease with 20 million of workers in UE, following the demographic regress with direct consequences on the workforce deficit;

- achievement at the EU level of an efficient integration of migrants by enhancing the immigration legal ways;

- enhancing the Commission efforts for achieving a coherent framework in the area of migration at a European level.

The main measures used by the Community States to harmonise the efforts for fighting against illegal migration are:

- harmonising the Member States' regulations by adopting an anti-migratory policy, consisting of subordinating the visas policy to the security interests.

- applying international penalties for human traffickers

- implying the personnel of transport agencies in order to assume specific charges for fighting against illegal migration

- rapid return of all the foreigners who entered illegally or who did not received asylum

- international exchange of information

[9] Seville Summit, 21-22.06.2002.

[10] PhD Thesis Regimul juridic al străinilor şi fenomenul migraţiei în contextul integrării României în Uniunea Europeană Legal, PhD advisor Prof. PhD Dumitru Mazilu, PhD student Florin Viorel Virtici, Bucharest, 2005, p. 111.

- international collaboration with origin and transit countries
- enhancing the collaboration with these categories of countries by PHARE Programme (financial support system for fighting against migrants)
- continuing the Schengen process, as a humanitarian right value applied in this area

The orientation of the UE immigration policy may be summarised as follows:[11]

- external dimension: partnership with the origin and transit countries (classic readmission agreements, specific dialogues on different subjects)
- solving the issue of asylum applicants and of their status
- solving the issue of immigrants found in illegal situation: it is very important to make a clear distinction between the admission policy and the integration policy
- refining the community acquis and enhancing the democratic legitimacy of its construction and of its decision making system
- extending to other Non-Member European States
- confirming a coherent external approach, which may be perceived on the international stage as a specific identity

The population of immigrants within the EU Member States in 2011 was of 20.2 million of people. 14.3 millions out of them were residents of an EU State, but did not beneficiate of the citizenship of any of the EU States, representing 3.8% of the EU total population, in comparison to the 6 million, which are the citizens of one of the Member States and residents of another State.[12]

The highest percentage of immigrants related to the country population is registered in Luxembourg (36.9%), followed with a significant difference by Austria, Germany and Belgium, where the percentage is about 8-9%, then by Greece with 7%. In the other European countries, the percentage is of 3-6%.

Illegal migration is higher and higher and illegal migrants are frequently in precarious situations and at the command of several criminals implied in different forms of organised crime.

Conclusions

It is difficult to conduct a study to compare relevant by the crime properly before and after the fall of communist regime because these regimes were not very willing to recognize the existence of social problems. It is certain that the opening of borders between Eastern and Western Europe led to an increase in crime with international implications. Moreover, economic openness and the development of new laws to promote a market economy have generated serious internal problems.

Some Western observers fear that massive immigration Eastern European criminals would move to Western Europe. To compensate for the suppression of internal borders, it should be equally provision of mechanisms to support mutual assistance between Member States and cooperation between them.

The main risks arising from migration flows are to destabilize the existing markets of labor, the development of organized crime, economic destabilization, destabilization of the population, increasing corruption among public officials, destabilizing economic investments of foreign companies in the country

Attempting to decrease illegal migration through cooperation among states and by enhancing border control, visa policy restrictive candidate countries, legislative codification of them.

[11] Aurel Vasile Sime, Gabi Esanu, Migraţie şi globalizare, Publishing Detectiv, Bucharest, 2005, p. 171.
[12] V Drăgoi, Corneliu Alexandru, Migraţia şi azilul, Publishing Ministry of Interior, Bucharest, 2004, p.43.

References

- Spanish Institute of Imigration, Introduction al derecho migratorio, Madrid, 1976.
- US Commission for the Study of International Migration and Cooperative Economic Development (1990). Unauthorized Migration: An Economic Development Response. Washington, DC: Government Printing Office.
- Sassen, S, Globalization and its Discontents. New York, New Press, 1998.
- Seville Summit, 21-22.06.2002.
- PhD Thesis Regimul juridic al străinilor şi fenomenul migraţiei în contextul integrării României în Uniunea Europeană, PhD advisor Prof. PhD Dumitru Mazilu, PhD student Florin Viorel Virtici, Bucharest, 2005.
- Drăgoi, V, Alexandru, Corneliu, Migraţia şi azilul, Publishing Ministry of Interior, Bucharest, 2004.
- Sime, Aurel Vasile, Esanu, Gabi, Migraţie şi globalizare, Publishing Detectiv, Bucharest, 2005.
- Ţical, George Marius, Crima organizată şi traficul de droguri, Publishing CentrulTehnic-Editorial al Armatei, Bucharest, 2008.
- Lisbon treaty signed by EU member states on 13 December 2007 and entered into force on December 1, 2009.
- Dascălu, Ioan, Negoiţă, Robert Sorin , Iacob, Adrian, Ştefan, Cristian Eduard, Pelcaru, Costel, Ţone, Cătălin, Spiridon, Virgil, Bîrlă, Dan, Criminalitatea organizată- treaty theory and practice, vol I, Publishing Sitech, Craiova, 2009.
- Predescu, Ovidiu , Mihuţ, Elena Ana , Iancu, Nicolae , Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor, Publishing Agora, Oradea, 2009.
- Pasca, Florea, Fenomenul infracţional de trafic de fiinţe umane, Publishing Pro Universitaria, Bucharest, 2010.

SYSTEM OF LOCAL GOVERNMENT IN SWEDEN

DOINA POPESCU[*]

Summary
Sweden is a unitary state with a history of strong local government involvement in public affairs. Local government has played an important role in the welfare state system with many responsibilities for the delivery of public services to citizens. Because of this important position in the welfare system, it has attracted local politicians of a high calibre. Swedish citizens have on the whole a positive view of Swedish local government and, partly because of the important policy and administrative responsibilities of the local authorities, there has been a high turnout in local elections, although this has been in some decline in recent years. The positive Swedish attitude to local government is also shared by the central government and parliament and Sweden signed and ratified the European Charter of Local Self-Government as early as 1989, just four years after its promulgation. The Instrument of Government (the Swedish Constitution), which came into force in January 1974, gives explicit recognition to the principle of local self-government and this has been further expanded in the Local Government Act (1991) which came into force in January 1992.

***Key words**: Local government, Swedish Constitution, Local Government Act, local authorities, European Charter of Local Self*

1. Introduction

The Swedish Constitution defines how the country shall be governed. It contains provisions on the relationship between decision-making and executive power and the basic rights and freedoms of citizens.Sweden has four fundamental laws which together make up the Constitution: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.The Instrument of Government contains the basic principles of Swedens form of government: how the Government is to work, the fundamental freedoms and rights of the Swedish people and how elections to the Riksdag (Swedish parliament) are to be implemented. The adoption in 1974 of the Instrument of Government currently in force meant a considerable reduction in the powers of the monarchy. The King remained Head of State but with no political power whatsoever, while the Speaker of the Riksdag (Swedish parliament) was given the task of appointing the new prime minister in connection with changes of government.It is laid down in the Instrument of Government that Sweden shall have a King or Queen as Head of State, but the Act of Succession enacted in 1810 regulates who is to inherit the throne. [1]Until 1979 succession to the throne of Sweden was through the male blood line. Then the Riksdag decided that a woman could also inherit the throne.The most recent Freedom of the Press Act was adopted in 1949 although Sweden established freedom of the press by law as early as 1766 and was first in the world to do so. Freedom of the press means the right to disseminate information in printed form but with accountability before the law. Another feature of the Freedom of the Press Act is citizens right to study public documents, the principle of public access to official documents.[2]The Fundamental Law on Freedom of Expression was adopted in 1991 and is Swedens youngest fundamental law.In addition to the fundamental laws, there is the Riksdag Act which holds a special status between fundamental law and ordinary law. To amend this Act only one Riksdag decision is required but it must be adopted by a qualified majority (at least three quarters of votes and the support of more than half the members). The Riksdag Act contains detailed provisions on the Riksdag and its workings.

[*] Lecturer, PhD, University of Pitesti (dopopescu@yahoo.com).
[1] Jan Andersson,. *A History of Sweden*, Weidefield and Nicolson, London,1955,pg.209.
[2] Sonkam Strömholm, *An Introduction to Swedish Law*, vol. 1, Kluwer, Netherlands,1981, pg.56.

As a member of the European Union, Sweden is also covered by the EU acquis communautaire, which means that laws jointly enacted in the EU usually take precedence over members national laws. On joining the EU Sweden was therefore obliged to make a few minor adjustments to the fundamental laws.

2. The institutions of Local Government

Sweden has three levels of government: national, regional and local. In addition, there is the European level which has acquired increasing importance following Sweden's entry into the EU. At parliamentary elections and municipal and county council elections held every four years, voters elect those who are to decide how Sweden is governed and administered. At the national level, the Swedish people are represented by the Riksdag (Swedish parliament) which has legislative powers. Proposals for new laws are presented by the Government which also implements decisions taken by the Riksdag. The Government is assisted in its work by the Government Offices, comprising a number of ministries, and some 400 central government agencies and public administrations.

At the regional level Sweden is divided into 21 counties. Political tasks at this level are undertaken on the one hand by the county councils, whose decision-makers are directly elected by the people of the county and, on the other, by the county administrative boards which are government bodies in the counties. Some public authorities also operate at regional and local levels, for example through county boards.

Local level

Sweden has 290 municipalities. Each municipality has an elected assembly, the municipal council, which takes decisions on municipal matters. The municipal council appoints the municipal executive board, which leads and coordinates municipality work.

European level

On entering the EU in 1995, Sweden acquired a further level of government: the European level. As a member of the Union, Sweden is subject to the EU acquis communautaire and takes part in the decision-making process when new common rules are drafted and approved.

Sweden covers a vast area of around 450,000 square kilometres with a population of just over 9,000,000 people. The Instrument of Government (the Swedish Constitution) and also the Swedish Local Government Act, states that Sweden has municipalities and county councils. The constitution does not therefore recognise any further form of subnational government such as a region. Every county council comprises one county, failing express provisions to the contrary. There are 290 municipalities (*kommuner*) and 20 county councils (*landstingen*) which sometimes call themselves "regions"2. The island municipality of Gotland, combines the functions of the county council and the municipality. There are also 21 County Administrative Boards (CABs) that are a branch of the central administration and are headed by a state-appointed governor, with responsibilities mainly for economic planning and regional development. Their board members are, since 2003, appointed by the central government. The CABs are entrusted with paramount responsibility for co-ordinating activities at county level. They command a strategic view of relations between bodies at local, county and central levels and can therefore act as a connecting link between central and local authorities.

CABs have administrative duties in for example the following areas:

- civil defence and emergency and rescue services; - social welfare and community care; - communications; - agriculture; - fishing; - gender equality; - culture; - planning and conservation of natural resources; - nature conservation and environmental protection.

CABs are also responsible for ensuring that the county's development proceeds in such a way as to facilitate the achievement of national goals while taking account of specific regional conditions and requirements. Important elements of this task are the promotion of economic and other kinds of development in the county as well as the provision of information for government use on prevailing conditions, problems and opportunities in the region. This task entails co-ordination of the state's

regional development measures on a number of fronts, for example, business, infrastructure, agriculture, forest and fishing. The task of actively promoting regional development calls for continual dialogue with other government agencies, the county's local authorities, county councils and other organisations.[3]

Two county councils - Västra Götland and Skåne – also call themselves "regions" and differ from other county councils in that they have taken over planning and development responsibilities from the CABs on a trial basis .Their creation was preceded by the amalgamation of previously existing counties. They have taken over the health care functions of the amalgamated county councils3. Another development in recent years has been the creation of Regional Co-operation Councils (RCCs – *regionala samverkansorgan*). The RCCs are indirectly elected, drawing their members from county and municipal councils. Like the Västra Götland and Skåne, they, too, may take over some of the development and planning responsibilities from the CABs. In the Swedish system, there is no hierarchical relationship between the different levels of local government, that is, no one level can exercise control over any other. Furthermore, the two regions, constitutionally speaking, are no different from the other levels of local government and are regarded simply as larger county councils even if they have taken over, on a trial basis, some of the responsibilities of the CABs.

Local authorities in Sweden, but especially the municipalities, have a wide range of functions. Some of these are exclusive to the municipalities (all primary and secondary education, most social welfare functions, town planning, water and sewage, environmental protection, refuse collection, parks and open spaces). Others are shared with the county councils, the CABs and/or the central government (e.g. regional/spatial planning, some culture and leisure activities). The most important but also the most financially burdensome of these tasks are education and social welfare but constitutional laws give the local authorities the right to raise taxes to carry out these duties. There is, however, a division of labour between the different levels. Municipalities have a wide range of responsibilities in several policy fields, while county councils deal, almost exclusively with health care.

3. Local Finances

The Swedish Constitution (Instrument of Government) guarantees that local authorities may levy taxes to enable them to perform their tasks (Chapter 1, Section 7 (2)). Local taxes are entirely in the form of a local income tax that is paid both to the municipalities and to the county councils. These taxes are the most important source of income for the local authorities and represent 67% of the total budget of the municipalities and 69% for the county councils. Besides revenues raised through local taxation, local authorities also receive grants from the central state. These are divided into general grants and ear-marked grants. For the county councils, general grants come to 7% and ear-marked grants 14% of their total income. The main part of the ear-marked grants to the county councils is a specific grant covering the county councils' expenditures for pharmaceutical subsidies to households, a grant that the county councils have wished to be maintained as a specific grant at least in the foreseeable future. The county councils also collect fees paid by patients, which came to 3% and the sale of other services, which amounted to 7%. A few smaller sources of income amounted to 2%. With regard to the municipalities, general grants are 9% and ear-marked grants 3.2% of total income. Rates and charges are 8.2%.The "Funding Principle" stipulates that, if the central government by law lays new tasks on the local authorities, the central government must provide the initial funds to carry out these tasks. There is no obligation on the part of Government to continue with the financial support in the successive years.

[3] Christian Diesen, Observations on the Swedish legal system, Stockholm's University,2010, pg.76.

4. The Equalisation System

Significant changes have been made in the equalisation system from January 1 2005. The purpose of the equalisation system, is however, the same, that is to create conditions of equal opportunity for local authorities across Sweden. The new equalisation system consists of five segments: revenue equalisation; equalisation for spending needs (cost equalisation); a structural grant; a transitional grant; and a per capita "regulation" grant or fee.The revenue equalisation has been changed from a horizontal equalisation to a mainly vertical equalisation, although still with a small horizontal component. Municipalities with a per capita tax base below 115% and county councils with a per capita tax base below 110% of the national average receive a revenue equalisation grant. Those with a per capita tax base above these levels have to pay a revenue equalisation fee to the central government. Since this fee only covers a small proportion of the revenue equalisation grant, the central government has to finance the main part of it, and is using the former general grant and to some extent previously ear-marked grants for this purpose.

The equalisation for spending needs or cost equalisation is maintained as a horizontal equalisation system, although some changes have been made. The cost equalisation is intended to equalise for costs relating to structural needs and cost differences due, for example, to differences in the age distribution of the population or to the fact that additional costs are incurred due to long distances in the local authorities concerned.Some of the components in the cost equalisation system have been removed from the horizontal equalisation scheme. Instead, a new structural grant has been introduced, financed by the central government. This grant covers, for example, costs for the promotion of business and employment and costs related to low population density.[4]

5. Swedish Local Government and the European Charter of Local Self-Government

It is clear that the Swedish tradition of local government is broadly in line with the spirit and provisions of the Charter. In Sweden, there is a long tradition that local self-government enhances democracy, effectiveness and efficiency in Swedish society. It is not surprising, therefore, that the Swedish parliament, with the full backing of the county councils and municipalities, should have ratified the Charter in 1989, just four years after its adoption. The Charter applies to the Swedish municipalities (*Kommuner*) as well as to the Swedish county councils (*Landsting*). Since the Instrument of Government (the Swedish Constitution), which came into force in January 1974, gives explicit recognition to the principle of local self-government the government stated in its Governmental Bill on Approval of the European Charter of Local Self-government (1988/89) that existing Swedish legislation did not require any further amendments. The Local Government Act (1991), entailed the further reinforcement local autonomy in line with the Charter. The previous Swedish Local Government Act (from 1977 and even previous ones) was also founded on the principle that municipalities and county councils should have the largest possible freedom to govern and organise themselves.

More specifically, several key articles of the Charter correspond with Swedish legislation. Article 2 states that the principle of local self-government should be recognised in the constitution. Chapter 1, section 1 of the Swedish Instrument of Government grants such recognition. This was further reinforced by the Local Government Act (1991). Article 3 of the Charter states that local authorities have the right, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. Both the Instrument of Government and the legislation on local government are based on these principles. Article 4, para. 6, requires that local authorities be consulted on all matters that directly concern them and the bill proposing approval of the Charter stated that the Swedish system was consistent with this. Article 6, recommends that local authorities should be able to determine their own internal

[4] Christian Diesen, Observations on the Swedish legal system, Stockholm's University,2010, pg.112.

administrative structures, was complied with when the Local Government Act (1991) abolished the requirement that there be specific committees.

Article 9 deals with local authorities' financial resources. It states (para.1) that local authorities shall be entitled, within national economic policy, to adequate financial resources, of which they may dispose freely within the framework of their powers. It also stipulates (para. 2) that their financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. With regard to local government sources of revenue, these should be derived from local taxes and charges, which, within the limits of statute, they may determine themselves (para. 3) and should be sufficiently diversified and buoyant (para. 4). There should be a system of equalisation to protect financially weaker local authorities (para. 5). With regard to grants from central government, it is recommended that these should, as far as possible, not be earmarked and should not remove from local authorities the freedom of policy discretion (para. 7).

To some extent, the provision in the Instrument of Government that states that local authorities have the right to levy taxes corresponds to this principle. This was further strengthened in 1993, when the Swedish Parliament, in connection with the introduction of general government grants approved the Funding Principle, which states that the government must explain how a reform is to be financed if it involves new tasks for local authorities. If local authorities have no alternative but to finance the reform by higher taxes, the state must give them financial compensation.

In the light of these considerations, we acknowledge the efforts made by the Swedish national and local authorities to apply the principles underlying the Charter. Nevertheless, the local authorities themselves have called to the attention of the Congress a number of issues where they feel the principles are not being fully complied with. One danger is that the central authorities in Sweden, precisely because they have a strong tradition of local self-government, may feel that the Charter is being fully complied with in the present Constitution and legislation.

6. The Changing Context Of Swedish Local Government

The thirty-year economic boom, following the Second World War, together with moderate tax increases financed the Swedish model of the welfare state. When economic growth slowed in the 1970s, further expansion of the welfare state had to be financed by large tax increases. During the second half of the 1980s, favourable economic growth financed a further expansion of the welfare state. This came to an end with the crisis in the early 1990s, which affected Sweden particularly badly and resulted in a very large budget deficit. Two major structural reforms were introduced in the 1990s. The tax reform of 1991 reduced the high levels of taxation on income and capital. The defined benefit pension system was transformed to a sustainable defined contribution system in 1995. A programme of fiscal consolidation was introduced in 1994. This programme ran over several years and included both tax increases and cuts in welfare expenditure. The rather favourable economic development since the late 1990s, with low inflation and interest rates, has made it possible to revise most of the former cuts and even to introduce new reforms and tax cuts in the last few years.

The local government plays a very important role in the delivery of welfare services as well as in the taxation system, since the main form of direct tax paid by most Swedes was the local income tax. Neither the position of the local authorities nor the dominance of the local income tax was questioned during the period of reforms in the 1990s. What was questioned, however, already in the 1980s, was the high level of central regulation of the local authorities' activities. The free commune experiment was an attempt to resolve this problem in the direction of greater local freedom and this principle was incorporated into the Local Government Act (1991).

In last years, however, again economic constraints have been re-introduced partly as a result of the changing international financial scene, in which central governments are obliged to apply a strict fiscal orthodoxy (even countries outside the Eurozone, such as Sweden and the United Kingdom follow this approach). This means keeping a tight control over public finances and spending. To some extent, at least, it is the local authorities who are paying the price both financially

and in terms of the lessening of their autonomy over policy areas and also local administration. Central governments and parliaments are interfering more in local affairs through both increased regulation and through fiscal control.

6.1 The Committee on Public Sector Responsibilities

The Swedish Government set up the Committee on Public Sector Responsibilies to examine the division of responsibilities between different levels of government in order to respond to some of the challenges outlined above. The Committee produced its report entitled "Innovation capacity for sustainable welfare"Stockholm: Official Government Reports – SOU, 2012:123). The Committee recommended that the Government's ambition should be to provide an equivalent high level of public services through a system of public administration that has a high level of democratic legitimacy and closeness to citizens. This should be done by following three strategies:

a) a strategy for clarifying the division of responsibilities between different levels of the administrative system (where multi-level governance occurs) in cases where it is impossible or inappropriate to concentrate responsibility at a single level, and for enhancing innovation capacity;

b) a strategy for enhanced innovation capacity at local government level, building on a clear division of responsibilities between local and central government levels;

c) a strategy for enhanced innovation capacity at central government level, comprising intersectoral development of central government services and national level governance.

The Committee proposed that the following specific matters should be given special priority in the continued enquiry:

a) the overall task of local government, including more far-reaching co-operation at local government level;

b) the design of the regional system of public administration;

c) the framework for governance and supervision by the Government and Riksdag (Parliament);

d) country-wide equivalence in the provision of welfare services and the legal regulation of individual rights;

e) the consequences of alternative operational arrangements in the public sector for the welfare services concerned;

f) the impact of the EU on Swedish public administration.

The initial report of the Committee indeed recognises that trends within Sweden, occasioned by phenomena such as globalisation, europeanisation, new economic forms of growth and innovation and changing citizen's needs and expectations have changed the context in which regional and local democracy is exercised. They highlight the increasing trend towards greater centralisation and regulation: "Most the 17 public sector services transferred from central to local government level [in the period 1970-2013] were very small … and 28 services were transferred from municipalities and county councils to the central government domain".

Furthermore, "public sector services underwent *substantial change in the 1990s* [emphasis in original] … Most of the government bills that in 2003-2013 clarified the responsibilities of different parts of the public administration system also curtailed the freedom of municipalities and country councils, while only a quarter gave them more freedom." In addition, central government controls local governments in the following ways:

a) by the design and size of *central government grants* – in the 1990s, there was a trend towards eliminating especially ear-marked central government grants in favour of general government grants – in recent years, however, new specially ear-marked grants have been introduced;

b) by issuing provisions *requiring local governments to balance their budgets* and by drawing up rules for taxes and fees. Central government has also for periods frozen local government tax rates

and it determines the services for which fees may be charged. It has also decided on *maximum* charges for child-care services and care for the elderly;

c) the controversial *application of the "funding principle*";

d) by using the *financial co-ordination mechanism* whereby central and local government share a common budget;

e) through *national action plans* which often contain ear-marked grants for the implementation of the plan.

f) by means of *time-limited projects* sometimes combined with the above-mentioned co-financing arrangements.

6.2 Commission on the Constitution

The Swedish Government has also appointed a Commission on the Constitution, whose terms of reference are to conduct a comprehensive review of the Instrument of Government. The work of the Commission was primarily concentrate on and orientated towards improving and enhancing the Swedish government with a view to increasing the confidence of citizens in democratic institutions and increase their participation in elections. The Commission also, among other things, look into the issues related to the review of legislation and consider whether there is a need for a constitutional court. The Commission may also deal with issues relating to local government democracy.

7. Some Problems In The Implementation Of The Charter

7.1 Central regulation of local government

Sweden presents something of a paradox with regard to the practice of local self-government. On the one hand, there is a relatively strong constitutional and legislative recognition of the principle. On the other hand, Sweden is a unitary state with a long tradition of egalitarianism and generous social welfare provisions, largely delivered by the local authorities but in a standardised way and regulated by the national parliament. Special laws passed by the parliament specify and regulate tasks to be carried out by the local authorities. The Local Government Act (1991) does give a power of general competence to the local authorities while the special laws give special competences for municipalities and/or county councils. The Local Government Act makes reference to special laws and states that special provisions exist concerning the power and obligations of municipalities and county councils in certain fields. The question which arises here is whether these specific references undermine the autonomy of the local authorities in practice even though, in a legal sense, the Local Government Law is not in any way subordinate to the special laws. The financially important areas of activity are all regulated by special provisions, which can be quite detailed.

The Instrument of Government is, in fact, ambiguous with regard to local autonomy. On the one hand, as we have noted, it recognises the right to local self-government. On the other hand, it does not contain any provisions specifying the tasks and functions of local authorities. In Chapter 8, para. 5, it states that the principles governing the organisation and activities of local authorities, local taxation and local authorities' powers shall be governed by law, that is by Parliament. It is this part of the Instrument of Government that allows the Parliament to intervene in local authorities' affairs in sometimes a quite detailed way. This may contravene the principle of self-government also contained in the Constitution. It is true that Article 3, para. 1, of the Charter, to some extent, circumscribes the exercise of local self-government by adding the phrase "within the law". This phrase, however, should not be interpreted as meaning that the central authorities may undermine local autonomy through detailed legislation. The Swedish authorities, in their written comments on the first draft report, pointed out that the Instrument of Government is meant to be flexible. In their opinion, it allows the distribution of tasks between the Swedish state and the local government to shift over time. The regulation in Chapter 8, para. 5 is normative and protects local government by regulating who has the right to decide about the organisation, etc. It was clear to the Council of Europe

delegation that there is, at the very least, an ambiguity here in the Constitution, which may be interpreted in quite different ways.

During the period up to the 1970s, when the Swedish welfare state was being consolidated, local authorities, while occupying an important position in the political and administrative system, were seen as agents of the central government for the delivery of a variety of services. These were closely regulated by the parliament. There was a wide consensus in Sweden at the time as to the desirability of this system. In the 1980s, however, there was a feeling among many local authorities and the government that there should be some loosening of the controls. This led to the "free commune" experiment during that period, which began in 1985 and lasted until the Local Government Act (1991) came into force in 1992. The experiment involved selected local authorities applying to the parliament to be relieved of central controls in specified policy sectors. The selected authorities could also organise their committee structure as they wished, within broad limits. The 1991 Act incorporated the right to this self-organisation and thus continued one of the main features of the experiment. There is now a tendency to issue framework legislation, which enunciates the principles, rather than detailed specific regulations. Nevertheless, some commentators have claimed that the government and parliament are now intervening more in local government affairs. It has been claimed that in recent years there has been a greater tendency for central government to intervene in local affairs and this has provoked reactions on the part of the local authorities. We were informed by some of our interlocutors that this is partly because some issues, disability rights, for example, have become more highly politicised thus leading to great central involvement. The authorities, on the other hand, denied that such politicisation was occurring but rather that it was simply in the national interest that these services should be equal throughout the entire country and not vary between the municipalities. Another reason is that the costs of social welfare and health care have increased rapidly and local authority budgets have sometimes been unable to cope with the increases. This is especially true of the county councils who are responsible for health care and costs have risen partly because of an increase in the elderly population and partly because of new technological developments within medicine. One of the responses of central government to these changes has been to provide more grants thus increasing ear-marked grants for specific purposes.

7.2 The shift from general grants to ear-marked grants and the sale of municipal housing

According to Article 9, para. 7 of the European Charter of Local Self-Government, grants to local authorities should, as far as possible, not be ear-marked for the financing of specific projects. For a period during the 1990s, the Swedish government moved to increasing the amount of general grants to ear-marked grants. More recently, however, there has been a tendency to return to the ear-marked system.The issue arose with regard to the sale of municipal housing when the government sought to restrict this by reducing the level of general grants in a Draft Act Temporarily Reducing General Government Grants Following the Sale of Shares in or Dividends from Municipal Housing Companies. Although the Council on Legislation considered that this was an infringement of the constitutional principle of local self-government as "the management of housing supply and implementation of housing policy are primarily a matter for the local authorities", the Parliament did pass the Act which entered into force on 19 June 1999. The Act has now been repealed. The Municipal Housing Companies Act (2002), stipulates (Chapter 2, Sections 3 and 5) that local authorities, subject to some exceptions, must seek permission from the County Administrative Board before they sell, or lose their controlling influence over, a municipal housing company. There is a party political issue involved here as the ruling Social Democrat government favours this while the opposition parties (Moderate Party, Liberal Party, Christian Democrats and Centre Party) have reservations about From the point of view of the Charter, the reduction of the general grant by Government as a reaction to the sale of municipal housing by local authorities appears to be in conflict both with the stipulation that government grants should be general rather than ear-marked

and also that central government should not interfere in a task that has been assigned to the local authorities. Again, it would seem here that the grant system is being used for ideological purposes with regard to the sale of municipal housing although the central authorities claim that this was not the case. Although the authorities accepted the ruling of the Council on Legislation that there was an infringement of the principle of self-government, they argued that there is a reason for this, being that both the state and the municipalities share responsibility for municipal housing, which received state support and thus it is not only an issue concerning municipalities but how this public capital may be used.

7.3 The impact of "rights" legislation on local government

During the 1980s, there were several laws passed which gave rights to specific groups. The best-known is the Social Services Act (1980 and 2001). The Support and Service for Certain Categories of Disabled Persons Act came into force in 1993. Although few would dispute the underlying rationale behind these laws, the legislation itself was rather imprecise and they have imposed financial constraints on the local authorities, who are responsible for implementing them. Disputes between individual citizens who make claims on the basis of the legislative and the local authorities who must pay for them are adjudicated by administrative courts. In practice, the courts have determined the volume and quality of various social services, e.g. home-help services, care of substance abusers, accommodation in service apartments for the elderly, among others. The question is whether these measures, decided by the national parliament, but administered by the local authorities, are in conformity with Article 9 of the Charter, as the Swedish Funding Principle, which state that local authorities should receive adequate financial resources to carry out tasks which are required of them by the central authorities. During our visit in October, we raised this issue with the central authorities, who were convinced that the local authorities did have adequate resources, while the local authorities' associations were convinced of the opposite. One problem here is that the final arbiter in the matter is the Parliament, which is also one of the parties of the dispute. The administrative courts are merely applying the parliamentary legislation although their administrative decisions can be deemed an infringement of the autonomy of the local authorities to allocate their resources in accordance with local needs. In some cases, the courts' decisions on finances have meant cutting back on other policy priorities. Furthermore, in the case of delays in compliance with the courts' decisions, the local authorities may receive penalty payments, which is another drain on their financial resources. The Committee on Public Sector Responsibilities also highlighted this as a problem for local autonomy. The legislation as promulgated suffers from a lack of creating a fair balance between the rights of citizens and the duty of the local authorities to provide services according to priorities in the interest of the community at large.

7.4 Tax capping

Although the Instrument of Government and the Local Government Act grant local authorities fiscal autonomy, there are limitations on this autonomy. The local authorities can fix local tax rates but all other rules governing local government taxation, e.g. the tax base, are decided by Parliament. There is thus some ambiguity with regard to the actual practice of fiscal autonomy. This was evident when Parliament imposed a tax freeze during the years . The Standing Committee on the Constitution and the Council on Legislation both made statements on this. The Committee stated that the Constitution provided little scope for tax capping. However, the Committee also gave its approval for temporary restrictions on the local authorities' fiscal autonomy. The Council stated that certain restrictions may be imposed on fiscal autonomy. Although the freezes are not in operation now, they may be re-imposed at any point in the future. The Committee on Public Sector Responsibilities also highlighted this as a problem for local autonomy.

Conclusions

Sweden is a unitary state but with a strong system of local autonomy, which applies many of the principles of local self-government contained in the European Charter of Local Self-Government. There is constitutional recognition of the principle of local self-government as well as constitutional recognition of the right for local authorities to levy taxes to perform their tasks. The Funding principle states that central government will provide adequate funding resources if additional tasks are requested of them. In practice, Swedish local authorities have played a very important role in the welfare state system and have a high standing in the eyes of the population.

There are, nevertheless, problems with the implementation of the above-mentioned principles. The Instrument of Government itself is ambiguous with regard to the principle and this allows different interpretations. The two bodies which examine the constitutionality of legislation, the Council on Legislation and the Standing Committee on the Constitution, themselves seem to disagree on the interpretation of the principle as found in the Instrument of Government. There are also serious disagreements between the central and local authorities. To some extent, these disagreements are based on party political considerations but we were also struck by the fact that, among the local authorities, councillors of all parties were united in their defence of the principle of local self-government against what they regarded as encroachments by the central authorities. This unanimity was manifest between county councils and municipalities, and among county councils and municipalities right across Sweden whatever their size, geographical location, party political leadership or model (e.g. the trial project of Skåne). We felt that, at the level of the national government, there was a greater emphasis on the principles of equality achieved through uniformity than on recognising the importance of local autonomy and that this was at least in part a party political difference. Although we recognise that these two principles are not easy to reconcile in practice, we would recall to the Swedish authorities that they have signed and ratified the European Charter of Local Self-government and are obliged to take into account its provisions.

Although the principle of local self-government is given constitutional and legal recognition in Sweden, we feel that its constitutional position could be strengthened by obliging Swedish law-makers always to refer to the European Charter of Local Self-government when drawing up all legislation. At present, Swedish law-makers simply assume that, because the principle is mentioned in the Instrument of Government (the Swedish Constitution) and the Local Government Act, then it will be taken into account. In this regard, there should be a system of redress, referred to in the Constitution, to which local authorities could refer breaches of the principle. The European Charter of Local Self-government could then be the bench-mark against which such breaches would be judged. This might mean a Constitutional Court, although we understand that this option is not widely favoured in Sweden even among the local authorities themselves. Another option would be to strengthen the position of the local authorities vis-à-vis the Parliament which is currently the final court in interpreting the scope of local self-government in particular with regard to funding. This might mean creating a parliamentary committee on local self-government which could hear both sides of the case – the government and the local authorities.

References

- 1.Roland Séroussi**,** Introduction au droit comparé , Dunod, Paris, 2000.
- 2. Dinedl Buttery *"Sweden." Encyclopedia of Play in Today's Society,* Stockholm's University *2009*. Retrieved from SAGE Publications: http://www.sage-ereference.com/view/play/n402.xml.
- 3.Sonkam Strömholm, *An Introduction to Swedish Law*, vol. 1, Kluwer, Netherlands,1981.
- 4.Jan Andersson,. *A History of Sweden*, Weidefield and Nicolson, London,1955.
- 5.Christian Diesen, Observations on the Swedish legal system, Stockholm's University, 2010.
- 6. https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-se-ro.do.
- 7. http://ec.europa.eu/social/main.jsp?langId=en&catId=815.

THE ANALYSIS OF THE HUMAN RESOURCES MANAGEMENT IN THE ROMANIAN LEGAL SYSTEM FROM THE PERSPECTIVE OF THE COOPERATION AND VERIFICATION MECHANISM

VIORICA POPESCU*

Abstract
At 1st January 2007 when Romania joined the European Union was established a Cooperation and Verification Mechanism (further named "CVM") in order to support Romania to remedy certain shortcomings in the areas of judicial reform and fight against corruption, as well as to monitor the achieved progress through periodic reports. Though the reforms of the human resources management in the Romanian legal system were conceived in a coherent framework, the main changes in this area often did not complement each other, their implementation being sometimes inconsistent with previous measures taken.
In this context, the study aims to make a short analysis of the way in which the human resources management's reform was reflected in the European Commission's reports, pointing the measures adopted by the Romanian authorities.

Keywords: *legal system, human resources management, reform, Cooperation and Verification Mechanism, European Commission.*

Introduction

The adhesion of Romania to the European Union has drawn a series of significant mutations in the paradigm of political, socio-economic, cultural phenomena and not least in judicial system, which suffered changes in its functioning framework, expectations from citizens and civil society, attributions, responsibilities and raking the significance of the sources for performances.

In this context became very important that human resources be placed on the highest scale of values in the legal system.

The use of the entire potential of human resources can be ensured only by a performing management, based on strategic principles which would stimulate the permanent development of such potential.

The creation and management of the Romanian judicial system was more based on the normative framework and less on the processes of management and organization. It is obvious that the importance of the normative framework cannot be denied, but ignoring the need of a strategic perspective, the lack of constant preoccupations in management training of the members of the Superior Council of Magistracy has left its mark on the functioning of the judicial authority.

Today management training in justice is still neglected, judicial managers being less trained for their position. It often starts from the false idea that experience is the only teacher, and the character the only possible qualification, because there is not an effective managerial training based on scientific principles adjusted for this area. Training and perfection become even more important if we consider the evolutions of justice, the fact that it is in a continuous reformation, the accelerated rhythm of changes and pressures supported by it from the external environment rising serious problems for the courts.

Nevertheless, the complexity of the issue of human resources management for public organizations and for justice needs a rigorous approach, the purpose being the integration in the system of persons who will answer the exigencies imposed by the system, namely the performance of justice. Hence the importance of drafting and implementing in justice some strategies for

* Assistant Lecturer, PhD, Faculty of Law and Administrative Sciences, University of Pitesti, (viorica_r30@yahoo.com).

perfecting human resources management , because public organizations, as the judicial system, unlike private ones, do not have many resources available, and among those available the human resource is the most important and its performance is responsible for the efficiency of justice.

Romanian judicial system

The actual judicial organization is stated by Art 126 Para 1 of the revised Romanian Constitution[1] and is governed by Art 2 Para 2 of the Law No 304/2004[2], stating that justice is carried out through the following courts:

a) The High Court of Cassation and Justice;
b) The courts of appeal;
c) The tribunals;
d) The specialized tribunals;
e) Military courts;
f) The first instance courts.

The Public Ministry is also part of the Romanian judicial system, which according to Art 131 Para 2 of the revised Romanian Constitution corroborated with Art 1 Para 3 of the Law on judicial organization is formed by prosecutors organized in prosecutor's offices, representing its basic structure.

Art 89 Para 1 of the Law on judicial organization states that "attached to each court of appeal, tribunal, juvenile and family tribunal, a prosecutor's office shall operate". Also, attached to the High Court of Cassation and Justice operates a prosecutor's office led by a general prosecutor, assisted by a prime-prosecutor, a deputy and three counselors. The prosecutor's office attached to the High Court of Cassation and Justice coordinates the activities of the other prosecutor's offices, has legal capacity and manages the Public Ministry's budget.

The prosecutor's offices are headquartered in the place of residence of the courts to which there are attached to and have the same circumscription as these. The prosecutor's offices attached to the courts of appeal and tribunals have legal capacity and are led by a general prosecutor, and the prosecutor's offices attached to juvenile and family tribunals are led by prime-prosecutors. Nowadays in Romania there are 15 prosecutor's offices attached to the courts of appeal and 41 prosecutor's offices attached to tribunals.

Attached to every military court a military prosecutor's office shall operate. A military prosecutor's office is attached to the Military Court of Appeal, the Military Territorial Tribunal of Bucharest. Each military court has the statute of a military unit, with its own registration number.

---

[1] The Romanian Constitution was adopted on 21 November 1991 and published in the Official Gazette of Romania, Part I, No 233 of 21 October 1991, modified and amended by Law No 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette, Part I, No 758 of 29 October 2003.

[2] Law No 304/2004 on judicial organization, published in the Official Gazette of Romania, Part I, No 576/29 June 2004 modified by Government Emergency Ordinance No 124/2004 published in the Official Gazette, Part I, No 168/9 December 2004, approved with modifications and amendments by Law No 71/2005, published in the Official Gazette of Romania, Part I, No 300/11 April 2005, Law No 17/2006 published in the Official Gazette of Romania, Part I, No 48/19 January 2006, Government Emergency Ordinance No 50/2006 published in the Official Gazette of Romania, Part I, No 566/30 June 2006, Government Emergency Ordinance No 60/2006 published in the Official Gazette of Romania, Part I, No 764/7 September 2006, Government Emergency Ordinance No 100/2007 published in the Official Gazette of Romania, Part I, No 684/8 October 2007, Government Emergency Ordinance No 137/2008 published in the Official Gazette of Romania, Part I 745/4 November 2008, Government Emergency Ordinance No 56/2009 published in the Official Gazette of Romania, Part I, No 381/4 June 2009, Government Emergency Ordinance No 114/2009 published in the Official Gazette of Romania, Part I, No 919/29 December 2009, Law No 202/2010 published in the Official Gazette of Romania, Part I, No 714/26 October 2010.

Romanian judicial system management

Justice is, as already shown, a public service which is natural to enjoy a proper management in the conditions of the Law on judicial organization. This management aims only aspects regarding the organization and administration, not aspects regarding the trial. According to the law the most important administrative organ is the Superior Council of Magistracy.

The Superior Council of Magistracy was created by Art 133 of the Romanian Constitution of 1991[3] and acts as an authority with attributions concerning the statute of magistrates and the function of the courts.

Today, the Superior Council of Magistracy is a democratic organism with the attribution to guarantee the independence of justice, as stated by Art 133 Para 1 of the revised Romanian Constitution and Art 1 Para 2 of the Law No 304/2004.

According to the Law No 317/2004 on the Superior Council of Magistracy, it is independent and only subjects to the law in its activity. The members of the Superior Council of Magistracy answer only to judges and prosecutors for their activity performed in their position[4].

Regarding its attributions in the management of human resources of the courts and magistrates' careers, Art 35-36 the Law on the Superior Council of Magistracy established the following powers of the plenum of the Superior Council of Magistracy:

a) To propose to the President of Romania the appointment and dismissal of judges and public prosecutors, except for the probationary ones;

b) to appoint probationary judges and probationary public prosecutors, based on the results obtained by them in the National Institute of Magistracy final examination;

c) to order the promotion of magistrates to execution positions;

d) to dismiss probationary judges and probationary public prosecutors;

e) to propose to the President of Romania the granting of awards for magistrates, under the terms of the law;

f) carries out any other attributions established by the law or regulation

The Cooperation and Verification Mechanism and its reflection in the management of human resources in the Romanian justice

In 2006 the European Commission in its Decision No 2006/928/EC[5] established on 13 December the creation of a Cooperation and Verification Mechanism of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.

The first Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following CVM was published on 27 June 2007[6] and stated that: "*The situation of human resources in the Romanian judicial system, as well as the management capacity at central level and at court or prosecutor's office level, continue to challenge the authorities. The SCM and the General Prosecutor's Office (GPO) are addressing these tasks.*

---

[3] Art.133 of the 1991 Romanian Constitution stated: (1) The Superior Council of the Magistracy shall nominate Judges and Public Prosecutors for appointment by the President of Romania, except those on probation, in accordance with the law. In this case, the proceedings shall be presided over by the Minister of Justice, who shall have no right to vote; (2) The Superior Council of the Magistracy shall perform the role of a disciplinary council for Judges, in which case proceedings shall be presided over by the President of the Supreme Court of Justice.

[4] Law No 317/2004 published in the Official Gazette of Romania, Part I, No 599/2 July 2004, subsequently modified and completed by Law No 247/2005 regarding reform in the fields of ownership and justice, published in the Official Gazette, Part I, No 653/22 July 2005.

[5] European Commission Decision No 2006/928/EC of 13 December 2006 published in the Official Journal L 354/56 on 14 December 2006 and available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:354:0056:0057:EN:PDF.

[6] The Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 27 June 2007 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0378:FIN:EN:PDF.

Staff rationalization and institutional restructuring are currently under way. Judicial authorities are usually to decide, at conceptual level, what matters fall within the general term of "court management" and how various managerial tasks shall be distributed".

A bilateral program of technical assistance from Great Britain on the courts' management initiated an evaluation of the possible ways to improve their management. Moreover, a study on the volume of activity of the courts and prosecutor's offices served as base for an initiative of the Ministry of Justice and of the Superior Council of Magistracy to rationalize their staffing structures, with tasks far below average.

The Report also states that "in December 2006 the Superior Council of Magistracy approved a study on the work volume of the courts based on the 2005 ad 2006 statistics". The Report indicates a significant intensification of the work volume of tribunals and first instance courts in 2006, as well as the work volume of every judge, especially for those in tribunals. The same document states that the work volume of the courts continued to decrement. Romania aims to consider the main findings in completing the study regarding the optimal work volume for every judge. The draft conclusions of a study on small courts' activity, which is under analysis

by the SCM and Ministry of Justice confirm that many of the small courts require a rationalization of their staffing structures (for some even the discontinuation of activity); hence, the re-arrangement of human resources to better reflect the actual workload of each court requires a careful balance of administrative and legislative initiatives, which have not yet materialized.

Based on the principles set by the Commission Decision and on the conclusions of the first Report on CVM, the Romanian Government adopted the Decision No 1346 of 31 October 2007 on the approval of the Action Plan for the fulfillment of the terms within the cooperation and verification mechanism of the progress registered by Romania in the area of the reform of the judiciary and of the fight against corruption[7]. On this occasion it was stated that the improvement of the human resources policies is still a priority for Romania because the situation of human resources in the Romanian judicial system, as well as the management capacity at central level and at court or prosecutor's office level, continue to challenge the authorities. The criteria which had to be considered in establishing a real policy of human resources were:

- establishing the complexity degree of cases in courts and prosecutor's offices
- establishing the optimal volume of cases per judge
- analyzing the dynamics of filling vacancies
- progressive filling of vacancies
- priority filling the vacant execution positions in courts and prosecutor's offices with the highest deficit of personnel

Also in relation with other areas regarding the specificity of human resources were stated measures of improvement such as: the organization of seminars and symposiums for the improvement of the program of professional training and the unification of jurisprudence, the consolidation of the administrative capacity of the SCM.

A second Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism was published on 23 July 2008 stating that "The performance of the Romanian judicial system is hampered by legal uncertainty due to many factors, including an uneven application of the law and the excessive use of emergency decrees. It will take some time for the reform to take firm root. The need for verification and cooperation will hence continue for some time. Concerning the reform of the judiciary, the Superior Council of Magistracy (SCM), as guardian of the independence of the judiciary, has been

[7] Government Decision No 1346/31 October 2007 on the approval of the Action Plan for the fulfillment of the terms within the cooperation and verification mechanism of the progress registered by Romania in the area of the reform of the judiciary and of the fight against corruption published in the Official Gazette of Romania No 765/12 November 2007.

allocated the human and financial resources necessary to allow it to assume its core responsibilities for judicial reform including advising and acting on pressing human resource problems. Judicial reform is moving ahead but progress is uneven. The human resource situation in the judiciary is improving. The number of recruits in the National Institute of Magistracy has increased and the number of vacancies has dropped. New judges have been assigned to the Courts of First Instances. However, there are chronic and serious staff shortages in the public ministry and recruitment practices do not always work to guarantee quality of staff. The commitment to reform among key judicial institution needs strengthening: the Superior Council of the Magistracy has to take steps to foster the transparency and efficiency of the judiciary and to improve its own accountability. It must take an unequivocal position on the fight against high level corruption in the context of the current controversial political debate in Parliament. The Council still needs to develop credibility with the judiciary by offering sustainable solutions to staffing and management deficiencies. Serious staff shortages in the public ministry may call for emergency measures such as a temporary re-assignment of posts. Some elements of the recruitment procedure need to be improved to attract suitably qualified recruits"[8].

On 12 February 2009 an Interim Report from the Commission[9] stated that the rhythm of the reform was not maintained in relation to those stated in 2008 and there still are deficiencies regarding the deficit of personnel and the management of justice.

The same views were maintained by the Annual Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 22 July 2009. According to this document "a new human resource strategy for the judiciary was adopted but the situation remains a challenge for Romania in terms of the budgetary costs and in providing qualified personnel and support infrastructure. Despite these difficulties, some steps have been taken as regards the staffing situation in courts and prosecutors' offices at local level, however further improvements are needed. The Superior Council of Magistracy has intensified judicial inspections to improve the quality of justice notably with respect to ensuring uniform application and consistency across the court system. Appointment procedures and new competitions have been undertaken in line with the objectives set to provide for objectivity and high qualification. Nevertheless, the SCM must intensify its activity so as to ensure an efficient and flexible human resource policy. The impact of the new strategy cannot yet be fully assessed but increased awareness and better anticipation of problems can already be seen. Staffing constraints have been sharpened by the recent decisions of the SCM to alter the rules on secondments which in effect prevent the seconding institution to terminate the secondment of the judges or prosecutors concerned even if it faces a severe staffing problem. In addition the limited managerial possibilities of the General Prosecutor's Office with respect to promotion, disciplinary measures or transfer of staff render the restructuring of the prosecution service particularly difficult. Increased cooperation from the SCM is needed to reorganize the Prosecution Office effectively"[10].

In relation to these critics, the SCM established for 2009 by Plenum Decision No 307/26 February 2009[11] that some of the priority directions are represented by the improvement of the

---

[8] The Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism published on 23 July 2008 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0494:FIN:EN:PDF.

[9] The Interim Report from the Commission to the European Parliament and the Council published on 12 February 2009 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0070:FIN:EN:PDF.

[10] Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism on 22 July 2009 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0401:FIN:EN:PDF.

[11] Superior Council of Magistracy Plenum Decision No 307/26 February 2009 available at http://www.csm1909.ro/csm/linkuri/06_01_2011__38006_ro.pdf since 31 October 2011.

human resources management, the organization of the courts and prosecutor's offices, as well as by the professional training of the magistrates, the following measures should be taken:

- the organization of new competitions in magistracy, according to a calendar established by the SCM;
- a rigorous analysis of requests for deployment to other courts or prosecutor's offices;
- redistribution of the vacancies in the system;
- a proposal for a legislative modification regarding the retirement of magistrates with at least 25 years of experience in justice;
- professional training of magistrates and auxiliary personnel for the proper application of the new codes' provisions;
- review of the initial training programs of the National Institute of Magistracy and of the National School of Clerks

On 20 July 2010[12] the Report from the Commission to the European Parliament and the Council shows that human resources are still a major challenge. "The recommendations of the Commission to apply emergency measures such as a transfer of vacant posts between court levels, where significant imbalances of workload occur, have not been applied but neither has Romania implemented adequate alternative measures. The Superior Council of the Magistracy (SCM) reacted to the net staff loss registered during 2008- 2009 with measures to increase both the yearly intake to the National Institute of Magistracy (NIM) and in particular through the direct recruitment of legal professionals with five years practice. Some initial steps to address the significant imbalances in workload between courts and prosecutors' offices through a structural reorganization of courts have also been taken. However, these measures are too limited in scope to produce a significant impact on the important capacity shortfalls within the judicial system and require additional measures to ensure that all new recruits meet minimum professional standards. Predictability of staff movements has not improved since July 2009 as several hundred magistrates eligible for retirement may still leave the magistracy at short notice as a legal solution to improve the predictability of retirements has not yet been found".

Considering the conclusions and key elements in the report on justice, the SCM according to its Plenum Decision No 841/30 September 2010[13], was preoccupied with combining the recruitment of new personnel with the support of transferring the vacant posts were needed and the redistribution of the existing personnel by stimulating mobility within the system to cover the urgent needs of personnel on short term. Also it was established as measure to reduce the deficit of personnel the organization of new competitions for admission in magistracy, according to a calendar established by the NIM and identifying new means for occupying the vacant posts and drafting proposals for a new legislative modification.

As a conclusion, this complex of actions assumed the correlation of the scheme of personnel with the workload in order to allow for new, promoted or transferred employees to be directed towards the courts or prosecutor's offices with the highest workload. Moreover, the SCM redistributed the vacant posts identified in the beginning of 2009, but were no longer identified new posts, and any other identification of posts for a horizontal redistribution was postponed despite the fact that there were vacant posts fit for reallocation. Regarding NIM it was decided the increment of its capacity regarding initial and continuous training, as well as adopting measures guaranteeing professional standards for all magistrates.

---

[12] Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism on 20 July 2010 available at http://ec.europa.eu/cvm/docs/com_2010_401_en.pdf.

[13] Superior Council of Magistracy Plenum Decision No 841/30 September 2010 available at http://www.csm1909.ro/csm/linkuri/06_01_2011__38012_ro.pdf since 31 October 2010.

For the optimization of professional training it was ascertained the need to review the quality of training programs and the standards of recruitment.

According to the information offered by the Report from the European Commission on Justice on 22 July 2010, the SCM started to identify the courts and prosecutor's offices with the lowest workload for a potential closure and reallocation of their resources. Though, from the initial number of 41 courts and prosecutor's offices, the working group reduced the researches to a number of 9 courts out of function and 6 courts working below capacity.

In October 2010 was published the standpoint of the working group of SCM on the establishment of the proper workload and the insurance of quality activity in courts[14]. According to this document it was necessary the insurance of quality activity in courts because it balances the workload, dedicating adequate time for judges to solve every case, it reduces the risks of judicial errors. The implementation of this program was to be achieved starting with 2011 for a year.

Nevertheless, on 20 July 2011 in the Report from the Commission to the European Parliament and the Council on progress of Romania under the CVM[15], the European Commission stated that "little tangible progress has been made since last summer in addressing recommendations by the Commission to tackle pressing capacity imbalances of the judicial system: A proposal by the Government to close a smaller number of nonviable courts was diluted by the Parliament. In addition, the Commission's call for immediate measures to reduce capacity imbalances has not been followed up systematically. Likewise, proposals to strengthen the recruitment and training of magistrates which were also developed in autumn have not yet been adopted. The National Institute of the Magistracy (NIM) has not been strengthened despite its important role in preparing for the implementation of the new codes".

This Report and the concordance with the findings of the European Commission, the SCM Plenum Decision No 679/4 October 2011[16] decided the creation of a management of justice based on the principles of transparency and objectivity, in order to review the system of professional evaluation and promotion of judges and prosecutors. In order to improve the standards of training and recruiting magistrates, the SCM proposed as measures the specialization of the trainers, redistribution of posts for judges and prosecutors, and also for the other categories of personnel from the courts and prosecutor's offices which are about to be closed.

Regarding the consolidation of the institutional capacity of the NIM and the improvement of standards of recruitment and training, it was proposed the optimization of the infrastructure and logistic of the Institute, of the activity and scheme of personnel.

Even more, in 22 November 2011 the SCM approved the *Action Plan for the implementation of the Justice Sector Reform Strategy for the years 2011-2016*[17]. This Action Plan set the main course in human resources by pointing the measures to be taken:

- transparency and objectivity in the recruitment, promotion and evaluation

1. reformation of the means of recruitment
2. reevaluation and draft of the legislative framework for the improvement of the system of professional evaluation of magistrates:

- consulting the courts, prosecutor's offices and civil society

---

[14] The standpoints of the working group of the SCM on the establishment of the optimal workload and the insurance of quality activity in courts available at http://www.csm1909.ro/csm/linkuri/20_10_2010__35357_ro.pdf since 26 January 2011.

[15] Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism on 20 July 2011 available at http://ec.europa.eu/cvm/docs/com_2011_460_en.pdf.

[16] SCM Plenum Decision No 679/4 October 2011 available at http://www.csm1909.ro/csm/linkuri/25_10_2011__44708_ro.PDF since 14 January 2012.

[17] *Action Plan for the implementation of the Justice Sector Reform Strategy for the years 2011-2016* available at http://www.csm1909.ro/csm/index.php?cmd=0901 on 14 January 2012.

- organizing the evaluation commissions
- training the trainers
- improving the secondary legislation
- establishing the responsibilities of the courts' and prosecutor's offices' presidents if a magistrate is unable to perform his activity

3. improving the system of promotion in the High Court of Cassation and Justice

4. establishing a new mean of evaluation for the auxiliary personnel of courts and prosecutor's offices

• insuring an institutional effective management by creating an unitary framework of the management in courts assuming:

- unifying the jurisprudence
- improving the system of recruitment for the personnel in courts and prosecutor's offices
- establishing a system of objectively appoint members in different commissions

On 18 July 2012 the European Commission in its Report to the European Parliament and the Council on the progress in Romania under the CVM[18] stated that "*the level of performance in public administration in Romania is the least effective in the European Union according to the measures of the World Bank. The judicial system is affected by some of the same deficiencies. Despite certain improvements the global image is that of a lack of dynamism in approaching the issues with a real impact on the capacity of justice to solve cases quickly and consistently*".

Among these issues are the limited capacities and pressure of the workload of judges and prosecutors, which are generalized by imbalances in the resources and differences on the workload between geographical areas and levels of jurisdictions. Other issues are related to the high number of vacant posts, the insurance of an initial training and deficiencies in the internal structure and organization of the courts and prosecutor's offices. Such efforts were made in order to solve these issues. Among these we name the organization of periodical competitions for recruitment, rationalization of certain procedures and the adoption of certain decisions to consolidate the capacity of the NIM in insuring initial training.

In 2011 a little step was taken for rationalization by closing nine redundant courts and three courts with minimum activity, as well as of the prosecutor's offices attached to them. Despite all this, the impact of the measures is minimal. Key indicators for efficiency, such as the differences in the workload and the rate of vacant posts were not improved since 2007.

The pressures in the area of resources and a conflict between executive power and judicial system in 2009 slowed the reforms and led to a high number of retirements in a moment in which the workload was constantly increasing. The judicial system does not have or developed efficient indicators of performance in order to offer information on the total necessities in the area of resources and the allocation of resources in justice. Romania has recently admitted its deficiencies, which shall be approached within a project financed by the World Bank, which will use, by the beginning of 2013 reviewed pilot-indicators for the number of cases and workload.

The SCM was not able to draft a strategy for human resources to change the structures and systems, focusing on the request for numerous personnel and resources. The Parliament contributed to this state of inertia by diminishing the content of the proposals for the restructuration of justice.

In accordance with the standpoint of the European Commission on 29 March 2012 was launched the project "Independent analysis on the efficiency of justice" financed by the Structural Funds through the Sectorial Operation Program for Administrative Capacity Development and implemented by the World Bank as a consultant. The main objective of the program was an analysis of the efficiency in justice from the perspective of the organization and function of its institutions, of

[18] The Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism on 18 July 2012, available at http://ec.europa.eu/cvm/docs/com_2013_47_en.pdf.

human and material resources management and of processes supporting the system (i.e. the efficiency of the IT system) for the sustainable development of justice and the foundation of future policies in justice.

The SCM Plenum Decision No 709/23 August 2012[19] for the restructuration of the courts and prosecutor's offices in order to restore the balance between the number of employees and the workload was established a human resources policy based on the conclusions of the projects "Establishing and implementing an optimal workload for judges and clerks and the insurance of the quality activity of courts" and "Independent Analysis on the efficiency of justice". In this regard was established the need to create a monitoring group for the judicial reform formed by representatives of all state powers, professional associations and civil society. It was also established the support of all activities of professional training in ethics and deontology.

Even more, for transposing into practice the principles of transparency, objectivity and professionalism, the SCM modified the Regulation for the organization of the competition for promotion as judge of the High Court of Cassation and Justice[20] establishing the criteria for this promotion, namely by competition within the limit of the number of vacant posts, at least 15 years of service, the lack of disciplinary sanctions.

Also, Government Ordinance No 13/2012 on the budget adjustment on 2012[21] and Government Emergency Ordinance No 61/2012[22] established a series of measures on human and financial resources necessary in justice, by allocating funds to finance the occupation of 564 vacant posts in the system.

The SCM Plenum Decision 1114/13 December 2012[23] established the criteria for redistribution of vacant posts by reducing the number of vacant posts for judges in certain courts with minimal workload in correlation with the supplementation of the number of posts for judges in overload courts. These criteria are:

- the medium workload resulted from the statistics for the current year and the past 2 years – called reference average
- the distribution to the courts with a medium workload of 100 cases above the reference average
- exclusion from the supplementation of posts of the courts with over 3 vacant posts
- the redistribution is usually made in the same jurisdiction of a Court of Appeal; if this rule is not possible the redistribution is national
- the redistribution shall be made by granting each court with one vacant post in descending order of the workload, restarting the cycle in order to achieve the reference average

The Interim Report from the European Commission to the European Parliament and the Council on the progress in Romania under the cooperation and verification mechanism published on 30 January 2004[24] emphasized "the general pressure exerted by the workload on the Romanian justice and the need to restructure the courts and prosecutor's offices by rebalancing the number of

---

[19] SCM Plenum Decision No 709/23 August 2012 available at http://www.csm1909.ro/csm/linkuri/03_09_2012__51132_ro.PDF since 12 January 2013.

[20] Rules of organization of the competition for promotion as judge of the High Court of Cassation and Justice available at http://www.csm1909.ro/csm/linkuri/07_01_2013__53488_ro.pdf since 16 July 2012.

[21] Government Ordinance No 13/2012 on the budget adjustment in 2012 published in the Official Gazette Part I, No 614/27 August 2012.

[22] Government Emergency Ordinance No 61/2012 on the budget adjustment on 2012 published in the Official Gazette Part I, No 730/29 October 2012.

[23] SCM Plenum Decision No 1114/13 December 2012 available at http://www.csm1909.ro/csm/linkuri/14_12_2012__53227_ro.pdf since 16 January 2013.

[24] Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism on 30 January 2013 available at http://ec.europa.eu/cvm/docs/com_2013_47_en.pdf .

employees and the workload. The Government remedies the source of these issues by legislative modifications, approaching some of the special causes of a wave of new cases. Such efforts to reduce the workload in the system's pressure points can be more efficient than the tries to solve the issue by incrementing the number of judges and prosecutors, which could risk jeopardizing the recent improvements in the quality and training for the new practitioners. Another key element of reputation and responsibility of justice is the procedure of appointing the magistrates. The new provisions on the promotion of magistrates to the High Court of Cassation and Justice seem to have introduced a new strictness in the system: it seems more important to maintain the quality of competition than to remedy the gaps perceived which can be on short term".

Conclusions

The reform of justice in the area of human resources was and still is a major preoccupation of the Superior Council of Magistracy which established its priorities starting from the conditions mentioned in the verification mechanism for Romania.

The standpoints of the European Commission correctly and efficiently reflected both the progresses, as well as the vulnerabilities in justice, which determined the Romanian authorities to work together in order to continue the reforms started in 2004, despite the imminent legislative and financial obstacles.

Properly the measures proposed by the Superior Council of Magistracy aim the correction of the noticed imbalances, including the definition of a policy of personnel in accordance with the requirements of the European Commission, policy which shall consider:

- the dynamics of human resources on medium and long term reported to the actual competences;
- recruiting new judges and prosecutors using the criterion of quality;
- controlling the exits from the system and rationalize the deployments within or outside the system;
- a predictable and equitable development of career, by a transparent selection and improving the initial and continuous training programs, as well as their permanent adjustment

The need to improve human resources management in justice is a strategic objective by which to promote changes in the approach of human resources, approach which shall be achieved according to the following principles: to be realistic, coherent with the aspirations of the system and feasible.

References

National legislation

- The Romanian Constitution was adopted on 21 November 1991 and published in the Official Gazette of Romania, Part I, No 233 of 21 October 1991, modified and amended by Law No 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette, Part I, No 758 of 29 October 2003.
- Law No 304/2004 on judicial organization, published in the Official Gazette of Romania, Part I, No 576/29 June 2004 modified by Government Emergency Ordinance No 124/2004 published in the Official Gazette, Part I, No 168/9 December 2004, approved with modifications and amendments by Law No 71/2005, published in the Official Gazette of Romania, Part I, No 300/11 April 2005, Law No 17/2006 published in the Official Gazette of Romania, Part I, No 48/19 January 2006, Government Emergency Ordinance No 50/2006 published in the Official Gazette of Romania, Part I, No 566/30 June 2006, Government Emergency Ordinance No 60/2006 published in the Official Gazette of Romania, Part I, No 764/7 September 2006, Government Emergency Ordinance No 100/2007 published in the Official Gazette of Romania, Part I, No 684/8 October 2007, Government Emergency Ordinance No 137/2008 published in the Official Gazette of Romania, Part I 745/4 November 2008, Government Emergency Ordinance No 56/2009 published in the Official Gazette of Romania, Part I, No 381/4 June 2009, Government Emergency Ordinance No 114/2009

published in the Official Gazette of Romania, Part I, No 919/29 December 2009, Law No 202/2010 published in the Official Gazette of Romania, Part I, No 714/26 October 2010.
- Law No 317/2004 on the Superior Court of Magistracy published in the Official Gazette of Romania, Part I, No 599/2 July 2004, subsequently modified and completed by Law No 247/2005 regarding reform in the fields of ownership and justice, published in the Official Gazette, Part I, No 653/22 July 2005.
- Government Decision No 1346/31 October 2007 on the approval of the Action Plan for the fulfillment of the terms within the cooperation and verification mechanism of the progress registered by Romania in the area of the reform of the judiciary and of the fight against corruption published in the Official Gazette of Romania No 765/12 November 2007.
- Superior Council of Magistracy Plenum Decision No 307/26 February 2009.
- Superior Council of Magistracy Plenum Decision No 841/30 September 2010.
- The standpoints of the working group of the SCM on the establishment of the optimal workload and the insurance of quality activity in courts.
- Superior Council of Magistracy Plenum Decision No 679/4 October 2011.
- Action Plan for the implementation of the Justice Sector Reform Strategy for the years 2011-2016.
- Superior Council of Magistracy Plenum Decision No 709/23 August 2012.
- Rules of organization of the competition for promotion as judge of the High Court of Cassation and Justice
- Government Ordinance No 13/2012 on the budget adjustment on 2012, published in the Official Gazette Part I, No 614/27 August 2012.
- Government Ordinance No 61/2012 on the budget adjustment on 2012, published in the Official Gazette Part I, No 730/29 October 2012.
- Superior Council of Magistracy Plenum Decision No 1114/13 December 2012.

International legislation
- Commission Decision No 2006/928/EC published in the Official Journal L 354/56 on 14 December 2006.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 27 June 2007.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 23 July 2008.
- Interim Report from the Commission to the European Parliament and the Council on 12 February.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 22 July 2009.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 20 July 2010.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 20 July 2011.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 18 July 2012.
- Report from the Commission to the European Parliament and the Council on the progress in Romania under the Cooperation and Verification Mechanism published on 30 January 2013.

Websites
http://www.csm1909.ro
http://eur-lex.europa.eu
http://www.just.ro
http://ec.europa.eu
http://www.juridice.ro

FEATURES OF THE UNWRITTEN SOURCES OF EUROPEAN UNION LAW

ROXANA-MARIANA POPESCU[*]

Abstract
There are three sources of European Union law: primary law, secondary law and supplementary law. Besides the case law of the Court of Justice, supplementary law includes international law and the general principles of law. It has enabled the Court to bridge the gaps left by primary and/or secondary law. International law is a source of inspiration for the Court of Justice when developing its case law. The Court cites written law, custom and usage. General principles of law are unwritten sources of law developed by the case law of the Court of Justice. They have allowed the Court to implement rules in different domains of which the treaties make no mention.

Key words: *European Union; EU law; unwritten sources; case law of the Court of Justice; general principles of law.*

1. Introductive considerations

The sources of European Union law are specific ways by which the rules of conduct deemed necessary in the European structures, become rules of law by a will agreement of member states[1]. Narrowly, the preponderance of EU law sources, from quantitative point of view, is given both by the establishing treaties (as primary, principal sources) and by other rules contained in the documents (acts) adopted by the Union institutions in the implementation of these treaties (as derived, secondary sources).

More broadly, however, EU law is: all the rules (of law) applicable in EU legal order, some of them even unwritten; the general principles of law or the jurisprudence of the Court of Justice; the rules of law whose origin is outside the Union legal order, originating from external liabilities of the Communities, of EU, respectively, and the complementary law derived from conventional acts concluded between the member states, for enforcing the Treaties. Further, we shall analyze, in synthesis, the features of the unwritten sources of European Union law.

2. General principles of EU law[2]

Special attention, within the unwritten sources of EU law, should be paid to the general principles of law, because they have a considerable contribution to the process of establishing EU law.Established by the Luxembourg Court of Justice case law, the general principles of law are an important factor in strengthening and developing the EU legal system; this is possible due to their essential characteristic, namely the need to be consistent with the specificity of this legal system unique in the world.

Starting from the classification provided by the doctrine in the field[3], we shall further present and analyze the general principles of EU law, in the following structure:

---

[*] Senior Lecturer, PhD, "Nicolae Titulescu" University of Bucharest, Faculty of Law (rmpopescu@yahoo.com).

[1] Dumitru Mazilu, *"Integrare Europeană. Drept comunitar şi Instituţii Europene"*, Lumina Lex Publishing House, Bucharest, 2000, p. 69.

[2] For details, see Mihaela Augustina Dumitraşcu, "*Dreptul Uniunii Europene şi specificitatea acestuia*", Universul Juridic Publishing House, Bucharest, 2012.

[3] Denys Simon, *„Le Système juridique communautaire* ", 2nd Edition, PUF, Paris, 2000, pp. 251-255. The author classifies the general principles of EU law, as follows: fundamental rights; principles deriving from the

- fundamental rights;
- principles specific to EU law;
- principles derived from the national legal systems of member states.

A. Fundamental rights. The fundamental rights are all those essential and inalienable rights of the human being, valid in all circumstances and without any possibility of derogation. In the EU context, this formula is used as a synonym for the phrase "human rights" and covers a wide range of rights, including economic rights, similar to those recognized by the Constitutions of member states or international conventions, in general and the European Convention on Human Rights, of November 4, 1950, in particular.

Under art. 6, par. (1) TEU[4], following changes brought to the Treaty of Lisbon, the Charter of Fundamental Rights has the same legal value as the Treaties, although this legal instrument is not really a treaty, not being ratified by the member states. The Charter is not incorporated in the Treaty, but it is attached by means of a provision referring to that document. Among novelties introduced in this field, we see that the former "principles" become "values" in the Treaty of Lisbon and, for the first time, the rights of minorities are mentioned. Thus, art. 2 TEU, as amended by the Treaty of Lisbon states that the Union is founded on values of respect for the human dignity[5], freedom[6], democracy, equality[7], rule of law[8], as well as on the respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.As shown in the "Explanations on art. 52 of the Charter", Member states wished to emphasize the distinction between rights and principles. In order to prevent future judicial activism[9] of the Court of Justice, member states considered that the principles would be implemented by legislative and executive acts, when that thing[10] is wanted and would be known only in the interpretation of those provisions and by the jurisprudence referring to their legality[11].

From the point of view of its legal obligation, it should be mentioned that even before obtaining legal value, the Court of Justice had recognized the principle of respect for fundamental

---

European Union's quality of subject of international law, and the structural principles. In the same vein, see also Jean-Marc Favret, *"Droit et pratique de l'Union Européenne "*, 3rd Edition, Gualino Editor, Paris, 2001, pp. 237-242. According to Favret, general principles of EU law are classified as: general principles deduced from the nature of the Union, general principles derived from national legal systems, fundamental rights, and principles of international law.

[4] Article 6 (1) The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties. Provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Rights, freedoms and principles from the Charter shall be interpreted in accordance with the general provisions from Title VII of the Charter governing its interpretation and implementation and with due regard to the explanations referred to in the charter, that set out the sources of those provisions.

(2) The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. The Union's competences, as defined in the Treaties, shall not affect the membership.

(3) Fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

[5] New specification introduced by the Treaty of Lisbon.

[6] Interesting to note is that in English, the Treaty of Lisbon replaces the term *"liberty"* (referring to rights) with *"freedom"* (referring to principles).

[7] New specification introduced by the Treaty of Lisbon.

[8] Specification made also by ECJ in its jurisprudence, *Environmental Parties - Les Verts vs. European Parliament*, 1986, 294/83: "Community based on the rule of law".

[9] *"The Lisbon Treaty"*, European Institute, Leiden University, Law Faculty, The Netherlands, March 19, 2008 (http://media.leidenuniv.nl/legacy/lisbon-treaty-summaries.pdf), p.33.

[10] Article 52 par. (2) Charter.

[11] Article 52 par. (6) Charter.

rights as part of the general principles of law protected by the Court. In this respect, the Court has recognized since 1969 "the fundamental human rights enshrined in the general principles of Community law whose compliance is provided by the Court"[12], following that, in 1974, this aspect to be developed, as follows: "As the Court has already stated, the fundamental rights are included in the general principles of law whose compliance is provided by the Court". To ensure protection of these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member states, and therefore it can not accept measures incompatible with the fundamental rights recognized and guaranteed by the Constitutions of those states. The international instruments on the protection of human rights to which member states have cooperated or acceded, can also provide guidelines that need to be taken into account in Community law"[13].

Under the Treaty of Lisbon, there are two sources regarding the human rights, namely: the Charter, under art. 6, par. (1) TEU[14], with legal value of treaty and, under art. 6, par. (3) TEU[15], the European Convention for the Protection of Human Rights and Fundamental Freedoms, as general principles of EU law.

Under art. 6, par. (2) TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but the Union's competences, as defined in the Treaties, shall not be affected by the membership. As for the accession to the Convention, "Protocol no. 8 on art. 6, paragraph (2) TEU" was annexed to the Treaty of Lisbon.

Regarding the content of the Charter, it contains in a single text, for the first time in EU history, all civil, political, economic and social rights of European citizens, as well as of all people living on the Union's territory. These rights are divided into six chapters as follows: dignity, freedom, equality, solidarity, citizenship, justice.

The Charter, unlike the European Convention on Human Rights, covers a broader protection field, beyond civil and political rights, referring to other issues, such as the right to good administration, workers' social rights, and protection of personal data or bioethics. In addition, the Charter takes into account the political rights of EU citizens which, by definition, cannot be included in the Convention.

The Charter resumes some rights, not explicitly outlined in the Convention of 1950 and, on the other hand, it provides a more detailed definition of certain rights (for example, the right to an effective judicial appeal that must be exercised before an independent judge, the appeal being possible for the defence of all rights protected by this law, even if it does not concern fundamental rights; the right to marry, which no longer considers the classical concept, but recognizes other ways to found a family; the right not to be on trial or punished twice, after a trial and for the same offence which applies not only within the same State, but also between the jurisdictions of several member states).

EU institutions must comply with the rights enshrined in the Charter. The member states have the same obligations when they implement EU law. The Court of Justice must guarantee the proper application of the Charter. Including the Charter in the Treaty does not modify the Union's competences, but it provides enhanced rights and greater freedom to citizens.

---

[12] Section 7 of ECJ Judgement of November 12, 1969, *Stauder*, 29/69.

[13] Section 13 of ECJ Judgement of May 14, 1974, *Nold*, 4/73.

[14] "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties. Provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing its interpretation and implementation and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

[15] "Fundamental rights, as guaranteed by the European Convention and as they result from the constitutional traditions common to the member states represent general principles of Union law".

We **conclude** by stating that the Charter of Fundamental Rights is an expression, at the highest level, of a democratically established political consensus on what today must be regarded as a catalogue of rights, catalogue that is part of EU legal order. The acquisition by the Charter of Fundamental Rights, of binding legal force, can be considered as the fulfilment of the promise of Brussels officials to put citizens at the heart of the European Union activities.

B. The specific principles of EU law

A number of various principles fall within this category, sharing the intrinsic, essential link to EU legal system, meaning that it marks its specificity in relation to other legal systems, of state or international. These include: the principle of institutional balance, the principle of conferral, with multiple consequences on the entire EU system, but also the principle of subsidiarity and proportionality.

a. The principle of institutional balance. With the ratification of constituent treaties, member states have decided to transfer part of their competences to the European Union. At EU level, they are exercised by institutions provided by treaties, institutions receiving specific tasks in the decision making, execution and control process. According to EU Treaties, each institution "acts within the powers conferred by (...) the Treaty"[16]. We are, therefore, facing a separation of powers between institutions, separation which, however, cannot harmonize with the model proposed by Montesquieu in the eighteenth century. Thus, the existing institutional machinery does not allow the separation of the legislative, executive and judicial powers. The European Parliament does not have the same powers of a national parliament, meaning that it does not have a real legislative power. The Council participates to the legislative function, as well as to the executive function, the latter being shared with the European Commission. However, even if the division of powers is not the same as in the national constitutional law, the role of this division might be comparable to that provided by the classical principle of separation of powers. It is about the need to avoid concentrating all powers in the hands of one body in order to prevent an abusive, arbitrary use of these powers.

It should be noted that, at EU level, most of the functions are concentrated in the Council, institution with an intergovernmental structure. This is because, the Union, despite its specificity, remains an international organization, and the authors of the Treaties have established an important role for the member states in EU structure. However, the powers conferred on other institutions tend to counterbalance those conferred on the Council in order to enable the Union, in the exercise of its powers, to take into account all the interests involved - those of the states represented by the Council, but also those of European citizens represented by the democratically elected body, namely the Parliament; the Union's interest, manifested in the independent institution - the Commission -, and the public interest in complying with the law, provided by the Court of Justice.

The principle of institutional balance combines two essential components, namely[17]: the separation of powers, respectively of tasks of institutions concerned, on the one hand and the collaboration, cooperation between institutions, on the other hand.

The first component presupposes the impossibility of delegation, transfer, acceptance or conferral of competences, from one institution to another. This separation requires the obligation of each institution not to obstruct the performance of tasks, by the other institutions. Consequently, no institution must be blocked to perform its duties. In this case, the principle of the favourable behaviour reciprocity is reflected.

This principle does not exclude, but rather involves the collaboration between institutions, in order to achieve the objectives proposed.

---

[16] Art. 13 par. (2).

[17] Augustin Fuerea, *"Manualul Uniunii Europene"*, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p 87.

b. The principle of conferral. According to provisions of the Treaties, each institution shall act within the limits of powers conferred by the Treaty.

The principle of conferral can be understood as a translation into EU law, of the specialty principle of international organizations. This follows from the fact that, like all international organizations, the Union is an entity established by the member states and does not share with them, the quality of fundamental subject of international law.

Under art. 5 of the Treaty on European Union, "the separation of the Union's competences is governed by the principle of conferral". "Under the principle of conferral, the Union shall act only within the limits of competences conferred on it by the member states, in the Treaties, to achieve the objectives set out therein. Competences not conferred on the Union by the Treaties remain the domain of the member states"[18].

The importance of the principle of conferral is determined by the types of competences regulated by EU treaties. In this respect, the nature and characteristics of competences are reflected in the process of conferring them. Thus, we can distinguish two situations. In the first case, EU competences do not replace state powers. They remain, but will be surrounded by EU fundamental legal rules. In this situation, the EU institutions will have the task to exert a double action: on the one hand, to prescribe in accordance with treaties, rules that would detail and customize the limits set by them and secondly, to ensure compliance with those limitations, by the member states.

In the second case, the competences of the Union are intended to replace state powers. In this situation, the EU institutions have legislative powers, more important than those of the member states, due to the Community dimension of actions, having thus, the task to enact common rules, for the enforcement and execution of which, the member states acquire the quality of Community authorities (such situation is encountered, for example, in joint policies).

Under art. 3 of the Treaty on the Functioning of the European Union, "the Union shall have exclusive competence in the following areas:

(a) the customs union;

(b) establishing rules regarding competition, necessary for the functioning of the internal market;

(c) the monetary policy for member states whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) the common commercial policy", but also for "concluding an international agreement when its conclusion is provided in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in the case when it may affect common rules or alter their scope".In all these cases, "only the Union may legislate and adopt legally binding acts, the member states being able to do so only if so empowered by the Union or for the implementation of the Union's acts".

Further, the Treaty sets out the areas in which the Union shall share competence with the member states, namely: (a) the internal market; (b) the social policy, for aspects defined in this Treaty; (c) the economic, social and territorial cohesion; (d) the agriculture and fisheries, excluding the conservation of marine biological resources;(e) the environment; (f) the consumer's protection; (g) the transportations; (h) the trans-European networks; (i) the energy; (j) the area of freedom, security and justice;(k) common safety objectives concerning public health matters, for aspects defined in this Treaty".

The following provisions are added to these above mentioned: "In the areas of research, technological development and space, the Union shall have competence to carry out activities, and in particular to define and implement programs, without the exercise of that power to prevent member states from exercising their own competence. In the areas of cooperation for development and humanitarian aid, the Union shall have competence to carry out activities and conduct a common

[18] For details, see Augustin Fuerea, *"EU legal personality and areas of competence according to the Treaty of Lisbon"*, ESIJ no. 1/2010 ("Lex ET Scientia International Journal").

policy, without the exercise of that competence to result in the member states' deprivation of the opportunity to exercise its jurisdiction. Also, "The Union and the member states may legislate and adopt legally binding acts in this area. Member states shall exercise their competence to the extent where the Union has not exercised it. Member states shall again exercise their competence to the extent where the Union has decided to cease exercising it".

Protocol 25 on the exercise of shared competence, contains a provision to the unique article, according to which "if the Union develops an action in a certain area, the scope of the exercise of competence covers only those elements regulated by that Union act, and therefore does not cover the whole area".

Declaration no. 18 concerning the delimitation of competences complements everything that we have described above, meaning, "in accordance with the division of competences between the Union and the member states, as provided in the Treaty on European Union and the Treaty on the Functioning of the European Union, any competence not conferred on the Union by the Treaties remains the domain of the member states. When the Treaties confer on the Union, competences shared with the member states in a specific area, the member states shall exercise their competence to the extent where the Union has not exercised its competence or has decided to cease exercising it. The latter situation may arise when the relevant EU institutions decide to repeal a legislative act, especially to ensure better constant compliance with the principles of subsidiarity and proportionality. The Council may request, at the initiative of one or more of its members (representatives of member states) and under article 241 of the Treaty on European Union, to submit proposals for repealing a legislative act".

In addition to these provisions, comes art. 6 TFEU, which, among other things, lists areas where the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the member states, as follows:

"(a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, professional training, youth and sport; (f) civil protection; (g) administrative cooperation". "The legally binding Union acts adopted under the provisions of the Treaties relating to these areas shall not entail the harmonization of laws, regulations and administrative provisions of member states. The scope and conditions for exercising the Union's competences are established by provisions of the Treaties relating to each area".

c. The principles of subsidiarity and proportionality. Under art. 5 of the Treaty on European Union, the exercise of the Union competence is regulated by "the principles of subsidiarity and proportionality". According to the principle of "subsidiarity, in areas which are not within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but they can be better achieved at Union level due to the dimensions or effects of the proposed action". In addition to these provisions, there are to be found also those listed in art. 4, paragraph (1) TEU, namely: "any competence not conferred on the Union by the Treaties remains the domain of the member states".

d. Principles derived from national legal systems of the member states. Expressly provided by art. 340 par. (2) TFEU[19], in the context of extra-contractual liability, the general principles of law of the Member states are often used in the reasoning of ECJ judgements. Without making a simplistic comparison of national systems of law, but rather a synthesis which helps the Court to adopt the best solution in this case[20], the Luxembourg Court established, at EU level, a set of

[19] "In matters of extra-contractual liability, the Union is required to pay, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or by its servants in the performance of their duties".

[20] Takis Tridimas, *"The General Principles of EU Law"*, 2nd edition, Oxford EC Law Library, 2006, pp. 20-21.

common principles inspired by the law of the member states, among which, by way of example: the principle of appeal against any decision of a national authority denying a right under the treaties[21], the right to defence[22], the principle of legal security[23], the principle of good faith[24], the principle of equality before the regulation[25], the principle of withdrawal of administrative acts[26].

According to Takis Tridimas[27], the two national legal systems that have had the greatest influence in setting EU administrative law and therefore, the general principles of law are the French and German systems; the reasons are of course, of historical nature. We shall, further, present some conclusions reached by the author during the study of the influence of German, French and English legal systems on the general principles of law, as sources of EU law. Thus, the author notes[28] that the German influence was present in creating the principles of proportionality, legitimate expectation and protection of fundamental rights. The French system also had a major influence, its public law tradition being the strongest in Europe, and the French administrative law has been a model for other countries on the continent. Examples of such influences for EU law are: the action for annulment and the organization of the Court of Justice, after the State Council model. Unlike the German and French influence, the English system did not have a significant impact on EU law and, in particular, on the development of law principles. This fact is explained by the relatively late entry of Great Britain and Ireland in the European Communities (1973) and, therefore, its absence in the period of establishing the EU law. However, we must notice the major influence on procedural safeguards that the Luxembourg Court case law has had. Findings highlighted by Takis Tridimas, following his short study are that: no system of law can claim an overwhelming influence on EU law. Also, according to the author mentioned, the influence occurs in both directions, the national legal systems being profoundly influenced by jurisprudential developments at EU level, leading thus to a *jus communae* that develops and evolves constantly.

3. Case-law of the Luxembourg Court

The influence of the case law on the development of EU law is considerable, which is explained by the fact that the Union faces a system of law in the process of developing[29]. At the same time, with the purpose of ensuring compliance with the law, the Luxembourg Court of Justice was asked not only to accurately define the law, but also to cover gaps by a creative, praetorian jurisprudence; the law has often prefigured the legislative evolution.

The Court of Justice is not a source of EU law in the sense known by the *common law* legal system, the judicial decisions not having *erga omnes* effect. Solutions given by the Luxembourg Court of Justice are required on how to interpret the provisions of EU law. So, although we cannot say that EU law is a "case law", we opine that the interpretation and application of EU law in accordance with the Treaties are possible only through the jurisprudence of the European Court of Justice.

It is also appropriate to remember that Treaties provide for the ECJ, as the main role, to ensure compliance with law in the interpretation and application of the Treaties. Thus, Treaties provide the possibility of initiating an action in interpretation, with prior title. Interpretation is useful, especially if EU law, in many respects, contains either gaps or provisions having general character or unclear aspects about the meaning of a provision.

---

[21] ECJ Judgement, May 15, 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 222/84.
[22] ECJ Judgement, January 27, 1987, *Verband der Sachversicherer v. Commission*, 45/85.
[23] ECJ Judgement, June 16, 1993, *France v. Commission*, C-325/91.
[24] ECJ Judgement, March 22, 1961, *S.N.U.P.A.T. v. Haute Autorité*, 42/59.
[25] ECJ Judgement, November 12, 1969, *Stauder v. Stadt Ulm*, 29/69.
[26] ECJ Judgment, July 12, 1957, *Algera e.a. v. Assemblée commune*, 7/56, 3-7/57.
[27] Takis Tridimas, *op. cit*., p. 24.
[28] *Ibid*.
[29] Augustin Fuerea, *op. cit*., p. 147.

The usefulness of ECJ judgements is obvious in situations where some definitions for terms used in the Treaties and whose content was not determined enough, had to be given; we can take as example, the explanations on "charge having an effect equivalent to customs duties", "measures having equivalent effect to quantitative restrictions", "worker", "priority of Community law in relation to the member states", "autonomy of Community law" etc. Thus, according to the Court, the charge having an effect equivalent to customs duties means "any fee, regardless of its name or application, which, imposed on a product imported from a member state in order to exclude a similar national product has, by the price change, the same effect on the free movement of goods as a customs duty and can be regarded as a charge having equivalent effect, regardless of its nature and form"[30].

Since the concept of "measures having equivalent effect to quantitative restrictions" is not defined in the Treaty, the Court of Justice had the mission to clarify it. Therefore, the Court formulated the *Dassonville* judgement[31], opinion according to which "all trading rules imposed by the member states which may hinder directly or indirectly, actually or potentially, the intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions"[32]. Subsequently, in the *Cassis de Dijon*[33] judgement, the Court extended this notion ruling that "a measure can be considered as having equivalent effect even without discrimination between imported and internal goods. In particular, the technical regulations of the importing state imposed on goods from other member states, can be considered as an equivalent measure, if not justified, because imported goods are penalized by the obligation to make changes in prices. The absence of Community harmonization cannot be used to justify this attitude, where it effectively prevents the freedom of movement. Thus, the Court established the principle according to which any product legally manufactured and marketed in a member state, in accordance with fair and traditional rules and manufacturing processes existing in that country should be allowed on the market of any other member state. This is the principle of mutual recognition by member states of those rules, in the absence of harmonization"[34].

The Treaty on the Functioning of the European Union establishes the free movement of workers, but does not define the term, which is why once again, the Court must cover the gap. By corroborating interpretations offered in several judgements[35], it results that, in the sense of EU law, worker is any person who performs work under an employment contract and for which he/she receives remuneration; the following aspects are not important: the legal nature of the contract, the remuneration amount, the contract duration, the time spent at work (full or part time); what is important is that the finality represents an economic activity.

4. Common law

In public international law, common law is particularly important and is the oldest source of both international law and law, in general[36]. International common law is, therefore, under art. 38, par. 1 letter b) of the Statute of the International Court of Justice, annexed to the UN Charter, "proof of a general practice accepted as law". Customary process elements are: the common law should be a

[30] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm

[31] ECJ Judgement, July 11, 1974, *Dassonville*, 8/74.

[32] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm

[33] ECJ Judgement, February 20, 1979, *Rewe / Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), 120/78.

[34] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm

[35] ECJ Judgement, July 3, 1986, *Lawrie-Blum*, 66/85; ECJ Judgement, March 23, 1982, *Levin*, 53/81; ECJ Judgement, May 31, 1989, *Bettray*, C-344/87 etc.

[36] Raluca Miga-Besteliu, *"Drept internaţional public"*, Volume II, C.H. Beck Publishing House, Bucharest, 2008, p 68.

general practice, relatively long and uniform considered by states as expressing a rule of conduct with legally binding force.

The common law is an unwritten source and can be defined, in the light of EU law, as a practice followed and accepted, becoming legally binding, a practice that adds or modifies the primary or secondary/ derived EU legislation. It must be said that EU law does not include customs in the sense described above with reference to customary international law. Contrary to public international law, where it represents a fundamental source of law, the custom is quasi-inexistent in EU law[37].

As arguments for what we have earlier stated, we present the following:

- firstly, there is a special procedure for amending the Treaties; it does not exclude the possibility of a custom, but sets some demanding criteria that such practice must meet in order to be applicable;

- another obstacle would be that the validity of any action of the institutions is checked in relation to the Treaties, and not to their practice, which means that from the point of view of Treaties, common law cannot be created in any case, by the Community institutions; at most, the member states can do this, and even assuming that – only under the strict fulfilment of conditions mentioned.

However, certain repeated practices that are part of the texts of EU Treaties, could have the propensity to form, on a long term, customary rules. The Court of Justice did not exclude that possibility, recalling that "in any case, a mere practice cannot prevail over the rules of the Treaties"[38]. A practice *contra legem* could not in any case be a source of law. On the contrary, a practice *praeter legem* which might intervene to complete texts of treaties in order to resolve an unexpected aspect, could lead to the creation of customary rules. It is, thus noteworthy that, at Community level, one single custom is, for now, in the process of being created: it is the practice of resorting increasingly more often to informal agreements[39] established between EU institutions.

5. Conclusions

The unwritten sources are considerably important among sources of EU law. It is up to the EU legal order to receive the unwritten law, consisting mainly of the Luxembourg Court of Justice case law, among other sources[40]. To this ability, it corresponds that not less remarkable, of the Court of Justice establishing the law.

The exercise by the Court, of this regulatory mission becomes singular, in particular, by using the methods of dynamic interpretation, as well as by widely resorting to general principles of law.

References

- CARTOU, L.; CLERGERIE, J.-L.; GRUBER, A.; RAMBAUD, P., „*L'Union Européenne"*, Dalloz Publishing House, 2000.
- DUMITRAŞCU, Mihaela Augustina, "*Dreptul Uniunii Europene şi specificitatea acestuia*", Universul Juridic Publishing House, Bucharest, 2012.
- FAVRET, Jean-Marc, *"Droit et pratique de l'Union Européenne "*, 3rd Edition, Gualino Editor, Paris, 2001.
- FUEREA, Augustin, *"EU legal personality and areas of competence according to the Treaty of Lisbon"*, ESIJ no. 1/2010 ("Lex ET Scientia International Journal").

[37] L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, „*L'Union Européenne"*, Dalloz Publishing House, 2000, p. 78.

[38] ECJ Judgement, August 9, 1994, *France v. Commission*, C-327/91.

[39] Not to be confused with inter-institutional agreements.

[40] The imprecise, incomplete character of general rules contained in the Treaties; the rigidity of primary law due to the cumbersome procedure for revision; the inertia of secondary law resulting from blockages in the Council.

- FUEREA, Augustin, *"Manualul Uniunii Europene"*, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011.
- MAZILU, Dumitru, *"Integrare Europeană. Drept comunitar şi Instituţii Europene"*, Lumina Lex Publishing House, Bucharest, 2000.
- MIGA-BESTELIU, Raluca, *"Drept internaţional public"*, Volume II, C.H. Beck Publishing House, Bucharest, 2008.
- SIMON, Denys, *„Le Système juridique communautaire* ", 2nd edition , PUF, Paris, 2000.
- TRIDIMAS, Takis, *"The General Principles of EU Law"*, 2nd edition, Oxford EC Law Library, 2006.
- ECJ Judgement, May 15, 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 222/84.
- ECJ Judgement, January 27, 1987, *Verband der Sachversicherer v. Commission*, 45/85.
- ECJ Judgement, June 16, 1993, *France v. Commission*, C-325/91.
- ECJ Judgement, March 22, 1961, *S.N.U.P.A.T. v. Haute Autorité*, 42/59.
- ECJ Judgement, November 12, 1969, *Stauder v. Stadt Ulm*, 29/69.
- ECJ Judgment, July 12, 1957, *Algera e.a. v. Assemblée commune*, 7/56, 3-7/57.
- ECJ Judgement, July 11, 1974, *Dassonville*, 8/74.
- ECJ Judgement, February 20, 1979, *Rewe / Bundesmonopolverwaltung für Branntwein*, 120/78.
- ECJ Judgement, July 3, 1986, *Lawrie-Blum*, 66/85.
- ECJ Judgement, March 23, 1982, *Levin*, 53/81.
- ECJ Judgement, May 31, 1989, *Bettray*, C-344/87.
- ECJ Judgement, August 9, 1994, *France v. Commission*, C-327/91.
- *"The Lisbon Treaty"*, European Institute, Leiden University, Law Faculty, The Netherlands, March 19, 2008 (http://media.leidenuniv.nl/legacy/lisbon-treaty-summaries.pdf).
- http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm.

ASPECTS OF THE EVOLUTION OF HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION

NICOLAE PURDĂ*

Abstract
Human rights protection within the European Community and the European Union has developed judicially, the human rights being protected by the Community Courts as general principles of Community law.
The Treaty of Maastricht and the Treaty of Amsterdam have codified the Community law within the area of human rights. The codification of European Union's concept of human rights in a single document was realized by adopting the Charter of Fundamental Rights of the European Union, on 7 December 2000 in Nice, whose provisions acquired legally binding under the Treaty of Lisbon.

Keywords: *European Union, protection of human rights, Court of Justice of the European Union, European Convention on Human Rights, Charter of Fundamental Rights of the European Union.*

1. Preliminary views

The absence of legally binding instruments on human rights has been a problem both theoretically and practically, for a long time inside the borders of European Communities and later of the European Union.

Along with the diversification of the Communities' powers, there are questions regarding the relation between the Community law and the fundamental freedoms. To this end, the Court of Justice had a decisive intervention, which since 1969 has developed a jurisprudence which tended to effectively protect certain rights and freedoms. Initially, the Court of Justice refused to exercise the control of legality of Community acts in terms of fundamental rights guaranteed by the constitutions of the Member States on the grounds that "there shall be no responsibility for ensuring compliance with internal rules, even constitutional, effective in one or another of the Member States"(case Storck-1959).

Pursuant to the Court's position, some national Constitutional Courts (German and Italian) have expressed their determination to examine the constitutionality of a treaty and the Community rules derived in terms of human rights guaranteed by national constitutions, thus reversing in this field the report between Community law and national law (governed by the principles of primacy and direct effect).[1]

In the absence of a catalogue of rights enshrined by the Community law, the Court of Justice has undertaken the task of solving by praetorian means the gap problem Community's system of fundamental rights protection.

The Luxembourg Court emphasized that the protection of fundamental rights is a principle of Community law, in cases *Stauder*, November 12, 1969, *Internationale Handelsgesellschaft* of December 17, 1970 and *Nold*, May 14, 1974. The Court also resorted to "adopt" as standard rule on the constitutional traditions common to the Member States and to the "international instruments on protection of fundamental rights on which the Member States have cooperated or acceded"[2] . The International instruments to which the Court appeled in its case were: the International Covenant on Civil and Political Rights, European Social Charter, the European Convention on Human Rights.

---

* Professor, PhD, "Nicolae Titulescu" University of Bucharest, Faculty of Social and Administrative Sciences (email: purda_nicolae@yahoo.com).

[1] *Frédéric Sudre*, *Droit européen et international des droits de l`home, 6*é *edition refondue*, (Paris: PUF, 2003), p.140.

[2] Decsion in the case *Nold*, no 4/73 of 14 May 1974, Rec., p. 491.

The Court's observation concerning the fundamental rights has gradually expanded from acts adopted by Community to those of institutions of the national with incidence in the area of the Community law.[3] Therefore, the Court has accepted that there are limits to the legislative activity of the European Community, arising from the need to respect human rights, which was gradually considered as a condition of the lawfulness of Community acts.

The encompassing of Fundamental Rights by the Court in Luxembourg was based on the constitutional traditions common to the Member States and the international human rights acts. Also the Community law contains specific provisions on free movement and non-discrimination. The Court of Justice, based on essentially economic provisions of the Community law, deduced by a liberal interpretation and an array of social rights.

In order to ensure an effective protection of fundamental rights, the European judge relates primarily to Community's texts. Except for the free movement of persons and non-discrimination, the economic and social rights have only a programmatic nature, they cannot be invoked in court other way than by means of provisions of secondary Community law.[4]

2. Principles deriving from community law (constitutive treaties) in the protection of human rights

The principle of free movement of persons and non-discrimination included in the Treaty establishing the European Community (EC Treaty) are "structural" fundamental principles of the Community.

2.1. The principle of free movement of persons

The freedom of movement is a fundamental principle of community's construction, since its objective is to create a common market so the four freedoms may be guaranteed -freedom of movement of persons, freedom of movement of goods, free movement of capital and freedom of movement of services.[5]

The principle of free movement is differentially applied according to whether they are citizens of the Member States or citizens of other States. The freedom of movement shall entail the right of States to exercise control over the entry of foreigners into their territory.

The freedom of movement was first recognized by the Treaty of workers, but rights related to freedom of movement have been extended to the worker's family members, regardless of their nationality. Article 48, par.3 of the Treaty establishing the European Community provides workers the right to move freely within the Member States, to establish themselves inside the Members States in order to continue to work and even after quitting the job. Also, workers have the right to reunite with their family inside the State they are working.

The free movement of Community nationals has a wide field of application, assuming the freedom of establishment within a State, and to choose a job in one of the Member States.

The Treaty on European Union provides Community members the right to move and to reside in the Member States, which is an attribute of the European citizenship.

For non-Community nationals, the Schengen agreements authorize them to enter and move freely in the Schengen area for a period of 3 months, after which national rules are applied and each Member State is free to regulate the issue of immigration in compliance with international commitments.[6]

---

[3] Decsion in the case *Wachauf,* no.5/88 of 13 July 1989, Rec., p. 2609.

[4] Bianca Selejan-Guţan, *Protecţia europeană a drepturilor omului*, (Bucharest: C.H.Beck, 2011), p.243.

[5] Raluca Miga-Beşteliu, Catrinel Brumar, *Protecţia internaţională a drepturilor omului*, (Bucharest: Universul Juridic, 2010), p.79.

[6] Ibidem, p.80.

2.2. The principle of non-discrimination

The Community law has no unique and general provision to enshrine discrimination in all areas. Therefore, the Court of Justice of European Union has made this principle one of the fundamental principles of Community law. The EC Treaty makes several references to discrimination, but only in two specific areas, citizenship and sex.

2.2.1. Restraint of discrimination based on nationality

The Article 6 of the EC Treaty prohibits widespread discrimination based on nationality. This prohibition is then resumed in special cases. A general provision provides greater efficiency to others, strengthening prohibitions and limiting exceptions under special provisions, especially the reserve of "public order" or the special case of employment in public administration. Special provisions are set out in the secondary legislation.[7]

EU law prohibits discrimination based on nationality only to citizens of EU Member States. Therefore, different treatments may arise for foreign citizens.

2.2.2. Restraint of discrimination based on sex

The constituent treaties do not contain general provisions on gender equality, but there are many texts that refer to it. For example art.119 of the Treaty establishing the European Community provides that States must ensure the implementation of the principle of equality of payment between men and women for equal work. This provision is directly applicable and has direct effect. Individuals can appeal it afore the national courts.

The area of the principle of equality is extended to professional equality, social security, access to employment, working conditions.[8]

The Court of Justice ruled that professional equality is incompatible with night work prohibition for women since it is allowed for men.

3.Concerns of the European Union and communities on human rights

Political institutions of the Communities have clearly expressed their position on human rights. In a Joint Statement of the Council, Parliament and Commission on 5th April 1977 on fundamental rights, the three institutions emphasized the importance it attaches to fundamental human rights and alleged that in exercising their powers and in pursuit of Communities' goals they observe and will continue to observe these rights.

In 1989, the European Parliament enacted a Declaration of Rights and Fundamental Freedoms, which sets forth a "catalogue" of rights without legal binding, since this document was not mentioned in subsequent treaties. Also, in 1989 was adopted the Community Charter of the Fundamental Social Rights of Workers, programmatic enforceable document in protection socio-economic rights.

The Single European Act of 1986 expresses the Member States' will to promote democracy based on fundamental rights.

The jurisprudential efforts of the Court of Justice had conventional consecration by art. F parag.2 of the **Treaty on European Union** (**Treaty of Maastricht** of February 7, 1992, entered into force on November 1, 1993), which states that "The Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights of 1950 and as they result from the constitutional traditions of the Member States, as general principles of Community law".

The treaty introduced the institution of *European citizenship*, stating some of its specific rights: freedom of movement and residence within the Member States, the right to elect and be elected in local elections and European Parliament elections in their country of residence, the right to petition the European Parliament and the right to refer to the European Ombudsman, the right to

[7] Bianca Selejan-Guţan, op.cit., p. 244.

[8] Raluca Miga-Beşteliu, Catrinel Brumar, op.cit., p.81.

diplomatic and consular protection by any Member State when the State of nationality is not represented in a third country.[9]

The absence in a Treaty of the enumeration of fundamental human rights inevitably involves an appeal to the Court of Justice.

The **Treaty of Amsterdam** of October 2, 1997, entered into force on May 1, 1999 included important provisions on fundamental rights. Article 6, parag.1 of the Treaty enshrines the three principles which form the "common heritage of values" of Member States: human rights, democracy, the rule of law. These principles were undertaken from the Statute of the Council of Europe and became true constitutional principles of the European Union.[10]

For that matter, Article 49 of the Treaty achieves by the respect of these principles a condition of adherence in the Union. The Treaty enshrines the legal guarantee of respect for human rights by recognizing the jurisdiction of the Court of Justice in enforcing the fundamental rights of the European entities (Article 46, letter d).

The Treaty expressly authorizes the Council to take appropriate action to combat discrimination based on sex, race, ethnicity, religion, opinion, disability, age or sexual orientation, acting unanimously on Commission's proposal and after consulting the European Parliament.

The Treaty also enables the Council, on a proposal by one third of the Member States or the Commission, to suspend certain rights of a Member State which might be responsible for serious and persistent violations of these rights.

Social provisions of the Treaty provide the groundwork for the Community's legislative action in order to improve working and living conditions of workers, including equality between men and women in the labour market.[11]

TheTreaty of Amsterdam also aims at the recognition of new rights that are part of the process of integration of policies related to free movement of persons within the Community pillar and creating an area of freedom, security and justice.

The new rights introduced by the Treaty are: the right to employment, access to documents and the fight against discrimination. The right to access documents, as opposed to European "administration", guarantees each and every European citizen or legal persons resident or localized in a Member State, a right to access documents of The European Parliament, Council and Commission, to strengthen the principle of transparency. [12]

The **Treaty of Nice** of 25 February 2000 (which entered into force on 1 February 2003) completed the area of political control over the observance of fundamental rights by Member States, giving them both a preventive function, of alert and repressive, to sanction the given States.

The preventive role is exercised by determing a risk of inobservance of EU principles by a Member State, this role is exercised by the Council gathered in regular formation, with a majority of 4/5, by the reasoned proposal by one third of the Member States of the European Parliament or the Commission and with the assent of Parliament. Basically, the Council shall make recommendations to the State and then monitor the progress.

The Treaty provided the opportunity for the State in question that within one month from the moment of determining serious and persistent infringement of human rights by Council, it may appeal to the European Court of Justice but only on matters of procedure. The Court may assess the legality of sanctions adopted by the Council, but only for substantive reasons.

The idea of "coding" EU human rights concept in a single document to harness both the traditions of the Member States and previous experience of the organization, was achieved by the

---

[9] Ion Diaconu, *Drepturile omului în dreptul internaţional contemporan,* (Bucharest: Lumina Lex, 2010), p.293.
[10] *Frédéric* Sudre, op.cit, p.147.
[11] Ion Diaconu, op.cit., p.294.
[12] Raluca Miga-Beşteliu, Catrinel Brumar, op.cit., p.84.

adoption on December 7, 2000, the Conference of Nice, the **Charter of Fundamental Rights of the European Union**, which remained outside the treaty document, therefore it has no legally binding.

In an amended version, the Charter of Fundamental Rights was introduced in Title II of the draft **Treaty on a Constitution for Europe** which was signed in Rome on October 29, 2004 by the Heads of State and Government of Member States of the European Union, but remained only a project because it was rejected by referendum in France and the Netherlands.

Treaty of Lisbon, signed on December 13, 2007 and entered into force on December 1, 2009, invests with legally binding the Charter of Fundamental Rights, with some additions to the original (regarding personal data protection, the right to good administration, access to EU documents) without reduplicating the Charter. Hence, the Treaty extends the jurisdiction of the EU in general and the Court of Justice of the European Union to all provisions of the Charter. In addition, the Treaty reasserts the principle of human rights and fundamental principle of the EU and provides the accession states of the European Union to the European Convention of Human Rights and Fundamental Freedoms.

By these provisions, the Treaty of Lisbon marks the decisive step in putting the entire EU's activity based on fundamental human rights.[13]

The Treaty has brought some changes in the procedures to be followed in cases of human rights violations by a Member State. Thereby, the preventive procedure allows the Council to "establish that there is a evident risk of a serious inobservance by a Member State" of values such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of those belonging to minorities. Before acting such a determination, the Council monitors the State in question and may address recommendations, deciding at the same time.

The procedure with punitive purpose takes place within the European Council, which after the observation may decide by qualified majority the suspension of certain rights up against the State in question resulting from application of the Treaties, including the voting rights of the representative of the Government in the Council taking into account the consequences such a suspension of the rights and obligations of natural and legal persons. This way it was established a clear link between EU membership and common values including respect for human rights.

4.Court of Justice of the European Communities and the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Court of Justice of the European described the Convention on Human Rights as being part of the international instruments capable of providing 'directions' to the Court for determing fundamental rights in the international legal order (Case *Nold* -1974). Accordingly, the Court of Justice in its resolutions referred, in particular, to the European Convention on Human Rights.

In its subsequent decisions, the Court referred to the European Convention on Human Rights on the right to property, the right to respect for private and family life, home and correspondence, the right to marry, freedom of association, freedom of thought, freedom of expression, the non-retroactivity of criminal law, the principle of legality of criminal offenses and penalties, the right to a fair trial. For example, the Court confirmed that Article 11 of the Convention on Freedom of Association is one of the fundamental rights protected by the Community legal order.[14]

In one of its decisions, the Court expressly stated that draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have

[13] Ion Diaconu, op.cit., p.295.

[14] Jean-François Renucci, *Tratat de drept european al drepturilor omului*, (Bucharest: Hamangiu, 2009), p.666-680 and 682-699.

collaborated or acceded and it has given a "special significance" to the European Convention in this regard.[15]

Then the Court's jurisdiction to review the compatibility of national measures implementing Community law with the European Convention on Human Rights was recognized and switched to direct invocation of European Court of Human Rights on the grounds of its resolutions.[16]

Regarding the implementation of these principles, the Court stated the following:[17]

- shall not accept actions incompatible with fundamental rights recognized and guaranteed by the constitutions of the Member States;

- international documents on human rights on which the Member States have cooperated on or acceded may give some indication of what is necessary to take into account within Community law, which allows the integration of the European Convention on Human Rights into EU law through general principles, as European minimum standard;

- fundamental rights should not be regarded as absolute, but taking into account the social function of property and protected activities by applying limitations justified by objectives of general interest pursued by the Community.

The Court considered human rights as a condition of the lawfulness of Community acts and agreed that specific measures can be taken to protect the Community's human rights without amending the Treaties and Community's objectives.

Although the European Convention on Human Rights is a prerogative source of inspiration for the Court in Luxembourg, it must report the European interpretation (carried out by the European Court of Human Rights and must be taken together with the Convention's provisions, with whom it has an inherent and common body) with Community judiciousness with specific Community construction.[18]

The European Court of Justice may invest the provisions of the European Convention on Human Rights with an autonomous interpretation and ensures the rights only a "protection by ricochet", namely the situations related to the application of Community law. Therefore, theoretically, it may arise in cases of discrepancies of interpretation.[19]

Although formally, the Convention does not affiliate the Court in Luxembourg, it cannot ignore the interpretation and application of the Convention by the Strasbourg Court, especially since some concepts of the Convention received autonomous meaning and interpretation by it.

The Court of Justice has sometimes exceeded borders imposed by the European Convention, inferring some fundamental rights which are not provided for this: the right to free exercise of economic activity, the right to export and right to family reunification.[20]

In recent jurisprudence, the Court in Luxembourg began to refer directly to the jurisprudence of the Strasbourg Court, adopting its interpretation.[21]

The two jurisprudences met especially in the protection against discrimination, and other rights such as property or freedom of expression. Most times, the positions of the two European Courts are converging, especially in the socio-economic measures taken by states (social contributions related to the age criteria for retirement, pension rights of teachers and so on). In the field of non-discrimination, the two Courts are located on different positions; the Community law is providing more extensive protection against discrimination than the European Court of Human Rights.[22]

---

[15] Decisions in cases *Rutili*, no.36/75,Rec.,1219, pct.32 and *ERT* no. C-260/89, Rec.,2961, p.41.
[16] Decisions in cases *Wachauf,* no.5/88, Rec.2609 and *Roquette Freres SA*, no. C-94/2000, pct.29.
[17] Ion Diaconu, op.cit., p.285.
[18] Raluca Miga-Beşteliu, Catrinel Brumar, op.cit, p.82.
[19] *Frédéric* Sudre, op.cit., p.143.
[20] Jean-François Renucci, op.cit., p.681-682.
[21] In case *Baustahlgewebe Gmbh c. Comisiei* (1995).
[22] Bianca Selejan-Guţan, op.cit., p.246.

5. Charter of Fundamental Rights of the European Union

The Charter was enacted by the European Council at the Summit in Nice on December 7, 2000, as inter-institutional agreement (joint statement of the European Parliament, the EU Council and the European Commission). Along with changes resulting from the 2004 IGC, the Charter was solemnly proclaimed in Strasbourg on December 12, 2007 and separately published in the Official Journal. Currently, it has the same legal value as the Treaties, in accordance with paragraph 1 of Article 6 of the EU Treaty as amended by the Treaty of Lisbon. The Charter of Fundamental Rights became, from the perspective of the Lisbon Treaty, a legally binding document of the European Union, which engages the EU institutions, the Member States when implementing Community law and, as far as it relates to individual acts of individuals is mandatory for EU citizens.

The Charter is the first international legal instrument which gives expression to the principle of indivisibility of human rights, including political, civil, economic, social and cultural rights, all being envisaged as shared values of the Union.

The rights presented in the Charter are grouped into six titles as: dignity, freedom, equality, solidarity, citizenship and justice.

Two articles of the Charter bring under regulation the relations with other documents in the field of human rights, in particular the European Convention: Article 52 paragraph 3 and Article 53. The Article 52, paragraph 3 provides that "Insofar as this Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, the meaning and scope are the same as those presented by the said Convention". At the same time, Article 53 provides that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in the fields of application, by Union law and international law and international conventions to which the Union or all the Member States are parties, and in particular the European Convention on Human Rights and Fundamental Freedoms, and the constitutions of the Member States".

Consequently, the international instruments are regarded as a *minimum standard* to which the protection provided by the Charter may be increased, but not decreased.[23]

The repeated references to the European Convention on Human Rights and the designation of its provisions as a source of fundamental rights is intended to substantially close in the two documents, in order to ensure their uniform interpretation and application.

However, full coherence makes the accession of the European Union its self-necessary in order to avoid a double standard in implementing the two documents and the decisions of the two Courts, keeping the autonomy of the Community's legal.[24]

A first step towards incorporating the Community legal system of rights protection under the European Convention on Human Rights was made by the European Court of Human Rights in the case *Bosphorus Airways v. Ireland* (2005).[25] In its decision, the Court asserted that any measures taken by Member States under other international obligations undertaken are justified as long as these organizations are considered to protect human rights, both on offered material guarantees and the mechanisms of control of their protection, in a way that it can be considered *at least equivalent* to that provided by the Convention.

The European Court used for this particular decision a special criterion in order to determine the responsibility of the States: it shall not be engaged "if a State does nothing but to implement international legal obligations". Thence, the *discretion criterion* is decisive in this regard. If the State is provided with such power in the execution of its international obligations, then it remains

[23] Ion Gâlea, *Aderarea Uniunii Europene la Convenţia Europeană a Drepturilor Omului*, (Bucharest, C.H.Beck, 2012), p.34.

[24] Ion Diaconu, op.cit., p.302.

[25] Bianca Selejan-Guţan, op.cit., p.248.

responsible for its acts regarding the observance of the European Convention. For obligations arising from the Community law, however, the Court has created "immunity" from this point of view.

It was given a special role in human rights and community institutions to the Charter of Fundamental Rights of the European Union.

In 2001, the European Commission stated that any legislative proposals and regulatory act shall be subject, even during its development under normal procedures, of *a priori* compatibility control with the Charter. The EU Council has indirectly recognized the importance of the Charter by referring to it along with the European Convention, in the preamble to Directive 2003/86 on the right to family reunion.

The Charter has been regarded as the basis for a decision by the Court of First Instance[26], and also the European Court of Human Rights referred to the Charter in one of its decisions.[27]

The Charter was mentioned for the first time, once with the acknowledgement of its importance for Community law in a decision of the Court of Justice of the European Communities - *European Parliament v. Council of European Union*, June 27, 2006.[28]

The case was also related to Directive 2003/86, and the Court in Luxembourg, recognizing a wide margin of appreciation of States on granting the right to family reunion, which made a "symbolic recognition" of this document's role: "If this Charter is not a legal instrument with binding force, the Community legislature apprehended, however, to recognize its importance, by stating in the second consideration of the Directive that the latter observes the principles recognized by Article 8 of the European Convention, and also by the Charter".

In the same decision, the Court also displays its own view on the connections between the Charter and the European Convention: "the primary objective of the Charter (...) is to reaffirm the rights deriving mainly from the constitutional traditions and international obligations common to the Member States, the Treaty on the European Union and the Community Treaties, the European Convention on Human Rights, the Social Charters enacted by the Community and the Council of Europe and the case law of the Court (...) and the European Court of Human Rights".

6.European Union's Accession to the European Convention of Human Rights

The EU Council requested in 1994 a notification emanating from the Court of Justice regarding the possibility of the European Community to become a part to the European Convention on Human Rights, based on the Commission's proposal which had been submitted in 1979. The Court gave a negative opinion (Opinion 2/94), mentioning Community's lack of competence to accede to this Convention, and noting that the only solution would be adopting a special clause in the treaties. The Court affirms it cannot decide on the compatibility of accession to the 1950 Convention by the EC Treaty, in the absence of sufficient information on the institutional arrangements involved.

According to Article 6, parag.2 of the Treaty on European Union as amended by the Treaty of Lisbon, the Union shall accede to the *European Convention on Human Rights and Fundamental Freedoms*. *Union's competences as defined in the Treaties shall not affect the accession*.

The accession shall be accomplished according to the Protocol No. 8 appended to the Treaty of Lisbon, which provides that the Agreement on EU accession to the European Convention referred to in paragraph 2 of Article 6 of the Treaty on European Union shall reflect the necessity of preserving the specific characteristics of EU and EU law, in particular with regard to: a). specific arrangements for the Union's possible participation among the control authorities of the European Convention, b). mechanisms to ensure that proceedings of non-Member States and individuals actions are correctly directed against Member States and / or, where against the European Union.

---

[26] In case *Max mobil Telemkommunikation Service GmbH c.Comisia,* no. T-54/99, din 30 ianuarie 2002, Rec. 2-313.

[27] In case *Christina Goodwin c. Regatului Unit,* complaint no. 28957/95.

[28] Bianca Selejan-Guţan, op.cit., p.249.

Also, Article 2 of the Protocol states that this agreement should ensure that the accession of the EU shall not affect the powers of the European Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States with regard to the European Convention and the Protocols thereto, the measures taken by Member States derogating from the European Convention, in accordance with Article 15 of thereof and also diffidence regarding the European Convention enunciated by Member States in accordance with Article 57 of the Convention.

At the same time Protocol No. 14 to the European Convention of Human Rights, enacted on May13, 2004 and entered into force on June 1, 2010, contains an express provision allowing EU accession to the Convention (Article 17 paragraph 2).[29]

Following the entry into force of the Lisbon Treaty, the EU Council began negotiations in order to establish the negotiating mandate for the finality of the EU's accession Agreement to the Convention. The Commission was appointed as a negotiator of the European Union. After the enactment on June 4, 2010, the mandate given by the Council to the Commission to negotiate the accession to the Convention, the negotiations began between the EU and the Member States of the Council of Europe on July 7, 2010.[30]

Conclusions

Designed to decrease the democratic deficit of which the European Union was repeatedly accused, in order to approach the EU to its citizens, the Charter is integrated into the overall development of the European Union for the consecration and protection of human rights and fundamental freedoms. It is the expression of a political and legal consensus of Member States, the result of an evolution often difficult, but a starting point for new developments in this area.

EU's accession to the European Convention of Human Rights has clearly become a necessity, as long as Member States are parties to the Convention. In so far as they transfer some sovereign powers to the EU institutions, it is difficult to admit that during their exercise ths may act without complying with the Convention. There shall be a Europe of "two speeds" on human rights.

The accession of the EU to the Convention would avoid jurisdictional conflicts arising from the different decisions in similar cases or even in the same case, not on the existence of rights but of their contents, such situations are already arising.

References

- Ion Gâlea – *Aderarea Uniunii Europene la Convenţia Europeană a Drepturilor Omului*, C.H.Beck, Bucharest, 2012.
- Nicolae Purdă, Nicoleta Diaconu – *Protecţia juridică a drepturilor omului*, Universul Juridic, Bucharest, 2011.
- Bianca Selejan-Guţan - *Protecţia europeană a drepturilor omului*, C.H.Beck, Bucharest, 2011.
- Raluca Miga-Beşteliu, Catrinel Brumar – *Protecţia internaţională a drepturilor omului*, Universul Juridic, Bucharest, 2010.
- Ion Diaconu - *Drepturile omului în dreptul internaţional contemporan,* Lumina Lex, Bucharest, 2010.
- Jean-François Renucci – *Tratat de drept european al drepturilor omului*, Hamangiu, Bucharest, 2009.
- Frédéric Sudre- *Droit européen et international des droits de l`home, 6e edition refondue*, Paris, PUF, 2003.

[29] Nicolae Purdă, Nicoleta Diaconu, *Protecţia juridică a drepturilor omului*, (Bucharest: Universul Juridic, 2011), p.86.

[30] Ion Gâlea, op.cit., p.92.

INDIRECT EXPROPRIATION IN ROMANIAN BITs

LAURA-CRISTIANA SPĂTARU-NEGURĂ*

Abstract
Direct expropriations and nationalizations are rare nowadays, but the problem of indirect expropriation is far from being resolved. International legal texts provide very general and brief provisions regarding this issue. Usually, bilateral investment treaties contain general and brief provisions on indirect expropriation. The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated.
In the last years, the expropriation claims arising out of regulatory measures have attracted the public attention like no other issue in international investment law. However, not all state measures which interfere with properties amount to expropriation. Moreover, it was suggested in the doctrine that the focus of debate in this area of law has shifted from the standard of compensation to the definition of expropriation. The delimitation is so delicate that the problem is not anymore if the compensation awarded was appropriate, but if there was an expropriation at all.
Since foreign investors' protection from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements, the purpose of this paper is to analyse the indirect expropriation provisions in the most representative BITs concluded by Romania.

***Key words**: expropriation, investment, foreign investor, BIT, creeping*

Introduction

In practice the line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated.

Although we all know the general principle providing that a state may do whatever it wants on its territory, there are specific clear rules on compensation for expropriation and settlement of disputes through a court which is outside the state host. A well-known human right is the right to property which must be respected also for foreigners, therefore, if his property is taken, he must be compensated.

As mentioned in a previous paper[1], the *treatment of foreign investment* is defined as the set of principles and rules of international and national law governing the international investment, since its creation until its liquidation. Principles and rules of international law can be derived either from non-conventional sources and, in particular, from the general principles of international law or conventional sources, treaties and agreements, both multilateral and bilateral.

Since foreign investors' protection from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements, the purpose of this paper is to analyse the *indirect expropriation* provisions in the most representative BITs concluded by Romania.

For this matter, we have selected 20 representative BITs concluded by Romania[2] (*out of the 82 BITs concluded by Romania as of mid-June 2012*[3] *- besides the 63 other IIAs*), in order to observe the legal provisions concerning this issue. Please have in mind that the order of the BITs is strictly alphabetical.

---

* Assistant Lecturer, PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest, Romania, LLM alumnus, Fribourg University, Switzerland (email: negura_laura@yahoo.com).

[1] Spătaru-Negură Laura-Cristiana, Spătaru-Negură Mihai, *Cases of Indirect Expropriation in International Economic Law*, CKS E-book, 2012, ISSN 2068-7796, p. 821.

[2] Available at http://unctad.org/Sections/dite_pcbb/docs/bits_romania.pdf.

[3] UNCTAD, World Investment Report…, p. 201.

Paper content

I. The World of Bilateral Investment Treaties

Bilateral investment treaties (BITs) constitute the most important instrument for the international protection of foreign investment. Since the *adoption of the first BIT in 1959*, the number of such treaties has grown steadily and, by the end of 2011, reached a total of 2,833 BITs. The most *dramatic increase* took place during the 1990s, when their number quintupled. Initially, the BITs were concluded between a developed country and a developing country, usually at the initiative of the developed country. The developed country (i.e. a capital exporting country) entered into a BIT with a developing country (i.e. a capital importing country) in order to secure additional and higher standards of legal protection and guarantees for the investments of its firms than those offered under national laws. The developing country, on the other hand, would sign a BIT as one of the elements of a favourable climate to attract foreign investors[4].

The main provisions dealt within the BITs over the time are:

- the scope and definition of foreign investment;
- admission of investments;
- national and most-favoured-nation treatment;
- fair and equitable treatment;
- guarantees and compensation in respect of ***expropriation*** and compensation for war and civil disturbances;
- guarantees of free transfer of funds and repatriation of capital and profits; and
- subrogation on insurance claims; and dispute-settlement provisions, both State-to-State and investor-to-State[5].

In addition, some BITs include provisions regarding:

- transparency of national laws;
- performance requirements;
- entry and sojourn of foreign personnel;
- general exceptions; and
- extension of national and most-favoured-nation-treatment to the entry and establishment of investments.

Within these broad themes, the exact content of BIT provisions varies considerably, even between BITs signed by the same country, reflecting different approaches as well as bargaining positions. Over the years, as practice develops, some provisions in BITs have tended to become more elaborated.

From the information provided by UNCTAD, it appears that "*FDI inflows rose 16 per cent in 2011, surpassing the 2005–2007 pre-crisis level for the first time, despite the continuing effects of the global financial and economic crisis of 2008–2009 and the on-going sovereign debt crises. (...) A resurgence in economic uncertainty and the possibility of lower growth rates in major emerging markets risks undercutting this favourable trend in 2012. UNCTAD predicts the growth rate of FDI will slow in 2012, with flows levelling off at about $1.6 trillion, the midpoint of a range. Leading indicators are suggestive of this trend, with the value of both cross-border mergers and acquisitions (M&As) and greenfield investments retreating in the first five months of 2012. Weak levels of M&A announcements also suggest sluggish FDI flows in the later part of the year*"[6].

---

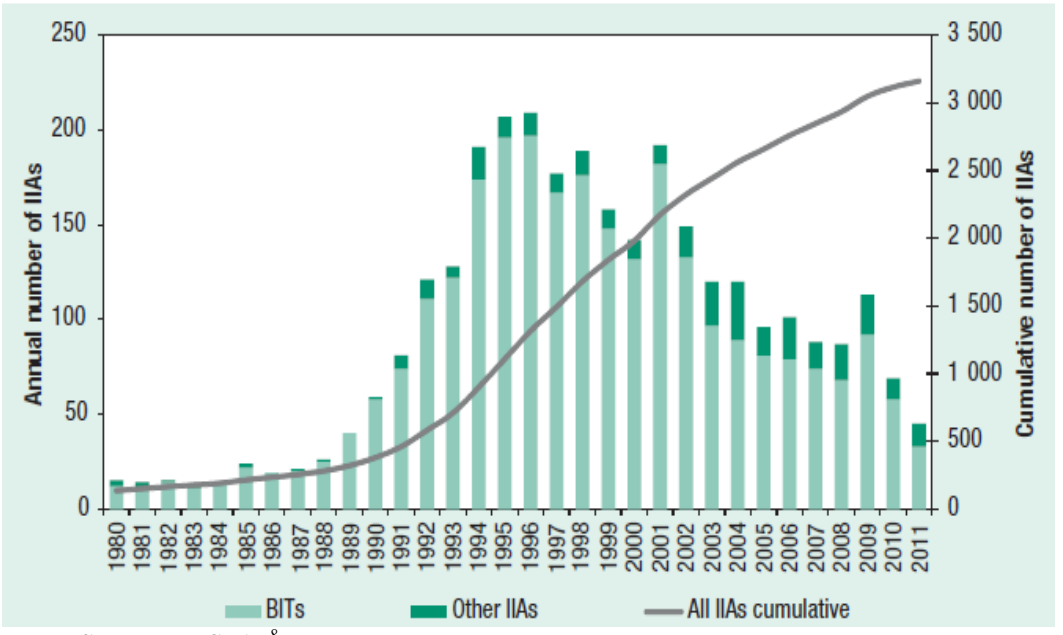
[4] UNCTAD, Bilateral Investment Treaties 1959-1999, United Nations New York and Geneva, 2000, p. 1, available at http://unctad.org/en/Docs/poiteiiad2.en.pdf.

[5] Idem, p. 20.

[6] UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, United Nations New York and Geneva, 2012, p. xiii, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (hereinafter "UNCTAD, World Investment Report…").

As UNCTAD statistics provide, by the end of 2011, there were overall 3,164 agreements international investments agreements (IIAs), which include ***2,833 bilateral investment treaties*** (BITs) and 331 "other IIAs", including, principally, free trade agreements (FTAs) with investment provisions, economic partnership agreements and regional agreements[7]. It appears however that the number of IIAs decreased in 2011 than in 2010 (in 2011 there were signed 47 IIAs - 33 BITs and 14 other IIAs, while in 2010 there were signed 69 IIAs). What can be the cause of this decrease? There may be several causes, like for instance, the tendency to conclude regional treaties or the controversies and sensitivities of IIAS.

Figure 1 Trends of BITs and "other IIAs", 1980–2011



Source: UNCTAD[8]

Although, in quantitative terms, BITs still dominate in terms of economic significance, *regionalism* becomes more important. "*The increasing economic weight and impact of regional treaty making is evidenced by investment negotiations under way for the Trans-Pacific Partnership (TPP) Agreement; the conclusion of the 2012 trilateral investment agreement between China, Japan and the Republic of Korea; the Mexico-Central America FTA, which includes an investment chapter; the fact that at the EU level the European Commission now negotiates investment agreements on behalf of all EU member States; and developments in ASEAN*"[9].

In most cases, these regional treaties are FTAs. What is the big advantage of these FTAs? They bring *consolidation and harmonization* of the investment rules, representing a step towards multilateralism.

We should keep in mind the fact that at the EU level, the European Commission is now negotiating not only regarding the liberalization of trade and investment, but also on conditions

[7] Idem, p. xx.
[8] Idem, p. 84.
[9] Idem, p. xx.

related to protection of investment on behalf of all member States. Taken together, EU member States account for about *half of the world's BITs*. Even though FTAs are pursued by the EU, at the same time, individual EU member states continue to conclude BITs with third States: since the EU Lisbon Treaty's entry into force, 45 such agreements have been signed, including 10 in 2011[10]. But what will happen to this BITs signed by the member states? They will remain in force until replaced by EU agreements, but they will have to be amended if they are not accordingly with the EU legislation.

Therefore, until FTAs are concluded, the BITs concluded by member states are very important and remain the relevant agreements providing investment protection and promotion.

II. Expropriation Legal Provisions from Selected BITs

Since foreign investors' protection from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements, the purpose of this paper is to analyse the *indirect expropriation* provisions in the most representative BITs concluded by Romania.

As mentioned before, we have selected 20 representative BITs concluded by Romania[11] (*out of the 82 BITs concluded by Romania as of mid-June 2012[12] - besides the 63 other IIAs*), in order to observe the legal provisions concerning this issue.

The respective BITs were concluded with the following states (*please have in mind that the order of the BITs is strictly alphabetical*): Republic of Albania[13], Republic of Argentina[14], Australia[15], Bulgaria[16], Canada[17], People's Republic of China[18], Czech Republic[19], Finland[20], Federal Republic of Germany (*concluded with the Socialist Republic of Romania*)[21], Hellenic Republic[22], Hungary[23], Republic of Korea[24], the Lebanese Republic[25], Mongolia[26], Slovak Republic[27], Kingdom of Sweden[28], Republic of Turkey[29], United Kingdom of Great Britain and Northern Ireland[30], United Arab Emirates[31], United States of America[32].

We noticed that a typical provision on expropriation of these BITs would be:

---

[10] Idem, p. 86.
[11] Available at http://unctad.org/Sections/dite_pcbb/docs/bits_romania.pdf.
[12] UNCTAD, World Investment Report…, p. 201.
[13] Signed on 11 May 1995, entered into force on 2 September 1995.
[14] Signed on 29 July 1993, entered into force on 1 May 1995.
[15] Signed on 21 June 1993, entered into force on 22 April 1994.
[16] Signed on 1 June 1994, entered into force on 23 May 1995.
[17] Signed on 8 May 2009, entered into force on 23 November 2011.
[18] Signed on 16 April 2007, entered into force on 1 September 2009.
[19] Signed on 22 January 2008, entered into force on 30 July 2009.
[20] Signed on 26 March 1992, entered into force on 6 January 1993.
[21] Signed on 12 October 1979, entered into force on 7 August 1981, available at http://unctad.org/sections/dite/iia/docs/bits/germany_romania.pdf (this text is the only text provided by UNCTAD, although in a list of BITs concluded by Romania it appears that a BIT concluded between Romania and Germany has been signed on 25 June 1996 and entered into force on 12 December 1998 http://unctad.org/Sections/dite_pcbb/docs/bits_romania.pdf).
[22] Signed on 23 May 1997, entered into force on 11 June 1998.
[23] Signed on 16 September 1993, entered into force on 6 May 1996.
[24] Signed on 23 January 1998, entered into force on 31 March 2001.
[25] Signed on 15 April 2009, no date of entry into force appears on www.unctad.org.
[26] Signed on 6 November 1995, entered into force on 15 August 1996.
[27] Signed on 3 March 1994, entered into force on 7 March 1996.
[28] Signed on 29 May 2002, entered into force on 1 April 2003.
[29] Signed on 3 March 2008, entered into force on 8 July 2010.
[30] Signed on 13 July 1995, entered into force on 10 January 1996.
[31] Signed on 11 April 1993, entered into force on 7 April 1996.
[32] Signed on 28 May 1992, entered into force on 15 January 1994.

Investments by investors of either Contracting Party shall not be expropriated, nationalized or ***subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party*** *except under the following conditions:*

a) the measures are taken in the ***public interest*** *and* ***under due process of law****.*

b) the measures are ***clear and not discriminatory****, and*

c) the measures are accompanied by provisions for the payment of ***prompt, adequate and effective compensation****. Such compensation shall amount to the* ***market value*** *of the investments affected immediately before the measures referred to above in this paragraph occurred or became public knowledge and it shall be freely transferable in convertible currencies from the Contracting Party, at the official rate of exchange prevailing on the date used for the determination of value. The compensation shall be transferable without delay in a* ***freely convertible currency****. The compensation shall include interest until the date of payment at an* ***appropriate commercial rate*** *as determined by the* ***Central Bank*** *of the Contracting Party, and its amount shall be subject to* ***review by due process of law****, within the framework of the legislation of the Contracting Party in the territory of which the investment has been made.*

III. General Remarks on Indirect Expropriation

From the beginning, we have to emphasize that under public international law, the states have a sovereign right to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons. In order that this taking to be lawful, the exercise of this right requires the accomplishment of some conditions that can be seen in all the above mentioned BITs:

(a) Property has to be taken for a **public purpose**;
(b) On a **non-discriminatory** basis;
(c) In accordance with **due process of law**;
(d) Accompanied by **compensation**.

Through these BITs, states have established a guarantee for foreign investors against the expropriation of their investments without compensation, and we must underline that "*today virtually all bilateral investment treaties contain an expropriation provision*"[33]. As regards the indirect expropriation, we realize that the indirect acts of takings are quite the same defined in the BITs analysed, although the doctrine and the arbitral tribunals' case law have still problems in defining this situation.

Well, indirect expropriation supposes ***total or near-total deprivation of an investment*** but without a ***formal transfer of title or outright seizure***[34]. UNCTAD states however that it can be argued that even when an IIA "*does not specifically mention indirect takings, the notion of expropriation is broad enough to cover relevant measures of both direct and indirect kind*"[35]. In our BITs, there are explicit references to indirect expropriation in one way or another.

As a general remark, we note that the articles on expropriation are placed quite at the beginning at the BITs, usually in article 3, 4 or 5. This fact is due to the high importance of this provision in the foreign investment protection.

However, the terminology is not fully uniform, although the idea is quite the same (e.g. "*tantamount to expropriation or nationalization", "any other measure having the same effect [to expropriation]", "effect equivalent to nationalisation or expropriation", "tantamount to expropriation or nationalization", "or indirectly, measures of expropriation, nationalization or any*

[33] UNCTAD, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, p. 5, available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (hereinafter "UNCTAD, Expropriation …").

[34] Idem, p. 7.

[35] Idem, p. 8.

other measures having the same nature or the same effect", "measures of expropriation or nationalization, requisition or any other measures of like effects such as freezing compulsory sale of all or part of an investment").

We are surprised to observe that no subcategories of indirect expropriations are used, for instance *creeping, de facto, constructive, disguised, consequential, regulatory or virtual* expropriation. Of course that out of these, the subcategory most important is the so-called *creeping* expropriation that results in a deprivation of property or a loss of control, but which occurs gradually or in stages. The arbitral tribunal in *Generation Ukraine v Ukraine*[36] *qualified this special form of expropriation as coming "with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property"*[37].

We note also that these BITs do not include special exceptions regarding certain types of measures, for instance, compulsory licenses for intellectual property rights. Such an example could be the Article 13.5 of the Canadian BIT model (2004) which provides that: "*The provisions of this Article [Expropriation] shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement*"[38]. Of course, this exception ensures coherence between WTO law and international investment law.

For instance, in the UNCITRAL Partial Award *Lauder v Czech Republic*, dated 13 September 2001, the arbitral tribunal stated that an indirect expropriation "*does not involve an overtaking but effectively neutralises the enjoyment of property*". In the award dated 12 April 2002 on the ICSID case No. ARB/99/6, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, indirect expropriation was described as "*measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights*".

Another problem is that the expropriation provisions refer to the expropriation of "*investments*", but no definition of an investment can be found in the BITs, therefore the expropriation challenged under an investment treaty depends on how *narrow* or *broad* is the interpretation of such a term. Some recent treaties include however a clarification that "*an action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment*" (2004 US model BIT)[39]. The expression "*property interest in an investment*" can be however subject to interpretation, especially in light of the host state domestic law.

In 4 BITs analysed (i.e. the BITs concluded with Czech Republic, Hungary, Slovak Republic and with United Arab Emirates) we have discovered a special provision on the issue of taking of assets from a domestic company in which a foreign investor holds shares, for instance the article 5 paragraph 3 of the Czech Republic-Romania BIT: "*The provisions of paragraph 1 of this Article shall also apply where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares*". Article 6 paragraph (1) iv) of the BIT concluded with the United Arab Emirates is going even far: "*iv) When a Contracting nationalizes or expropriates the investment of a legal person which is established or licenced under the law in force in its territory and in which the other Contracting Party or any of its investors owns shares, stocks,*

[36] ICSID Case No. ARB/00/9.
[37] UNCTAD, Expropriation …, p. 11.
[38] Available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.
[39] UNCTAD, Expropriation …, p. 5.

debentures or other rights of interest, it shall ensure that prompt, adequate and effective compensation is received and allowed to be repatriated.

Such compensation shall be determined and paid in accordance with the provisions of Paragraph (1) (iii) of this Article".

Why would the above mentioned provision be important? It would be important because this type of provision would result in compensation paid to the foreign shareholders, even in the situations when just some assets are expropriated from the domestic company – situation when it would not result in the loss of full value of the shareholding. Several tribunals have chosen however to consider the whole business enterprise as an investment, and not the constituent parts.

As regards the requirements for a *lawful* expropriation, we noticed that the four crystallized criteria appear in every BIT - *public purpose, non-discriminatory manner, due process of law and payment of compensation* – even though the BITs display some difference in formulations.

However, there are some other BITs which add further conditions to assess the legality of an expropriation - for instance, the United Arab Emirates-Romanian BIT (1996) which provides that the expropriation "*does not violate any specific provision or contractual stability or expropriation contains in an investment agreement between the natural and legal persons concerned and the party making the expropriation*" (Article 6 paragraph (1) letter (d)). Another example would be the Netherlands-Oman BIT (2009) which sets forth that the expropriatory measures shall not be "*discriminatory or contrary to any specific undertaking which the former Contracting Party* ***may have given***" (Article 4 letter (b) of the Belgium/Luxembourg-Colombia BIT (2009) which provides that the "*measures shall be taken in a non-discriminatory manner, in good faith …*" (Article IX paragraph (1) letter (b)).

The criterion which has the bigger variation is the payment of compensation. The most used solution is the *Hull standard* - the standard of *prompt, adequate and effective compensation*. The compensation is considered to be *prompt* if it is paid without any delay, *adequate*, if it has a reasonable relationship with the market value of the investment concerned, and *effective*, if paid in convertible or freely useable currency.

In spelling out what constitutes an adequate compensation, several of the analyzed BITs refer to an investment's fair market value. The Australia-Romania BIT provide a back-up solution: "*Where that value* ***cannot be readily ascertained****, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors*".

But Canada-Romania BIT opts for another type of calculating the adequate compensation: *"the* ***genuine value of the investment or returns expropriated*** *immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier"*.

However, no references to *just compensation* (Chile-Tunisia BIT 1998) or *real value* (Slovenia-Turkey BIT 2004) are made in the analysed BITs.

Many older IIAs do not address the issue of *applicable interest*. The trend in recent treaty practice has been to explicitly provide for the payment of interest from the date of the taking until the date of payment, fact that we discover in our BITs. Most recent treaties contain guidelines on the applicable rate of interest and do so in a variety of ways, some of which are rather vague (e.g. "appropriate", "fair", "commercially reasonable" interest, "normal market rate", "usual commercial rate"), while others are quite precise (e.g. LIBOR rate).

Some BITs lay down the obligation to pay interest only in those situations when the payment of the principal amount of compensation is delayed, for instance, article 4 paragraph (2) of the Romania-Turkey BIT provides that "*in the event that payment of compensation is delayed, the investor shall receive interest for the period of any* ***undue delay*** *in making payment*" (emphasis added).

No reference to the *type of interest* – simple or compound – is made. As regards the *currency*, we noticed that many of the BITs analyzed provide that compensation must be paid in a "freely convertible currency" (e.g. the BITs concluded with the Republic of Czech Republic, Greece and Slovakia). The Australia-Romania BIT (1993) provides *that the "compensation shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in any other freely convertible currency*".

Even though there are things that are not provided under this expropriation articles, all of the above mentioned provisions could be considered to be a "high protection model", instead of an "increased predictability" model and a "qualified" model. Under this high protection model, Romania and the other states seek to maximize the protective effect of the treaty. Therefore, such a typical clause contains "*a prohibition against direct and indirect expropriation of investments unless for a public purpose, on a non-discriminatory basis, under due process of law and upon payment of compensation, which shall be prompt (without delay), adequate (fair market value) and effective (freely convertible and transferable currency)*"[40].

Several BITs analyzed provide the possibility for a prompt review: "*The investor affected by a judicial or other shall have a right to prompt review, independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article*" (the Czech Republic-Romanian BIT). There is one interesting provision on this aspect which deserves to be remembered here – article 3 paragraph (2) of the Germany-Romania BIT – but there are historic considerations to be had in mind: "***The legality*** *of any expropriation measure within the meaning of paragraph 2 (b) of the protocol to this Treaty* ***shall be reviewed at the request of the investor*** *in a legal proceeding of the respective Contracting Party:*

(a) In the Federal Republic of Germany: ***in all cases****;*

(b) In the Socialist Republic of Romania: ***only in those cases in which expropriation has not been ordered by law or by a decree of the State Council or by presidential decree***".

We consider that much more things could be said regarding the provisions of the above mentioned BITs, but for sure the decision whether a taking constitutes an indirect expropriation measure is taken on a case by case basis. There is not a magical solution, therefore the arbitral tribunals have to decide each time if the state has violated its obligations towards the foreign investor.

Conclusions

We noticed earlier that the balance is gradually shifting from bilateral to regional treaty making, thereby increasing the impact of regions in IIA rulemaking. In most cases, regional treaties are at the same time FTAs. As UNCTAD underlines, "*by comprehensively addressing the trade and investment elements of international economic activities, such broader agreements can better respond to the needs of today's economic realities, where international trade and investment are increasingly interconnected. It is also notable that investment chapters in new regional agreements typically contain more refined and precise provisions than in earlier treaties. This shift can bring about the consolidation and harmonization of investment rules and represent a step towards multilateralism. However, where new treaties do not entail the phase-out of old ones, the result can be the opposite: instead of simplification and growing consistency, regionalization may lead to a multiplication of treaty layers, making the IIA network even more complex and prone to overlaps and inconsistencies*"[41].

In a future research it would be interesting to analyse the provisions regarding expropriation in FTAs.

[40] UNCTAD, Expropriation …, p. 125.
[41] UNCTAD, World Investment Report …, p. 84.

The right to expropriate is an undisputed prerogative of sovereign States, and, as mentioned before, although the indirect methods of taking have not been identified with any certainty either in arbitral decisions or in the literature, it is unlikely that this deficiency of the law will be cured.

So we must ask ourselves what the foreign investor should do? How can a foreign investor know if the host's state conduct affecting the investment is compensated? How can a foreign investor know whether the host's state conduct affecting the investment is compensable? The law may provide a basis to answer those questions, but the circumstances which determine the question remain crucial for the determination. It is obvious that some governmental actions, in some cases, almost always, will give rise to indirect expropriation finding cases, and therefore to compensation. Other measures will not. Between the two categories will be the "*very brief and hard*" area about which the famous professor Dolzer was speaking, still full of gaps.

References

- Books and articles
- Browlie Ian, *Principles of Public International Law*, Fifth edition, Clarendon Press, Oxford, 1998, p. 1 – 730.
- Brewster Rachel, *Unpacking the State's Reputation*, 50 Harv. Int'l L.J. 231 2009, p. 231 – 269.
- Fortier L. Yves, CC, QC, Drymer Stephen L., *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 13 Asia Pacific Law Review 79 2005, p. 79 – 110.
- Sornarajah M., *The International Law on Foreign Investment*, Third edition, Cambridge University Press, New York, 2010, p. 1 -524.
- Spătaru-Negură Laura-Cristiana, Spătaru-Negură Mihai, *Cases of Indirect Expropriation in International Economic Law*, CKS E-book, 2012, ISSN 2068-7796, p. 820-831.
- UNCTAD, Bilateral Investment Treaties 1959-1999, United Nations New York and Geneva, 2000, available at http://unctad.org/en/Docs/poiteiiad2.en.pdf;
- UNCTAD, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.
- UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, United Nations New York and Geneva, 2012, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.

- Judicial Practice

- *ADF Group Inc.* v. *United States of America*, ICSID Case No. ARB (AF)/00/1, Final Award, January 9, 2003 (F. Feliciano, A. de Mestral, C. Lamm, Arbitrators), 18 ICSID Rev. – For. Inv. L. J. 195 (2003); 6 ICSID Reports 470.
- *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983 (B. Goldman, I. Foighel, E. Rubin, Arbitrators), 1 ICSID Reports 389 (1993).
- *Lauder v Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001.
- *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6.
- *Saluka Investments BV* v. *The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 (A. Watts, Y. Fortier, P. Behrens, Arbitrators), 18(3) World Trade and Arb. Mat. 166 224 n69, 227, 228 n89, 264 n65, 318, 337–38.

- Websites
- www.heinonline.org.
- www.icj-cij.org.
- www.icsid.worldbank.org.
- www.iusct.org.
- www.italaw.com.
- www.oecd.org.
- www.un.org.
- www.unctad.org.
- www.worldcourts.com.

THE EUROPEAN CENTRAL BANK AND THE EUROZONE CRISIS MANAGEMENT

MONICA ŞAGUNA*

Abstract
The Euro is the single currency shared by 17 of the European Union's Member States, which together make up the Euro area. Since its introduction, in January 2002, it became the second most traded currency in the world after the United States dollar. With the launch of the Euro, the monetary policy became the responsibility of the independent European Central Bank, which was created for that purpose, and of the national central banks of the Member States, having adopted the Euro. However, the accumulation of massive and unsustainable deficits and public debt levels in a number of peripheral economies threatened the Eurozone's viability by the end of its first decade, triggering a Eurozone sovereign debt crisis. The institutional mechanisms surrounding the Euro have also been an integral part of the crisis. On this line, the European Monetary Union is supported on one side by treaties and multilateral agreements including the Maastricht Treaty, the Stability and Growth Pact and the Lisbon Strategy and, on the other side, by the European Central Bank. The combination of these institutions has produced a mix of monetary, fiscal and labour market policies with powerful social implications. And, what started as a debt crisis in Greece in late 2009 has evolved into a broader economic and political crisis in the Eurozone and European Union.
In this framework, the purpose of my paper is to analyze the roots of the Eurozone crisis, as the biggest challenge since the Euro adoption and the European Central Bank's response to it. Therefore the objectives are: identification of the reasons that stand behind the crisis, then observing how the crisis has affected the functioning of the European Central Bank and the Euro, and how it was forced to respond and, finally, focusing on the future and the challenges that lie ahead.

Key words: *Euro zone, Euro, crisis, European Central Bank, challenges*

Introduction

Since 2010, the Eurozone debt crisis triggered a growing scepticism about the future of the European Union and of the Eurozone. Across Europe, a fundamental debate is taking place upon this subject and many citizens are concerned about where Europe is heading.

Though, the crisis highlighted the economic interdependence of the European Union, while also underscoring the lack of political integration, needed to provide a coordinated fiscal and monetary response. Since the eruption of the sovereign debt crisis in the Euro area in May 2010, the European Central Bank (or for that matter the Eurosystem) has been in the spotlight of crisis management and resolution.

Having these premises, **my study focuses on the Eurozone crisis, as the biggest challenge since the adoption of the Euro and tries to make an objective analysis of its causes**.

The importance of my study lies in the fact that, only by understanding the reasons that stand behind a crisis, that had and still has deep consequences on the European Union as a whole and on its composing member states, we can learn some lessons, in order to avoid such event happening in the future.

In this highlight, the objectives are: identification of the reasons that stand behind the crisis, then observing how the crisis has affected the functioning of the European Central Bank and the Euro, and how it was forced to respond and, finally, focusing on the future and the challenges that lie ahead.

* Lecturer, PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: angra121@yahoo.com).

To answer at these objectives, I will start by understanding the roots of the Eurozone crisis, in order to find out in the end the challenges that lie ahead.

Therefore, I will divide my paper in three sections:

- The reasons that stand behind the crisis;
- How the crisis has affected the Euro and the functioning of the European Central Bank and how it was forced to respond;
- The future and the challenges that lie ahead;

The existent specialized literature has widely debated this subject, but this paper will try to make an objective and understandable analysis of a matter that preoccupies and affects many countries and, in the end, many people, and implies a coordinated answer at the European Union level.

Paper content

1. The reasons that stand behind the crisis

The *Organization for Economic Cooperation and Development* (OECD)[1] announced the Eurozone debt crisis was the world's greatest economic threat in 2011, and things have only worsened in 2012. The crisis has festered since 2009, when the world first realized Greece could default on its debt. In three years, it's escalated into the potential for sovereign debt defaults from Portugal, Italy, Ireland and Spain.

The European Union, led by Germany and France, struggled to support these members with bailouts from the European Central Bank and the International Monetary Fund. These measures haven't been enough, allowing the crisis to threaten the existence of the Euro itself.

How did such a great crisis evolved?

The creation of the European Union and the founding of one of the most important central banks in the world – the European Central Bank – at the end of the 1990s was an historical accomplishment. Yes, there were sceptics that, right at the start, warned that the Economic and Monetary Union will not survive its first serious recession….but were they right? This is a question that preoccupied in the last years many sound voices.

The origins that stand behind this crisis are considered by the analysts to be multiple, as shown below.

Analysts note that the powerful original members of the European Economic Community, such as Germany, were eager to develop a large and competitive Eurozone, and so allowed less solvent European Union nations to adopt the Euro, even if they had failed to fulfil the criteria outlined by the Maastricht Treaty[2]. Today, all European Union member states - with the exception of the United Kingdom, Denmark, and Sweden - are required to join the Eurozone, only when they meet the criteria[3]. Entry to the Eurozone is controlled by the so-called Eurogroup, which comprises the seventeen Eurozone finance ministers; the group has been led by Luxembourg Prime Minister Jean-Claude Juncker since 2005.

---

[1] The Organization for Economic Cooperation and Development, (OECD) is an association of 34 nations in Europe, North America, and the Pacific. Its goal is to promote the economic welfare of its members, and coordinate their efforts to aid developing countries outside of its membership. Although it was originally based in Europe, it is broadening its scope to become more global. It is working to add six of the fastest growing countries in the emerging markets as members.

[2] The **Euro convergence criteria** (also known as the **Maastricht criteria**) are the criteria which European Union member states are required to meet to enter the third stage of the Economic and Monetary Union (EMU) and adopt the Euro as their currency. The four main criteria, which actually comprise five criteria as the "fiscal criterion" consist of both a "debt criterion" and a "deficit criterion", are based on Article 140 (ex article 121.1) of the Treaty on the Functioning of the European Union.

[3] The Eurozone in crisis, Cristopher Alessi, 23 July 2012.

This is where things have gone wrong. Let us first recall that the convergence criteria relate to government finance, long term interest rates, inflation and real exchange rates. In the year before the introduction of the Euro it was realised that compliance with the government finance criteria after the introduction of the Euro did require additional measures and procedures, so the Stability and Growth Pact was introduced. However, it is now abundantly clear that this Pact was not complied with and that government finance criteria are still not respected by many Euro area countries. The other criteria were more or less ignored. The interest rate criterion is closely related to the government finance criterion. At the moment, a number of Euro area countries no longer fulfill this criterion, which specifies that long-term rates should not deviate by more than 200 basis points from the average long term rate of the three best performing countries in terms of inflation.[4]

Following Maastricht, leaders of European countries with weaker economies tended to defer tougher budgetary measures because of domestic challenges. The effects were not immediately felt: the periphery states thrived in the first years of the Euro, propelled by large infusions of liquidity and unprecedented access to credit from other Eurozone states. At the same time, the "productive capacity" of the periphery was limited by rigid labour markets and a reduction of economic competitiveness.

The underlying structural issues in the Eurozone periphery became increasingly visible following the global financial meltdown of 2007-2008. Liquidity quickly dried up and several states were left with unsustainable deficits and public debts greater than their Gross Domestic Product. By 2010, a sovereign debt crisis - most pronounced in Greece - was spreading throughout the periphery and imperilling the future of the Eurozone. Between spring 2010 and spring 2011, the European Union and the International Monetary Fund acted to bail out Greece, Ireland, and Portugal.[5]

So, the sovereign debt crisis[6] that broke out in Greece at the end of 2009 is fundamentally due to the precarious integration of the peripheral countries[7] in the Euro-zone. Its immediate cause, however, lie with the crisis of 2007-2009. Speculative mortgage lending by the United States financial institutions, and trading of resultant derivative securities by international banks created a vast bubble in 2001-2007, leading to crisis and recession. State provision of liquidity and capital in 2008-2009 rescued the banks, while state expenditure prevented a worsening of the recession. The result in the Eurozone was a sovereign debt crisis, exacerbated by the structural weaknesses of the monetary union.

In this context, the crisis of public debt, thus, represents Stage Two of an upheaval that started in 2007 and can be called a crisis of "financialization[8]". Mature economies have become

[4] The European Central Bank in (the) crisis, Sylvester Eijffinger, Lex Hoogduin, CESifo DICE Report 1/2012.

[5] The Eurozone in crisis, Cristopher Alessi, 23 July 2012.

[6] The **European sovereign debt crisis** (often referred to as the **Eurozone crisis**) is an ongoing financial crisis that has made it difficult or impossible for some countries in the Euro area to repay or re-finance their government debt without the assistance of third parties.

[7] In World Systems Theory, the **periphery countries** (sometimes referred to as just **the periphery**) are those that are less developed than the semi-periphery and core countries. These countries usually receive a disproportionately small share of global wealth. They have weak state institutions and are dependent on – according to some, exploited by – more developed countries. These countries are usually behind because of obstacles such as lack of technology, unstable government, and poor education and health systems.

[8] *Barron's Finance & Investment Dictionary:* Concept associated with developments leading up to the 2008–2009 crisis and defined differently by various people, but referring generally to the dominance of financial services over industry as the primary creator of wealth. Whereas, traditionally, the capital markets made bank-based savings available to producers who created wealth, capital market systems became themselves the generator of profit making and wealth. Derivatives, such as futures contracts, swaps, and options, originally designed as tools for use in hedging and risk management, became widely traded financial assets.

The definition of financialization proposed by Gerald Epstein has been cited by many authors: "the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies".

"financialized" during the last three decades resulting in growing weight of finance relative to production. Large corporations have become to rely less on banks, while becoming more engaged in financial markets. Households have become heavily involved in the financial system through assets (pension and insurance) and liabilities (mortgage and unsecured debt). Banks have been transformed, seeking profits through fees, commissions and trading, rebalancing their activities toward household rather than corporations. Financial profit has emerged as a large part of total profit.

But financialization has unfolded in different ways across mature countries, including those in the European Union. Germany has avoided the explosion of household debt that recently took place in other mature countries and peripheral Eurozone countries. The performance of German economy has been mediocre for many years, while great pressure has been applied on German workers' pay and conditions. The main source of growth for Germany has been its current account surplus inside the Eurozone, resulting from pressure on pay and conditions rather than on superior productivity growth. This surplus has been recycled through foreign direct investments and German bank lending to peripheral countries and beyond.

The implications for the Eurozone have been severe. Financialization in the periphery has proceeded within the framework of the monetary union and under the dominant shadow of Germany. Peripheral economies have acquired entrenched current account deficits. Growth has come from expansion of consumption financed by expending household debt or from investment bubbles characterised by real estate speculation. There has been a general rise of indebtedness, whether of households or corporations. Meanwhile, pressure has been applied to workers' pay and conditions across the periphery, but not as persistently as in Germany. The integration of peripheral countries in the Eurozone, then, has been precarious, leaving them vulnerable to the crisis of 2007-2009 and eventually leading to the sovereign debt crisis[9].

Finally, the financial crisis of 2007-2008 had a very strong impact on the banking sector in some countries. Governments offered support to their banks in order to avoid a collapse of the financial system, which weakened government budgets and increased government debt. This negative impact was reinforced by the deep recession of 2009, which caused a sharp decline in government revenues. In countries like Ireland, and to a lesser degree Spain, this became a threat to fiscal sustainability. The fiscal sustainability crisis in individual countries became a threat to financial stability in the Euro area, because of high financial integration in the Euro area and due to (the threat of) contagion. High financial integration was reflected in the fact that, in many cases, a high proportion of the government debt of Euro area countries is held outside the country concerned.

Doubts about the sustainability of debt of a certain country therefore have an immediate impact on the solvency of banks across the Euro area. The discussion about private sector involvement in the case of Greece and as an element in the functioning of the European Stability Mechanism (ESM) enormously reinforced the potential and actual spill-over effects between countries and between government instability and financial sector instability.[10]

Last, but not least, the institutional mechanisms surrounding the Euro has been an integral part of the crisis. To be more specific, European Monetary Union is supported by a host of treaties and multilateral agreements, including the *Maastricht Treaty*, *the Stability and Growth Pact* and the *Lisbon Strategy*. It is also supported by the European Central Bank, in charge of monetary policy across the Eurozone. The combination of these institutions has produced a mix of monetary, fiscal, and labour market policies with powerful social implications.

2. How the crisis has affected the Euro and the functioning of the European Central Bank and how it was forced to respond

As we seen which were the main origins that stand behind this crisis, the next step is to find out how the crisis has affected the Euro and the functioning of the European Central Bank and how it was forced to respond.

[9] Crisis in the Eurozone, Costas Lapavitsas et al., Verso, UK, 2012, pg. 1-2.
[10] The European Central Bank in (the) crisis, Sylvester Eijffinger, Lex Hoogduin, CESifo DICE Report 1/2012.

The crisis is so severe that there are neither soft options, nor easy compromises for peripheral countries. The choices are stark, similar to those of developing countries confronted with repeated crisis during the last three decades.

The first alternative is to adopt austerity by cutting wages, reducing public spending and raising taxes, in the hope of reducing public borrowing requirements. Austerity would probably have to be accompanied by bridging loans or guarantees by core countries to bring down commercial borrowing rates. It is likely that there would also be "structural reform", including further labour market flexibility, tougher pension conditions, privatisation of remaining public enterprises, privatisation of education, and so on. The aim of such liberalisation would presumably be to raise the productivity of labour, thus improving competitiveness.

This is the preferred alternative of ruling elites across peripheral and core countries, since it shifts the burden of adjustment onto working people. But, there are several imponderables. First, it is the opposition of workers to austerity, leading to political unrest. Further, the Eurozone lacks established mechanisms both to provide bridging loans and to enforce austerity on peripheral members. There is also strong political opposition within core countries to rescuing others within the Eurozone. On the other hand, the option of forcing a peripheral country to seek recourse to the International Monetary Fund would be damaging to the Eurozone as a whole.

The second alternative is to reform the Eurozone. There is almost universal agreement that unitary monetary policy and fragmented fiscal policy have been a dysfunctional mix. The aim would be to produce smoother interaction of monetary and fiscal forces, while maintaining the underlying conservatism of the Eurozone.[11]

So, what about the Euro and the European Central Bank?

"*The European Central Bank's actions since the onset of the financial crisis have been bold, and yet firmly anchored within the medium-term framework of our monetary policy strategy."* (Trichet[12], 2009).

Before the crisis, the European Central Bank's success in achieving price stability was typically interpreted as testimony to the effectiveness of its underlying principles of central banking.

The main objective of setting up the European Central Bank was to maintain price stability in the Euro area as a whole. The European Central Bank has so far been very successful in achieving its main objective: since the introduction of the Euro inflation has on average been around 2%. That is lower than the average outcome for Germany in the era of the Bundesbank, and lower than in many other advanced countries around the world. The European Central Bank has also succeeded in becoming a very highly respected central bank in the international arena. Therefore, the Euro as such and the European Central Bank are not the problem.

As stated above, it is more a question of the sovereign debt crisis affecting the Euro and the European Central Bank through two channels.

The first channel is the creation of (potential) financial instability in the Euro area. This is an issue for the European Central Bank because one of its tasks is to contribute to the financial stability policies of the competent authorities without prejudice in terms of maintaining price stability.

The second channel is even more fundamental from the perspective of the Euro, because it affects the conditions for the existence of the Euro and the European Central Bank's capacity to maintain price stability in the Euro area.

The so-called convergence criteria are fundamental to the existence of the Euro and the possibility of running a single monetary policy for the Euro area. These criteria should not only be fulfilled as a condition for introducing the Euro and for entering the Euro area at the moment of

[11] Crisis in the Eurozone, Costas Lapavitsas et al., Verso, UK, 2012, pg. 8-9.

[12] Jean-Claude Trichet is the former president of the European Central Bank. On 1 November 2003 he took Wim Duisenberg's place as president of the European Central Bank.

entry, but should be complied with on a sustainable basis. The latter means that compliance must be ensured after adopting the Euro.

Nevertheless, the European Central Bank was immediately thrown into the spotlight after the sovereign debt crisis hit in May 2010. There were three aspects to its responsibilities: future prevention, crisis resolution and crisis management. In future prevention and final crisis resolution, the European Central Bank can only offer its analysis and views. The responsibility is in the hands of the politicians.

These are not areas that put pressure on the (cohesion of) European Central Bank Governing Council's decision-making. All Council members have a similar interest, although they may somewhat disagree on the precise content of the measures to be taken. Initially, however, resolving the crisis is a matter for the governments of the Euro area. It is in the area of crisis management that the European Central Bank and the cohesion of its Governing Council were quickly put to test. During the Greek sovereign debt crisis market turbulence increased to high levels and interest differentials against Germany went up sharply[13].

European Central Bank's main actions in the Eurozone crisis:
The Securities Markets Programme

In May 2010, the European Central Bank decided to start the Securities Markets Programme (SMP) in order to address tensions in certain market segments that hampered the monetary policy transmission mechanism. The latter refers to the process with which the European Central Bank aims to influence prices in the entire Euro area via its interest rates. Under the SMP, should this mechanism be disrupted by dysfunctional market segments and the European Central Bank's rate signal not be transmitted evenly to all parts of the Euro area, the European Central Bank could intervene by buying, on the secondary market (i.e. from banks and against market prices), the securities that it normally accepts as collateral. The last SMP purchases took place in February 2012 and the programme was terminated in September 2012[14].

The European Central Bank Governing Council found itself in uncharted territory. For the first time it had to take a decision on whether and how to intervene in government debt markets. This was, of course, no ordinary monetary policy decision. It could even be debated whether the decision was indeed a monetary policy decision, or whether it was about supporting financial stability measures taken by governments.

There was also a substantive argument against the Securities Markets Programme (SMP). By buying government bonds, the European Central Bank would relieve market pressure on the governments concerned to consolidate and adjust. This is the argument of induced moral hazard and why the European Central Bank stressed the temporary nature of all of its so called unconventional measures and thus also of the SMP.

The SMP was meant to be temporary, but governments did not take sufficient measures to end the market turbulence or to make it possible for the European Central Bank to (gradually) exit the programme. There was a period beginning in spring last year when tensions in the markets became smaller. The size of the SMP more or less started to stabilise at around 70-75 billion Euro and started to look like it would die quietly, until the crisis flared up again when Spain, and later Italy, came under pressure. A very rapid increase in the size of the SMP to well above 200 billion Euro was the result. The SMP purchases only came down when the European Central Bank, under its new President Mario Draghi, announced two three year LTROs with full allotment[15].

[13] The European Central Bank in (the) crisis, Sylvester Eijffinger, Lex Hoogduin, CESifo DICE Report 1/2012.
[14] www.ecb.int.
[15] The European Central Bank in (the) crisis, Sylvester Eijffinger, Lex Hoogduin, CESifo DICE Report 1/2012.

Addicted banks

In October 2008, following the collapse of Lehman Brothers, the financial turmoil turned into a global financial crisis. Growing uncertainty about the financial health of major banks worldwide led to a collapse in activity in a large number of financial markets. The virtual breakdown of the money market caused short-term interest rates to increase to abnormally high levels, both inside and outside the Euro area. During this period of great uncertainty, banks built up large liquidity reserves, while removing risks from their balance sheets and tightening loan conditions. The crisis also began to spread to the real economy, with a rapid and synchronised deterioration in economic conditions in most major economies and a free fall in global trade. The European Central Bank responded with several measures, the most important of which was a switch to a policy of full allotment and fixed rates. This meant that Euro area banks were able to get unlimited liquidity from the European Central Bank at the main refinancing rate provided they offered adequate collateral. The European Central Bank effectively took the place of the money market. Other measures (besides a substantial cut in interest rates) included widening the range of eligible collateral and lengthening the maturities of loans to banks[16].

This is perhaps the most important policy measure that the European Central Bank had introduced before the sovereign debt crisis. As a by-product of full allotment, a number of banks addicted to the European Central Bank credit had emerged. The purpose of full allotment was to provide funding to banks that could no longer rely on the professional funding markets, and the interbank market in particular, which almost completely dried up as a consequence of high uncertainty after the collapse of Lehman Brothers.

Three year LTROs and collateral measures

The European Central Bank then surprised everybody by announcing two long-term refinancing operations (LTROs) with a 3 year maturity and full allotment (against collateral). It also allowed seven national central banks to accept a wider range of collateral against European Central Bank refinancing operations.[17]

In December 2011, in response to severe market tensions that threatened the functioning of the money market and the flow of credit from banks to businesses and consumers, the European Central Bank decided to conduct two longer-term refinancing operations with a maturity of 36 months. The rate in these operations was fixed at the average rate of the main refinancing operations over the life of the respective operation. The first operation was allotted on 21 December 2011 and the second on 29 February 2012.

In addition, the European Central Bank decided to increase the availability of collateral by reducing the rating threshold for certain asset-backed securities and by allowing national central banks, as a temporary solution, to accept as collateral additional credit claims (bank loans) that satisfy specific criteria. The responsibility entailed in the acceptance of such credit claims will be borne by the national central bank authorising their use.

Thirdly, the European Central Bank decided to reduce the reserve ratio to 1% (from 2%) thus freeing up collateral and supporting money market activity.

In September 2012, to preserve the singleness of its monetary policy and to ensure the proper transmission of its policy stance to the real economy throughout the Euro area, the European Central Bank announced the possibility of Outright Monetary Transactions (OMTs). OMTs are interventions in secondary sovereign bond markets to address severe distortions in these markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the Euro. OMTs

[16] www.ecb.int.

[17] The European Central Bank in (the) crisis, Sylvester Eijffinger, Lex Hoogduin, CESifo DICE Report 1/2012.

provide, under appropriate conditions, a fully effective backstop to avoid self-fulfilling destructive scenarios with potentially severe challenges for price stability in the Euro area. In order to preserve the primacy of the European Central Bank's price stability mandate and to ensure that governments retain the right incentive to implement the required fiscal adjustments and structural reforms, a necessary condition for OMTs is strict and effective conditionality attached to an appropriate EFSF/ESM programme[18].

3. The future and the challenges that lie ahead

One of the main challenges that lie ahead is reforming the European Union.

The challenge is probably due to the fact that not all countries of the Euro area currently fulfil the convergence criteria; and this will probably the case for quite a number of years to come. Fiscal consolidation and restoring competitiveness in particular take time.

In the wake of the global financial and debt crisis, the European Union began to adopt measures for centralizing governance mechanisms and coordinating fiscal and economic policy. Most notably, in December 2011, European Union leaders agreed to the formation of a so-called fiscal union. Twenty-five European Union countries - all but the United Kingdom and Czech Republic - signed on to the German-engineered **fiscal pact,** which would allow the European Union to dictate the national budgetary policies of participating nations. European Union leaders also agreed to introduce the $650 billion **European Stability Mechanism** - the permanent bailout fund meant to replace the EFSF - a year earlier than planned, in July 2012.

Germany has resisted calls to issue joint Eurobonds to combat rising borrowing costs throughout the single currency zone. However, Eurozone leaders announced plans in the summer of 2012 to push forward with further integration by creating a **single banking authority**, situated in the European Central Bank, as a first step towards developing a **Eurozone-wide banking union**. When in place, such an oversight mechanism could ultimately allow the Eurozone's rescue funds to, for example, directly aid Spanish banks, rather than channelling the loans through the already indebted Spanish government.[19]

Conclusions

As a conclusion, the study focused on the Eurozone crisis, a long debated subject in the last years, from multiple points of view.

In the first part, there were analysed the main causes that are considered to stand behind the recent crisis.

Second part, tried to reveal how the crisis affected the functioning of the European Central Bank and the Euro, and, having this premises, how the European Central Bank was forced to response through its actions.

The last part was dedicated to some considerations about the future and the challenges that lie ahead in an uncertain economic context.

Passing through this topics, had a clear purpose: only by clearly understanding the reasons that stand behind a crisis, that had and still has deep consequences on the European Union as a whole and on its composing member states, we can learn some lessons, in order to avoid such event happening in the future.

As a suggestion for future researches, I believe that an interesting paper would consist into analysing the proposal for a banking union, as one the European leaders response to the crisis.

[18] www.ecb.int.

[19] The Eurozone in crisis, Cristopher Alessi, 23 July 2012.

References

- The Eurozone in crisis, Cristopher Alessi, 23 July 2012.
- The European Central Bank in (the) crisis, Sylvester Eijffinger, Lex Hoogduin, CESifo DICE Report 1/2012.
- Crisis in the Eurozone, Costas Lapavitsas et al., Verso, UK, 2012, pg. 1-2.
- The European Central Bank and the Eurozone debt crisis, Daniela Gabor.
- Euro crash, the exit route from monetary failure in Europe, Brendan Brown, Palgrave Macmillan, Second edition, 2012.
- Money, debt and the New World Order, Philip Coggan, Penguin Books, 2012.

REFLECTIONS ON THE PRINCIPLE OF THE INDEPENDENCE OF JUSTICE

ELENA EMILIA ŞTEFAN*

Abstract
The independence of justice is no longer just a wish of the Constitution editors, it represents a reality, has a practical applicability and it is not at all just a state of mind. Moreover, the judicial independence is regulated by a number of international documentation which completes the whole picture of the national legislation.
Does the civil society represent only a pressure agent likely to influence the independence of law? So here is a question we will try to answer in this study, and we will present theoretical but also practical aspects on the principle of the independence of justice.

Keywords: *Constitution, law, the principle of the independence of justice, magistrates' liability, the European Court of Human Rights.*

Introduction

The social political changes but also the globalization of law has been focused on the concepts of the state, law, of society in general. By examining from the legal point of view the activity of the state, it was found that its strength of will and commandment, which is sovereignty, is accomplished through three powers: the legislative, the executive or administrative and the judicial power[1].

Can we still talk nowadays about a classic separation of the three powers[2] or can we identify their collaboration? Originally, the Romanian Constitution had not bee expressly governed by the theory of the separation of powers, this thing being accomplished by the European level events that have led to its revision in 2003. The form in which we find the separation of powers is provided in art. 1, (4), as follows: "the state is organized according to the principle of separation and to the balance of powers – legislative, executive and judicial power, within the constitutional democracy".

As shown in the dogma, the reason of the insertion of this paragraph was mainly the contribution to a better delineation of the relationship between the powers, representing the advantage that an express norm always represents towards that resulting from the interpretation, which is said the certainty, strictly, the undoubtedly predictability.[3] Basically, currently expressions such as "*state of law*", "*rule of law*", "*separation of powers*", "*supremacy of the law*", are concepts closely related with "*human and citizen rights*", so that we have o rich European law in terms of human and citizen rights.

We therefore do not propose to analyze the theory of separation of powers in relation to the political system, and neither to render the way how this theory is regulated in the Constitution of the world states, but the approach we propose aims to capture a single component, namely the law, analyzed in terms of its independence.

---

* Assistant Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email: stefanelena@gmail.com).

[1] C. G. Rarincescu, "*Contenciosul administrativ român",* (*The Romanian Administrative Disputed Claims Office*), Universal Publishing Alcalay& Co, Bucharest, 1937, p. 18, quoted by Rodica N. Petrescu, „*Drept administrativ*", (*Administrative Law*), Hamangiu Publishing House, Bucharest, 2009, p. 3.

[2] See extensively A. Iorgovan, „*Drept constituţional şi instituţii politice*" (*Constitutional Law and Political Institutions*), Jean Louis Calderon Publishing House, Bucharest, 1994, p. 147.

[3] M. Constantinescu, A. Iorgovan, I. Muraru, S. Tănăsescu, *"Constituţia României revizuită, comentarii şi explicaţii"*, (*The Revised Romanian Constitution, Comments and Explanations)*, All Beck Publishing House, 2004, p. 2-3.

1.The legal frame of the independence of law

The analysis of the judiciary in our country includes undoubtedly the issue of magistrates' liability. This topic is extremely sensitive and for a real approach it has to be considered many aspects, such as: the legal and constitutional regulating of the system of liability of this socio-professional category, but also of the vulnerabilities resulting from daily activities of a magistrate related to the organization and functioning system of the courts and prosecutors' offices, the pace of solving the cases and other matters.

In our opinion, in order to talk about the independence of justice, we have to consider the independence of the magistrate, the two concepts being closely related.

The revised Romanian Constitution expressly regulates the principle of the independence of the judicial power in relation to the executive and the legislative power, as previously mentioned in the introduction to this study. The constitutional provisions related to the independence of justice are contained in Chapter VI entitled "Judicial Authority", art. 124-134. So that, according to art. 124, (3): "Judges shall be independent and subject only to the law" and related to art. 125, (1): "The judges appointed by the President of Romania shall be irremovable, according to the law". We also mention that the institution called "the Superior Council of Magistracy" is the guarantee of the independence of law, according to art. 133 and. 134 from the Constitution. Moreover, the organic law on the status of the magistrates[4], as amended and supplemented, has provided the principle of the independence of the judges and their obedience only to the law and the principle of the independence of the prosecutors. Another article refers to the fact that the justice is carried out in the name of the law, it is unique, equal and impartial for everyone. To these provisions, we can state that in our country, the independence of justice is constitutionally established.

Considering art. 6 of the European Convention on Human Rights, the fundamental principles of the United Nations Organization on the independence of the magistrates, approved by the United Nations General Assembly in November 1985, The Council of Europe (…) indicates that: "the governments of the Member States should adopt or reinforce all necessary measures to promote the role of the judges, individually, and also of the judiciary as a whole and should improve their independence and effectiveness (…)"[5]

On the European level, there is the Recommendation 94 (12) of the Committee of Ministers[6] to the Member States on the independence, efficiency and role of the judges, adopted on October 13th 1994, that wishing to promote the independence of the judiciary, has developed several rules having the value of principles.

The same Recommendation under the Principle IV entitled "The Legal Responsibilities", in paragraph 3 b) states that "the judges should have the following specific responsibilities: to solve cases in an impartial manner in accordance with the evidences presented and the interpretation of law, to ensure that a fair hearing is given to all parties in the process and the procedural rights of the parties are being complied with in accordance to the provisions of the Convention".[7]

---

[4] Law no. 303/2004 on the status of the magistrates, published in the Official Gazette 576/2004.

[5] Florentina Dragomir, "*Răspunderea penală a magistratului"*, (*The Criminal Liability of the Magistrate),* C. H. Beck Publishing House, Bucharest, 2011, p.19.

[6] Recommendation 94 (12) of the Committee of Ministers, adopted by the Committee of Minister son October 13th 1994 within the 156th meeting of the State Secretaries, taken from *Consiliul Superior al Magistraturii, Apărarea independenţei, imparţialităţii şi reputaţiei profesionale ale judecătorilor şi procurorilor. Hotărâri ale Plenului Consiliului Superior al Magistraturii 2006-2009*, *the Superior Council of Magistracy,(The Defence of the Independence, Impartiality and Professional Reputation of the Judges and Prosecutors. Decisions of the Superior Council of Magistracy 2006-2009)*, C.H. Beck Publishing House, Bucharest 2010, pp. 185-202.

[7] *The Superior Council of Magistracy, The Defence of the independence, impartiality and professional reputation of the judges and prosecutors. Decisions of the Superior Council of Magistracy, 2006-2009, work cited,* p. 189.

This is how, according to the above mentioned, the independence of justice is both nationally and internationally regulated.

2.The criteria for assessing the independence of a Court in the Jurisprudence of the European Court of Human Rights.

Closely related to the analysis of the concept of independence of the magistrates, in our opinion, is the concept of independence of the court. In order to identify what practical significance was given to it, we bring to mind that the European Court of Human Rights has a rich jurisprudence on establishing the compliance with the principle of independence.

Thus, in a case the European Court of Human Rights has stated the criteria for assessing the independence of a court, as follows: the independence of the executive as a party; the designation; the term of office; the warranties against pressure; the appearance of independence.[8] Also the Court notes that in terms of art. 6 and 8, the impartiality must be assessed according to a subjective approach, trying to determine the personal conviction of a judge in a particular occasion, and also, according to an objective approach, reaching to ensure that there were enough warranties to exclude any legitimate doubt in this respect.

In another case, the Court in *case Maszni versus Romania* easily reaffirms that that in order to establish whether a court may be considered "independent" within the meaning of article 6 § 1, should be taken into account, in particular, the designation and term of office of its members, the existence of a protection against outside pressure and the fact of knowing whether or not there is an appearance of independence.[9]

If in relation to the judges, in the practice of the European Court of Human Rights, things are solved in terms of the signification of the warranties of independence, in the sense that we have already raised with regard to the prosecutors, things are slightly different. For example, in the *case Pantea v. Romania*[10], the Court stated that the Romanian prosecutor, acting as a representative of the Public Ministry, subordinated in accordance to the law to the General Attorney but also to the Ministry of Justice, does not meet the condition of independence in relation to the executive, as required by art. 5, paragraph 3 of the Convention.

Also in case *Vasilescu v. Romania*[11] case, starting from the practice of the Court, Corneliu Bârsan stressed the idea that the text of art. 5, (3) of the Convention, lets the contracting states to choose between two types of authorities that cannot be confused, which is said judge or another magistrate.[12]

Also in terms of impartiality, the European Court of Human Rights in its jurisprudence defines it as "the absence of any prejudice or preconceived idea about the solution of a process and it reflects an important element of the rule of law, namely the sentence of the court is binding, unless it is invalidated by a higher court…"[13]

---

[8] Popescu Nasta v. Romania case (Application no. 33355/96), Strasbourg Judgement, 7th January 2003, par. 44, http://www.scj.ro/strasbourg%5CPOPESCU%20NASTA-Romania%20RO.htm, accessed on August 9th 2012.

[9] Maszni v. Romania case (application no. 59892/00), Strasbourg Judgement, September 21st 2006, http://www.scj.ro/strasbourg/maszni%20romania%20RO.html, accesed on August 9th 2012.

[10] Pantea v. Romania case on June 3rd 2003, http://www.scj.ro, accessed on August 9th 2012.

[11] Vasilescu v. Romania case on May 22nd 1998, http://www.scj.ro, accessed on August 9th 2012.

[12] C. Bârsan, *Convenţia europeană a drepturilor omului, comentariu pe articole*", Vol. I, „*Drepturi şi libertăţi*", (*European Convention on Human Rights, Comment on Articles*, Vol. I, R*ights and Freedoms*), All Beck Publishing House, Bucharest, 2005, p. 349, quoted by Silviu Gabriel Barbu *Funcţiile procurorului în protecţia libertăţii individuale-analiză din perspectivă constituţională",(The Prosecutor's functions in protecting individual freedoms – analysis from the constitutional perspective*), in Liber Amicorum Ioan Muraru „*Despre Constituţie şi constituţionalism*", (*On Constitution and Constitutionalism*), Hamangiu Publishing House, Bucharest, 2006, p. 88.

[13] De Cubber v. Belgium, judgement on October 26th 1984 and September 14th 1987, www.echr.coe.int, as quoted , Florentina Dragomir, *work quoted*, p. 37.

3.The Civil Society and the independence of justice

As expressly provided in the text of the Recommendation 94 (12) of the Committee of Ministers to Member States, on the independence, efficiency and role of the judges, the independence of judges is firstly and foremost linked to the maintenance of the separation of powers, namely, the executive and legislative bodies must refrain from taking any measures that could undetermined the independence of the judges. Moreover, the Recommendation states that "the pressure groups or other interest groups should not be allowed to undetermine this independence". The question regarding this provision is the following: "Does the Civil Society represent a pressure factor likely to influence the independence of justice"?

In our opinion, a warning sign is the excessive media coverage of the cases pending in courts, situation in which we consider the defense claims of professional reputation by magistrates to be extremely justifiable. The practice of the Superior Council of Magistracy has plenty of these applications of magistrates.

The report[14] on the Superior Council of Magistracy activity in 2012 states that: "according to the provisions of Law no. 303/2004 on the status of the judges and prosecutors, republished, with subsequent amendments and completions, the Superior Council of the Magistracy defends the judges and prosecutors against any act that could affect their independence or impartiality or would create suspicions about them".

Thus, in a case[15], it was noted that: "in a newspaper article published in a central daily, there were made assessments on the fact that the prosecutor, although he was in the possession of conclusive evidence in a case that he was prosecuting, he did not want to find the truth because of the political and money power, being <<sponsored>> together with a police officer by an investigated defendant. Towards those exposed the Superior Council of Magistracy Plenary estimated that the demand for professional reputation defense by the prosecutor P.D. is justified, as the articles published in the central daily in the period in which the research were about to come to an end, were likely to affect the professional reputation of the prosecutor." Essentially, concludes the Superior Council of Magistracy Plenary "the professional reputation is closely linked to the independence, impartiality and integrity that must be shown by every prosecutor in his work", this representing "the opinion that the magistrate creates in the collective consciousness about how he carries his profession" etc.

"To the extent that the trust of the society in the existence of these features is affected, and the public opinion becomes unfavorable, the lack of credibility of the magistrate results in the impairing of the professional reputation of the magistrate.[16] Also, "the debate within a TV show of an evidence given in a civil case that is still pending in court, in appeals, and only the presentation of the opinion of the losing party, are likely to affect the professional reputation of the judge, doubly so as the program moderator made allegations about his professional training and moral probity."[17]

Moreover, in another case, it was noted that: "the specific act of law accomplishment cannot be subject of public debate, motivated by the fact that it is the exclusive attribute of the judge and

---

[14] The Report on the Superior Council of Magistracy activity in 2012, http://www.csm1909.ro/csm/index.php?cmd=24, accessed on February 16th 2013.

[15] The judgement of the Superior Council of Magistracy Plenary no. 188 on March 6th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 53-55.

[16] The judgement of the Superior Council of Magistracy Plenary no. 295 on March 27th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 64-66.

[17] The judgement of the Superior Council of Magistracy Plenary no. 479 on May 29th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 73-75.

prosecutor, as stated in the constitutional principle of separation of powers, and in the provisions of the organic laws on the administration of law."[18]

Not in all cases where the parties of a process make use of the right of petition provided by the Constitution whereby notify the Superior Council of Magistracy on the committing of a disciplinary offense by a magistrate does not mean the prejudice of the professional reputation of the magistrate. Thus, it was considered by the Superior Council of Magistracy Plenary that "the assessments of the petitioner M made in the statement addressed to the Superior Council of Magistracy and the prosecution requests submitted in the file, on the validity of the measures taken by the panel of judges and the compliance of the judges with the obligation of impartiality, is a manifestation of the freedom of expression as enshrined in art. 30 of the Constitution, of the exertion of the procedural law and of the right of petition." "To the extent that the limits of the freedom of expression and the exertion of subjective civil rights have not been violated, and the assessments of professional activity of the judges have not been publicly exposed in a manner which is likely to create a negative image on the way of exertion of profession, it has been noted that the professional reputation of the judges C and S has not been prejudiced.

As shown in the Report on the Superior Council of Magistracy activity in 2012, during the year, within the Judicial Inspections Department, there were recorded 21 papers seeking the defense of the independence, impartiality and professional reputation of the judges, or, as the case, the defense of the independence and impartiality of the judiciary. As it concerns the prosecutors, the same report shows that, between 01.01.2004-14.11.2012, at the Judicial Inspections Department were recorded 20 papers seeking the defense of the independence, impartiality and professional reputation of the prosecutors, or, as the case, the defense of the independence and impartiality of the judiciary.

Conclusions

Through this study, we tried to capture in a personal manner, the peculiarities of the principle of the independence of law, starting with the legislative regulations and ending with the jurisprudence. That the law is independent is stated by the Constitution itself and by the international regulations. That the law is functioning emerges from the consultation of the jurisprudence. Moreover, as we have shown, the European Court of Human Rights, within its jurisprudence, has stated that the criteria for assessing the independence of a court, as presented. In conclusion, in our opinion, the independence of justice is functioning at the moment, it is not just a wish of the editors of the Constitution.

We believe that we have answered the question in the preamble of this study, namely if the Civil Society represents a pressure agent likely to influence the independence of law. From our perspective, it is not recommended and the Civil Society should not become a pressure agent on the principle of the independence of law, but at the most a balance agent. The excessive coverage of some topics has created the false impression that the law is influenced by the media pressure, which otherwise would be very dangerous if it happens in a democratic society in which each institution should operate according to well established rules on legislative.

Henceforth we anticipate a decrease of the demands for the defense of the professional reputation of the magistrates as long as there will not be a real liability of the media. Thus, in our opinion it is imperative to be established the law of the media so that the principal of the independence of law functions effectively.

[18] The judgement of the Superior Council of Magistracy Plenary no. 618 on June 26th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 80-82.

References

- Silviu Gabriel Barbu, „*Funcţiile procurorului în protecţia libertăţii individuale-analiză din perspectivă constituţională" (The Prosecutor's functions in protecting individual freedoms – analysis from the constitutional perspective*), in Liber Amicorum Ioan Muraru, „*Despre Constituţie şi constituţionalism*"," (*On Constitution and Constitutionalism*), Hamangiu Publishing House, Bucharest, 2006.
- C. Bârsan, "*Convenţia europeană a drepturilor omului, comentariu pe articole*", Vol. I, „*Drepturi şi libertăţi*", (*European Convention on Human Rights, Comment on Articles*, Vol. I, R*ights and Freedoms*), All Beck Publishing House, Bucharest, 2005.
- M. Constantinescu, A.Iorgovan, I.Muraru, S. Tănăsescu, *"Constituţia României revizuită, comentarii şi explicaţii"*, (*The Revised Romanian Constitution, Comments and Explanations)*, All Beck Publishing House, 2004.
- Florentina Dragomir, "*Răspunderea penală a magistratului"*, (*The Criminal Liability of the Magistrate),* C. H. Beck Publishing House, Bucharest, 2011.
- A. Iorgovan, „*Drept constituţional şi instituţii politice*", (*Constitutional Law and Political Institutions*), Jean Louis Calderon Publishing House, Bucharest, 1994.
- Rodica N. Petrescu, „*Drept administrativ*", *(Administrative Law), Hamangiu Publishing* House*, Bucharest, 2009.*
- C.G.Rarincescu, "*Contenciosul administrativ român*", (*The Romanian Administrative Disputed Claims Office*), Universal Publishing House Alcalay& Co, Bucharest, 1937.
- Romanian Constitution.
- *The Superior Council of Magistracy, The Defence of the independence, impartiality and professional reputation of the judges and prosecutors. Decisions of the Superior Council of Magistracy, 2006-2009,* C. H. Beck Publishing House, Bucharest 2010.
- Law no. 303/2004 on the status of the magistrates, published in the Official Gazette 576/2004.
- Recommendation 94 (12) of the Committee of Ministers, adopted by the Committee of Minister son October 13th 1994 within the 156th meeting of the State Secretaries.
- Popescu Nasta v. Romania case (Application no. 33355/96), Strasbourg Judgement, 7th January 2003, par. 44, http://www.scj.ro/strasbourg%5CPOPESCU%20NASTA-Romania%20RO.htm, accessed on August 9th 2012.
- Maszni v. Romania case (application no. 59892/00), Strasbourg Judgement, September 21st 2006, http://www.scj.ro/strasbourg/maszni%20romania%20RO.html, accesed on August 9th 2012.
- *Pantea v. Romania case on June 3rd 2003*, *http://www.scj.ro,* accessed on August 9th 2012.
- *Vasilescu v. Romania case on May 22nd 1998, http://www.scj.ro, accessed on August 9th 2012*.
- De *Cubber v. Belgium,* judgement on October 26th 1984 and September 14th 1987, www.echr.coe.int.
- The Report on the Superior Council of Magistracy activity in 2012, http://www.csm1909.ro/csm/index.php?cmd=24, accessed on February 16th 2013.

BRIEF CONSIDERATIONS ON THE DISCIPLINARY LIABILITY OF THE MAGISTRATES

ELENA EMILIA ŞTEFAN[*]

Abstract

The recent amendments in the applicable law on the disciplinary liability of the magistrates have induced many debates regarding the increase of holders that own the right to initiate the disciplinary action against a magistrate and also regarding the area of disciplinary offenses. The conferring of the status of holder of the disciplinary action to the Minister of Justice, the President of the High Court of Cassation and Justice and to the General Attorney of the Prosecutor's Office of the High Court of Cassation and Justice, has conferred us the opportunity to present the impact of these legislative amendments on the legal environment.

Therefore, the theme proposed through this study will be done by presenting the relevant legislation and the relevant constitutional jurisprudence.

Keywords: *magistrate, disciplinary liability, Constitutional Court, Minister of Justice, Superior Council of Magistracy.*

Introduction

In several texts of the Constitution is present the notion of public office or service, and therefore the notion of officer[1]. The legal system of public office also includes its liability, whose purpose is the suppression of errors made by public officials, which represents only one of the liability purposes.[2] In this context of public servants, in the doctrine was stated that: "legal liability applies to the magistrates too, being obvious that, in a democratic society, the magistrate can not be under the protection of absolute immunity when he seriously breaks the obligations of impartiality and fairness".[3]

In the case of the magistrates, the multiplication of facts that may represents misconducts, made them furthermore to be in front of a reality that can no longer be ignored, namely, the magistrates, the judges, the public servants in general, may interfere at some point in time with a possible disciplinary action promoted against their activity. Therefore, here is the fact, at least theoretically but also practically, the disciplinary action against a magistrate is a predictable action within the context of the legislative amendments, but also undesirable in the activity of a magistrate.

1. The holders of the disciplinary action against a magistrate

In our opinion a controversial issue that will raise many problems in practice is related to the amendments to the legal system al the liability of the magistrates. Thus, the amendments to Law no. 303/2004[4] on the status of the judges and prosecutors are on: the extending of the disciplinary offenses area; the increase of the holders of the disciplinary action; the amendment of legal provisions that regulate the disciplinary sanctions applicable to judges and prosecutors, including the introduction of disciplinary sanction of suspension from office for a period of up to 6 months, the

---

[*] Assistant Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email: stefanelena@gmail.com).

[1] Rodica Narcisa Petrescu, *„Drept administrativ" (Administrative Law),* Hamangiu Publishing House, Bucharest, 2009, p. 522.

[2] Dana Apostol Tofan, *„Instituţii administrativ europene", (European Administrative Institutions),* C. H. Beck Publishing House, Bucharest 2006, p. 184.

[3] I. Leş, *„Organizarea sistemului judiciar românesc"*, (*The Organization of the Romanian judiciary system),* C. H. Beck Publishing House, Bucharest, 2004, p. 211.

[4] Law no. 303/2004 on the status of the judges and prosecutors published in the Official Gazette no. 576/2004.

definition of the exertion of the function with serious disregard or bad faith; the introduction of the condition of good repute as a requirement of access and office sustentation.

Concerning the exception of unconstitutionality on new amendments on the law regarding the status of the judges and prosecutors, the status of the magistrates and the law on the Superior Council of Magistracy,[5] Romanian Constitutional Court, through the decision no. 2/2012,[6] was rendered a judgment on its constitutionality, as we would briefly present it, *a point of view that we disagree*. The criticism has been focused on several issues, but we will analyze only those concerning the conferment of the status of holder of disciplinary actions to the Minister of Justice, the President of the High Court of Cassation and Justice and the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Thus, the criticism refers to the conferment of the status of holder of disciplinary actions by including together with the Judicial Inspection represented by the judicial inspector, the Minister of Justice and the President of the High Court of Cassation and Justice in case of misconduct committed by judges, and the status of holder of disciplinary actions to the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice, for disciplinary violations committed by prosecutors. Essentially, the criticism of unconstitutionality in this respect points out that these amendments determine the decrease of the autonomy of the Judicial Inspection, it is violated the independence of law and of the principle of the separation of power owing to the fact that they allow the executive to have an influence on the triggering of the mechanism of the disciplinary liability of the magistrates and in this case we refer to the provisions of art. 44, paragraph 3-5 of Law no. 317/2004.

The Romanian Constitutional Court considers that the law is constitutional owing to the fact that, we must distinguish between the participants to the disciplinary procedure and the disciplinary research court, so in this case we refer to the Superior Council of Magistracy. In its jurisprudence,[7] the Constitutional Court states that "a dimension of the Romanian state is represented by the constitutional law accomplished by the Romanian Constitutional Court (…), its role being to ensure the supremacy of the Constitution, as a fundamental law of the state of law. Thus, in accordance with art. 142 (1) of the Constitution, the Romanian Constitutional Court is the guarantor for the supremacy of the Constitution".

In order to support our arguments, contrary to the view of the Romanian Constitutional Court, we will present below the relevant legislative texts, both form the Romanian Constitution and from the two laws in question. According to art. 3 letter c) of Law no. 317/2004: "The President of the High Court of Cassation and Justice, representing the judiciary, the Minister of Justice and the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice are members of the Superior Council of Magistracy" and according to art. 4 (1) : "the Members of the Superior Council of Magistracy shall be elected among the judges and prosecutors appointed by the President of Romania".

In what concerns the Minister of Justice, the designation and appointment procedure is closely related to the executive. Thus, according to the provisions of the revised Constitution, the Minister of Justice may eventually hold the function of minister:

a) through the procedure of forming a new Government , as a member on the list of the members to be of the Government, proposed by the candidate for prime minister and voted by the

[5] Law no. 314/2004 on the Superior Council of Magistracy, published on the Official Gazette no. 599/2004.

[6] The Constitutional Court Decision no. 2/2012 on the objection of unconstitutionality of the provisions of Law for the amendment and supplementing of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 131/2012.

[7] The Decision of the Romanian Constitutional Court no. 727/ 2012, published in the Official Gazette no. 477/12.07.2012.

Parliament, in block together with the rest of the proposed ministers, procedure called "the investiture of the Government".

b) or due to the vacant position by "Government reshuffle", when the Minister of Justice is proposes by the Prime Minister and appointed by decree of the President.

In connection with the Superior Council of Magistracy, as shown, the Minister of Justice is a member of the Superior Council of Magistracy. Basically, the method of appointment and his status as a member of the Superior Council of Magistracy, the law conferring the right to take disciplinary action against a magistrate is, in our opinion, an obvious breaking of the separation of powers by mixing the executive in the judiciary, affecting also the independence of law. We therefore agree with the criticism of unconstitutionality in what concerns the Minister of Justice, holder of the disciplinary action, being obviously, as stated previously, the political character of this institution.

What concerns the President of the High Court of Cassation and Justice, although is part of the judiciary, he is appointed by the President of Romania and member of the Superior Council of Magistracy. In our opinion, the President of the High Court of Cassation and Justice, when exerting the disciplinary action against a magistrate, he cannot be considered impartial if the judge is considered guilty in the disciplinary procedure, he will appeal the measure taken by the Superior Council of Magistracy, the appeal will be solved by the High Court of Cassation and Justice, the panel of 5 judges, it is said the same court that, indirectly through its president, has triggered the disciplinary action. Furthermore, as what concerns the Minister of Justice, we state that by this appointment is violated the principle of the independence of law, we argue that if the President of the High Court of Cassation and Justice, holder of the disciplinary action, this contradiction between his status and the legal attributions is very visible, leading to questioning his impartiality.

The third holder of a disciplinary action against a magistrate is the General Attorney of Romania. We state that the General Attorney of Romania (judiciary power), according to the Romanian Constitution, appointed by the President of Romania (executive power!!!) on the proposal of the Minister of Justice (executive power!!!), with the opinion of the Superior Council of Magistracy, depends on the executive power, politically influenced, so that when exerting the disciplinary action against a prosecutor, he determines the violation of the separation of powers and of the law state. Moreover, according to art. 132, paragraph 1 of the Constitution," prosecutors operate according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice". Can it be in this case about impartiality or independence since the status of the prosecutors provides the hierarchical control and their subordination to a member of the executive power, namely the Minister of Justice?

In our opinion, the holders of the disciplinary action, as presented above, once they have triggered the disciplinary action, we are no longer interested in the position of the Superior Council of Magistracy in those concrete cases, in this case disciplinary court, in the scope of solving the disciplinary action, owing to the fact that the prejudice has already been produced by promoting the action. These considerations above lead us to believe that the decision of the Constitutional Court through which the amendment of the law system of the disciplinary liability of the magistrates was considered to be constitutional, is not inspired.

As shown in the Report[8] on the Superior Council of Magistracy activity in 2012, "although the legislative amendments occurred during 2012 concerning the holders of the disciplinary action have displeased the judiciary as a whole, is to be reported that, by the end of the year, the Minister of Justice has not used the legal privilege that has been conferred to him". The same report points out that, in disciplinary matter, the Department for judges in disciplinary matters delivered by the end of 2012 a total number of 16 decisions and the Department for prosecutors a total number of 9 decisions.

[8] The Report on the Superior Council of Magistracy activity in 2012, http://www.csm1909.ro/csm/index.php?cmd=24, accessed on February 16 th 2013.

2. The extending of the disciplinary offenses area

The disciplinary liability of public servants is defined in art. 77 [1] of the republished law no. 188/1999, according to which: "the guilty violation by the public servants of their public office duties and of the professional and civic conduct provided by the law, represents a disciplinary misconduct and results in their disciplinary liability".[9] In the doctrine of the administrative law, the disciplinary offense represents the act committed with guilt by the public servant through which he violates the obligation arising from the report of public office or in connection to it and which affects his socio-professional and moral status.[10] Coming back to the magistrates, according to art. 99 of Law no. 303/2004, amended in 2012, a large number of actions are considered to be disciplinary offenses.[11]

The new legislative amendments are focused, in case of the disciplinary offenses, on a number of actions related to the moral conduct of the person who acts as a magistrate, actions that may prejudice the prestige of law. For example, *in case of the magistrates, the disciplinary offenses* may be: the events affecting the honor and professional integrity or the reputation of law, committed when exerting or outside of the exerting of duties; the violation of the legal provisions on incompatibilities and prohibitions on judges and prosecutors; *undignified attitudes* while exerting their duties of service, *the unjustified refusal to perform a service duty;* the failure of the prosecutor to comply with the provisions of the superior prosecutor, given in writing and in accordance to the law*; the repeated failure* and for attributable reasons of the legal provisions regarding the solving without delay of all the mattes or the *repeated delay of works*, for attributable reasons; *the total lack of motivation* of the prosecutor's judicial judgments or actions; the use of *inappropriate expressions in the prosecutor's judicial judgments or actions* or the motivation which is manifestly contrary to the legal reasoning, likely to affect the prestige of law or the dignity of the magistrate office. Also, in the case of disciplinary offenses is situated *the failure of the Constitutional Court decisions, too or of the decisions of the High Court of Cassation and Justice* in the solving of appeals for the convenience of law; the exerting of office with *bad faith or serious inadvertence.* We can note that after a long time, there are defined in this area the notions of *bad faith or serious inadvertence.*

In the recent jurisprudence of the Superior Council of Magistracy has been noted that, "in order to find the serious inadvertence, it is necessary for the judge to show a conduct of violation of some basic professional duties, with serious consequences for the accomplishment of the act of law. The Department observes from the administrated probation in question that there are accomplished the conditions required by the law because the defendant judge has flagrantly violated the procedural rules, by not preparing the device of the judgment, in the cases in which he has disposed the termination of debates, being obvious to any judge that takes part in the solving of a case, the obligation of drawing the minute, as a result of the deliberation".[12] In another disciplinary case, it is noted that "the guilt of the defendant prosecutor G. V. G. and takes the form of the bad faith and arises from the fact that he has unduly disposed the taking over of a criminal case from a Prosecutor's Office local drive, if the prosecutor of the case had concluded the criminal investigation and had started the drafting of the indictment."[13] "If there is charged the misapplication of the procedure rules as a result of their interpretation by a judge, he cannot be liable of disciplinary liability, as it is not a

[9] Rodica Narcisa Petrescu, *quoted work*, p. 562.

[10] Verginia Vedinaş,"*Drept administrativ*",*(Administrative Law),* Universul Juridic Publishing House, Bucharest, 2009, p. 487.

[11] Law no. 24/2012 for the amendment and the completion of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 51/2012.

[12] Decision no. 10J/2012, The Department for judges – the disciplinary matter, http://www.csm1909.ro/csm/linkuri/03_09_2012__51190_ro.pdf, accessed on 16.02.2013.

[13] Decision no. 7P/2012, the Department for prosecutors – disciplinary matter, http://www.csm1909.ro/csm/index.php?cmd=0301&tc=s, accessed on 16.02.2013.

serious violation of the procedure rules"[14], it is noted in a case. "In order to be a prejudice, the violation has to be unquestionable and to be lacked of any justification, elements that have not been revealed in this case, yet. Thus, there is noted from the probation material in question that the legal requirements to attract disciplinary sanction are not accomplished owing to the fact that the judgment given by the defendant judge in the case is not the expression of the serious inadvertence in exerting the office, by disregarding the legal provisions on the notification of the court (…) but it reflects the interpretation of the defendant judges for the probation material in question"…

As shown in the Report of the Superior Council of Magistracy in 2012, "between 01.01.2012-25.05.2012 (until the abolition of the commissions for discipline), the *Commission for Discipline for judges* has ordered the disciplinary investigation in 19 cases and the Commission for Discipline for prosecutors has ordered the disciplinary investigation in 6 cases and after the abolition of the commissions for discipline, the disciplinary investigation has been ordered by the judicial inspectors in 4 files. As of 24.05.2012 the disciplinary investigation has been ordered by the *judicial inspectors*. Thus, the judicial inspectors have ordered the commencement of the disciplinary investigation in 16 cases.

At the same time, the Report of the Superior Council of Magistracy activity in 2012 has also revealed some abnormalities in the activity of the magistrates. For example, it is reminded the difficulty of complying with the deadlines of drawing the works, in the context of a large number of vacancies for inspector and staff, the finding of the fact that some legal provisions contained in Law no. 317/2004 on the Superior Council of Magistracy refer to concepts which are not sufficiently well defined. In this context, it was noted that "the notion of good reputation does not meet the requirements of foresee ability of the law, not being correlatively provided the desirable behavior of the magistrates in exerting their duties, thus they objectively do not know which parts need circumscribe their behavior in order to enjoy the good reputation".

Conclusions

As we have proposed, this study has brought into discussion a topical issue in terms of the disciplinary liability of the magistrates, namely legislative amendments on the extension of the holders of the disciplinary action. In the same time the study has conducted a brief presentation of the amendments on the disciplinary offenses, by presenting a selection of several cases solved by the Superior Council of Magistracy. In what concerns the holders of the disciplinary action, although the Constitutional Court has described as constitutional the law that has provided these amendments, in our opinion it has been created the legal frame for the violation of the constitutional principles that aim the independence of law and the separation of powers.

Furthermore, the widening of the disciplinary offenses area, by the presenting of the selected cases, has revealed some abnormalities of the Romanian judiciary concerning not only the actual activity of a magistrate but, in our opinion, related with the system. Thus, unless we note a real reform of the judiciary, we cannot have fewer cases of disciplinary liability of the magistrates.

References

- I. Leş, „*Organizarea sistemului judiciar românesc"*, (*The Organization of the Romanian judiciary system)* C. H. Beck Publishing House, Bucharest, 2004.
- Rodica Narcisa Petrescu, „*Drept administrativ", (Administrative Law),* Hamangiu Publishing House, Bucharest, 2009.

[14] Decision no. 9J/2012, the Department for judges – disciplinary matter, http://www.csm1909.ro/csm/linkuri/15_10_2012__52151_ro.PDF accessed on 16.02.2013.

- Dana Apostol Tofan, „*Instituţii administrativ europene”*, *(European Administrative Institutions),* C. H. Beck Publishing House, Bucharest 2006.
- Verginia Vedinaş, *“Drept administrativ”(Administrative Law),* Universul Juridic Publishing House, Bucharest, 2009.
- Romanian Constitution.
- Law no. 24/2012 for the amendment and the completion of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 51/2012.
- Law no. 303/2004 on the status of the judges and prosecutors published in the Official Gazette no. 576/2004 through G.E.O. no. 81/2012, published in the Official Gazette no. 837/2012.
- Law no. 314/2004 on the Superior Council of Magistracy, published on the Gazette no. 599/2004 with the latest amendments through G.D.no. 824/2012, published in the Official Gazette no. 571/2012.
- Law no. 188/1999 on the Status of the public servants, published in the Official Gazette no. 600/1999, with the latest amendments through Law no. 187/2012 for the enforcement of Law 286/2009, published in the Official Gazette 757/2012.
- The Constitutional Court Decision no. 2/2012 on the objection of unconstitutionality of the provisions of Law for the amendment and supplementing of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Offcial Gazette no. 131/2012.
- The Decision of the Romanian Constitutional Court no. 727/ 2012, published in the Official Gazette no. 477/12.07.2012.
- Decision no. 10J/2012, The Department for judges – the disciplinary matter, http://www.csm1909.ro/csm/linkuri/03_09_2012__51190_ro.pdf, accessed on 16.02.2013.
- Decision no. 7P/2012, the Department for prosecutors – disciplinary matter, http://www.csm1909.ro/csm/index.php?cmd=0301&tc=s, accessed on 16.02.2013.
- Decision no. 9J/2012, the Department for judges – disciplinary matter, http://www.csm1909.ro/csm/linkuri/15_10_2012__52151_ro.PDF accessed on 16.02.2013.

THE PUBLIC PENSION POINT - A GOVERNMENT BUSINESS

MĂDĂLINA TOMESCU*

Abstract
Each of us pays every month a percentage of his/her salary for receiving a public pension after a certain age. As a percentage, this amount of money varies depending of salary. But retirement means a number of pension points. Where is the business? Pension point is determined by the Government as a percent of medium salary. This article aims to make an analysis of pension point as a government business.

Key words: *public pension, pension point, government business, human rights, the right to pension.*

Introduction

This paper brings into question the theme of granting public pensions based on a scoring and the existence of pension point as a great business of any government.

The Pension right represents a very important right for all of us. Throughout the working life we contribute (without the possibility of choice) obligatorily at the constitution of state social insurance budget. Because of this contribution we benefit, at retirement age, sometimes earlier, of a real ownership of pension. This represents a form of respect for human dignity.

Therefore, political decisions must take account respecting the elderly without violate their dignity. Ensuring a decent life, a financial independence of these categories of persons must be an important goal for every government.

Unfortunately, the granting system of public pension based on score and, implicitly, by means of pension points confirmes a great injustice. This injustice refers at the fact that pension point value is set at the political level. Therefore, it is at the discretion of any government, because there is no minimum value confirmed by law .Therefore, I decided to analyze this injustice with the hope that it will draw attention on it in order to be removed.

1. Brief considerations on social insurance over time

Industrial development in the late nineteenth century led to the appearance of working employees class in industrial enterprises, which occurred as a result of economic development in most European states. The appearance of working employees class generated new social relations and new risks on the income achievemnt necessary for support. Simultaneously with these, was increasingly reduced the social role of three generation family agrarian type in ensuring a protection for elderly or sick members and as well as the church's role in providing social protection for the poorest members of society[1].

The appearance of working employees class generated thus, the need to ensure against new risks such as disability risk, the risk of losing working capacity due to an accident at work, maternity risk, the risk of loss of employment, old age risk, the risk of death breadwinner, and so on, generically called social risks . Under these conditions, the social partners, namely **employees** and **entrepreneurs – employers**, and also the state as guarantor, **have agreed to establish a social insurance system** in which the social partners have to pay social insurance contributions in relation with the salary incomes achieved in the active period, and in the case of appearance of one of the

* Associated Professor, Ph. D., Faculty of Legal and Administrative Sciences, "Dimitrie Cantemir" Christian University (madalina.tomescu@gmail.com).

[1] Nistor, Ioan - *Romanian public pension system - between reform, social equity and financial sustainability. Considerations and recommendations*, article available on the website http://www.aipensie.ro/?page_id=420.

recognized social risks, the insured will benefit of a **replacement income** troughout the period of manifestation of the insured risk, income **that will be calculated relative proportional with the contributions paid in all active period.**[2]

Public pension thus represents the most important social insurance service and involves ensuring a decent and equitable replacement income for life after retirement due to old age.

At the end of the XIX century (1880-1890), German Chancellor Otto Von Bismarck and his government conceived and proclaimed several laws, of reference, in the field of social insurance. Many of the principles regulated then are valid today, the reason for which Germany is considered the "cradle of European social security" and its system of social insurance and pensions is considered as one of the best and most efficient in the world. His public pension system is "pay as you go" is considering intergenerational solidarity (between generations), which presumes that from the contributions paid by active generations are paid the pensions of the retired generations removed from the activity as a result of old age, the pensions being calculated proportionally with the contributions paid throughout the active period. This system, based on the foregoing principles, is working properly for over 130 years. Currently it works independently and is based on compulsory social insurance contributions 19.10% of monthly salary incomes, compulsory social insurance contributions 19.10% of monthly salary incomes, paid by employers and employees equally, as well as indirect contribution of the state that supports 25% of the cost of public pension payments. The German model of social insurance [3]and pensions, was taken over by most European countries, adapted and qualified according to national specificities and concrete social and economic conditions of each state.[4]

In Romania, the social insurance system is forming and developing in the interwar period, after the appearance of National State. Its historical evolution can be divided into three periods, namely: the interwar period, the communist and post-revolutionary or current period.

In the interwar period, appear the first laws of regulation of compulsory social insurance, after the appearance of Nation State. One of the most important social insurance laws of that time was called the Insurance Law of Unification, also called “Ioanitescu Law” from 1933, by which were regulated for the first time, some basic principles namely: the principle of compulsory, the principle of contribution or principle of solidarity and involvement of the state by guaranteeing social insurance system and subsidize public pension fund, if necessary. Public pension system organized on these principles included the state officials and employees of public or private undertakings. For other social categories was encouraged appearance and development of private insurance systems. Thus, in interwar period, in Romania was founded over 100 private insurance companies, many of them being organized on occupational or professional criteria (lawyers, writers, artists, religious representatives and so on). It is noted that agricultural and forest land owners (small farmers and large landowners) and agricultural workers of all categories or small craftsmen in rural area were not included in the public pension system[5].

With regard to military retirement system, we find **that this was functioning since 1830** under the old Rules of the Soldiers which established "**soldierly Rights of Officers, pensions and**

[2] NISTOR, IOAN – op.cit.- http://www.aipensie.ro/?page_id=420.

[3] We cannot bring here a story recently published in the press, namely that Germany considers that maintenance of many old (some being sick) in hearths is too expensive on its territory. Therefore began to seek solutions to care outside the country, specifically in the territories of the former communist countries of Southeast Europe, where their maintenance is cheaper. How great is the economic interest, to uproot their citizens and to "export" them because they reached the third age, they are for no use to you??? See this: http://www.mediafax.ro/externe/germania-acuzata-ca-isi-deporteaza-pensionarii-in-europa-de-est-si-asia-10414470

[4] Ibidem.

[5] Nistor, Ioan – op.cit. - http://www.aipensie.ro/?page_id=420.

other budget calculations[6]". Therefore, military pensions were not introduced in the public pension system, being considered service pensions, non-contributory and funded from the state budget. Military service pensions were set according to the length of military service, and also the pay owned at the date of withdrawal or transfer to reserve.

The period 1945-1989, corresponding to the period of glory of communism is characterized by modifying from foundations of social insurance system in general and especially the pension system. Thus was legislated the social insurance system and state pension in which were included only employees of enterprises and institutions, as well as the assimilated, namely the beneficiaries of employment contracts. Free Pensions Houses were dissolved and over 100 private Pensions Houses, their funds being abusively taken to the state budget. Also, unemployment benefits and social assistance have not been recognized, being abolished[7], due to the introduction of the compulsoriness of all people to "get a job".

The reform of state social insurance system began with the adoption of Law 10/1949 by which are introduced new regulations regarding setting up pension funds and their redistribution to the new criteria established by law. Social contributions have been established in the task of state enterprises, institutions and employers (also of State) in general. Social insurance fund management was taken over by the state, through the state budget and pension rights were established on the principle of distribution according to length of service and average salary from last 12 months of activity.[8]

The pension system reform continued through Law no. 27/1966 and then by the Law no. 3/1977, and the adoption of other laws by which were taken in state social insurance system and members handicraft cooperatives, farmers from cooperative system and areas that are not collectivized and independent craftsmen or artists, composers and members of cults etc., thereby integrating in state pension system over 90% of the active population of the country.

Viewed as a whole, this period may be considered a reformist period and a development of state social insurance system, with significant results from this point of view. Thus, the unique system of social protection only managed to include at some point, almost the entire population of the country. Brutal economic reform characterized by the abolition of private property led inevitably to a reform of social insurance system, as brutal and unjust. Brutal economic reform characterized by the abolition of private property led inevitably to a reform of social insurance system just as brutal and unjust[9]. New social class appeared - the working class - was favored by the new social security law. So, all the social costs of the reform were supported by social categories disliked by the new arrangement (peasants, landowners, former industrial owners, former government officials capitalist).

Peasantry (small and large farmers) was the unjustified social category[10]. In the process of abolishing private property in land and forced collectivization, the peasants were dispossessed of all goods necessary support [11](land properties, agricultural machinery, animals, etc.) and were left out of the new system of social protection and public pensions a long time. Barely in 1966, by Decree no. 535/1966 was established a retirement home for peasants and a pension fund financed by CAP's determined by a contribution rate of 8% of global production and individual contributions of farmers in areas that were not collectivized, but rights of pension of retired farmers were regulated

[6] This is one reason why it seems to me a little misplaced the endless discussion on pensions for military and policemen!!!

[7] Ibidem.

[8] Ibidem.

[9] Ibidem.

[10] Ibidem.

[11] Moreover, it was also talked about this issue, because many of them were forced to provide "rules" to CAP to have enough to live.

differently, leading to much lower pensions compared to pensions of employees in state undertakings.[12]

A regulation unusual for the time, considered a measure of reform of the state pension system was Law no. 6/1967 concerning the establishment of supplementary pension in 1967, law which became separate chapter in Pension Law nr.27/1966, with effect from 01.01.1967 and held on in Law no. 3/1977 also as a separate chapter is in effect until March 31, 2001.[13]

This regulation concerning supplementary pension had all the characteristics of mandatory pensions managed private today (current Pillar II) except that the funds made up of mandatory contributions retained to all employees and their incorporates were stored at Romanian National Bank or C.E.C., being the interest carrier. Supplementary pension is granted separately from the state pension, based on the number of years of contribution to the supplementary pension fund and the average salary which constituted the basis for calculating the state pension. The contribution to supplementary pension was paid by employees and their incorporates in 1967-2001 period and the social insurance contribution for public pensions (CAS) was paid entirely by employers (companies, institutions, private employers and so on). Individual contribution for supplementary pension was fixed by law at the rate of 2% (optional 4%) between 1967-1986 and then 3% between 1986-1998 and 5% between 1998-2001, compared to the monthly salary of framing and to permanent increases. These individual contributions, stored National Bank of Romania then at CEC or at banks were interest accrues and from the total amounts accumulated were paid the adequate supplementary pensions. It can be assumed that this additional pension fund had a surplus important considering the large number of employees – contributors and their assimilated ones, comparatively with the number of pensioner – beneficiaries of supplementary pensions. These funds were subsequently "confiscated" from the state budget in 1998 by Government Ordinance nr.31/1998. According to art. 2 paragraph 2 of this act, *"The revenue budget for supplementary pension funds managed by institutions from national defense, public order and national security, as established by the regulations in force* ***are state revenues****."* It should be noted that neither on this occasion nor before or after this date was ever presented a balance sheet or public information about the funds accumulated from individual contributions (private) retained to all employees and their included ones and from interest income, or how to spend these funds.[14]

In early 1990 the Romanian public pension system was regulated by Law no. 3/1977 standard retirement age of 62 for men and 57 years for women, the opening pension rights being conditioned by a minimum length of 10 years . At the same time, the retirement age upon request (in advance) was 60 years for men and 55 for women, conditioned by the achievement of full length of 30 years for men and 25 years for women. Pension rights were determined as a percentage from average tariff wages calculated from five consecutive years, chosen from the last decade of activity. The worth percentage was differentiated by the size of average salary from the last five years elected, and also depending of group work experience. For the lowest average wage, equal to minimum wage, the percentage for granting the pension was the highest, namely 75% in the case of group III, 80% in the case of group II and 85% in the case of group I, and for the highest average salary, the percentage of granting the pensions was the lowest, namely 54% for the group III, 56% for group II and 58% for group I. The retirement before reaching the standard age provided by law was achieved only in the case of employees from higher work groups, the number of beneficiaries being small because of the small number of jobs. Before reaching standard retirement age provided by law only to be achieved if employees work from superior groups, the number of beneficiaries being small due to the small number of jobs appointed in superior groups. According to statistics, in 1989 were recognized approximately 300,000 jobs in special conditions (Group I and Group II labor) jobs that

[12] NISTOR, IOAN- op.cit.- http://www.aipensie.ro/?page_id=420
[13] Ibidem.
[14] Ibidem.

allowed to those employees to benefit of a retirement age reduction with up to 12 years. Also, the total number of taxpayers employees was more than 8.3 million persons, and the total number of pensioners was about 2.5 million people (employees and pensioners ratio being about 3.4 of employees to one pensioner). Social insurance contribution (CAS) required by law was 15% of salary fund, with its payment obligation by the employer. Employees were required to pay for additional pension contribution of 3% and 5% of monthly income (consisting of tariff wage of framing and increases regulated by the remunerate law). Contributions for supplementary pension was retained by employers and then transferred into an account opened at CEC or other banks being bear of interest.[15]

Pensions established under Law no. 3/1977 (basic pension and supplementary pension) together accounted for about 70% of monthly income had on the retirement date.

2. Pension rights - a way of ensuring respect for human dignity

Pensions are the most important social insurance benefits provided under the public system. Any type of pension is granted at the request of the person entitled, the mandatory appointed by it with special proxy, guardian or custodian of its.[16]

It can therefore be said that due to contributions paid by each person employed throughout his active life**, pension becomes a won right.** Thus, citizens exercise a ownership right over pension and over the right of pension. Also, **pension, as a law itself and as part of private property, represents a claim that the state is obliged to pay and protect it[17].** From this perspective, the pension amount is considered that cannot be changed in a negative way, because it is a won right. Even in field of criminal law, exists the principle of the more favorable criminal law, therefore, much more, in determining the amount of pension of a person, when making a recalculation it will be kept the pension more favorable (with the highest amount). It is natural to be so because it is proper that the society to thank so to those who contributed in their own way, at the society development.

At the same time, in compliance with Resolution no. 3137/XXVIII from 1973 (Romania was a member the United Nations at that time.), the state's obligation was to ensure the elderly, on the one hand, a decent pension - which ensure their financial independence and a decent life, and on the other hand, to ensure job opportunities according to their needs with discouraging discriminatory policies and measures. However, they recommend that when developing national policies and programs take into account the following principles:

• To develop programs for the welfare, health and protection of the elderly, including measures that ensure their full economic independence and social integration;

• Develop social security measures to ensure sufficient income;

• To reinforce the contribution of older people at economic and social development;

• To discourage discriminatory attitudes, policies and measures based exclusively on age that exists in practice in employment;

• Encourage cooperation agreements on social security in favor of the elderly;

• To encourage the creation of employment opportunities for older people according to their needs

Between July 26 and August 6, 1982, in Vienna was held World Assembly specifically dedicated to elderly and convened with the aim to form a stand to launch a program of international action to ensure economic security for the elderly and social development in their country. This is

[15] NISTOR, IOAN- op.cit.- http://www.aipensie.ro/?page_id=420.

[16] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/pensions;jsessionid=003C8E1F7316AF28E0EE1A07BB40C684.

[17] http://www.facias.org/documente/Petitie%20ONG%20Romania%20-%20abuzurile%20guvernului%20Boc.pdf.

because the Assembly considered that the number of these people will increase dramatically over the next 20 years[18], but these people are precious human resources both in economic and social field and in the transmission of cultural heritage.[19]

These measures are designed to promote and ensure **respect for the dignity of older people** because their brutal removal from labor system and the disregard of their creative capacities on the grounds of age, have disastrous effects on society as a whole.

3. Contemporary regulations of pensions. Introduction based on pension points

3.1. The pressure of "*the street*" ...

The 1990 was essentially a year of "street pressure". It was a year in which people - freed from the yoke of communism - have considered exit in the streets represents the best way to solve problems. They got up and fell governments, public order was "restored" not by police but miners - for example, "the authority of" authorities depended on who and what comes out in the street ...

Therefore, nothing was found shifted when they were issued, even in pension legislation without financial impact studies, opportunity or legal advice. These documents created, some still create legal effects inconsistent with temporal moment. Thus is, for example, controversial **Government Decision No 267/14.03.1990** by which was established retirement age of **45 years from mining personnel**, who subsequently applied to other industrial companies (such Sometra SA Copsa Mica). Although the Government Decision no. 267/1990 **WAS NOT PUBLISHED** in Official Gazette of Romania to receive official character (it was published only in the Government Information Bulletin No. 9 of 01.10.1991 (so over about 11 months from the date of issue) has produced important legal effects since 03/14/1990 (date of issue) for over 10 years. It was then taken into another form of regulation by the Law no. 19/2000 and applied along with it starting on April 1, 2001. So this Government Decision **never published in Official Gazette** produce ever actually legal effects and now because the provisions on retirement age set by the Government no. 267/1990 are set out in Law no. 263/2010 and shall apply from the date January 1, 2011. In addition to the effect of reduced retirement age, HG 267/1990 also influenced the size of pensions for some employees retired after 01.04.2001 under Law no effect. 19/2000. It also created inequities between members of the same categories of policyholders, respectively mining personnel in the sense that in the recalculation of all pensions determined before 1 April 2001 pensioners from mining before publication date HG no. 267/90, 14.3.1990 respectively, received smaller pensions recalculated by about 30% compared to their peers who retired after 14.03.1990 and obvious to those who retired after 01.04.2001[20].

Another famous normative act was *Order no. 50/1990 for the specification of jobs, activities and professional categories with special conditions are fitting in Groups I and II of work for retirement* issued by the National Commission for Work Protection, by which have been reframed, over 2.5 million jobs in normal conditions (grade III of work) in special conditions (groups I and II of work). In this way, a lot of employees who knew that they worked under normal conditions (working group III suddenly) found that they can become pensioners for the limited age and that they benefit of reducing the retirement age up to 12 years, motivated by the fact that their job was reframed in Group I or group II of work and was retroactively recognized such as from 1969[21]. These normative

[18] From 1982 until now (2013), the elderly population has increased dramatically indeed, fact evidenced by current statistics.

[19] Ionel Cloşcă, Ion Suceavă, *Human Rights Treaty*, Europa Nova Publishing House, Bucharest, 2003, p. 201.

[20] See Nistor, Ioan- op.cit.- http://www.aipensie.ro/?page_id=420.

[21] In these circumstances, to obtain demonstrative certificates of occupation s jobs reclassified into higher labor groups were given real fight, but they exercised "pressure" of any kind directly or indirectly to the employer or liquidators empowered to issue and certificates. Sometimes were found documents contradictory (for instance the

acts achieved, paradoxically and a discrediting of real activity carried out under special conditions (heavy, harmful, toxic, etc.) by opening the possibility to take advantage of employment in superior groups of work for some employees whose work does not had nothing to do with what the law calls "special conditions".[22]

The duplication of the number of pensioners in the period 1990-2000 have contributed other normative acts, some with limited application term, as Law-Decree 60/07.02.1990 which allowed the retirement of men at the age of 55 years and retirement of women at the age of 50 years, with ridiculous justifications as a *"collective work agreement because the employee concerned low-yield activities".*[23]

All these normative acts, and other similar, all with reparatory character, but often without that reparation to be needed, have contributed to the transformation of the public pension system into a false social security system, unfairly and without real financial support.

3.2. Introduction of public pension based on pension points

The Romanian Constitution from 1965, art. 20, established the right of citizens to material security for old age, illness or disability. Under this Article, the right to material security for workers and clerks through pension and sickness benefits provided under the state social insurance system, and for members of cooperative organizations or other community organizations, trough insurance forms organized by it.

In applying this constitutional provision was adopted Law no. 3/1977 on social insurance pensions and social assistance. According to this law, the State guarantees every citizen, regardless of gender or nationality, the right to a pension based on the contribution to society.

The pension is determined in relation to the quantity, quality and social importance of the work submitted, being provided the principle of achieving an equitable report between income from salary and pension.

The criteria for distinguishing the pension level were formed by the length in work, the salary had and the group of work.

If initially Law. 3/1977 provided the method of calculation, in terms of salary criterion, as an average monthly tariff wages, through modifications made after 1990 was foreseen as a calculation basis for this criterion, the average salary for a period of 5 years, elected by retirees in the last 10 years of activity[24].

The necessary funds for the payment of pensions consisted in contributions paid by units and amounts allocated for this purpose from the state budget. Employed persons contribute 2-4% from monthly tariff for the additional pension contribution. By law, pension **right was imprescriptible and pension was not taxable**.

The pension right, at the time in which the conditions were met, was materialized through "Decision" in which was quantified the proper monthly amount under this law.

The law no. 3/1977 was correct one - but that because was not adapted to the new financial and economic conditions (inflation, unemployment, changing labor laws and wages etc.), led to flagrant inequities.

In these circumstances, the retired general situation has deteriorated continuously, that is why in 2000 the real average pension has come to represent less than 50% of the real average pension in 1989.

---

workbook was written the quality of legal counsellor and on the certificate was written that most of the activity took place in an industrial building (sic)), reason why so many of these certificates were rejected by officials pension funding in determining pensions, but they were later reconfirmed by the court and then recovered, which encouraged the process of issuing such certificates below. View and some John-op. - Http://www.aipensie.ro/?page_id=420.

[22] See Nistor, Ioan- op.cit.- http://www.aipensie.ro/?page_id=420.

[23] Ibidem.

[24] Băjan, Doru - ***a****bout entitlement to public pension* - item available on the website http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html.

On the other hand, massive restructuring of state enterprises, in fact removing them for sale as "privatization" and closing them because it represents competitors extremely serious even for those who have purchased, meant not crossing to unemployed the workers, but ... the retirement at a reduced age. Under these conditions, there was an unprecedented phenomenon in Romania, namely increasing the number of pensioners at the expense of workers – taxpayers at the social insurances budget. Relationship between employees and pensioners came to be the lowest from the last half century, and governments that have succeeded at the helm of the country did not only increase social insurance contributions from 15% to 30% and those supplementary pensions to 5%.[25]

However, the incomes at state social insurance budget HAD NOT INCREASED. But was recorded **"one of the most treacherous forms of tax evasion" referred to framing a large number of employees with minimum wage. This form of tax evasion is practiced today and it should be noted that it is almost impossible to refute, since employment contracts by which are established all rights (including salary) and employee obligations, constitute the law of parts.** Therefore, the contributions received dropped dramatically, and the consequences have been seen. They will be more evident when the current minimum wage employees will be pensioners with pension smaller than the current minimum pension[26].

Under these conditions the Romanian Parliament adopted Law no. 19/2000 on public pension and social security normative act, which came into force on 01.04.2001. The new law differs substantially from the Law no. 3/1977. The first difference is represented by principles underlying public pension system namely uniqueness, equality, social solidarity, contribution, distribution, autonomy. **The law was based on mandatory contributions and pensions were based on a score for contributions paid throughout the active period.**

The newness it was represented by the way how was established the pension amount, determined by multiplying the annual average score achieved by the insured during the period of contribution with a pension point value in the month of retirement.

The pensions would have been calculated by the method of calculating a score correlated with wages had in the whole period of activity of the insured (employees), with the desire declared to result "equal pension for equal contributions[27]."

The contributions were owed by policy holders and their employers, being differentiated in relation to working conditions, rates being approved annually through state social insurance budget law.

Social insurance contributions were finally set to represent 35% of the gross monthly salary for normal working conditions, 40% for special conditions (the former group II) or 45% for special conditions (formerly group I). These were to be paid as follows: 11.66% from monthly income of the employee and the difference up to 35%, 40%, or 45%, as applicable, by the employer, which was required to withhold employees' individual contributions of 11, 66% due and to remit social security budget with the employer contribution payable each month. In this way, for additional pension contribution of 5% was converted to individual contribution and employer's contribution of 11.66% was reduced to 30%, 35% or 40% as appropriate, at 23.32%, 28.32 %, or 33.32% by case.[28]

4. Pension point - a for any government

According to Law no. 19/2000 and the law in force at this time, Law no. 263/2010 the pension is a performing of social insurance and represents an income replacement for professional income loss due to old age, which is an insured risk.

[25] See NISTOR, IOAN- op.cit.- http://www.aipensie.ro/?page_id=420.
[26] Ibidem.
[27] Nistor, Ioan- op.cit.- http://www.aipensie.ro/?page_id=420.
[28] Ibidem.

The pension right, at the time when the conditions were met, was materialized through "retirement decision" that sets the average score achieved. **This score is multiplied by the value of the pension point, resulting a person's pension amount.**

The very introduction of the idea of "pension point" is a form of business for the government, because so, deliberately, it can control the incomes of a category of people about which knows for sure they would have a hard time to even find a job to complete their income.

In its original form, Law no. 19/2000 **provides that a pension point value representing at least 45% of the average gross wage per economy,** forecast for the year and is approved by state social insurance budget law and in the case of a deviation greater than 10% between average gross monthly wage economy achieved compared to the predicted one, it will fallow to recalculate the pension point value based on a new forecast of average gross monthly wage in the economy.

Trough Government Emergency Ordinance no. 41 of 17.04.2000, but changed the art. 80 of Law no. 19/2000, referring to the value of the pension point. **Thus, the order forecasts that the value of a pension point represents NO MORE than 45% of the gross average wage projected used to substantiate the social insurance budget.** How the law was fallowing to be applied in 2001, so by another government because the 2000 was an election year, the amendment passed without being seen by unions or organizations of pensioners. We believe that it was not observed, and not that it was accepted by them, as if they had an interest. In my opinion, successive electoral campaigns that came after a nearly catastrophic governances had more importance for trade unions and also for organizations of pensioners.

This Government ordinance represents a first manifestation of "government businessmen" on the point of pension, because it represents a brutal limitation of pensioners income towards the contribution paid during their working lives. By modifying Article 80 of Law no. 19/2000, the pension could be reduced as much, because it was not estimated any minimum threshold, and the principle of contribution was respected only in what concerns the COMPULSORINESS to pay contributions, but not in the assignation and payment of pension for equal contributions[29].

The inequities created in the pension system and due either to incomplete or incorrect provisions of law or of some discrimination among employees from state and private companies, or simply due to populist changes and inobservance of the principle of contribution led to recalculations which are, as far as it can be seen, repeated periodically, as long the governors either needed the votes of elderly people, or want to implement a new "government business" and they need the support of civil society.

Referring to the value of the pension point quantification, according to Law no. 19/2000 but also the current Law no. 263/2010 is up to the state, **losing the touch with the person's contribution at social insurance budget over the working life. The concrete value, the pension amount, thereby becomes dependent on the state's financial resources allocated by the State for this purpose through the Government, which draws up the annual budget bills, but also by the majority of parliament, which approves the annual budget laws.**

Concrete proof of manipulation at the pleasure of parties or alliance being at the governance is the increase or decrease of percentage pension point value from the average gross wage in the economy. So, the value of the pension point was decreased from 37.35% of the average gross wage in December 2004 to 32.9% of the average gross wage in 2005, then to 30% in 2006 and 31.2% in in 2007. In 2008, is returned to the coefficient for calculating the pension point 37.5% of the average gross salary expected, due to the occurrence of Law no. 250/2007 which amended again, Article 80 of Law no. 19/2000, in an attempt to reduce the pension point value at the coefficient of 45% of projected gross average wage, as foreseen in the original text of the law. Since 2005, the outgoings with farmer pensions payments, and since 2006, the outgoings with paid short-term benefits (sick

[29] Ibidem

leave) were transferred to the State Budget to reduce annual deficits bigger and bigger of the state social insurance budget[30].

Law no. 263/2010 regarding unitary public pension system provided in art. 102 that: *"At the date of entry into force of this law, the pension point is 732.8 lei."*

In other words, although The Romanian Constitution has enshrined equality in rights and about the equal right to a pension, according to the principle of contribution - so often mentioned by actual politicians and stated by Law no. 263/2010 - establishing by law or government decision of the point pension, without any clear justification of the calculation manner, it turned out that practically it exists only on paper! Therefore, we can talk about the principle of contribution??

There is a responsibility of the State which, to ensure the realization of fundamental rights foreseen in constitution, has handy the public and private property that belongs, being the largest landowner in Romania. Financial resources depend only on the ability of the political class in power / govern to administer this estate[31]. Therefore, the taxpayer, although he contributed long at Social Insurance budget, has no control over the money which had been suspended monthly, from the gross wage. **This raises the question: If the pension point should not get ahead of a percentage of max. 45% of the average gross wage in the economy, what it happens to the rest of the money contributed by citizens?**

At an empirical and utopian analysis on the contribution of a citizen with a gross average wage on economy throughout the active period and whose score would be 1, anyone can see that our citizen instead to receive back all his contribution , he only receive 49.59% of that amount. And what happens to the rest of the money???

The answer is clear. From my point of view the principle of contribution theory is unreal, as in fact, is not taken into account the value of this contribution, as long as there exists a pension point whose amount is set at the **political level**. From my perspective, this way of calculating the pension of citizens, far from be equal in rights is actually an equalization of pension rights. I argue this point of view stating that the pension point is established in the same way for all of us, without taking into account the value of labor, how necessary is it to the society. The only issue considered is the one of "working conditions". But, as I said above, even in these circumstances, the right taxpayer citizen is stung, being lacked with more than half of the money with which he contributed to social insurance budget.

5. Instead of conclusions ...

Pension system and, generally, social insurance system in general, needs to take a share of reform. This reform does not mean political decisions without cover in real life. **It must, in my opinion, to target a direct link between the contribution that each active person submits along life and his pension.**

The principle of contribution, which is still spoken, is a very important principle, but in the same time is one that gives the measure of fairness and equality in the rights of determining the pension citizens who worked for 35 years or, according to the "special conditions" of less work.

We appreciate that a well done law must attach the pension amount to a salary amount which a person had during the activity. It will be argued that it is not possible, because from social contributions it is paid other activities, such as tickets free treatment. However, going all the way up of our analysis, it can be easily found that free tickets treatment. or "social" tickets is not received by all pensioners, but only those whose pension has a certain amount and which .... still have the power to raise these tickets.

[30] Ibidem

[31] Băjan, Doru - *About entitlement to public* - article available on the website http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html.

It is impossible not to think in which way is going more than 50% of the contribution that each of us work and pay every month in the hope that when reaching old age, we can live without worrying about tomorrow, **but especially without worrying that a government more or less irresponsible will think primarily in its own interest and not its citizens, without which no country could not exist, or there are too many pensioners in the country, or that they live too long. .**

In the spirit of respect the Resolution no. 3137/XXVIII from 1973 (Romania was a member the United Nations at that time**.), the state's obligation is to ensure the elderly, on the one hand, a decent pension - which ensure their financial independence and a decent life, and on the other hand, job opportunities according to their needs discouraging discriminatory policies and measures.**

Clearly, these measures are designed to promote and **ensure respect for the elder's dignity,** because their brutal removal from labor system and the disregard their creative capacities on the grounds of age, have disastrous effects on society as a whole.

This is why I think that as the young generations and national trade union organizations should be more involved in knowing the pension legislation, since the passing of time, all of us get at the third age. The acceptance of "black" work " as an acceptance by a large percentage of employees of a minimum wage can only create an imbalance in the state social insurance budget, whose consequences extend over time increasingly longer.

In addition to these business "impulses" of any party or alliance who comes to power and who cares about more of his own pocket than citizens. This explains not only introducing the idea of the pension point, but even "juggling" with its value, without thinking about someone and the effects that these "juggling" have on the lives of millions of people who have no other fault than that they live under one government or another ...

References

- Bajan,Doru, *About entitlement to public* - item available on the website http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html.
- Giddens, A. - *Sociology*-Ed ALL, Bucharest, 2010.
- http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/pensions;jsessionid=003C8E1F7316AF28E0EE1A07BB40C684.
- http://www.dingermania.com/2010/demnitatea-umana.
- http://www.facias.org/documente/Petitie% 20ONG% 20Romania% 20 -% 20abuzurile% 20guvernului% 20Boc.pdf.
- Ionel Closca, Ion Suceava, *Human rights treaty*, Ed Europa Nova, Bucharest, 1995.
- Law no. 19/2000 on public pension system and other social insurance rights.
- Law no. 263/2010 on the unitary public pension.
- Nastase, Adrian - *Contribution - a perverse principle*, available on the website:http://nastase.wordpress.com/2010/05/19/contributivitatea-%E2%80%93-un-principiu-cu-efecte-reale-perverse/.
- NISTOR, ION-*Romanian public pension system - between reform, social equity and financial sustainability. Considerations and recommendations*, article available on the website http://www.aipensie.ro/?page_id=420.

ONLY STATE PRESIDENT?

MARIUS VACARELU*

Abstract
Last 4 years showed to Romania that is impossible to deny the national feeling of passionately activism in politics: for sure, we are Latin and we remain Latin. All this big debate was related to a person and to his position in Romanian state.
However, no one was able to be totally independent in his/her analyze, and, if he/she was totally independent, the press take hundreds of attacks against every person who wrote any opinion in this special problem: what kind on republic want we? Politicians want to change this year our Constitution, but I believe they won't be able to do this.
In this context, we must start a real national debate of public law specialists, about this institutional problem: we want one president and one prime-minister with powers, or a prime-minister with powers and a president like a puppet?
This kind of speech appears now because in 2012 and the key-word of our politics was the legitimacy. In this case, when this political concept become too strong, it is necessary to offer a legal answer. Our text tries to be one of them.

Key-words: *President of Romania, Constitution, state institutions, legitimacy, government.*

Introduction

For Romania, the 2012 year was one of the hardest, since the movements of December 1989 brought us the liberty.

That year was not very dangerous because of snow, but it becomes more dangerous because in Romanian legislation are not settled some specific regulations against the politicians, cause their power to make bad for the society is not limited. In this case, even the small medical examination - mainly psychiatric - will be able to stop some "characters" who perform now, without any control, in national and sometimes European politics.

Romanian Constitution is not very good of its institutional part, because the purpose of its regulations was made by the same president, on 1991 and 2003, who had a strong influence on the commission who wrote the project. Thus, the main problem is that no institution is completely well defined by the constitutional norms, and starting with this truth, we can watch that the their functioning was bad from the beginnings.

The author try to analyze and describe where is the limit of state president powers in Romania and abroad, trying to understand what is the main solution for Romanian state and society.

The author intends to answer underlining few ideas who are still available in legal science, especially in their relation with new socio-political paradigm. In the same time, we must offer a perspective for the future: the dispute between national ideas about state framework and world ideas about the executive power must be finished in one way; we must choose one direction and step forward.

On a normal society, this kind of scientific articles are analyzed with deep attention, because it might offer some directions for future, just because - for example - one of the authors can become after a while judge on Constitutional Court and his/her ideas about state framework can produce a lot of result for the daily practice of executive institutions.

* Lecturer, PhD, National School of Political and Administrative Studies, Bucharest, Romania (marius123vacarelu@gmail.com).

We try to answer to all these question *sine ira et studio*, remembering the historic facts and some specific characteristics of Romanian nation. A real comparative description - which are the regulations on Romanian Constitutions, but also on another ones. After that, we made a small conclusion: in fact, this debate cannot be solved in 10 pages or less, it is necessary to write a treatise about public law and its dimension.

There is a lot of literature for this subject: less in Romanian doctrine, more in Western Europe and other developed part of the world. What is bad - is mainly written by the political scientist, and less by the lawyers, or, in the best cases, professors of law are read, but not followed. And is almost unanimously proportion, politicians don't read law professor's work, because they can find there the legal obstacles against their wishes - which are not always according with the law.

The author believes that is time to come back to normal logic in public law and politics, because the good ideas cannot be replaced by propaganda.

Paper content

1. If we want to remember the constitutional year of 2012, we must note that lawyer had spoken about the legal framework of state stronger than in any other year, because the context was in that way, but they was not listen - the public agenda on constitutional law solutions was made by the politicians and foreign journals.

There is a problem: Constitution of every state is translated into English - so, if the internal debate of Romanian regulation is quite complicate for foreigners, because they don't know Romanian language, the fundamental law is easy to analyze by anyone.

The consequence is related to the national public image, because a bad image affect the national economy, foreign investments and offers a bad image, which is not good for citizens and state. A bad image today means unemployment, means lost of a lot of money and if forced state institutions to make age of lobby and PR to solve this problem.

In the same time, we must understand that the Constitution means "the rule of law" and its dimension is huge now, when internet is able to describe very fast the main activities of politicians. As we can see, in many countries the main public enemy for citizens are the politicians and their unlimited power; just one example, on Cyprus, where the banks was hit and controlled by the politicians, and all society must pay now for the ruler's mistakes.

2. Last year for Western Europe press was full with subjects about Romanian problems, that the executive branch of powers feel even today the power of any articles published by The Economist, by Spiegel, Le Figaro or The London Times, as example. Their article described Romanian Constitutions and the political facts made by some stupid categories of people, who was almost able to send back to the anarchy times the Romanian state.

Few examples are here:

a) "Romania is divided into two political tribes," says Dimitar Bechev, who runs the Sofia office for the European Council on Foreign Relations. "It isn't a principled political disagreement, it is a dirty war. And it has become very personal."

The nationwide vote on whether Basescu should be allowed to remain in office became necessary after the Romanian parliament suspended the president from his office in early July. The Ponta government accuses Basescu of overstepping his authority to interfere in the daily running of the country and preferring loyalists when making important judiciary appointments.

Disregard for the Constitution

But Ponta's energetic efforts to discredit the president have landed him in hot water with the European Union. Indeed, the prime minister was called to Brussels early this month for a dressing down from European Commission President José Manuel Barroso. Specifically, the EU is concerned with what critics have described as Ponta's disregard for his country's constitution.

For one, Ponta ignored a high court decision regarding who was constitutionally authorized to represent Romania at European Union summits. After the court ruled that the president alone was

authorized, Ponta travelled to Brussels for a summit anyway. In addition, Ponta has indicated that he intended to defang the Constitutional Court and replace some of the justices.

"Events in Romania have shaken our trust," Barroso said two weeks ago, underlining his concern. "Party political strife cannot justify overriding core democratic principles." The EU's progress report on Romania was likewise scathing, saying that "exceptional events" in the country were a "major source of concern."

Ponta had likewise attempted to change the rules governing national referenda of the kind that took place on Sunday. He issued a decree casting aside the requirement that half of registered voters take part in referenda before it became valid. Under EU pressure, however, he reversed course recently.

Still, Ponta seems intent on seeing the back of the president. In a recent interview with SPIEGEL, in which the prime minister was eager to present himself as a committed democrat, he was asked: "If only 45 percent turn out, but there is a clear majority against Basescu, do you think he should remain in office?" Ponta replied: "That would then be his decision if he remains in office or not. He would have to ask himself in such a situation who he represents, but certainly not the majority of the people."[1]

b) Is Romania worse than Hungary?

Victor Ponta, the prime minister, ignored a ruling of the Constitutional Court on who should represent Romania at EU meetings. The court was stripped of its powers to overrule the parliament's decisions, judges were threatened, and the ombudsman, Gheorghe Iancu, replaced with a party loyalist. The official journal, which publishes court rulings and laws, was moved under government control to delay inconvenient rulings by the Constitutional Court - such as the one about who represents Romania at EU meetings.....

Nobody in Brussels really understands why the Ponta government is so blatant in ignoring current legislation and in moving swiftly to get institutions - especially the judiciary - under party control. It is even more difficult to comprehend as Mr Ponta is poised to win the general elections later this year. "We were flabbergasted. But it is a mistake for them to think they can pull it through, these are not the 1990s," the EU official said. Romania is still under EU monitoring for guaranteeing an independent judiciary and for effectively fighting corruption and other crimes. A report is due later this month .....

Another sanction against Romania that is envisaged in Brussels is a freeze of EU funds. Payments are already suspended since July 1st on technical grounds such as faulty public procurement rules. This could be made permanent and linked to the political situation.

The most likely outcome of all this is that Romania's bid to join the borderless Schengen area will be completely derailed. The Netherlands were the only country opposing the move so far. Earlier this year the Dutch indicated they may lift their reservation if the EU commission's report is positive. (The decision to let Romania has to be taken with unanimity among member states.) Now the Dutch position seems to gain Germany's support. On July 8th, Guido Westerwelle, Germany's foreign minister, said "serious violations of the letter and spirit of EU values may raise question about the last steps to Romania's full integration in the EU."[2]

c) The ruling coalition, of Social Democrats and Liberals, had passed a law earlier this week to ease the impeachment procedure. They had also replaced the heads of both chambers of Parliament, (both allies of Mr Băsescu) with politicians close to the Prime Minister, Victor Ponta. One ally, the Liberal leader Crin Antonescu, was appointed president of the Senate. That move will make him the country's interim president if Mr Băsescu is suspended.

---

[1] http://www.spiegel.de/international/europe/basescu-survives-referendum-in-romania-a-847178.html, consulted at 27th of March 2013.

[2] http://www.economist.com/blogs/easternapproaches/2012/07/romanian-politics-2, consulted on 27th of March 2013.

In another important move, an emergency ordinance shifted control of the Official Gazette, a bulletin that gives formal publication to laws and regulations, from parliamentary to government. Civil society groups are concerned that this could enable instant lawmaking. .....

The Cabinet also replaced the Ombudsman with a former Social Democrat lawmaker. That has sparked another round of controversies. The Ombudsman is the only Romanian public body who can challenge the emergency ordinances of the Government before the Constitutional Court.

Mr Ponta has also tried to change some of the judges from the Constitutional Court, accusing them of political bias. According to the Constitution, the judges are irremovable during their time in office. The Court said Mr Ponta's government is trying to threaten its independence with such potential dismantling acts.[3]

As we can see, the main vectors of Western Europe press presented state institutions - mainly the government - as an aggressor, who don't respect the Constitution and who lost its respect abroad. In fact, even a single article about this problem can create problem for a weak economy, but on June, July and August the number of articles was huge; a map from that time underline that Romanian case of war between President and Parliament + Government - with all legal context described - was present of 98% of states.

3. Is not our job to solve the image problems, there are a lot of institutions able to do that, a lot of PR companies ready to work for this subject.

We must analyze which are the main conditions to put in form on Romanian Constitution, to fulfill the main purpose of state: increasing its power, offering satisfaction to every citizen.

For this, we must imagine a real and coherent legal framework for our country. On this hypothesis, we must imagine a national way of solving problem, but watching carefully to other states examples - good practices are always necessary to be known, because their importance is huge of juridical battles of arguments.

There are two global models in fact, because both of them are the main expression of a special kind of legal culture:

French one, who is a representation of former times, when Paris was the intellectual center of the world, and where the ideas were followed with passion. Its role was huge for many countries, because the cultural domination of XIX corresponds to the national state creation on many continents; in this case, the global time of ideas was good not only for writers, but also for lawyers, and many codes and constitutions had as main influence French legislation.

The second example is the United States of America's example, because after World War II its power becomes the single pillar of democracy - and, for this, their legal concepts started to be spread on world: first, on the commercial branch, after that, one many other cases.

There is something very special on both cases: France is based by the national and historical loyalty, but the US are based by the loyalty for Constitution.

4. French president powers - which are closer by the Romanian regime - are described by few articles, as they are:

Article 5:

The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State.

He shall be the guarantor of national independence, territorial integrity and observance of treaties.

Article 8:

The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.

---

[3] http://www.economist.com/blogs/easternapproaches/2012/07/romanian-politics-1, consulted on 27th of March 2013.

On the proposal of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments.

Article 9:

The President of the Republic shall preside over the Council of Ministers.

Article 10:

The President of the Republic shall promulgate Acts of Parliament within fifteen days following the final adoption of an Act and its transmission to the Government.

He may, before the expiry of this time limit, ask Parliament to reconsider the Act or sections of the Act. Reconsideration shall not be refused.

Article 11:

(1) The President of the Republic may, on a proposal from the Government when Parliament is in session or on a joint motion of the two assemblies, published in either case in the Journal Officiel, submit to a referendum any government bill which deals with the organization of the public authorities, or with reforms relating to the economic, social, or environmental policy of the Nation and to the public services contributing thereto, or which provides for authorization to ratify a treaty that, although not contrary to the Constitution, would affect the functioning of the institutions. .....

Article 12:

The President of the Republic may, after consulting the Prime Minister and the Presidents of the assemblies, declare the National Assembly dissolved.

A general election shall take place not less than twenty days and not more than forty days after the dissolution. The National Assembly shall convene as of right on the second Thursday following its election.

Should it so convene outside the period prescribed for the ordinary session, a session shall be called by right for a fifteen-day period. No further dissolution shall take place within a year following this election.

Article 13:

The President of the Republic shall sign the ordinances and decrees deliberated upon in the Council of Ministers. He shall make appointments to the civil and military posts of the State. [...]

Article 14:

The President of the Republic shall accredit ambassadors and envoys extraordinary to foreign powers ; foreign ambassadors and envoys extraordinary shall be accredited to him.

Article 15:

The President of the Republic shall be commander-in-chief of the armed forces. He shall preside over the higher national defence councils and committees.

Article 16:

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council.

5. United States president is considered - by the force of the American economy and military power - the most powerful man in the world. For sure, from the military point, but the legal doctrine underline other things:

The basic features of the U.S. presidency noted above are part of what distinguishes presidential systems of government from other systems. By definition, in a presidential system the president must originate from outside the legislative authority. In most countries such presidents are elected directly by the citizens, though separation of origin can also be ensured through an electoral college (as in the United States), provided that legislators cannot also serve as electors. Second, the president serves simultaneously as head of government and head of state; he is empowered to select

cabinet ministers, who are responsible to him and not to the legislative majority. And third, the president has some constitutionally guaranteed legislative authority: for example, the U.S. president signs into law or vetoes bills passed by Congress, though Congress may override a presidential veto with a two-thirds majority vote in both houses[4].

Article II, Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows: .....No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. .....

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Analyzing these disposition, we can see that the French president is much close by the royal powers of history, because - we must remember, France is the country of monarchic absolutism.

6. Romanian history is connected - as almost good part of the European continent - to this paradigm. In fact, we can see that only after strong wars, where the national power was deeply affected, European states renounced to the absolutist power for chief of state.

Romania is a territory where wars were too much present, only in the last century we participated on 4 wars. Everyone was strong and with deep traces on Romanian map and Romanian citizen number, because our neighbors were not very positive in their attitude related to Romanian interests.

---

[4] Brian Duingan, *The executive branch of the federal government: purpose, process, and people* (New York: Britannica Educational Publishing, 2010), 34.

Thus, it appears the main and single question, who speaks about also about the president legitimacy against the government legitimacy: for what is he elected: mainly for economic powers or mainly for military dimension of presidential position?

The answer is very simple in Romania, and somehow it is shown by the public social investigations about the trust for state institution, when the church and the army are on the first position.

The church and the army are the state pillars (with the family). In this hypothesis, we must note that the citizens want to see a strong president, able to protect the state against any other aggression. This answer is the consequence of history and not of a paternalist mentality, because every state teaches its pupils national history. The Romanian history is complicate, but if offers a red wire: when the ruler was strong, the borders and citizen's life was better defended.

The legitimacy is given not only by the elections, there is more important to understand the history, to understand why a state acts in its way (for example, the Hungarian politics is almost no woman policy) - and laws cannot change in one day of vote (the referendum for Constitution approval) decades and centuries of history.

In the same time, the same social research wants to see the prime-minister more involved in economic problems - in fact, his career depends in almost complete proportion by the economic results, rather the military aspects.

In the same time, Romanian citizens watch every day without too much satisfaction to the borders, and they are not satisfied - they always consider that the main dangers come from the power and hate of some neighbor countries rather than the internal state framework.

For these arguments - who must be developed on a special book, but only after 2014 elections - we consider that is much better to not have a prime-minister, because, however, two important positions occupied means - naturally and without any other hesitations - an institutional conflict between persons (first) and institution (after).

Conclusions

Our text tried to describe better the main issues for a new regulation of executive power in Romania, presenting the French and United States regulation on this case.

In the same time, we presented some ideas about legitimacy and constitutional framework of Romania, underlining that the whole context is more close by the strong position for president, because the Romanian history send us to this conclusion, who don't show much options for prime-minister.

These kind of ideas are not totally welcomed today and a good part of readers will accuse me as being a partisan in internal politic war. In the same time, if the angry people will try to think with a "cold mind", they cannot ignore two things: history and map of Romania, especially our neighbors.

On this context, we consider that is necessary to understand much better the future on a correct line of history; if we cannot ignore geography and history, is better to deep our research on this part of public law. For sure, the author will continue this study, trying to present the best results for Romania and its nation.

References

- Brian Duingan, *The executive branch of the federal government: purpose, process, and people* (New York: Britannica Educational Publishing, 2010).
- http://www.spiegel.de/international/europe/basescu-survives-referendum-in-romania-a-847178.html, consulted at 27th of March 2013.
- http://www.economist.com/blogs/easternapproaches/2012/07/romanian-politics-2, consulted on 27th of March 2013.
- http://www.economist.com/blogs/easternapproaches/2012/07/romanian-politics-1, consulted on 27th of March 2013.

CROATIA: THE 28th MEMBER STATE OF THE EUROPEAN UNION

DAN VĂTĂMAN*

Abstract

In an enlarged European Union of 27 Member States, convinced that the successive enlargements have been a success both for the European Union and the Member States which acceded to it, thus contributing to stability, development and prosperity throughout Europe, the leaders of Member States considered that this process must continue, ensuring the success of future enlargement of the Union, for a better response to the many challenges they face. Croatia completed its negotiations on the European Union membership in June 2011 and the European Council has designated 1 July 2013 as the date of Croatia's accession to the European Union, provided that all the procedures required for full membership are completed by that date. Therefore, this study aims to analyze the progress made by Croatia in its preparations for accession to the European Union and if this country continues to meet the Copenhagen criteria and has the ability to take on the obligations of membership.

Keywords: *Croatia's Accession to the European Union, enlargement, European integration, membership negotiations, Member State of European Union.*

1. Introduction

After sixty years of evolution marked by successive waves of enlargement, the European Union today is a successful model based on values of respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, values were common to the Member States in a society characterized by pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men. According to Article 49 TEU, any European State which respects these values and is committed to promoting them may apply to become a member of the Union. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State and this agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Nowadays when the European Union faces major challenges and significant global uncertainty and gains new momentum for economic, financial and political integration, enlargement policy continues to contribute to peace, security and prosperity on our continent. The current enlargement agenda covers the Western Balkans, Turkey and Iceland. The European Union has consistently proclaimed the inclusiveness of its policy towards the Western Balkans, with successive European Councils confirming that the future of the whole region lies within the European Union. The enlargement process is by its very nature inclusive and necessitates wide stakeholder participation. In the enlargement countries, broad political consensus and support of the population for the reforms required contributes significantly to the transformation necessary for progress on the European Union path.[1]

Taking into account the progress made by Croatia on the path of European Union integration and the forthcoming accession of Croatia to the European Union on 1 July 2013, through this study we will try to highlight the efforts made by Croatia on the road to accession and analyze the commitments undertaken by Croatia in the accession negotiations. This approach is necessary because in the specialized literature there are few studies on this issue, given the relatively recent date

* Senior Lecturer, PhD candidate, Faculty of Economics, Law and Administrative Sciences - "Gheorghe Cristea" University of Sciences and Arts, Bucharest, Romania; PhD candidate - Faculty of Law, "Titu Maiorescu" University, Bucharest, Romania (e-mail: danvataman@yahoo.com).

[1] Communication from the Commission to the European Parliament and the Council COM(2012) 600 final, *Enlargement Strategy and Main Challenges 2012-2013*, Brussels, 10.10.2012.

of signature of the Accession Treaty of Croatia to the European Union. Therefore we intend to answer to these issues based on our research on the most recent documents of the European institutions and the recent progress reported even officials from Croatia.

2. The first steps of Croatia to the European Union

The beginning of relations between Croatia and the European Union was marked by the signing of the Stabilisation and Association Agreement (S.A.A.) on 29 October 2001[2]. Croatia was the second country to sign a Stabilisation and Association Agreement (S.A.A.) with the European Union and that agreement represented the first formal contractual step in institutionalising the relationship of Croatia with the European Union. The Stabilisation and Association Agreement (S.A.A.) provides the contractual framework for relations between the European Union and Croatia until the accession of the latter to the European Union and it covers areas such as: political dialogue; regional co-operation; the four freedoms, with the creation of a free trade area by 2007 for industrial products and most agricultural products; approximation of the legislation of Croatia to the European Union *acquis*, including precise rules in the fields such as competition, intellectual property rights and public procurement; wide-ranging co-operation in all areas of European Union policies, including in the area of justice, freedom and security[3]. From January 2002 until the entry into force of the Stabilisation and Association Agreement (S.A.A.), an Interim Agreement on trade and trade-related matters was applied[4].

On 21 February 2003, Croatia formally applied to join the European Union. In April 2004, the European Commission issued a positive opinion on this application and recommended the opening of accession negotiations[5]. This recommendation was endorsed by the June 2004 European Council who decided that Croatia was a candidate country and that the accession process should be launched. The December 2004 European Council requested the Council to agree on a negotiating framework with a view to opening the accession negotiations with Croatia on 17 March 2005 provided that there is full cooperation with the International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.). After a positive report by the then I.C.T.Y. Chief Prosecutor, the Council concluded that conditions for starting negotiations had been met and negotiations were officially launched on 3 October 2005[6].

3. Accession negotiations between the European Union and Croatia

Following the results of the analytical comparison of Croatian legislation and the one of the European Union (so called screening), the negotiations between the European Union and Croatia as a candidate country started in 2005, where the candidate country first presented its negotiating position

---

[2] The Stabilisation and Association Process conditionality for the Western Balkan countries was defined by the Council on 31 May 1999 and includes cooperation with the International Criminal Tribunal for the Former Yugoslavia, and regional cooperation.

[3] *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part - Official Journal L 26 , 28/01/2005.*

[4] The Stabilisation and Association Agreement (S.A.A.) entered into force on 1 February 2005.

[5] Communication from the Commission COM(2004)257 final, *Opinion on Croatia's Application for Membership of the European Union*, Brussels, 20.4.2004.

[6] The text of conclusions which the EU ministerial council adopted at their session in Luxembourg, warmly welcomes "the report to the Croatia Task Force by the ICTY Chief Prosecutor that Croatia was now co-operating fully with the ICTY, as well as the clear commitment by the Croatian Prime Minister that full cooperation would be maintained until the last remaining indictee was in The Hague, and as long as required by the ICTY". The Council confirmed that "sustaining full co-operation with the ICTY would remain a requirement for progress throughout the accession process" – *Press Release - 2678th Council Meeting, General Affairs and External Relations, Luxembourg, 3 October 2005.*

in which it specifies how it plans to adopt and implement the European Union *acquis*, in each 35 chapters of negotiations covering the whole range of European Union policies and rules [7].

Negotiating positions were adopted by the Croatian Government and submitted to the European Union. After that, the European Commission prepared the draft of European Union common negotiating position, which is finally adopted by a unanimous decision of the Council of Ministers. In its common position, the European Union set benchmarks which the candidate country had to meet before opening each chapter. After the opening benchmarks for individual chapters were met, the European Union and the candidate country discussed and negotiated at intergovernmental conferences which were held at the same time as everyday expert consultations between Croatia and the European Union. Once the preconditions for closing individual chapters were met (so called closing benchmarks), a negotiation chapter was considered to be provisionally closed.

The first chapter in Croatia's accession negotiations to European Union, Science & Research, was opened and temporarily closed on Monday, 12 June 2006, at the Intergovernmental Accession Conference held in Luxembourg between Croatia and the European Union.

After successful six-year process of negotiations, on 30 June 2011, the meeting of the Accession Conference with Croatia at Ministerial level closed negotiations on remaining four chapters thus closing the accession negotiations with Croatia, which allowed for the signature of the Accession Treaty. [8]

4. Accession Treaty of the Republic of Croatia to the European Union

4.1. Signature of the Accession Treaty

In light of the decisions taken on 30 June 2011, the the European Commission has received a strong mandate to closely monitor Croatia's fulfilment of the commitments undertaken. In line with Article 49 of the Treaty on European Union, the European Commission gave its formal favourable opinion on Croatia's accession on 10 October 2011[9].

After the Commission's favourable opinion, the European Parliament gave its consent to Croatia's European Union membership, in a vote on 1 December, with 564 votes in favour, 38 against and 32 abstentions[10].

Final approval was given by the General Affairs Council in its meeting held on 5 December 2011 in Brussels, when the Council adopted conclusions on enlargement and on the stabilisation and association process. With regards to Croatia, the Council concluded that Croatia has reached a high level of preparedness for membership and encourages Croatia to continue in its efforts in addressing all the issues identified therein, notably in the field of judiciary and fundamental rights, justice, freedom and security and competition policy. Consequently, the Council adopted a decision

---

[7] The negotiation chapters are: Chapter 1: Free movement of goods; Chapter 2: Freedom of movement for workers; Chapter 3: Right of establishment and freedom to provide services; Chapter 4: Free movement of capital; Chapter 5: Public procurement; Chapter 6: Company law; Chapter 7: Intellectual property law; Chapter 8: Competition policy; Chapter 9: Financial services; Chapter 10: Information society and media; Chapter 11: Agriculture and rural development; Chapter 12: Food safety, veterinary and phytosanitary policy; Chapter 13: Fisheries; Chapter 14: Transport policy; Chapter 15: Energy; Chapter 16: Taxation; Chapter 17: Economic and monetary policy; Chapter 18: Statistics; Chapter 19: Social policy and employment; Chapter 20: Enterprise and industrial policy; Chapter 21: Trans-European networks; Chapter 22: Regional policy and coordination of structural instruments; Chapter 23: Judiciary and fundamental rights; Chapter 24: Justice, freedom and security; Chapter 25: Science and research; Chapter 26: Education and culture; Chapter 27: Environment; Chapter 28: Consumer and health protection; Chapter 29: Customs union; Chapter 30: External relations; Chapter 31: Foreign, security and defence policy; Chapter 32: Financial control; Chapter 33: Financial and budgetary provisions; Chapter 34 – Institutions; Chapter 35 - Other issues.

[8] http://www.delhrv.ec.europa.eu – Official site of European Union.

[9] Commission Opinion on the application for accession to the European Union by the Republic of Croatia COM(2011) 667 final, Brussels, 12.10.2011.

[10] www.europarl.europa.eu/news/en/pressroom/content/20111201IPR32926/html/Croatia's-EU-accession-green-light-from-Parliament.

approving Croatia's admission to the European Union and the Treaty of Accession was scheduled to be signed in Brussels on 9 December 2011.

As agreed, the Treaty of Croatia's Accession to the European Union was signed in Brussels at a separate ceremony preceding the 9 December 2011 session of the European Council. The treaty was signed by President Ivo Josipovć and the then Prime Minister Jadranka Kosor on behalf of Croatia and by heads of states or governments of the European Union Member States[11].

The signing of the Treaty has marked the end of the lengthy process of preparations for the accession completed with the end of the six-year negotiations in June 2011, during this period Croatia has been asked not only to adopt new laws and regulations to comply with European Union standards, but also to implement them, thus proving the reforms has taken an irreversible course of action.

4.2. Content of the Accession Treaty of Croatia to the European Union

Accession Treaty of Croatia to the European Union contains only four articles which covers the following aspects:

a) Article 1 provides that Croatia hereby becomes a member of the European Union and of the European Atomic Energy Community. Also, Croatia becomes a Party to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community as amended or supplemented. In addition, this article provides that the conditions of Croatia's dmission to the European Union are set out in the Act annexed to the Treaty, and the provisions of this Act are an integral part of the Treaty.

b) Article 2 provides that the provisions concerning the rights and obligations of the Member States and the powers and jurisdiction of the institutions of the Union, as set out in the Treaties to which the Republic of Croatia becomes a Party, shall apply in respect of the Accession Treaty.

c) Article 3 states that the Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements, and the instruments of ratification shall be deposited with the Government of the Italian Republic by 30 June 2013. In this case, the Treaty shall enter into force on 1 July 2013 provided that all the instruments of ratification have been deposited before that date.

d) Article 4 stated that the Treaty was written in a single original in 24 languages (Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish) and the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the Governments of the other Signatory States.

The *Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community* (provided in Article 1 paragraph 3 of the Treaty), contains 55 Articles distributed into 5 parts as follows: Part One – Principles; Part Two - Adjustments to the Treaties; Part Three - Permanent Provisions; Part Four - Temporary Provisions; Part Five - Provisions relating to the implementation of the Act.

Croatia's accession Treaty contains 9 annexes, each addressing a particular issue as follows: ANNEX I - List of conventions and protocols to which the Republic of Croatia accedes upon accession (referred to in Article 3(4) of the Act of Accession); ANNEX II - List of provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it, to be binding on, and applicable in, the Republic of Croatia as of accession (referred to in Article 4(1) of the Act of Accession); ANNEX III - List referred to in Article 15 of the Act of Accession: adaptations to acts adopted by the institutions; ANNEX IV - List referred to in Article 16 of the Act of Accession: other permanent provisions; ANNEX V - List

[11] The treaty was published in the Official Journal of the European Union L 112/10, 24.4.2012.

referred to in Article 18 of the Act of Accession: transitional measures; ANNEX VI - Rural development (referred to in Article 35(2) of the Act of Accession); ANNEX VII - Specific commitments undertaken by the Republic of Croatia in the accession negotiations (referred to in Article 36(1), second subparagraph, of the Act of Accession); ANNEX VIII - Commitments undertaken by the Republic of Croatia on the restructuring of the Croatian shipbuilding industry (referred to in Article 36(1), third subparagraph, of the Act of Accession); ANNEX IX - Commitments undertaken by the Republic of Croatia on the restructuring of the steel sector (referred to in Article 36(1), third subparagraph, of the Act of Accession)

In addition, at the Treaty was attached a Protocol on certain arrangements concerning a possible one-off transfer of assigned amount units issued under the Kyoto Protocol to the United Nations Framework Convention on Climate Change to the Republic of Croatia, as well as the related compensation.

4.3. Ratification process of the Treaty of Croatia's Accession to the European Union

In accordance with Article 3 of the Accession Treaty, after signing the treaty must be ratified by each Member State of the European Union, this process must be completed by 30 June 2013, once the Treaty is ratified by all Member States, Croatia's membership in the Union will be formalised as of 1 July 2013.

So far, the Treaty of Croatia's Accession to the European Union has been ratified by most Member States of the European Union and there is belief that the ratification process will be completed by the due date.[12]

With regard to ratification of Croatia's Accession Treaty by Romania, on 26 June 2012 took place a joint session of the Chamber of Deputies and the Senate, on this occasion was passed the law on ratification of accession of Croatia to the European Union with unanimity of the 378 MPs[13]. After that, Romanian President signs the ratification act on 29 June 2012[14].

5. The progress made by Croatia in its preparations for accession

In the course of the negotiations, Croatia has agreed to a number of commitments, which have to be implemented by the date of accession, at the latest, unless specific transitional arrangements have been agreed.

Article 36 of the Act of Accession requires the Commission to closely monitor all commitments undertaken by Croatia in the accession negotiations focusing in particular on competition policy, judiciary and fundamental rights, and freedom security and justice. The Act further provides for the Commission to present a Comprehensive Monitoring Report to the European Parliament and the Council in autumn 2012.

As a result, on 10 October 2012, the European Commission presented a report to the European Parliament and the Council on the main findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for European Union membership[15]. The report assesses Croatia's

---

[12] This results from statements of the Irish Prime Minister Enda Kenny, who said that the completion of the ratification of Croatia's Accession Treaty with the European Union will be one of the priorities of Ireland's presidency of the Council of the European Union. Also, the Programme of the Irish Presidency of the Council of the European Union shows that: "In 2013 the Irish Presidency will continue to prioritise a credible enlargement policy based on the principle of conditionality. While the Presidency will work intensively to advance enlargement and support states as they prepare for membership, much will depend on the progress made by the states themselves. Firstly, the Presidency will oversee consideration of the final monitoring report on Croatia and looks forward to Croatia's accession to the EU on 1 July 2013" - http://www.eu2013.ie/ireland-and-the-presidency/about-the-presidency/programme-and-priorities/.

[13] Law No. 86 of 29 June 2012, published in Romanian Official Gazette no. 436/30 June 2012.

[14] Decree No. 431 of 29 June 2012, published in Romanian Official Gazette no. 436/30 June 2012.

[15] *Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, COM/2012/0601 final* - http://eur-lex.europa.eu.

state of preparedness on the basis of the political and economic criteria for membership and of the requirement to adopt and implement the European Union *acquis*, as laid down by the Copenhagen European Council in 1993.

As reflected in the report of the European Commission, Croatia continues to meet the **political criteria**, and in all areas covered by the political criteria (stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities) work has continued and results are becoming tangible. In the field of judiciary, efforts to strengthen the independence, accountability, impartiality and professionalism of the judiciary have continued. With regard to the fight against corruption, an adequate legal and institutional framework remains in place and a track record of implementation continues to be developed. Law enforcement bodies remain pro-active, especially on higher-level cases. Local level corruption needs attention, particularly in public procurement. With regard to human rights and the protection of minorities, human rights continue to be generally well respected, and protection of minorities has continued to improve, through the implementation of measures for the protection of minorities, including the Constitutional Act on the Rights of National Minorities. With regard to war crimes, Croatia continues to cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) and to process war crimes cases, but efforts to address impunity for war crimes should be intensified, as the majority of crimes have yet to be successfully prosecuted.

As regards the **economic criteria**, the European Commission report shows that Croatia is a functioning market economy and vigorous implementation of urgently needed structural reforms should enable Croatia to cope with competitive pressures and market forces within the Union in the near term. Despite the fact that there is a large political consensus on the fundamentals of a market economy, structural reforms progressed slowly in some areas, not least with respect to privatisation and the restructuring of loss-making enterprises, and were almost non-existent in others. In the area of labour markets in particular, where already low levels of employment and participation declined further, reforms are still at a very early stage and need urgently to be stepped up. The investment climate continued to suffer from a heavy regulatory burden, lengthy procedures, uncertainties in the legal environment, unpredictability of administrative decisions, and a high number of non-tax fees. Social transfer payments, which represent a relatively high share of public budgets, remained not well-targeted. Considering the need to achieve medium-term fiscal sustainability, the budgetary process could be improved further. Enhancing the efficiency of public spending remains a key challenge.

Regarding the **ability to take on the obligations of membership** (one of the Copenhagen criteria), the European Commission said that Croatia has continued to make progress in adopting and implementing European Union legislation and is now completing its alignment with the *acquis*. Nevertheless, the Commission has identified a number of issues requiring continued attention. The Croatian authorities need to take all necessary measures to ensure that the country is fully prepared for membership by 1 July 2013, including with regard to the administrative capacity for the implementation of the *acquis*. In accordance with Article 36 of the Act of Accession, particular focus is given in this section to competition policy, judiciary and fundamental rights and freedom, justice and security.

However, in its report the European Commission has identified areas where further efforts are necessary and a limited number of issues where increased efforts are required. These issues relate in particular to: the preparations for future European Union structural funds in order to ensure their proper management; the restructuring of the Croatian shipbuilding industry; the strengthening of the rule of law through continued implementation of Croatia's commitments to further improve public administration, the justice system; preventing and fighting corruption effectively, as well as; the management of external borders. Without prejudice to the importance of addressing all issues underlined in the Comprehensive Monitoring Report, the Commission considers that particular

attention should be paid by Croatia in the coming months in some areas such as: competition policy, judiciary and fundamental rights, and freedom security and justice.[16]

At its meeting on 11 December 2012, the Council welcomed the communication from the Commission of 10 October 2012 on the Enlargement Strategy and Main Challenges 2012-2013, as well as the comprehensive monitoring report on Croatia's state of preparedness for European Union membership and the accompanying monitoring tables, and takes note of the findings therein. The Council has assessed thoroughly the monitoring report and tables, and notes with satisfaction that Croatia has continued to make progress in adopting and implementing European Union legislation, is completing its alignment with the *acquis*, and has achieved substantial results in a number of areas. It is essential that Croatia sharpens its focus on the ten key issues highlighted by the Commission, in the fields of competition policy, judiciary and fundamental rights, and justice, freedom and security. At the same time, the Council notes that there are also a number of commitments undertaken by Croatia during accession negotiations in these and other chapters, where further or increased efforts are required from Croatia. In line with Article 36 of the Accession Treaty and with relevant European Council conclusions and Council conclusions, the Council reiterates the importance it attaches to close monitoring of Croatia's fulfilment of all its commitments undertaken in the accession negotiations, including those which must be fulfilled before accession. In this regard, the Council endorses the specific recommendations in the Commission's report and urges Croatia to address without delay the concerns highlighted in order to ensure that its preparations are successfully completed, and that this can be reflected in the Commission's final monitoring report on Croatia's preparations to be presented in 2013, in line with the provisions of the Accession Treaty. Bearing in mind the importance of good neighbourly relations and the implementation of legally binding international agreements, the Council encourages Croatia to continue addressing all outstanding bilateral and regional issues, including succession issues, building on progress achieved so far. Further efforts are needed to tackle impunity for war crimes through impartial handling of outstanding cases and through continued full cooperation with the International Criminal Tribunal for the former Yugoslavia[17].

Also, 18-month program of the Council (1 January 2013 - 30 June 2014) shows that monitoring of Croatia's fulfilment of all commitments undertaken in the accession negotiations will continue until Croatia becomes a full Member. Pending the successful conclusion of procedures for ratification of the Accession Treaty, Croatia will become the 28th Member State of the EU on 1 July 2013[18].

6. Conclusions

After 40 years since the first enlargement of the European Communities (accession of the Denmark, Ireland and United Kingdom) the enlargement policy remains a priority for the European Union.

However, there are some who wonder why we continue the process of European Union enlargement? Especially in the context of the recent global financial crisis, the difficulties currently facing the euro area and instability in certain areas of our neighbourhood. Do not already have enough problems without taking additional charge of European Union integration of new members?

On these legitimate concerns of European citizens we can argue that in the year 2013, at a time when the European Union faces major challenges and significant global uncertainty and gains new momentum for economic, financial and political integration, enlargement policy continues to contribute to peace, security and prosperity on our continent.

---

[16] COM(2012) 601 final.

[17] *General Affairs Council meeting, Brussels, 11 December 2012* - http://www.consilium.europa.eu.

[18] http://www.eu2013.ie/media/eupresidency/content/documents/Trio-Programme.pdf.

In addition, we believe that the extension serves both the interests of the Union and those countries wishing to join, thereby contributing to stability, development and prosperity throughout Europe, for this reason we believe that the enlargement process should continue, but not in any conditions. In this respect, the countries involved in the accession process should adopt political and economic reforms, the aim being to bring these countries up to European standards in all areas covered by the European treaties, which would support the European Union in achieving their goals in a number of key areas for economic recovery and sustainable growth, such as energy, transport, environment and efforts to tackle climate change.

In the last decade, Western Balkan countries have made substantial progress in terms of stability and regional cooperation, however, a number of problems stemming from conflicts in the region remain unresolved and affect both the internal workings of states and the relations between them. Therefore, the European Union is working with parties in the region to overcome these problems, with the conviction that lasting reconciliation requires efforts at all levels (of government, the judiciary and civil society), reconciliation is linked also to solving problems related to poverty and social exclusion.

Accession of Croatia to the European Union on 1 July 2013 will be an event with a significant resonance both for Croatia and for the whole region, specifically illustrating vocation of Western Balkan countries belong to the European family gathered through constant effort and decided to achieve democratic reforms and alignment to the principles and values underlying the European project. However, the accession of Croatia to the European Union will encourage other states who want to join the European Union to continue the reforms required to make their European journey, thus contributing to strengthening democracy and stability throughout the region.

In this context, Croatia is expected to continue playing an active role in regional cooperation in the Western Balkans, and is encouraged to address the remaining open bilateral issues with its neighbours.

References

- Communication from the Commission to the European Parliament and the Council COM (2012) 600 final, Enlargement Strategy and Main Challenges 2012-2013, Brussels, 10.10.2012.
- Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, COM/2012/0601 final.
- Commission Opinion on the application for accession to the European Union by the Republic of Croatia COM(2011) 667 final, Brussels, 12.10.2011.
- Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part - Official Journal L 26 , 28/01/2005.
- Communication from the Commission COM(2004)257 final, Opinion on Croatia's Application for Membership of the European Union, Brussels, 20.4.2004.
- Vătăman Dan, *History of the European Union* (Bucharest: Pro Universitaria Publishing House, 2011) 147-148.
- ***Other sources***:
- www.europarl.europa.eu - European Parliament.
- www.eu2013.ie - Irish Presidency of the Council of the European Union.
- http://eur-lex.europa.eu - Access to European Union law.
- www.consilium.europa.eu - Council of the European Union.
- http://ec.europa.eu/enlargement - European Commission.

TRADE NAME, FIRM, DENOMINATION SOCIALE AND RAISON SOCIALE. ARE THEY ALL THE SAME?

PAUL-GEORGE BUTA*

Abstract
The present study intends to point out the different designations used to indicate business identifiers and verify whether they facilitate the minimization of the two types of transaction costs usually mitigated by such identifiers.
Even when the Paris Convention for the Protection of Industrial Property was being drafted in the 19th century there were ample debates regarding the need for an international protection for trade names. And even then the reports presented to the Congress then mentioned the fact that national protection for trade names was provided for under various designations and with different scope in the countries that were analyzed.
Since the determination of the various designations used has as its starting point the provisions of the Paris Convention an analysis starting from the designations used in France is necessary. A comparison with the terms used in Germany and France is then provided so as to offer a wide array of models for business identifiers that are to be later assessed as against their ability to mitigate transaction costs.

Key Words: *Trade Name, Firm, Dénomination sociale, Raison sociale, Firma, Business identifiers, transaction costs*

Introduction

The present study deals with the protection of business identifiers defined as names benefitting from legal protection and used so as to primarily identify a trader. Business identifiers are at the intersection of company and intellectual property law and thus are the object of debate as to their nature and scope of protection. Since company names are mandatory in modern jurisdictions for the incorporation of any trader and similar protection is afforded to traders acting as natural persons and to other associative organizations, they are normally dealt with by either company law or the law relating to such associative organizations. Trade names are, on the other hand, protected as industrial property rights by the 1883 Paris Convention for the Protection of Industrial Property and should thus be offered protection under the special provisions of national and international law dealing with the protection of industrial property.

The economic dimension of industrial property protection concerning distinctive signs is traditionally anchored in the assumption that such rights allow for the minimization of transaction costs for the consumers. Trademarks especially have been evaluated in what regards the scope of protection according to their ability to fulfill their economic function of minimizing such transaction costs.

The present study aims to point out that business identifiers can be themselves evaluated by their ability to mitigate such costs under two dimensions. However there are differences in the names under which such business identifiers are protected under national law and not all of them allow for mitigation of all these costs.

The study undertakes to identify the categories of transaction costs normally expected to be mitigated by such business identifiers and then to determine, by means of verification of their legal content, categories of business identifiers which although have a different name share the same important characteristics.

* Assistant Lecturer, PhD Candidate, "Nicolae Titulescu" University, Bucharest (paul.buta@univnt.ro).

There is little literature on the subject, although the various names of business identifiers have been the subject of some analysis[1] while in economic scholarship there has been research concerning transaction costs[2] and the effects of reputation[3]

The economic benefits of business identifiers

William Blackstone claimed that the invention of companies "belongs entirely to the Romans"[4] since it is the Romans who have created the *societates* of the *publicani* and the *collegia* and *corpora* of the lower classes. One of the most important features of the Roman innovation was the idea that such associations would have a collective identity separated from those of its individual human components, i.e. the separation of identity between the company and its members taken either collectively or individually[5]. This was a major step forward from earlier forms of commercial associations in Mesopotamia, Phoenicia and ancient Athens.

The benefit a company brings is, as Ronald Coase put it in his seminal 1937 work "The Nature of the Firm"[6], the minimization of transaction costs[7] concerning the coordination of a particular economic activity. Such decrease in costs would normally result in an increase in both parties' surplus which would then be reflected in the market where the company is to sell its products or services. This Pareto improvement would result in a part of the surplus being further shared with the consumers of said products or services.

Transaction costs are traditionally divided into three categories: search and information costs, bargaining costs and policing and enforcement costs[8]. Another, more recent, classification identifies four categories of transaction costs: search costs, contracting costs, monitoring costs and enforcement costs[9]. Under the latter classification search costs "include the costs of gathering information to identify and evaluate potential trading partners"[10].

---

[1] Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), Alexandra Mendoza *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003).

[2] Ronald Coase, "The Nature of the Firm" in *Economica*, vol. 4 (1937), pp. 386-405; William M. Landes and Richard A. Posner, The economic structure of intellectual property law, The Belknap Press of Harvard University Press (Cambridge, London - 2003); Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997); Carl J. Dahlman, "The Problem of Externality" in *Journal of Law and Economics*, vol. 22 (1) (1979); O.E. Williamson, *The Economic Institutions of Capitalism*, Free Press, New York, 1985; J.-F. Hennart, „Explaining the swollen middle: Why most transactions are a mix of "Market" and "Hierarchy"", in *Organization Science*, vol. 4(4) (1993), pp. 529-547; D. C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1990 cit. in Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997), pp. 535-556.

[3] George Akerloff, "The Market for Lemons: Quality Uncertainty and the Market Mechanism" in *The Quarterly Journal of Economics*, Vol. 84, No. 3 (Aug., 1970); Steven Tadelis, "What's in a name? Reputation as a tradable asset" in *The American Economic Review*, vol. 89, No. 3 (June 1999).

[4] Quoted in Oscar Handlin and Mary Handlin "Origins of the American Business Corporation" in Frederic Lane (ed.), *Enterprise and Secular Change,* Richard Irwin, (Homewood – 1953), cit. in John Micklethwait and Adrian Wooldridge, *The Company: a Short History of a Revolutionary Idea*, Modern Library, (New York – 2003), p. 4, note 7.

[5] John Micklethwait and Adrian Wooldridge, *The Company: a Short History of a Revolutionary Idea*, Modern Library, (New York - 2003), p. 4.

[6] Ronald Coase, "The Nature of the Firm" in *Economica*, vol. 4 (1937), pp. 386-405.

[7] Initially termed "costs of using the price mechanism".

[8] Carl J. Dahlman, "The Problem of Externality" in *Journal of Law and Economics*, vol. 22 (1) (1979) pp. 141–162.

[9] O.E. Williamson, *The Economic Institutions of Capitalism*, Free Press, New York, 1985; J.-F. Hennart, „Explaining the swollen middle: Why most transactions are a mix of "Market" and "Hierarchy"", in *Organization Science*, vol. 4(4) (1993), pp. 529-547; D. C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1990 cit. in Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms

Therefore one of the cost components that the firm would normally mitigate is the cost of gathering information to identify and evaluate potential trading partners. These costs would be costs incurred by the firm (in order to secure investment, employment, supply) and by the potential investors/employees/suppliers. These costs are different than transaction costs incurred by customers when making purchase decisions regarding the products or services on the market. These transaction costs are mitigated by the trademarks available to entities at all levels (i.e. including firms, investors, employees, suppliers) as demonstrated by Landes and Posner[11].

Therefore business identifiers (such as trade names, emblems and the like) are useful in that they minimize transaction costs in the firm's contracting relating to issues non-related to the offering of its products or services on the market as opposed to trademarks which act as identifiers of the originator of the product or service to consumers.

Business identifiers encompass the name of the trader (be it called firm, raison or designation sociale, corporate name or business name), the name of the trader as used in his commerce (trade name, nom commercial, assumed name), his emblem and his Internet domain name (which we will not analyze in the context of the present study).

All these business identifiers serve to mitigate the search category of transaction costs by clearly indicating the identity and allowing for the evaluation of a business partner.

As shown by Dyer[12], there is a correlation between the search costs measured above, the other categories of transaction costs and the means used for their mitigation when one adopts a longitudinal perspective of costs. Thus the safeguards for transactions normally used (i.e. contracts) are complemented by alternative safeguards such as self-enforcing agreements including informal safeguards such as relational or goodwill trust and reputation[13]. These are considered safeguards requiring set-up costs and which pay their dividends over time thereby being more relevant in repeated-round games than on the short-term, where contracts appear to be preferable.

We may therefore proposition that two components are essential to business identifiers when perceived as safeguards lowering transaction costs: (1) a default (base) component allowing the firm to be identified as such by any transactor (and therefore lowering transaction costs in that a single identity is used by the same firm in all transactions and also allowing for the firm to accrue reputation, goodwill and trust under that identity) and (2) a complex component reflecting the reputation, goodwill and trust that firm has accrued over time and allowing not just the more rapid identification of said firm (thereby lowering costs more than the default component and therefore acting as an enhanced first component) but also the minimizing of the other types of transaction costs

---

Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997), pp. 535-556.

[10] Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997), p. 536.

[11] William M. Landes and Richard A. Posner, The economic structure of intellectual property law, The Belknap

Press of Harvard University Press (Cambridge, London - 2003).

[12] Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997), p. 536.

[13] R. Dore, „Goodwill and the spirit of market capitalism" in *British Journal of Sociology*, vol. 34(4) (1983), pp. 459–482; J. L. Bradach, and R. Eccles, „Markets versus hierarchies: From ideal types to plural forms" in *Annual Review of Sociology*, vol. 15 (1989), pp. 97-118; M. Sako, „The role of 'Trust" in Japanese buyer-supplier relationships" in *Ricerche Economiche*, vol. 45(2–3) (1991), pp. 449-474; D. Kreps and R. Wilson, „Reputation and imperfect information" in *Journal of Economic Theory*, vol. 27 (1982), pp. 253-279; K. Weigelt and C. Camerer, „Reputation and corporate strategy: A review of recent theory and applications" in *Strategic Management Journal*, vol. 9(5) (1988), pp. 443-454 cit in Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997), p. 537

(contracting, monitoring and enforcement) by allowing for compensation in repeat orders, economies of scale and scope, lower information asymmetry and increased unilateral defection costs[14].

These two components which we might, for present purposes, name the identity component and the reputational component of business identifiers need to be afforded protection by the law in order to allow for the beneficial effects to be reflected on the market.

But various national laws protect business identifiers under various names and therefore it is important to understand whether the different names under which such business identifiers are protected bring about differences in the level and content of the protection and whether under the complex framework for national protection the two components identified above are both protected by the protection afforded to the identifiers under a given name.

The purpose of the present study is to identify some of the names under which business identifiers are protected in some EU jurisdictions and to find whether the so-protected identifiers allow for both components identified above to be protected.

The terms identified

In the 1883 *Paris Convention for the Protection of Industrial Property* article 8 of the authentic French text indicates that "Le nom commercial sera protégé dans tous les pays de l'Union sans obligation de dépôt, qu'il fasse ou non partie d'une marque de fabrique ou de commerce". Thus textual reference is made to the "nom commercial". The official English translation indicates the article to state that "A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark". Thus "nom commercial" is meant to be the equivalent of a "trade name".

However, the Report[15] prepared by Le Comte Maillard de Marrafy for the International Congress regarding Industrial Property held in Paris from the 5th to 17th of September 1878 indicated that in Germany the law provides for the protection of *firms* – "La firme […] est une raison de commerce, transmissible comme une marque et soumise a l'enregistrement, soit lors de la création, soit lors des transmissions, modifications, etc.". Therefore the firm would be a transferrable *raison de commerce* that needs to be registered in order to be offered protection.

In France[16] *firm* is used both *as* having a wider meaning – it is a synonym for the company (*enterprise)*, commercial establishment (*etablissment)* or trade name (*nom commercial*) – and in a narrow sense – as a company name (*raison sociale* or *dénomination sociale*). In Germany *firm* is normally used only in the narrow sense[17], thereby excluding the meaning of *nom commercial*.

The same author indicates that the French *nom commercial* is the corresponding name for the German *Firmenname* or *Handelsname* whereby it would designate „a commerce, whichever the form under which it takes place"[18].

The German term *firma* on the other hand is said to be used as an equivalent of the French *raison sociale* or *dénomination sociale*, to which the direct German correspondent would be

[14] Jeffrey H. Dyer, „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" in *Strategic Management Journal*, Vol. 18:7 (1997), pp. 544-550.

[15] Le Comte Maillard de Marafy, « Rapport présenté au nom de la section des marques de fabrique et de commerce » in *Congrès international de la propriété industrielle tenu à Paris du 5 au 17 septembre 1878*, Imprimerie Nationale, (Paris – 1879), pp. 101 – 103.

[16] Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), pp. 448-516.

[17] Idem, p. 470.

[18] Idem, p. 466 – „les législations allemande, belge, française désignant ainsi un commerce en général quelle que soit la forme sous laquelle il est exercé".

Personalfirma[19]. The latter would be the one defined by art. 17 of the 1897 German Commercial Code indicating that „The trade-name of a mercantile trader is the name under which he carries on business and which he signs. A mercantile trader can sue and be sued under his trade-name"[20]. The German Commercial Code of 1861 contained as well, in article 15, similar provisions – The firm of a trader is the name under which he carries on business and which he signs[21].

Mention must be made of the fact that both the 1861 and the 1897 German Commercial Code contained the provisions relating to trade names in a separate section entitled *Von handelsfirmen* (in the 1861 Code) and *Handelsfirma* (in the 1897 Code). St-Gal indicated *handelsfirma* to be a synonym for *raison de commerce* or *raison commerciale*[22], which were in their turn considered to be synonyms for *nom commercial*[23].

It would thus appear that at least on a linguistic level the differences between the terms appear to be cancelled out by the numerous interconnected references. However subtle differences may be yet observed when analyzing the normative content associated with those terms.

Dénomination sociale and nom commercial

St-Gal presupposes that a subtle but fundamental difference exists between *raison sociale* on the one hand and *raison commerciale* and *nom commercial* on the other. By reference to French provisions of law he indicates that *raison sociale* designates a legal person (only being applicable to such persons) and as such would be an indicator of the company's personality[24] and the equivalent of a natural person's name[25].

Raison sociale would thus be „the name or pseudonym designating the owner or owners of an undertaking or enterprise"[26]. Moreover he indicates that *raison sociale* is to be differently adopted by different types of companies[27]. In time however most companies in France came to be able to use a *dénomination sociale* (except for professional civil partnerships still required to use a *raison sociale*) even if non-commercial, thus indicating that *raison sociale* has become „a designation of only residual use in [French] company law"[28].

Raison commerciale on the other hand is considered to be a synonym of *nom commercial* and a designation of the very undertaking it identifies[29]. It can be made up of a name, a *raison sociale* or a *dénomination sociale*[30].

---

[19] Idem, p. 454 – the following synonyms are mentioned: *firma von Eingelkauflenten*, *Personalgesellschaften*, *Firmenvorlaut*.

[20] *The German Commercial Code* – transl. A. F. Schuster, Stevens and Sons (London – 1911), p. 8

[21] Author's translation of Ernst Sigismud Puchelt *Komentaar zum Algemeinen Deutschen Handelsgesetzbuch*, Drud und Verlag der Roßberg'schen Hof (Leipzig – 1893), p. 49.

[22] Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), p. 467.

[23] Idem, p. 467.

[24] Idem, p. 457.

[25] Idem, p. 456.

[26] Author's translation of Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), p. 456.

[27] Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), p. 457.

[28] Alexandra Mendoza *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003), p. 68.

[29] Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), p. 467.

[30] Idem, p. 467.

The *nom commercial* on the other hand is shown to „tie (*rattache*) the individual to the goodwill just as his last name ties him to the family or state that he is part of"[31]. The classic definitions provided by St-Gal have, almost unanimously, as a common element the strong link between the *nom commercial* and the goodwill of the trader[32].

Other definitions refer to the *nom commercial* along the same lines. Maunoury suggests this would be a designation adopted irrespectively of any distinctive form as a term to indicate his commercial establishment (*maison*)[33]. *Nom commercial* would thus designate the goodwill of the trade or the trade itself rather than the personality or identity of the trader or owner of the trade/goodwill.

Maillard de Marafy quotes the Report of the French Senate Committee defining *nom commercial* as being „the simple or compound name under which traders, industrialists, producers or entrepreneurs carry on their business, industry or enterprise"[34].

To Azéma şi Galloux *nom commercial* is the name under which a natural or legal person carries on his business; it therefore distinguishes a certain goodwill from any similar other goodwill[35]. *Dénomination sociale* would be the name individualizing the legal person and thus be for a company what the name is for a natural person[36].

Philippe Bessis suggested *nom commercial* identifies (*désigne*) a company in its trade, being the name most familiar to third parties[37] while *dénomination sociale* would indicate (*désigne*) the company itself[38].

Paul Mathely, quoted by Bessis, defines *nom commercial* as "the designation by which a natural or legal person identifies (*désigne*) the undertaking or the goodwill in order to identify it in his dealings with customers"[39].

The definition that Yves Reboul quotes approvingly is that *nom commercial* would be an expression distinguishing a goodwill from any other identical or similar goodwill[40]. The same author quotes jurisprudential definitions of the term such as: "nom commercial is the designation by which the goodwill is known and utilized and which is the rallying sign of custom"[41] and *nom commercial* identifies the goodwill in the dealings with the customer[42].

---

[31] Author's translation of Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), p. 465.

[32] Idem, pp. 464-465.

[33] Maurice Maunoury *Du nom commercial. Thése pour le doctorat*, Arthur Rousseau (Paris – 1894), p. 170.

[34] Author's translation of Conte de Maillard de Marafy *Grand dictionnaire international de la propriété industrielle au point de vue du nom commercial, des marques de fabrique et de commerce et de la concurrence déloyale*, Ed. Chevalier-Marescq et comp. (Paris – 1892), Tome VI, p. 2.

[35] Jacques Azéma, Jean-Cristophe Galloux *Droit de la propriété industrielle*, 7e ed., Dalloz (Paris – 2012), p. 943

[36] Idem, p. 956.

[37] Philippe Bessis *Signes distinctifs et distribution. De la création du produit commercial à la notoriété de la marque de l'entreprise*, LGDJ (Paris – 1998), p. 36.

[38] Idem, p. 37.

[39] Author's translation of Paul Mathely *Le nouveau droit francais des marques*, Journal des Notaires et des Avocats (Vélizy – 1994) cit. in Philippe Bessis *Signes distinctifs et distribution. De la création du produit commercial à la notoriété de la marque de l'entreprise*, LGDJ (Paris – 1998), p. 37.

[40] Yves Reboul „Le nom commercial et la marque" in *Melanges offerts à Albert Chavanne*, Litec (Paris – 1990), p. 283 and note 1.

[41] *Sandoz*, CA Paris, 13 octombrie 1962 in „Annales de la propriété indsutrielle" 1963, p. 228 cit. in Yves Reboul „Le nom commercial et la marque" in *Melanges offerts à Albert Chavanne*, Litec (Paris – 1990), p. 283 note 2

[42] Yves Reboul „Le nom commercial et la marque" in *Melanges offerts à Albert Chavanne*, Litec (Paris – 1990), p. 283

Jérôme Passa indicates that *dénomination sociale* "identifies a natural person [while] *nom commercial* identifies a goodwill"[43].

In a more recent study it is shown that *nom commercial*, which had been a synonym of *raison de commerce* "identifies the goodwill in what concerns (*a l'égard*) the customers"[44].

The difference, under French law, between *dénomination* (or *raison*) *sociale*, on the one hand, and *nom commercial* and *raison de commerce* on the other, is now evident. While *dénomination* (or *raison*) *sociale* designates the owner, the company or the trader himself, *nom commercial* and *raison de commerce* designate the goodwill, the trade or the undertaking.

The differences are even more evident once we take into account that the right in *dénomination sociale* is born by its adoption on the Articles of Association[45], that the claim for its protection is admissible since its registration with the Commercial Registry[46] and that its protection spans the national territory[47] no matter whether it is well-known[48] or effectively used on all the territory[49].

The right in a *nom commercial*, on the other hand, is obtained not by registration with the Commercial Registry but by means of public[50] and honest[51] use. In order for such to be opposed to the registration of a trademark it must have been used in all the territory of the state of application[52] even if it is not required that it meets the criteria for being well-known[53].

Firma* and *dénomination sociale

From the above we might conclude that, given *Firma*'s definition in the German Commercial Code, it would more likely be the correspondent of the French *dénomination sociale* than of the *nom commercial*.

This conclusion is further strengthened by the fact that while for *Firma* and *dénomination sociale* the law provides for very strict rules[54] relating to the components of such while French law contains no similar provisions relating to *nom commercial*.

Moreover, the German Commercial Code section concerning the *Firma* does not apply to fantasy names used to designate trade (*Geschäftsbezeichnungen* or *Establissementsnamen*), these

---

[43] Jérôme Passa *Droit de la propriété industrielle*, Tome 1, 2e ed., LGDJ (Paris – 2009), p. 683.

[44] Author's translation of Alexandra Mendoza *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003), p. 76.

[45] CA Paris, 16 February 1988, in *PIBD* 1988, III, p. 395 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 11, accessed on 20 May 2012.

[46] *Baby Cool*, CA Paris, 16 January 1995, in *PIBD* 1995, III, p. 191 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 11, accessed on 20 May 2012.

[47] *Gesimmo*, Cass. Com., 11 February 2003, in *PIBD* 2003, 762, III, p. 210 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 11, accessed on 20 May 2012.

[48] *Artisans du Monde*, CA Paris, 7 June 1990, in *PIBD* 1990, III p. 713 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 11, accessed on 20 May 2012.

[49] But it needs to be used - Jérôme Passa *Droit de la propriété industrielle*, Tome 1, 2e ed., LGDJ (Paris – 2009), pp. 705-706.

[50] CA Paris, 8 March 2002, in *PIBD* 2002, no 749, III, p. 409 and TGI Paris, 7 December 2007, in *PIBD* 2008, no 869, III, p. 155.

[51] CA Paris, 2 October 1991 in *PIBD* 1992, III, p. 7, Com. 29 June 1999, in *PIBD* 1999, III, p. 419 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 12, accessed on 20 May 2012

[52] CA Paris, 2 February 1997, in *PIBD*, III, p. 363, *Cojuris*, CA Paris, 15 October 1997, in *PIBD* 1997, III, p. 646 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 12, accessed on 20 May 2012.

[53] *Cojuris*, CA Paris, 15 October 1997, in *PIBD* 1997, III, p. 646 cit. in *ACTIS/ACTISOL*, OHIM, 2nd Board of Appeals, R 736/2006-2, 13 March 2008, p. 12, accessed on 20 May 2012.

[54] Alexandra Mendoza *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003), p. 70.

being protected under Unfair Competition rules[55], the same being true[56] for *nom commercial* (but also for *dénomination sociale*) in France[57].

Mention should also be made of the fact that almost all authors[58] agree that *nom commercial* is optional while *dénomination sociale* is mandatory, just like the German *Firma*.

The similarities between the German *Firma* and the French *dénomination sociale* also include the fact that the German Commercial Code specifically indicates that the *Firma* is the name that the trader signs. In France it has been shown that the sign the trader signs is not the *nom commercial* but the *dénomination sociale*[59].

As a short conclusion of the above we propose that the German *Firma* is the equivalent of the French *dénomination sociale* and is different (as the *dénomination sociale* is as well) from the *nom commercial*.

Trade name* and *firm

According to St-Gal[60], *raison sociale* would be the equivalent of both firm name (when used as *raison sociale* for a partnership) and a *company name* (when used to designate a company differently incorporated).

Black's Law Dictionary defines *firm* as "The title under which one or more persons conduct business jointly" and "The association by which persons are united for business purposes" [61] but mention is made of the fact that "Traditionally, this term has referred to a partnership, as opposed to a company. But today it frequently refers to a company".

A *Business Name* is the designation under which a person or an association not required to be registered does business. A Business Name could be the last name of the trader, either alone or with his first name or initial[62] or, in the case of a partnership, all the partners' names either alone or with their first names and/or initials[63].

A Company Name is the name of the incorporated company having its own legal personality and, once adopted, cannot be changed as easily as a natural person's name[64].

A Trade Name is defined by the *Stroud Juridical Dictionnary*[65] as the name under which a person or company does or usually did its business and by which it is known in the world of business to which it belongs. A Trade Name thus distinguishes the nature, quality and renown of his goods and of his activity.

---

[55] Thomas Edward Scrutton, William Bowstead (ed.) *The Commercial Laws of the World*, Vol. XXIV, German Empire – I, Sweet and Maxwell (London – 1911), p. 83, note 4.

[56] With the exception of the claim under art. L 217-1 of the *Code de la consommation*, criminal action aimed against the unauthorized use of the name affixed on a product, which is very little used in practice - Alexandra Mendoza *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003), p. 435.

[57] Alexandra Mendoza *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003), pp. 432-439.

[58] With the exception of Jacques Azéma, Jean-Cristophe Galloux *Droit de la propriété industrielle*, 7e ed., Dalloz (Paris – 2012), p. 943.

[59] Thierry van Innis, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997), p. 69 – by analogy with Belgian law.

[60] Yves St-Gal „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953) in *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953), p. 457.

[61] Bryan A. Garner (ed.) *Black's Law Dictionary*, ed. 9, Thompson West (St. Paul – 2009), p. 710.

[62] *Companies Act 2006* – Part 41, ch. 1, ss. 1192 (2) (a) and (3) (a).

[63] Idem, ss. 1192 (b) şi (3) (b).

[64] Paul L. Davies *Gower and Davies' Principles of Modern Company Law*, ed. 8, Sweet & Maxwell (London – 2008), p. 83.

[65] Daniel Greenberg (ed.) *Stroud's Judicial Dictionary of Words and Phrases*, ed. 7, Sweet & Maxwell (London – 2010).

It would thus appear that the equivalent to the German *Firma* would be *firm* while would most easily be translated by *Company Name* and *nom commercial* by *Trade Name.*

Business identifiers and transaction costs

The conclusion that we would like to propose here is that there are generally two types of business identifiers: those that normally serve only as a default safeguard and thus mitigate transaction costs with little consideration for investment over time (*Firma*, *firm, dénomination sociale, Company Name*) and those akin to *nom commercial,* translated in English as *trade names*, which act as safeguards on both components and derive most value from being developed and consolidated over long periods of time.

Therefore it is evident that most transaction costs are mitigated not by the first type but by the second which is not to say that the second type is of a greater importance. The fact that the first type of business identifier is generally mandatory and the fact that it is used as main identifier in more numerous transactions (albeit possibly of lesser value) and with a more varied group of transactors comes only to emphasize its importance in modern economic life.

Conclusion

The present study has proposed to identify business identifier categories based upon the transaction costs they mitigate. An economic approach to the understanding of regulation of commercial life is not uncommon, but on the contrary, rather welcome. Given the omnipresence of business identifiers and the lack of a specific understanding of their purpose and the function to be fulfilled by their legal protection, some conceptual framework anchoring their importance in economic terms is likely to give more impetus to efforts aimed at deconstructing legal institutions which seem to have lost, in part, their meaning.

Future research should clarify and quantify the effects and value of such business identifiers and requalify their status of protection as either rights in names or intellectual property rights.

References

- Akerloff, George, "The Market for Lemons: Quality Uncertainty and the Market Mechanism", *The Quarterly Journal of Economics*, Vol. 84, No. 3 (Aug., 1970).
- Azéma, Jacques, Jean-Cristophe Galloux *Droit de la propriété industrielle*, 7e ed., Dalloz (Paris – 2012)
- Bessis, Philippe *Signes distinctifs et distribution. De la création du produit commercial à la notoriété de la marque de l'entreprise*, LGDJ (Paris – 1998).
- Bradach, J. L., and R. Eccles, „Markets versus hierarchies: From ideal types to plural forms" *Annual Review of Sociology*, vol. 15 (1989).
- Coase, Ronald, "The Nature of the Firm", *Economica*, vol. 4 (1937).
- Dahlman, Carl J., "The Problem of Externality", *Journal of Law and Economics*, vol. 22 (1) (1979).
- Davies, Paul L. *Gower and Davies' Principles of Modern Company Law*, ed. 8, Sweet & Maxwell (London – 2008).
- de Marafy, Le Comte Maillard, « Rapport présenté au nom de la section des marques de fabrique et de commerce », *Congrès international de la propriété industrielle tenu à Paris du 5 au 17 septembre 1878*, Imprimerie Nationale, (Paris – 1879).
- de Marafy, Conte de Maillard *Grand dictionnaire international de la propriété industrielle au point de vue du nom commercial, des marques de fabrique et de commerce et de la concurrence déloyale*, Ed. Chevalier-Marescq et comp. (Paris – 1892).
- Dore, R., „Goodwill and the spirit of market capitalism", *British Journal of Sociology*, vol. 34(4) (1983).
- Dyer, Jeffrey H., „Effective Interfirm Collaboration: How Firms Minimize Transaction Costs and Maximize Transaction Value" *Strategic Management Journal*, Vol. 18:7 (1997).
- Garner, Bryan A. (ed.) *Black's Law Dictionary*, ed. 9, Thompson West (St. Paul – 2009).

- Greenberg, Daniel (ed.) *Stroud's Judicial Dictionary of Words and Phrases*, ed. 7, Sweet & Maxwell (London – 2010).
- Handlin, Oscar and Mary Handlin "Origins of the American Business Corporation", Frederic Lane (ed.), *Enterprise and Secular Change,* Richard Irwin, (Homewood – 1953).
- Hennart, J.-F., „Explaining the swollen middle: Why most transactions are a mix of "Market" and "Hierarchy"", *Organization Science*, vol. 4(4) (1993).
- Kreps D. and R. Wilson, „Reputation and imperfect information" *Journal of Economic Theory*, vol. 27 (1982).
- Landes William M. and Richard A. Posner, *The economic structure of intellectual property law*, The Belknap Press of Harvard University Press (Cambridge, London - 2003).
- Mathely, Paul *Le nouveau droit francais des marques*, Journal des Notaires et des Avocats (Vélizy – 1994).
- Maunoury, Maurice *Du nom commercial. Thése pour le doctorat*, Arthur Rousseau (Paris – 1894).
- Mendoza, Alexandra *Les noms de l'entreprise*, Presses Universitaires d'Aix-Marseille (Aix-en-Provence – 2003).
- Micklethwait, John and Adrian Wooldridge, *The Company: a Short History of a Revolutionary Idea*, Modern Library, (New York – 2003).
- North, D. C., *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1990.
- Passa, Jérôme *Droit de la propriété industrielle*, Tome 1, 2e ed., LGDJ (Paris – 2009).
- Puchelt, Ernst Sigismud *Komentaar zum Algemeinen Deutschen Handelsgesetzbuch*, Drud und Verlag der Roßberg'schen Hof (Leipzig – 1893).
- Reboul, Yves „Le nom commercial et la marque" *Melanges offerts à Albert Chavanne*, Litec (Paris – 1990).
- Sako, M., „The role of 'Trust" in Japanese buyer-supplier relationships" *Ricerche Economiche*, vol. 45(2–3) (1991).
- St-Gal, Yves „La protection comparée de l'enseigne, de la raison sociale et du nom commercial" – Report at the Congress of the International League against Unfair Competition in Istambul (11-15 august 1953), *Annales de la Faculté de Droit d'Istanbul*, vol. 2 nr. 3 (1953).
- Tadelis, Steven, "What's in a name? Reputation as a tradable asset" *The American Economic Review*, vol. 89, No. 3 (June 1999).
- van Innis, Thierry, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997).
- Weigelt K. and C. Camerer, „Reputation and corporate strategy: A review of recent theory and applications" *Strategic Management Journal*, vol. 9(5) (1988).
- Williamson, O.E., *The Economic Institutions of Capitalism*, Free Press, New York, 1985.
- *The German Commercial Code* – transl. A. F. Schuster, Stevens and Sons (London – 1911).

COMMUNITY DESIGN PROTECTION: PARTICULAR ASPECTS OF THE PROCEDURE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

ALINA MIHAELA CONEA*

Abstract
The Court of Justice of the European Union (CJEU) has the opportunity to decide on the Community design and interpretation of the rules governing this matter in actions that can follow two different procedural paths.
In the first case we refer to the action brought before the Court against a decision of the Office for Harmonization in the Internal Market (OHIM). In this situation we must distinguish between actions that may or may not be led by a proceeding before the Board of Appeal of the Office. In a second case, we are in the presence of the preliminary procedure raised by national courts. Regarding action against the decision of OHIM the approach will be different, taking into account several reasons. First, we have to identify the nature of the action: are we in the presence of an action for annulment in the ordinary sense? The second reason is imposed by the existence of specific differences related to intellectual property rights litigation, compared to other European court procedures.
This paper is considering CJEU case law and implications of the new Rules of Procedure of the Court of Justice.

Keywords: *community design, new rules of procedure, action in annulment, Court of Justice of the European Union.*

Introduction

Invalidity proceedings against registered Community designs (CDR) are at utmost importance, as CDR are not examined for novelty and individual character prior to registration. A CDR can be declared invalid by means of two different procedures: directly, by bringing an invalidity action before OHIM or by a Community design court on the basis of a counterclaim in infringement proceedings. The appeal proceedings against an OHIM decision can imply three stages: the proceeding in front of the Boards of Appeal of OHIM, of The General Court and of the Court of Justice.

The present paper analyse the specific characteristics implied by the proceedings in front of the Court of Justice of the European Union.

The importance of this studied matter is based on the complexity of systematization of the procedural framework of the Community design protection. The reason is the institutional interference of protection afforded at the Union and national level. The analysis of specific questions regarding the enforcement of intellectual property rights is thus a contribution to clarifying Community design protection.

Thus, we have considered in the content of this material the specificity of the subject matter regarding the action before the Court of Justice against decisions of OHIM, the parties, the proceedings, terms and effects of the action.

Given that, seemingly, European primary law does not confer to the European level legislative competence of in the field of intellectual property law, the Court of Justice jurisprudence maintains its central importance as the foundation of Community intellectual property law. The specifics of the relationship between the Court and the field of intellectual property were outlined by legal literature from different perspectives. We are considering approaches centred on the interaction

* Assistant Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail:alinaconea@gmail.com).

of intellectual property rights with EU primary law (David Keeling, 2003[1]), with the internal market and competition rules (Inge Govaere[2]; Valentine Korah, 2006[3]; Catherine Barnard, [20074]), issue of "judicial activism" (Vlad Constantinesco, 2000 [5)] and normative significance of "case law" (Anthony Arnull , 2006[6]). Thus, it was shown the need to develop a coherent jurisprudence of intellectual property in the interest of the Union legal unity and its independent intellectual property policy (Hanns Ullrich, 2010[7]). It has also been stressed the coherence of EU judicial system that does not rely solely on the courts of the Union, but rather, on the articulated system of jurisdiction between the EU Court and national courts (Koen Lenaerts, 2007 [8]).

Preliminary Issues

The Court of Justice of the European Union is able to rule on the Community design and the interpretation of rules governing the matter in actions that come on two different procedural paths.

In the first case we refer to the action brought before the Court against a decision of the Office. And, in this case, it must be distinguished from actions that may or may not be preceded by a proceeding before a Board of Appeal of the Office. In a second case, we are in the presence of the preliminary procedure raised by national courts.

Preliminary procedure has no special features regarding intellectual property rights. Is the same, irrespective of the subject matter. In this respect, we believe that an analysis of the preliminary procedure it would go beyond the selected object of our study. However, the issue is of particular interest in the dynamics of the relationship between national courts and the Court of Justice. As far as procedural aspects are relevant, they will be the subject our presentation.

Regarding *action against the decision of OHIM* approach will be different, taking into account several reasons. First, we must establish the nature of the action: are we in the presence of an action for annulment in the ordinary sense? Or the action has a different nature?

The second reason is imposed by the existence of specific differences related to intellectual property rights disputes, compared to other European court procedures. It should be mention that the latter does not apply to actions brought directly against Office, without a proceeding before a Board of Appeal of OHIM. In the following, we present the procedural way in which action before the Court is preceded by an action before a Board of Appeal of the Office.

According to Regulation no. 6/2002 on Community designs "actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals"[9]. Under art. 61 of the

---

[1] David T. Keeling, Intellectual property rights in EU law. Volume 1, Free movement and competition law. Oxford: Oxford University Press, 2003.

[2] Inge Govaere, The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate. London ; Toronto, Sweet & Maxwell, 1996.

[3] Valentine Korah, Intellectual property rights and the EC competition rules. Oxford: Hart, 2006

[4] Catherine Barnard, *The substantive law of the EU*. 2nd ed. Oxford: Oxford Univ. Press, 2007.

[5] Vlad Constantinesco, "The ECJ as a law-maker: *Praeter* aut contra legem?", p. 73-79 în O'Keeffe, David, Judicial review in European Union law- Liber amicorum in honour of Lord Slynn of Hadley. The Hague: Kluwer Law International, 2000.

[6] Anthony Arnull, *The European Court of Justice*. Oxford: Oxford University Press, 2006.

[7] Hanns **ULLRICH**, "The Development of a System of Industrial Property Protection in the European Union: The Role of the Court of Justice (Die Entwicklung Eines Systems Des Gewerblichen Rechtsschutzes in Der Europäischen Union: Die Rolle Des Gerichtshofs)." *Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper* 10-11 (2010).

[8] Koen Lenaerts, "The rule of law and the coherence of the judicial system of the European Union." *Common Market Law Review* 44 (2007): 1625–59.

[9] Art. 61 (1), Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24.*

Regulation no. 6/2002, the Court of Justice has jurisdiction *to annul* or *to alter* the contested decision[10].

From the perspective of the nature of this form of procedure, according to an opinion, which we share, the appeal before the Court of Justice is not a form of appeal, but a judicial review of decisions of the Office[11]. The effect of that new legal remedy is, however, similar to an appeal since, for example, all parties in proceedings before the Office can take part[12].

Moreover, the right to request review by a judicial procedure is guaranteed by the TRIPs Agreement if the OHIM Boards of Appeal are considered administrative and not judicial bodies. Art. 41 (4) from TRIPs Agreement stated that: "*Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases".*

In the case of *ex parte* proceedings, the action is similar to review of any other decision of a Community institution. In the case of *inter partes* actions, the Office has the identity of the defendant and, in fact, replace the party in whose favour has decided. To enable all parties in proceedings before the Office to behave independently in the action before the ECJ, it have been operated a number of changes to procedural rules of the court in Luxembourg. Consequently, the part for which the Office has decided can not only intervene alongside the Office but it can present their own arguments, and can introduce their own appeal against the court decision.

Subject of proceedings before the Court of Justice against decisions of OHIM (preceded by a proceeding before a Board of Appeal)

The subject of proceedings before the Court of Justice is represented by decisions of the Boards of Appeal of the Office through which they adjudicate on an appeal.

Under article 61 of the Regulation no. 6/2002, the Court of Justice has jurisdiction *to annul* or *to alter* the contested decision[13]. Therefore, in addition to its power to annul a decision of the Board of Appeal of the Office, the Court has unlimited jurisdiction *to alter* the Board`s decision and replace it with its own[14]. Accordingly, the Court has no jurisdiction to rule on a request presented for the first time before it[15].

Article 61 (2) of the regulation provides that an action against a decision of the Board of Appeal of the Office may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of the Regulation or of any rule of law relating to their application or misuse of power. It follows that the General Court has jurisdiction to conduct a

---

[10] Art. 61 (3), Regulation No 6/2002.

[11] Koen **LENAERTS**, *Procedural law of the European Union, London*: Sweet & Maxwell, 2006, p. 494.

[12] David **MUSKER,** *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002, p. 206.

[13] Judgment of the Court of First Instance (Fourth Chamber) of 12 December 2002, eCopy, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-247/01, *European Court reports 2002 Page II-05301*; Judgment of the Court of First Instance (Fifth Chamber) of 23 November 2004, Frischpack GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-360/03, *European Court reports 2004 Page II-04097*.

[14] Judgment of the Court (Fifth Chamber) of 18 September 2003, Albacom SpA (C-292/01) and Infostrada SpA (C-293/01) v Ministero del Tesoro, del Bilancio e della Programmazione Economica and Ministero delle Comunicazioni, Joined cases C-292/01 and C-293/01, *European Court reports 2003 Page I-09449* reported by Koen **LENAERTS**, Procedural law of the European Union, London: Sweet & Maxwell, 2006, p. 495.

[15] **Judgment of the Court of First Instance (Second Chamber) of 2 July 2002, SAT.1 SatellitenFernsehen GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-323/00,** *European Court reports 2002 Page II-02839*, para. 18.

full review of the legality of OHIM's assessment of the particulars submitted by an applicant[16]. The General Court is called upon to assess the legality of the decisions of the Boards of Appeal of OHIM by reviewing their application of Community law, having regarded, in particular, to the facts which were submitted to them. Thus, the Court can carry out a full review of the legality of the decisions of OHIM's Boards of Appeal, if necessary examining whether those boards have made a correct legal classification of the facts of the dispute or whether their assessment of the facts submitted to them was flawed[17].

Admittedly, the General Court may afford OHIM some latitude, in particular where OHIM is called upon to perform highly technical assessments, and restrict itself, in terms of the scope of its review of the Board of Appeal's decisions in design matters, to an examination of manifest errors of assessment[18].

Those documents, produced for the first time before the Court, cannot be taken into consideration. The purpose of actions before the General Court is to review the legality of decisions of the Boards of Appeal of OHIM as referred to in Article 61 of Regulation No 6/2002, so it is not the Court's function to review the facts in the light of documents produced for the first time before it. Accordingly, the abovementioned documents must be excluded, without it being necessary to assess their probative value[19].

Parties

The defendant

In the case of *inter partes* actions, the Office has the identity of the defendant and, in fact, replace the party in whose favour has decided.

The applicant

The action shall be open to any party to proceedings before the Board of Appeal adversely affected by its decision[20]. The parties to the proceedings before the Board of Appeal other than the applicant may participate, as interveners.

For the purposes of determining whether an applicant is entitled to challenge a decision of the Board of Appeal before the Court, the view must be taken that a decision of a Board of Appeal of OHIM does not uphold the claims of a party when it rules on an application filed before OHIM by that party in a manner unfavourable to it. This case must be regarded as including the situation where the Board of Appeal, after having rejected an application the admission of which would have ended the proceedings before OHIM in a manner favourable to the party which made it, remits the case to the lower department for further prosecution, irrespective of the fact that that re-examination could give rise to a decision favourable to that party[21].

---

[16] Judgment of the Court (Grand Chamber) of 5 July 2011, Edwin Co. Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case C-263/09 P., *European Court reports 2011,* para. *52.*

[17] Judgment of the Court (First Chamber) of 18 December 2008, Les Éditions Albert René Sàrl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and Orange A/S, Case C-16/06 P, *European Court reports 2008 Page I-10053*, p. 38 and 39.

[18] Judgment of the Court (Fourth Chamber) of 20 October 2011, PepsiCo, Inc. v Grupo Promer Mon Graphic SA, Case C-281/10 P., *European Court reports 2011*, p. 67.

[19] Judgment of the General Court (Fifth Chamber) of 18 March 2010, Grupo Promer Mon Graphic, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-9/07, *European Court reports 2010 Page II-00981*, p. 24: Judgment of the General Court (Second Chamber) of 13 November 2012, Antrax It Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Joined cases T-83/11 and T-84/11, European Court Reports 2012*, p. 28.*

[20] Art. 61 (4), Regulation No 6/2002.

[21] Judgment of the General Court (Third Chamber) of 14 December 2011, Völkl GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-504/09, *European Court reports 2011, p. 27-28.*

Interveners

Privileged interveners in the matter of intellectual property rights

The Rules of procedure of the Court of First Instance admits that the parties to the proceedings before the Board of Appeal other than the applicant may participate, *as interveners*, in the proceedings before the General Court by responding to the application in the manner and within the period prescribed[22].

The interveners have *the same procedural rights* as the main parties. They may support the form of order sought by a main party and they may apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties.

Thus, an intervener may seek an order *annulling* or *altering* the decision of the Board of Appeal *on a point not raised* in the application and put forward *pleas in law not raised* in the application.[23] However, such submissions seeking orders or putting forward pleas in law in the intervener's response shall cease to have effect should the applicant discontinue the proceedings.

The role granted to intervener is reemphasized in case of impossibility of applying the proceedings by default under certain conditions. Therefore, in derogation from Article 122 of the Rules of procedure of the Court of First Instance[24], the default procedure shall not apply where an intervener has responded to the application in the manner and within the period prescribed.

Ordinary interveners

According to the Statute of the Court of Justice of the European Union, "Member States and institutions of the Union may intervene in cases before the Court of Justice"[25]. Member States and institutions of the Union are, according to the general rules of procedure before the Court of Justice, *privileged* interveners in the sense that they do not have to establish an interest in the outcome of the case[26]. An application to intervene shall be limited to supporting the form of order sought by one of the parties. This category of interveners is not able to put forward pleas in law independently of those applied for and put forward by the main parties.

The special provisions, as shown above, in the contentious intellectual property rights constitute an *exception* to this general rule. For this reason and in this context, we call *ordinary* the interveners that are generally *privileged*.

The proceedings

The competent court

Regarding the jurisdiction between the instances of the Court of Justice of the European Union, art. 256 (1) TFEU[27] and art. 51of the Statute of the Court of Justice of the European Union confer this jurisdiction to the General Court. *An appeal* to the General Court decision may be brought before the Court of Justice. As provided by the Statute of the Court, an appeal to the Court of Justice shall be *limited to points of law*. The appeal shall lie on the grounds of lack of competence of the

---

[22] Art. 134 (1) Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991 *OJ L 136, 30.5.1991, p. 1–23*, as amended until *22.6.2011*.

[23] Art. 134 (3) Rules of procedure of the Court of First Instance.

[24] „ If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply to the General Court for judgment by default."Art. 122 (1), Rules of procedure of the Court of First Instance.

[25] Art. 40, Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23.8.2012, p. 1).

[26] Koen **LENAERTS**, *Procedural Law of the European Union*. London: Sweet & Maxwell, 2006, p.569 .

[27] Treaty on the Functioning of the European Union, (Consolidated version 2012), OJ C 326, 26.10.2012, p. 47-199

General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court[28].

Particular aspects of the written procedure

The application

According to article 132(3) of the Rules of procedure of the General Court, the application shall contain[29] *the names of all the parties* to the proceedings before the Board of Appeal and the addresses which they had given for the purposes of the notifications to be effected in the course of those proceedings. Consequently, the contested decision of the Board of Appeal shall be appended to the application. It also must be indicated the date on which the applicant was notified of that decision.

If the application does not comply with these aspects, article 44(6) of the Rules of procedure of the General Court shall apply[30].

The Registrar will *inform* the Office and all the parties to the proceedings before the Board of Appeal of the lodging of the application. He will arrange for service of the application after determining *the language of the case*[31].

The application shall be served on the Office, as defendant, and on the parties to the proceedings before the Board of Appeal other than the applicant. Service shall be effected in the language of the case.

With regard to the communication of the application, the Rules of procedure stated that it will be served on *the Office, as defendant*, and on *the parties to the proceedings before the Board of Appeal* other than the applicant. Service shall be effected in the language of the case[32]. Once the application has been served, the Office shall forward to the General Court *the file relating to the proceedings before the Board of Appeal.*

---

[28] Art. 58, Statute of the Court of Justice of the European Union.

[29] Without prejudice to Article 44 Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991 *OJ L 136, 30.5.1991, p. 1–23*, as amended to *22.6.2011*.

[30] „ (...) the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the above-mentioned documents. If the applicant fails to put the application in order or to produce the required documents within the time prescribed, the General Court shall decide whether the non-compliance with these conditions renders the application formally inadmissible".

[31] „ The language in which the as application is drafted shall become the language of the case if the applicant was the only party to the proceedings before the Board of Appeal or if another party to those proceedings does not object to this within a period laid down for that purpose by the Registrar after the application has been lodged. If, within that period, the parties to the proceedings before the Board of Appeal inform the Registrar of their agreement on the choice, the language of the case, of one of the languages referred to in Article 35(1) that language shall become the language of the case before the General Court. In the event of an objection to the choice of the language of the case made by the applicant within the period referred to above and in the absence of an agreement on the matter between the parties to the proceedings before the Board of Appeal, the language in which the application for registration in question was filed at the Office shall become the language of the case. If, however, on a reasoned request by any party and after hearing the other parties, the President finds that the use of that language would not enable all parties to the proceedings before the Board of Appeal to follow the proceedings and defend their interests and that only the use of another language from among those mentioned in Article 35(1) makes it possible to remedy that situation, he may designate that other language as the language of the case; the President may refer the matter to the General Court.", Art.131 (2) Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991 *OJ L 136, 30.5.1991, p. 1–23*, as amended to *22.6.2011*.

[32] „Service of the application on a party to the proceedings before the Board of Appeal shall be effected by registered post with a form of acknowledgment of receipt at the address given by the party concerned for the purposes of the notifications to be effected in the course of the proceedings before the Board of Appeal.", Art.133 (2), Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991 *OJ L 136, 30.5.1991, p. 1–23*, as amended to *22.6.2011.*

Acts of procedure

The Rules of procedure of the General Court provides the possibility of the lodging of pleadings not only on behalf of the plaintiff and the defendant.

Therefore, the other parties may, within a period of two months of service upon them of the response[33], submit a pleading confined to responding to the form of order sought and the pleas in law submitted for the first time in the response of an intervener. That period may be extended by the President on a reasoned application from the party concerned.

The application and the responses may be supplemented by replies and rejoinders by the parties, including the interveners, where the President, on a reasoned application made within two weeks of service of the responses or replies, considers such further pleading necessary and allows it in order to enable the party concerned to put forward its point of view. The President shall prescribe the period within which such pleadings are to be submitted[34].

The Court clarified, in its judgment of 9 February 2011, Case T-222/09 Ineos Healthcare v OHIM - Teva Pharmaceutical Industries[35], the Court its case-law on the examination by the Board of Appeal of *facts which are well known*.

According to the Court, the Board of Appeal, when hearing an appeal against decision terminating opposition proceedings, may base its decision only on the facts and evidence which the parties have presented. However, the restriction of the factual basis of the examination by the Board of Appeal does not preclude it from taking into consideration, in addition to the facts expressly put forward by the parties to the opposition proceedings, facts which are *well known*, that is, which are likely to be known by anyone or which may be learnt from generally accessible sources[36].

Oral part of the procedure

According to the Rules of Procedure of the *Court of Justice*, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide *not to hold a hearing* if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling[37].

The Rules of Procedure of the *General Court* do not contain a similar provision. In other words, the General Court proceedings will *always* contain the hearing stage.

The contentious matters on intellectual property benefits, however, for an exception to the normal conduct of proceedings before the General Court.

After the submission of pleadings and, if applicable, the General Court, acting upon a report of the Judge-Rapporteur and after hearing the Advocate General and the parties, may decide to rule on the action without an oral procedure. If one of the parties submits an application[38] setting out the reasons for which he wishes to be heard then will take place also the hearing stage.

Reasoning of the action

Article 61 (2) of the Regulation provides that "the action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power."

---

[33] The defence include: the name and address of the defendant; the arguments of fact and law relied on; the form of order sought by the defendant; the nature of any evidence offered by him. Art.46 (1), Rules of procedure of the General Court.

[34] Art.135 (3) **Rules of procedure of the** General Court.

[35] Judgment of the General Court (Fourth Chamber) of 9 February 2011, Ineos Healthcare Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-222/09, *European Court reports 2011 Page II-00183.*

[36] Judgment of the General Court (Fourth Chamber) of 9 February 2011, Ineos Healthcare Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-222/09, *paras 28-29.*

[37] Art. 76 (2), Rules of Procedure of the Court of Justice, *OJ C 337, 6.11.2012, p. 1–42.*

[38] The application shall be submitted within a period of one month from notification to the party of closure of the written procedure.

These reasons are similar to those established for the action for annulment under art. 263 TFEU [39].

The doctrine distinguishes between the first two grounds of appeal, *lack of competence* and *infringement of essential procedural requirement,* aspects of external legality of the act ("la légalité externe") and the last two grounds of appeal, *infringement of the Treaty*, *of this Regulation or of any rule of law relating to their application* or *misuse of* („la légalité interne")[40].

The distinction is relevant from the perspective that the external legality reasons of the contested measure may be raised by the court on its own initiative. The last two reasons must be raised by the parties.

In the judgment of 16 May 2011, case T-145/08 Atlas Transport v OHIM - Atlas Air [41],

the Court was able to clarify, first, the applicable requirements as regards the obligation to set out the grounds of an appeal before the Board of Appeal. The Court concluded from this that an appellant wishing to bring an appeal before the Board of Appeal is required, within the prescribed time-limit, to file with OHIM a written statement setting out the grounds for its appeal, failing which his appeal is to be dismissed as inadmissible, and that those grounds involve more than an indication of the decision appealed and of the fact that the appellant wishes it to be amended or annulled by the Board of Appeal.

Special features of the action

It is considered[42] that the particulars of the proceedings before the Court regarding the action that we present come from the following specific issues:

1) Connection with *Article 263* of the Treaty on the Functioning of the European Union regarding the grounds of appeal;

2) *Revision of the contested decision* - The legality of a decision of the Board of Appeal cannot therefore be called into question by pleading new facts before the General Court. So it must be evaluated according to the facts and law existing at the time the decision was taken[43];

3) *The application must refer to a decision of the Boards of Appeal* - actions may be brought before the Community judicature only against decisions of the Boards of Appeal. Accordingly, in the case of such appeals, it is only pleas directed against the decision of the Board of Appeal itself which are admissible in such an action. In so far as it relates to a decision of a unit of the Office, giving a ruling at first instance, a plea of infringement of a legislative provision must, in consequence, be rejected as being inadmissible[44].

4) *The pleading should not change the subject-matter of the proceedings* - Art. 135 (4) of the Rules of procedure of the General Court states that the parties' pleadings may not change the subject-

[39] Art. 263 (2) TFEU „It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers".

[40] Georges **VANDERSANDEN**, Ami **BARAV**, *Contentieux communautaire*. Bruxelles: Bruylant, 1977, cited by Koen Lenaerts, op.cit, p. 289.

[41] Judgment of the General Court (Third Chamber) of 16 May 2011, Atlas Transport GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-145/08, *European Court reports 2011.*

[42] Koen **LENAERTS**, *Procedural law of the European Union, London*: Sweet & Maxwell, 2006, p.498.

[43] Judgment of the Court of First Instance (Fourth Chamber) of 12 December 2002, eCopy, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-247/01, *European Court reports 2002.*

[44] Judgment of the Court of First Instance (Fifth Chamber) of 7 June 2005, Lidl Stiftung & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-303/03, European Court reports 2005 Page II-01917.

matter of the proceedings before the Board of Appeal[45]. Pleas which have not been raised by the applicant before the departments of OHIM are not admissible before the Court [46].

Deadlines

Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals[47].

Effects of the action

The General Court has jurisdiction *to annul* or *to alter* the decision of the Board of Appeal of the Office. The annulment of the judgment has the same characteristics as the declaration of invalidity made pursuant to art. 263 TFEU[48]. Consequently, the effects will be retroactive, *ex tunc*, and will apply erga omnes.

According to Regulation no 6/2002, The Office shall be required to take the necessary measures to comply with the judgment of the Court of Justice[49]. Moreover, this provision of the Regulation was correlative to Art. 266 TFUE: "The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union".

Conclusions

Under article 61 of the Regulation no. 6/2002, the Court of Justice has jurisdiction *to annul* or *to alter* a decision of the Board of Appeal of OHIM. From the perspective of the nature of this form of procedure the appeal before the Court of Justice is not a form of appeal, but a judicial review of decisions of the Office. The effect of that new legal remedy is, however, similar to an appeal since, for example, all parties in proceedings before the Office can take part.

In the case of *ex parte* proceedings, the action is similar to review of any other decision of a Community institution. In the case of *inter partes* actions, the Office has the identity of the defendant and, in fact, replace the party in whose favour has decided. To enable all parties in proceedings before the Office to behave independently in the action before the ECJ, it have been operated a number of changes to procedural rules of the court in Luxembourg. Consequently, the part for which the Office has decided can intervene alongside the Office. This category of interveners has *the same procedural rights* as the main parties. They may support the form of order sought by a main party and they may apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties.

In addition, the specific features of the proceedings before the Court regarding the intellectual property contentious matters come out from the following: the legality of a decision of the Board of Appeal cannot be called into question by pleading new facts before the General Court, the Court may decide to rule on the action without an oral procedure, the actions may be brought before the Community judicature only against decisions of the Boards of Appeal, the pleading should not change the subject-matter of the proceedings.

---

[45] Judgment of the Court of First Instance (Fifth Chamber) of 23 November 2004, Frischpack GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-360/03, *European Court reports 2004 Page II-04097*.

[46] Judgment of the General Court (Eighth Chamber) of 9 December 2010, Tresplain Investments Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-303/08, *European Court reports 2010 Page II-05659*.

[47] Art. 61 Regulation No 6/2002.

[48] Koen **LENAERTS**, *Procedural law of the European Union, London*: Sweet & Maxwell, 2006, p.500.

[49] Art. 61 (6), Regulation No 6/2002.

References

- Specialized literature
- Arnull, Anthony, *The European Court of Justice*. Oxford: Oxford University Press, 2006.
- Barnard, Catherine, *The substantive law of the EU*. 2nd ed. Oxford: Oxford Univ. Press, 2007.
- Constantinesco, Vlad, "The ECJ as a law-maker: *Praeter* aut contra legem?", p. 73-79 în O'Keeffe, David, Judicial review in European Union law- Liber amicorum in honour of Lord Slynn of Hadley. The Hague: Kluwer Law International, 2000.
- Govaere, Inge, *The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate*. London ;Toronto, Sweet & Maxwell, 1996.
- Keeling, David T., *Intellectual property rights in EU law. Volume 1, Free movement and competition law*. Oxford: Oxford University Press, 2003.
- Korah, Valentine, *Intellectual property rights and the EC competition rules*. Oxford: Hart, 2006.
- Lenaerts, Koen, "The rule of law and the coherence of the judicial system of the European Union." *Common Market Law Review* 44 (2007): 1625–59.
- Lenaerts, Koen, *Procedural law of the European Union, London*: Sweet & Maxwell, 2006, p. 494.
- Musker, David, *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002, p. 206.
- Ullrich, Hanns, "The Development of a System of Industrial Property Protection in the European Union: The Role of the Court of Justice (Die Entwicklung Eines Systems Des Gewerblichen Rechtsschutzes in Der Europäischen Union: Die Rolle Des Gerichtshofs)." *Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper* 10-11 (2010).
- Legal text
- Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24.
- Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23.8.2012, p. 1).
- Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991 *OJ L 136, 30.5.1991, p. 1–23*, as amended to *22.6.2011.*
- Rules of Procedure of the Court of Justice, *OJ C 337, 6.11.2012, p. 1–42.*
- Treaty on the Functioning of the European Union, (Consolidated version 2012), OJ C 326, 26.10.2012, p. 47-199.
- Court of Justice of the European Union
- Judgment of the Court of First Instance (Second Chamber) of 2 July 2002, SAT.1 SatellitenFernsehen GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-323/00, *European Court reports 2002 Page II-02839.*
- Judgment of the Court (Grand Chamber) of 5 July 2011, Edwin Co. Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case C-263/09 P., *European Court reports 2011.*
- Judgment of the Court (First Chamber) of 18 December 2008, Les Éditions Albert René Sàrl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and Orange A/S, Case C-16/06 P, *European Court reports 2008 Page I-10053.*
- Judgment of the Court (Fourth Chamber) of 20 October 2011, PepsiCo, Inc. v Grupo Promer Mon Graphic SA, Case C-281/10 P., *European Court reports 2011.*
- Judgment of the General Court (Second Chamber) of 13 November 2012, Antrax It Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Joined cases T-83/11 and T-84/11, European Court Reports 2012.
- Judgment of the General Court (Fifth Chamber) of 18 March 2010, Grupo Promer Mon Graphic, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-9/07, *European Court reports 2010 Page II-00981.*
- Judgment of the General Court (Third Chamber) of 14 December 2011, Völkl GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-504/09, *European Court reports 2011.*
- Judgment of the General Court (Fourth Chamber) of 9 February 2011, Ineos Healthcare Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-222/09, *European Court reports 2011 Page II-00183.*

- Judgment of the General Court (Third Chamber) of 16 May 2011, Atlas Transport GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-145/08, *European Court reports 2011.*
- Judgment of the Court of First Instance (Fourth Chamber) of 12 December 2002, eCopy, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-247/01, *European Court reports 2002 Page II-05301.*
- Judgment of the Court of First Instance (Fifth Chamber) of 7 June 2005, Lidl Stiftung & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-303/03, European Court reports 2005 Page II-01917.
- Judgment of the Court of First Instance (Fifth Chamber) of 23 November 2004, Frischpack GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-360/03, *European Court reports 2004 Page II-04097* .
- Judgment of the Court (Sixth Chamber) of 5 February 2004, Commission of the European Communities v French Republic, Case C-24/00, *European Court reports 2004 Page I-01277.*
- Judgment of the General Court (Eighth Chamber) of 9 December 2010, Tresplain Investments Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-303/08, *European Court reports 2010 Page II-05659.*
- Judgment of the Court (Fifth Chamber) of 18 September 2003, Albacom SpA (C-292/01) and Infostrada SpA (C-293/01) v Ministero del Tesoro, del Bilancio e della Programmazione Economica and Ministero delle Comunicazioni, Joined cases C-292/01 and C-293/01, *European Court reports 2003 Page I-09449*.

TERM OF THE PATENT. PREMISES FOR THE CREATION OF THE SUPPLEMENTARY PROTECTION CERTIFICATE

BUCURA IONESCU*

Abstract

The legal nature of the rights derived from the patent was object of numerous theories and discussions in literature. Their main features represent recognized characteristics for the property right, nevertheless the limitation in time, in space and the ubiquity make the difference. Especially for new medicinal or plant protection products, due to the limitation in time, the period of effective protection under the patent is insufficient to cover the investment put into the research. There exists a risk of research centres situated in the Member States relocating to countries that offer greater protection. The uniform solution at Community level was created in form of regulations, as the most appropriate legal instrument to prevent the heterogeneous development of national patent laws affecting the free movement of products in the internal market. The duration of the protection granted by the patent may be extended to additional 5 years, by a supplementary protection certificate, granted, under same conditions provided by the regulation, by each Member State. The Community regulations created a legal form of a new national sui generis right, belonging both to the intellectual property right, namely patent right, and the administrative right of the marketing authorization. The main objective of the paper consists in informing the Romanian specialists in the field about the latest evolutions in intellectual property rights, especially in protection of the inventions, as a consequence of Romania's accession to the European Community.

***Key Words**: Patent rights- Legal character-Term of the patent- Medicinal products- Plant protection products- Extension of term- Uniform legislation-Supplementary Protection Certificate- Council Regulations.*

Introduction

The supplementary protection certificate, a new industrial property title concerning the inventions in the field of medicinal products or plant protection products, appeared in Europe at the end of the last century. The supplementary protection certificate is currently seen as one of the great challenges faced by both the national industrial property offices and, especially, the law courts, due to the complexity of this field characterized by the coexistence and combination of two different fundamental law norms, namely the norms relating to the patent and the norms relating to the authorization for medicaments and plant protection products. Although this sub-field of the patent was established more than 20 years ago, we may say that the number of supplementary protection certificate applications filed within the EU Member States is negligible in comparison with the number of patent applications, nevertheless their economic importance is huge. It is proved by the numerous trials that have been on the roll of the Court of Justice of the European Union and, last but not least, on the roll of the national courts of the Member States, Romania included.

Council Regulation (EEC) No 1768/92[1] concerning the creation of a supplementary protection certificate for medicinal products created, within the European Union, the legal framework for regulating the situations in which a pharmaceutical company, owner of a patent for a medicament and authorized to place the said medicament on the market, may benefit by an extension of the duration of its exclusive rights based on the grant of a „supplementary protection certificate". Another highly important economic field, in which the investment made in the identification, creation, research and development of new active substances is huge, is the field of plant protection

* PhD, engineering and law degree, Director of the Patent Directorate, State Office for Inventions and Trademarks, Romania (bucura.ionescu@osim.ro).

[1] Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ L 182, page 1, Special Edition, 13/vol.11, p.130).

products. A legal framework was also created to regulate, at the Community level, the grant of the supplementary protection certificate for these active substances or combinations thereof intended to be placed on the market, in particular, as pesticides, i.e. the Regulation (EC) 1610/96[2].

This paper aims at presenting the premises which led to the creation of this new protection title, with a special emphasis on the importance thereof in the internal market of the European Union, and, at the same time, at analyzing the legal characteristics of the supplementary protection certificate, as compared with the patent, in the light of the modern patent right doctrine, under the conditions of Romania's accession to the European Patent Convention and to the European Union, too. Given the ascertained scarce interest, in Romania, for the patent literature and given the fact that, before Romania's passing to the market economy, the law courts did not face many cases of patent-derived rights, we intend to present the conditions and premises of the creation of the supplementary protection certificate, with a view to clarifying certain aspects relating to the interpretation of Community regulations articles and the effect of the rights they establish.

At the same time, it is worth mentioning that the Romanian specialized literature includes a very low number of articles concerning the supplementary protection certificate and, although in the foreign literature there are many articles and reviews on this topic, a single important work on this subject is currently known, which comments the articles of the Community regulations while exemplifying them by national or Community case law; it was published in 2011, in Germany, and it was consulted and cited within this paper.[3]

Legal nature of the right arising from the patent. General considerations.

The specialized Romanian literature shows various approaches regarding the nature of the right conferred by the patent. It is unanimously agreed that the patent granted by the competent authority, i.e., in Romania, the Romanian State Office for Inventions and Trademarks, is an intellectual property title which confers exploitation and prohibitory rights to its owner who may be the creator of the invention – the inventor, or other person to whom the right to the patent has been assigned.

Retrospectively, it can be ascertained that, during the period of the French Revolution, the legislation established for the first time, in a modern form, similar to the current meaning of the term, the inventor's right in his creation as a property right.[4] The French Revolution laws deal with it as a type of property which is different from the concept of property in the civil law. This approach is still valid, the property is different as far as it is limited in time and richer in content. Starting therefrom, the subjective industrial property right arising from the patent as the recognized patent owner's prerogative of exclusively using the protected invention, has the following legal characteristics: an absolute *erga omnes* right, a patrimonial right, an alienable right (alienability which regards the patrimonial rights). Besides these general property right legal characteristics, there is a series of specific features which have led to extensive criticism concerning the legal nature of the right conferred by the patent, as a property right.

Such specific characteristics of the right arising from the patent are:

-temporariness representing a time limitation, i.e. a certain duration of the property titles,

-territoriality or space limitation, as the patent is granted for the territory of a certain country or region established by international treaties or conventions,

---

[2] *Regulation* (*EC*) No *1610/96* of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products (OJ L 198, 8.8.1996, page 30)

NB: The terms "plant protection products" and "phytosanitary products" have the same meaning and, consequently, both of tem will be used throughout this paper.

[3] Brückner C, von Czettritz P, Ergänzende Schutzzertifikate mit Pädiatrischer Laufzeitverlängerung, Carl Heymanns Verlag, Köln, 2011.

[4] Ştrenc A.C., Ionescu B., Gheorghiu G., Dreptul brevetului, vol. I, page.52, Ed. Lumina Lex, Bucureşti, 2005.

-ubiquity, namely the invention capacity of being simultaneously present in each and every object in which it is materialized. For instance, an invention which represents a technical solution to a problem relating to a motor vehicle gear box, shall be present in each and every gear box carried out based on said invention.

The criticism showed that, although features common with the property on tangible goods exist, i.e. the exclusive and *erga omnes* features, there are major differences, such as the acquisitive prescription of rights and the fact that the specific defense is not the action for the recovery of possession, resulting in the patent right not being classifiable in the category of property rights.

In time, a series of solutions were stated within the universal doctrine, such as considering the intellectual rights as a separate fourth category of patrimonial rights, besides the rights *in rem*, rights to receive payment of a debt and rights *in personam*. Another solution was to classify the inventors' rights in a distinct category named „monopoly rights", the essence of which is represented by the prerogative of making and economically exploiting the invention, as well as the right to prevent third parties, who occasionally acquire the same, from reproducing, multiplying and selling it.[5]

We do not intend to insist within this paper on conceptions regarding the legal nature of the inventor's subjective right in the Romanian post-war doctrine. As, in relation with the intellectual creations, both non-patrimonial and patrimonial rights arise, the right resulting from such creations, inventions included, is a complex right consisting of a number of distinct rights which neither appear nor become extinct at the same moment. For example, there are non-patrimonial personal rights such as: the right to authorship of the invention, the inventor's priority right, the right to make the invention public, while there are patrimonial rights, as well, such as: pecuniary rights resulting from the direct exploitation and from the indirect exploitation of a patent, by assignment and license, or the right to damages due to the unauthorized use of the patented invention. As regards the arising and extinction of invention-related rights at different moments, a good example is the right to the authorship of an invention which arises upon its creation, while the right to exclusive exploitation arises upon the grant of the patent.

Having in view that, in Romania, the doctrine established the term „rights arising from the invention" which is a generic one, intended to cover the entire diversity of rights, we will simply retain the conception according to which the right in the invention is ***a right in rem over an intangible asset, meant to be used in industry***[6]. It is worth mentioning that the phrase „to be used in industry" relates, in fact, to the „industrial application" whose meaning does not need to be analyzed in this paper. The rights arising from the invention were intended to comprise the patent owner's rights, the rights of the inventor who is not at the same time the patent owner and the rights of the company which is not at the same time the patent owner[7].

It should be mentioned that, after Romania's accession to the European Patent Convention in 2003, and, even more, after Romania's becoming a member of the European Union, the patent legislation, the practice of the State Office for Inventions and Trademarks and of the Romanian law courts, and, last but not least, the doctrine, have been highly influenced by these events. The European patent system is deeply anchored in the German patent law which thereby influenced the Romanian legislation harmonized with the European Patent Convention. At the same time, the complexity and the number of rights arising from an invention have defined a branch of the intellectual property rights, i.e. the patent right, concept which was introduced into the Romanian specialized literature in 2005.

---

[5] Lucian Mihai, Invenţia. Condiţiile de fond ale brevetării, page 86 and following, Drepturi, Ed. Universul Juridic, Bucureşti, 2002.

[6] A. Petrescu, Introducere, p-29-33, cited in L. Mihai, op.cit., page 96.

[7] Lucian Mihai, op.cit., page 22.

The patent right (in Romanian *dreptul brevetului*, in German *Patentrecht*, in French *droit du brevet*) comprises all the rights arising from the moment of creating the invention until they lapse, and it is divided, according to the German patent literature[8], into three categories:

- ***the right in the invention***, the so-called general inventor's right, arises from the very act of creation, the same as the copyright. It is a right *in rem* which comes into existence at the moment of finalizing the invention and making it available to third parties, in a simple measure, allowing it to be recognized, which does not mean publication or communication within a specially organized framework. This right could be assimilated to the „right arising from the invention" existing in the Romanian doctrine; however its components show significant differences. The inventor's right in the invention has two components that confer it a double legal nature: the right to the patent and the right to inventorship, of a personal non-patrimonial nature[9].

-***The right to the patent or the right in the patent*** is an absolute and incomplete patrimonial right concerning an intangible asset, the active subject thereof being the inventor, i.e. the creator. As one of the components of the right over an invention, it comes into existence at the moment of creation, the same as the copyright. This is the subjective material right opening the inventor's way to the granting of the patent and, this way, unlike the copyright which arises and is recognized without any formality, it needs to be recognized by a national or European administrative act, materialized in a property title. It is an absolute right because it is an *erga omnes* right, as its owner can act against any third party. It is incomplete because it does not confer the prerogative of the exclusive use or of prohibiting the use by third parties, these prerogatives being only accorded after the patent is granted or, with certain restrictions, after the patent application is published. It is considered, by the specialists in the field, an authentic property right;

-the right to the grant of the patent, a right of procedural nature which comes into existence for the first applicant, namely the first person who files an application for the grant of a patent (*first to file*) with the competent authority. The active subject of the right is the applicant for a patent, a legal fiction which is exclusively used in respect of the patent granting procedure;

-the right resulting from the patent is a material right which is distinct from the right to the grant of the patent and consists of the prerogative of exclusivity and of prohibition of unauthorized use. The active subject of this right is the patent owner which most of the times differs from the inventor, the author of the intellectual creation. The right comes into existence upon the grant of the patent and becomes extinct upon the expiry of the patent. The right arising from the grant of the patent is a private intellectual property right by which the inventor, by means the patent owner as his successor in title, is rewarded by the State for making his invention available to the public and thereby enriching the prior art. The reward consists of the positive right of exclusive expoitation, namely the prerogative of exclusive use of the patented invention conferred by the patent to its owner. Said positive exploitation right has a negative correspondent in the owner's possibility of preventing third parties from using the patented products and processes without his authorization.

The right arising from the patent may be subject to assignment or license, either total or partial. As it can be ascertained, this right is a full right *in rem* which confers to its owner the three attributes: *usus*, *fructus* and *abusus*.

Romanian legislation in the field, namely the Patent Law 64/1991, as republished, establishes these categories of rights, wherefrom a series of other rights derives[10].

---

[8] Schulte R., Patentgesetzt mit EPU, Kommentar 8. Auflage, page 295 and the following, Karl Heymanns Verlag, 2008.

[9] For those inventions which are created within the company, the so-called employees' inventions, the right in the invention generally belongs to the employer, the legal system which regulates these inventions being the labour law, not the patent law (Benckard G, Patentgesetz und Gebrauchmustergesetz, C.H.Beck'sche Verlagsbuchhandlung, Munchen 1993).

[10] Patent Law No. 64/1991, as republished, Art. 45 (1): „The right to the patent, the right to the grant of a patent and the rights deriving from a patent shall be transferable, either wholly or in part."

A newer characteristic, which is specific to this right, is the fact that the patent confers to its owner the possibility of extending the duration thereof under the conditions set by the Community Regulation concerning the medicaments and the Community Regulation concerning the plant protection products, which shall be analyzed below.

Patent duration

As we have previously shown, the property right arising from the patent is characterized, besides the general characteristics of property rights concerning material goods, by a series of features specific to the property rights concerning intangible assets: temporariness, territoriality and ubiquity. The temporariness is given by the limited duration of the patent, **generally 20 years from the application filing date**.

This time limitation of the exclusive right of exploitation of the protected invention comes from the high economic importance of the patent. Firstly, the patent documentation, i.e. the description of the invention and the claims, provides, by publication, the exceptional informational contribution to the prior art, with the advantage of making highly actual and detailed documents available to the public. These documents permit to specialized persons who consult them to start research and developments in the field from a certain already explored level, thereby sparing important intellectual and financial efforts. The so disclosed information reduces long and costly parallel efforts made nationally or internationally for finding original solutions to problems that need to be solved. Secondly, the patent is granted for a technical creation complying with the conditions of worldwide novelty, inventive step as compared with other solutions available to a person skilled in the art and industrial applicability. Protected novelty and originality represent the base of the innovation and create a suitable environment for economic growth in a country. The inventor having found a new solution to a certain problem is rewarded with a „monopoly" for exploitation that the State grants him in exchange for his contribution to the society development[11]. But this monopoly cannot be a perpetual one, as the novelty becomes obsolete in time, and the solution once new must be an incentive for newer and newer better and more creative solutions permitting the development and growth of an economy. This is why it was considered that a 20 year-term would be an equitable reward for him to exploit the invention, a period long enough for the expenses made for applying the invention to be paid off.

The TRIPS Agreement[12] which is currently considered to be „the foundation on which the international system of intellectual property, in general, and the patent law, in particular, rest […], is the most comprehensive international document ensuring recognition of the minimal level of protection and enforcement of patent rights"[13]. According to *Article 33* of this Agreement, „the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date".

Within the same meaning, the European Patent Convention states, under Art. 63(1) that "the term of the European patent shall be 20 years from the date of filing of the application". Moreover, the most countries in the world established, in application of the provisions of TRIPS Agreement, a patent term of 20 years from the filing date. As far as the Romanian patent law is concerned, it was amended for harmonization purposes, because it previously had provided, for the improvement inventions, a lower limit of 10 years and an upper limit equal to the duration of the patent. The current Patent Law 64/1991, as republished in 2007, provides, under Art. 31(1): "Patent duration shall be 20 years as from the date of filing the application".

[11] Intellectual Property Reading Manual, www.wipo.org.

[12] TRIPS Agreement – Trade-Related Aspects of Intellectual Property is a WIPO-administered international agreement deemed to be the most important multi-national instrument of globaliaztion of intellectual property laws, negotiated in 1994, at the end of Uruguay Round (GATT).

[13] Ştrenc A.C., Ionescu B, Gheorghiu G., op.cit., vol.I, page 86.

The 20 year-term of the patent has in view a maximal period of time in which the patent is valid, subject to payment of the maintenance fees. However, there is a difference between the patent term referring to the patent validity and the period of time during which the patent protection is really and effectively exerted, namely the duration of protection. While the first one, i.e. the patent term, relates to the above-mentioned maximal period of validity, in other words, the patent life, the second one, i.e. the duration of protection, is the period during which the patent owner benefits by his exclusive exploitation right. But the said right is only obtained after the grant of the protection title, namely the patent, the procedure up to grant being many times complicated and long lasting, generally ranging between 2 and 4 years from the filing date. In other words, the effective duration of protection is never equal to the 20 year-long validity of the patent. Nevertheless, the idea of a protection starting on the date of granting the patent was considered to be an unfair treatment for the applicant who, after 18 months from the filing date, makes his invention available to the public by publication; this is why, starting on the publication date, a provisional protection of the invention is established.

The Romanian patent law establishes the provisional protection under Art. 33 which stipulates that*: "Starting from the date of its publication […], the patent application shall provisionally confer on the applicant the protection laid down in Art. 32"*[14]. This provisional protection situation which is also known in the literature as "conditional"protection results, under the Romanian law, from the incomplete character of the action for damages. Thus, Art. 59(3) of the Patent Law 64/1991, as republished in 2007, provides that: *"Infringement of the rights referred to in Art. 32, paragraph (1), by third parties, after the publication of the patent application shall make the infringers liable for damages under civil law, and the entitlement to the payment of damages shall be enforceable after the grant of the patent."* By the amendment brought to this law in 2007, the applicant is given the option that, where, even before the publication of the application, he ascertains or considers that a third party uses the object of his patent application, he could summon such a third party to stop any potentially infringing act. This amendment is the subject of Art. 59(4) of the law, which stipulates that: *"Notwithstanding the provisions of Art. 32, paragraph (1), the acts referred to in Art 32, paragraph (2), performed by third parties before the date of publication of the patent application or before the date of the summons made by the applicant and accompanied by a certified copy of the patent application, shall not be deemed to infringe the rights conferred by the patent."*

Moreover, the duration of 20 years from the filing date is a maximal legal term of the patent which can only be reached subject to payment of the annual maintenance fees. The said duration may be however limited by a series of events that can occur during the patent life, as follows:

-failure to pay the maintenance fees shall lead to the loss of owner's rights;

-the owner's waiving the right conferred by the patent;

-patent revocation in whole within the legal time limit of 6 months from the date of publication of the patent issuance;

-patent revocation in whole, throughout its duration.

Having in view that, despite the 20 year-long patent term, the patent owner does not benefit all throughout this period by the full exercise of the rights conferred thereby, a mechanism was created for the industry of medicaments and plant protection products intended to permit an effective longer owner's protection. This extension of duration was limited to medicaments and plant protection products, because the period of time elapsed between the filing of a patent application for

[14] Art. 32 of the Patent Law 64/1991, as republished, sets out under paragraph (1): *„The patent shall confer on its owner an exclusive right of exploitation throughout its entire duration."* While, under paragraph (2), it stipulates that*: "It is prohibited to perform the following acts without the owner's consent: a) manufacturing, using, offering for sale, selling or importing for the purpose of using, offering for sale or selling, where the subject-matter of the patent is a product; b) using the process and using, offering for sale, selling or importing for those purposes the product directly obtained by the patented process, where the subject-matter of the patent is a process."*

a new medicament or plant protection product and the authorization for placing that product on the market reduces the effective protection conferred by the patent to a period of time which is not sufficient for the investment in research to be recovered. This internationally enacted mechanism is a regulation which recognizes the protection duration either by the registration of the extension, or, in Europe, by a supplementary protection certificate granted by the patent-granting industrial property authority.

Premises for the creation of the supplementary protection certificate

The remarkable technological evolution at the end of the 20th century led to creation and invention of new active substances representing the base of the development of the pharmaceutical industry and the chemical industry for plant protection products. The development of many companies which focused their strategy on the creation of new active substances was possible due to a sustained patent protection policy concerning these substances. Nevertheless the full exploitation of the obtained patents had to overcome a series of obstacles. On the one hand, the huge costs implied, in fundamental research, for the creation and preparation of active substances and, subsequently, for authorizing and marketing the medicinal products or pesticides made therefrom. Unlike many patented products that lose their economic significance by the decrease, in time, of their market attractivity, which leads to a patent life of 8 – 10 years, at the most, the medicaments and plant protection products are generally still on the market in the 20th year of patent life and their market value grows.

On the other hand, the extremely long and complicated administrative procedures related to the grant of the authorization for placing the product on the market, make the real market patent exploitation duration significantly shorter than the legal 20-year term. The owners of the exclusive right conferred by the patent which protects an active substance on which a medicament or plant-protection product is based cannot benefit by their right until the complex authorization procedure for placing the medicament or plant-protection product on the market is completed. Thus, within the Community area, the concern for public health protection led to the enactment, on 26.01.1965 of the Council Directive 65/65/EEC[15] on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products. Meanwhile, it was replaced by the Directives 2001/83/EC[16] and 2001/82/EC[17]. Moreover, the Directives 75/318 EEC[18] and 75/319/EEC[19] provide certain details concerning the requirements to be met in developing and authorizing a medicinal product. All these are procedures that can last for years.

In the last century, the private sector produced the most of the medicaments, treatments and vaccines existing on the market. When a pharmaceutical company makes investments in research and development of new medicinal products, the first step is the evaluation of chemical and biological compounds which are potentially useful in the treatment of newly appeared situations. Such an evaluation may comprise about 10000 compounds, a part of which are selected and tested for 10 – 15 years as relates to their effectiveness and safety, before their being launched on the market.[20] So, in 2009, 25 new compounds were launched on the market, while 3050 compounds were being in various development stages, which proves the high number of hindrances and difficulties to be

[15] OJ L of 9.12.1965, page 369.
[16] OJ L 311 of 28.11.2001, page 67.
[17] OJ L 311 of 28.11.2001, page 1.
[18] OJ L 147 of 09.06.1975, page 1.
[19] OJ L 147 of 09.06.1975, page 13.
[20] Innovation.org. *Drug Discovery and Development: Understanding the R&D Process*. Cited in The Pharmaceutical Industry and Global Health: Facts anf Figures, Issue 2011, International Federation of Pharmaceutical Manufacturers &Associations (IFPMA), page 12.

overcome for converting new compounds into safe and effective medicinal products.[21] It is also worth mentioning that, from the data provided by pharmaceutical companies, it results that the process of development of existent products implies huge costs, as the development of a single medicinal product currently costs more than 1.38 billion USD, in comparison with 138 million USD in 1975; it is a 1000% increase which in fact reflects the necessity of safer medicinal products of higher quality, in the sense of reducing the side effects in patients.[22] As a consequence of the higher quality standards used, in particular, in case of medicinal products, with a view to reducing the risks for public health, a significant time lag appears between the date of filing the patent application and the date of placing the product on the market.

Having ascertained that the said time lag caused an alarming decrease in the European pharmaceutical industry research and development activity for new active substances, the European Commission was concerned, starting from the '70s, to achieve a balance between the public health system and the interests of the industry, in order to allow it to keep up with the innovative pharmaceutical products developed in USA or Japan. The statistics made in the Community area after the implementation of the Directive 65/65/EEC showed that the real exclusivity period conferred by a patent for proprietary active substances authorized to be placed on the market had reached no more than 9 - 10 years; the incentive to be given to the medicinal product producers was based on the principle of a reward meant to permit them to recover the investment by extending the patent protection term with a period of time equivalent to the period required for the grant of the market authorization.

At the same time, it was ascertained that the already known active substances can represent an important source of new products, when the research efforts are focused to develop them instead of finding new active substances. But the products based on the said active substances, in particular those created after a long-lasting and expensive research, cannot be subject of a sufficient further development, in Europe, in the absence of a favouring legal regulation intended to provide a sufficiently long protection to encourage research. And, in the pharmaceutical field, research must be encouraged as it has a decisive contribution to the continuous public health improvement. In the filed of plant protection, as well, the research has an important contribution to the permanent improvement of crops and to the manufacture of high quality food products.

In this context, it was internationally agreed that, based on new legal provisions, the duration of a patent granted for an active substance on which a medicinal product or a plant-protection product is based could be extended with a certain period taking into account the administrative procedures needed for placing the product on the market and ensuring an exclusive protection sufficient for the patent owner to recover the investment made in research.

In the USA, the extension of patent duration was made possible by the Act of 24 September 1984, the legal framework for this regulation in respect of medicinal and plant-protection products being represented by the intellectual property law *United States Code, Title 35 Patents, Sections 155, 155A and 156 on Extension of Patent Term, 35USC§155-156 (2000), as well as the Code of Federal Regulations (CFR) Rules of Practice in Patent Cases, Extension of Patent Term: 37CFR§1710-1785(2000)*[23].

---

[21] Innovation.org. *New Medicines in Development*. Cited in The Pharmaceutical Industry and Global Health: Facts anf Figures, Issue 2011, International Federation of Pharmaceutical Manufacturers &Associations (IFPMA), page 12.

[22] PhRMA 2011. Cited in The Pharmaceutical Industry and Global Health: Facts anf Figures, Issue 2011, International Federation of Pharmaceutical Manufacturers &Associations (IFPMA), page 12.

[23] WIPO Handbook on Industrial Property Information and Documentation „Survey on the Grant and Publication of Supplementary Protection Certificates (SCPs)" published in 1994 and updated in 2002, www.wipo.int/standards/en.

In Japan, by the 1988 amendment of the patent law, there was created the legal framework for the extension of the term of patents on pharmaceuticals for human and animal use and plant protection products, by 5 years, at the most. These provisions are the subject matter of Sections 67/2, 67 bis and 67 ter of the Japanese Patent Law.

In Europe, at the end of the '80s, France, and then Italy and Germany, created, at the national level, the legal framework for the extension of the term of patents for medicinal products, by up to 5 years. The so-created situation led to a lack of balance at the level of the European Community and the risk of transferring the research centres from certain Member States to the States in which the duration of the exclusive protection gave the owners the possibility to recover the investment made in research, such as USA or Japan. At the same time, the development, at the Community level, of heterogeneous national legislations could result in obstacles to the free circulation of pharmaceutical products within the Community, thereby affecting the functioning of the internal market. Consequently, it was agreed upon a uniform solution at the Community level, to extend the patent duration by means of a Community legal instrument intended to enact the grant, within each Member State, in the same conditions, of a protection title for extending the duration of a patent granted for an active substance in respect of which an authorization for placing the product on the market as a medicinal product was issued within the Community. This way, a Community regulation was issued for the creation of a supplementary protection certificate capable to confer a *sui generis* right which extends *de facto* the patent duration while not affecting the national patent legislations, *per se*[24].

It is worth mentioning that, if in Europe the industrial property title extending the patent duration was named "Supplementary Protection Certificate" (in French - *Certificat complémentaire de protection*, in German - *Ergänzendes Schutzzertifikat*, in Romanian – *Certficat suplimentar de protecţie*), in the United States of America it is called "Certificate Extending Patent Term" and in Japan there is no special name for the extension procedure which is simply known as "Registration of extension of term of patent right".

The Regulation (EEC) 1768/92[25] concerning the creation of a supplementary protection certificate for medicinal products creates the legal framework meant to regulate situations in which a pharmaceutical company owning a patent concerning a medicinal product and having an authorization to place said medicinal product on the market may benefit by a total duration of its exclusive rights of 15 years, at the most, based on the grant of a "supplementary protection certificate". The above-mentioned Regulation entered into force on 2 January 1993 and, starting on 1 July 1994, as a consequence of the establishment of the European Economic Area, it was extended to the said entire area which comprised the European Union plus Austria, Finland, Norway, Iceland and Sweden (published in JO L 198, page 30). After the date of 1 May 1995, the EEA was extended to Liechtenstein, as well.

For the other field of high economic importance, in which the investment made in the identification, creation, research and development of new active substances is huge, i.e. the field of plant protection products, there was also created the Community legal framework which regulates the grant of the supplementary protection certificate, namely the Regulation (*EC*) No 1610/96[26] (hereinafter Regulation for plant protection products).

Both regulations have been amended following the accession of the group of 10 countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, to the European Union, in 2003. The accession, in 2007, of Romania and Bulgaria imposed

[24] Brückner c, von Czettritz P, op.cit., page 17.

[25] Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ L 182, p.1, Special Edition, 13/vol.II, page 130).

[26] Regulation (*EC*) No *1610/96* of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products (OJ L 198, 8.8.1996, page 30).

Note: The terms „plant protection products" and „phytosanitary products" have the same meaning and they shall be both used throughout this paper.

the amendment of Art. 19a of the Regulations[27]. The Act of accession of Bulgaria and Romania was published in the Official Journal of the European Union No L 157/11 of 21.06.2005. Annex III to the Protocol concerning the conditions and arrangements for admission of Republic of Bulgaria and Romania to the European Union, the chapter referring to the Company Law contains the section Industrial Property Rights, sub-section Supplementary Protection Certificates.

It is worth mentioning that, before Romania's accession to the European Union, the concern for creating the legal framework for extending the patent duration existed in our country, as a consequence of the legitimate interests of important producers of medicinal products and plant-protection products, patent owners and producers of generic products in these industrial fields.

Law No 581/2004 on the supplementary protection certificate for medicaments and phytosanitary products was published in the Official Gazette of Romania No 1233 of 21 December 2004. The law never produced effects and was expressly abrogated by the Law 107/2007, because from the date of Romania's accession to the European Union, the Community Regulations have become directly applicable and prevailed over any conflicting provisions of the national legislation. At the moment of creation of said act, there was an intense debate concerning the name of the certificate to be granted by the State Office for Inventions and Trademarks, i.e. either supplementary protection certificate or certificate for supplementary protection. An argument in favour of the second option was that the certificate was intended to extend (supplement) for a certain period of time the protection conferred by the patent. At the same time, the certificate was assimilated, as far as the reparation rights are concerned, with another provisional title granted on the territory of Romania, namely the transitional (pipeline) protection certificate. Under the trade agreement concluded with the United States of America in 1992 and ratified by the Law No.52/1992, a transitional (pipeline) protection was established in Romania for patents having as a subject-matter medicinal products for which, in Romania, up to the entry into force of the Patent Law 64/1991, foreign applicants were not allowed to enjoy patent protection. Besides the medicinal products, the substances obtained by chemical or nuclear methods, food products and spices were prohibited as subject-matter of foreign owners' patents. Thus, under the Law No 93/1998 concerning the pipeline protection, the so-called certificate of transitional (pipeline) protection was granted upon request and based on an examination procedure, for the owners of patents granted in the USA, the reference patent being, on the date of filing the certificate application with OSIM, a granted patent in force in its country of origin. We will not analyze further details regarding the protection established by this certificate, although there is a series of similarities with the supplementary protection certificate, however, in our opinion, the main difference between these protection titles consists of the legal system governing them. If the pipeline protection certificate is regulated only by the patent legislation and the scope of protection granted thereby is the same as the protection granted by the reference patent and it expires at the same moment as the reference patent, the supplementary protection certificate operates at the same time under the patent legislation and under the administrative legislation, by the market authorization, and the protection it grants is limited to the product indicated in the said authorization and to a duration which cannot exceed the legal patent term with more than five years. In this context, in our view, the suitable name is „supplementary protection certificate" which is, in fact, the term officially adopted within the European Union.

In 2009, as a consequence of the evolution of exigencies in the pharmaceutical field, on the one hand, and of the changes occurred in the geo-political area of the Community, on the other hand,

[27] The Protocol, in the Annex III of the Accession Treaty, stipulates under number II, „Supplementary Protection Certificates", that Art. 19a of the Regulation for medicinal products shall be amended by adding the following text: „l. any medicinal product protected by a valid basic patent and for which the first authorisation to place it on the market as a medicinal product was obtained after 1 January 2000 may be granted a certificate in Romania. In cases where the period provided for in Article 7(1) has expired, the possibility of applying for a certificate shall be open for a period of six months starting no later than the date of accession.' Under number II (2), Art. 19a is completed by letter (I) comprising a similar provision regarding the phytosanitary products.

the Regulation (EEC) 1768/92 was amended and the codified version thereof was adopted: the Regulation (EC) 469/2009[28] which shall be referred to hereinafter as Regulation for medicinal products.

The legal basis for the grant of the supplementary protection certificates on the territory of the European Union is represented by the two Community regulations: the Regulation (EC) 469/2009 for medicinal products and the Regulation (EC) 1610/96 for plant protection products, as well as the national legislation. The said regulations are, of course, normative acts directly applicable in the Member States, so that essential changes of the national legislation in the field of patents were not required, except for the introduction of a provision relating to the possibility of obtaining such a protection title following the patent for invention, under the conditions set out by the Community regulations concerning the supplementary protection certificate.

Consequently, in Romania, the Patent Law 64/1991, as republished in 2007, was completed by introducing, under Art. 31 referring to the patent duration, a paragraph (3) having the following content*: „For patented medicaments or plant protection products, supplementary protection certificate may be granted under the Council Regulation (EEC) no. 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicaments and the Regulation (EC) no. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products."* In order to ensure a unitary procedure for implementing the regulations and also to come to the assistance of the applicants, the Director General of the State Office for Inventions and Trademarks issued the Instruction No 146 of 28.12.2006 concerning the supplementary protection certificate for medicinal and plant protection products, published in the OSIM Official Industrial Property Bulletin (BOPI) No 12 of 29.12.2006. In our opinion, the amendments brought to the Community regulations should entail further amendment of the paragraph within the Romanian law, having in view that, for the field of medicinal products, the certificate applications as well as the Office decisions are currently made under the Regulations, in the codified version of 2009. That is why, *de lege ferenda*, a new drafting of this provision would be required in order to cover future situations in which new amendments of Regulations could occur.

As regards the rights conferred by the European patent, the European Patent Convention, under Art. 63 (2) which concerns the term of the European patent, sets out the patent term extension possibility and offers to the Contracting Parties the possibility of extending the duration of the European patent for products undergoing an authorization procedure, immediately after the expiry of the patent term[29].

Legal characteristics of the supplementary protection certificate

The Explanatory Memorandum of the European Commission of 11 April 1990, COM (90) final, published in the OJ 1990, C114, under the title "Proposal for a Council Regulation (EEC) concerning the creation of a supplementary protection certificate for medicinal products" stated, under paragraph 20, that a Community solution capable of taking into account the interests of all Member States, as regards the issue of the reduced effective duration of the patent within the medical sector of the Community market, is a Community regulation ensuring the legal form of a new *sui generis* right and lying at the interface between two systems, namely that of the authorization for placing the product in the market and the patent system. The 19th paragraph of the said Memorandum

[28] *Regulation* (*EC*) No *469/2009* of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (codified version) (OJ L 152/1).

[29] Art. 63 EPC: „Term of the European patent. (1) The term of the European patent shall be 20 years from the date of filing of the application. (2) Nothing in the preceding paragraph shall limit the right of a Contracting State to extend the term of a European patent, or to grant corresponding protection which follows immediately on expiry of the term of the patent […] (b) if the subject-matter of the European patent is a product or a process for manufacturing a product or a use of a product which has to undergo an administrative authorisation procedure required by law before it can be put on the market in that State [...].

shows that the idea of extending the patent duration by amending the national patent legislations could not be adopted because of the necessity to preserve the harmonization between the national legislations and the European legislation, i.e. the European Patent Convention. The situation in which one and the same medicinal product was protected for different periods of time under the national legislation and under the Convention had to be, by all means, avoided. At that moment, in 1990, in the European Patent Convention there were 14 Contracting States, 10 of which were Community Member States. In this context, the extension of patent duration within the framework of the Convention, by amending Art. 63 was impossible as a consequence of the extremely complicated procedure imposed by Art. 172 (a) of the EPC. This is why the final option was to include the possibility of extending the patent term within Art. 63(2), as mentioned above, and the amendment entered into force in 1997, which means six years after the date of the EPC Revision Conference.

In order to define the legal features of the rights arising from the supplementary protection certificate, the provisions of the two Regulations concerning the subject-matter of protection[30] and the effects of the certificate[31] shall be taken into consideration. As we have already shown in this paper, the supplementary protection certificate is deemed to be a **distinct industrial property protection title** which extends the patent duration and confers a *sui generis* right to its owner who is, in fact, the patent owner. The legal nature of this right is a double one, given by the patent right, as a branch of the intellectual property right, and the administrative right relating to the authorization for placing the medicaments or plant protection products on the market. This comes from the protection it confers, which is limited to the protection conferred by the basic patent and to the product for which the authorization was granted. At the same time, the effects of the certificate, i.e. the rights acquired by the entity of law, which is the protection title owner, are the same as the rights conferred by the basic patent and subject to the same obligations. Which means that it has the same legal features as the patent: an absolute *erga omnes* right, a patrimonial right, an alienable right, as well as the special characteristics, such as the time limit and the territorial limit of a national right. The time limit differs from the patent time limit, as it can reach five years, at the most, or exceptionally, five years and six months, in case of the medicaments for paediatric use.

The certificate is however different from the patent in that the protection it confers is limited to the product for which the authorization was issued for placing the product on the market as a medicinal or plant protection product. Taking into account that by the publication of the certificate application or of the granted certificate, the publication of the patent document on which the certificate is based is not ensured, as in the case of the patent, for interpreting the scope of the protection conferred by the certificate it is necessary to start from the scope of protection conferred by the basic patent, given by the content of the claims, which is, in its turn, interpreted by using the description of the invention. Thus, within the limits defined by the patent and the market authorization, the certificate confers the same rights and obligations as the patent on which its grant is based, namely the exclusive right of exploitation and the right to prohibit third parties the unauthorized use of the products protected by the certificate. Furthermore, there are other rights deriving therefrom, such as the right to transfer the same by assignment, licence or succession, the right to renouncement, as well as the defense of rights provided for by the law – security measures ordered by the law court, infringement actions, entitlement to damages. At the same time, the abuse of right may be sanctioned by third parties by actions of revocation or cancellation of the granted

[30] Art. 4 - Subject-matter of protection.

Within the limits of the protection conferred by the basic patent, the protection conferred by a certificate shall extend only to the product covered by the authorizations to place the corresponding medicinal product/plant protection product on the market and for any use of the product as a medicinal product/plant protection product that has been authorized before the expiry of the certificate.

[31] Article 5 - Effects of the certificate .

Subject to Article 4, the certificate shall confer the same rights as conferred by the basic patent and shall be subject to the same limitations and the same obligations.

certificate, with effect *ex tunc*. The same as in the case of the patent, the certificate may be maintained in force subject to payment of the legal fees throughout its entire term[32]

The supplementary protection certificate, the same as the patent, confers a national protection, on the territory of the Member State where an application for the grant of the certificate has been filed with the competent authority that also granted the patent on which the certificate is based. Ensuring uniform conditions, at the level of each Member State, relating to the grant of the certificate, the publication, in order to make it available to third parties, the duration and the cancellation thereof represent the subject of the Community regulations provisions, the uniform interpretation of which is the competence of the Court of Justice of the European Union.

Conclusions

The paper starts from the presentation of the legal characteristics of the right arising from the patent, as a property right having the generally-recognized features thereof as well as a series of characteristics specific to the property over intangible assets, i.e. temporariness, territoriality and ubiquity. The temporariness limits the patent term to 20 years, at the most. The patent term institution is presented in the light of international regulations and national laws, and also of the effects it has over the protection conferred by the patent. One of these effects is the reduced effective duration of the owners' exclusive rights which, in the field of products which undergo a market authorization procedure – medicinal and plant protection products – is even shorter as a consequence of the time elapsed up to the grant of such authorizations. These were the premises for the creation of a new industrial property title, the supplementary protection certificate, which was introduced 20 years ago in the European Community by means of two Council Regulations: Regulation (EEC) 1768/92 concerning the creation of a supplementary protection certificate for medicinal products and Regulation (EC) 1610/96 concerning the creation of a supplementary protection certificate for plant protection products. They both mainly aim at providing a uniform regulation, at the Community level, for the extension of the patent term by five years, at the most. Further on, the legal features of the certificate are presented in comparison with the patent features and the effect thereof upon the owners.

In our view, the paper is useful to the specialists in the field, helping them understand the conditions of creation of a new industrial property title generated by the market economy, and, at the same time, it contributes to the enrichment of the Romanian doctrine in this matter. This paper can be a starting point for other studies concerning the uniform interpretation of Community provisions by the Romanian authorities competent for protecting or settling the supplementary protection certificate cases.

References

1. Specialized literature

- Boroi Gabriel, Drept civil. Partea generală. Editura Hamangiu, Bucureşti, 2010.
- Calmuschi Otilia, Consideraţii privind procesul de armonizare a legislaţiei naţionale cu legislaţia comunitară, SDR, nr. 1-2/2004.
- Calmuschi Otilia, Dreptul proprietăţii intelectuale, Editura Universităţii Titu Maiorescu, Bucureşti, 2004.
- Furerea Augustin, Drept comunitar european. Partea generală, Editura C H Beck, Bucureşti, 2007.
- Fuerea Augustin, Drept comunitar al afacerilor. Editura Universul Juridic, Bucureşti, 2003.

[32] Art. 12 - Annual fees. Member States may require the certificate to be subject to the payment of annual fees.

- Gheorghiu Gheorghe, Ştrenc Alexandru Cristian, Ionescu Bucura, Dreptul brevetului Tratat, vol I şi II, Editura Lumina Lex, 2005, 2007.
- Roş Viorel, Protecţia invenţiilor, inventatorilor şi titularilor de brevete de invenţie, Dreptul proprietăţii intelectuale, Editura Global Lex, Bucureşti, 2001.
- Beier/Haertel/Schricker, Europäisches Patentübereinkommen. Münchner Gemeinschaftskommentar, since 1984, Carl Heymanns Verlag KG.
- Benkard Georg, Europäisches Patentübereinkommen, Verlag C. H. Beck, 2002.
- Brückner Christopher, Czettritz von, Peter, Ergänzende Schutzzertifikate mit pädiatrischer Laufzeitverlängerung, Carl Heymanns Verlag 2011.
- Chavanne Albert, Burst J. J., Droit de la propriete industrielle, Dalloz, Paris, 1998.
- DPMA, Taschenbuch des gewerblichen Rechtsschutzes, herausgegeben vom Deutschen Patent- und Markenamt, 67. Ergänzungslieferung, 2010.
- Dybdahl, European Patents, Carl Heymanns Verlag 2001; in German: Europäisches Patentrecht, Einführung in das europäische Patentsystem, Carl Heymanns Verlag, Köln etc. 2000.
- Brandi-Dohrn/Gruber/Muir, Europäisches und Internationales Patentrecht. Einführung zum EPÜ und PCT, Beck'sche Verlagsbuchhandlung, 5. Auflage 2002.
- Hirsch Fritjoff, Hansen Bernd, Der Schutz von Chemieerfindungen, Chemie-Kommentar zur Rechtsprechung nach dem deutschen Patentgessetz und em europäischen Patentübereinkommen, VCH Verlagsgesellschaft, Weinheim, 1995.
- Kramer Birgit, Patentschutz und Zugang zu Medikamenten, Carl Heimans Verlag, 2007.
- Krasser Rudolph, Lehrbuch des Patentrechts, C.H. Beck'sche Verlagsbuchhandlung, München, 1986.
- Lieck Stefan, Parallelhandel mit Arzneimitteln innerhalb der Europäischen Union unter arzneimittel-, marken- und patentrechtlichen Aspekten, GEW, Band 10, 2008, Universität Zürich.
- Mathély, Le Droit Europeen des brevets d'invention, Librairie du Journal des Notaires et des Avocats, Paris 1978.
- Pagenberg Jochen, Patentubereinkommen, Münchener Gemeinschaftskommentar, Carl Heymanns Verlag, KG, 2002.
- Pfanner/Sünner, Der gewerbliche Rechtsschutz im EURATOM- Vertrag, 1958.
- Singer Margarete, Stauder Dieter, Europäisches Patentübereinkommen, CarLHeymanns- Verlag, 3nd ed 2003.
- Schennen Detlef, Die Verlängerung deer Patentlaufzeit für Arzneimittel im Gemeinsamen Markt, 1993.
- Strauss Joseph, Deutsches und europaisches Patentrecht, Max Planck, 2001.
- Schulte Rainer, Patentgesetz mit EPU, 8-te Auflage, Carl Heymanns Verlag, 2008.
- M. Snodin, J. Miles, RAJ Pharma, Iulie 2007, pag. 459,"Making the Most of Paediatric Extensions", www.rajpharma.com.
- Symposium"Ergänzende Schutzzertifikate- geringe Anmeldezahlen, hohe wirtschaftliche Bedeutung", Deutsches Patent-und Markenamt in München, 17 März 2011, Dr. Georg Fuchs, Boehringer Ingelheim,"Ergänzende Schutzzertifikate für pädiatrische Untersuchungen von Wirkstoffen".
- Formulare des DPMA.
- Richtlinien des DPMA, Stand 17.03.2011, available under www.dpma.de.
- Merkblatt zum Anmeldeformular für ergänzende Schutzzertifikate.
- Forms and Information of the UK-IPO.
- Manual of Patent Practice of UK-IPO available under www.ipo.gov.uk.
- UK-IPO Guide for applicants available under www.ipo.gov.uk.

2. Internet Links

- European Union : http://europa.eu.int/index.
- EUR-Lex : http://eur-lex.europa.eu.
- European Parliament: www.europarl.europa.eu.
- World Organisation for Intellectual Property : www.wipo.int.
- Bucharest Law Court : http://portal.just.ro.
- Justiz Bundesministerium Deutschland : www.bmj.bund.de.
- Max Planck Institut fur Geistiges Eigentum www.intellecprop.mpg.de.
- Deutsche Vereinigung für gewerblichen Rechtschutz und Urheberrecht (GRUR) : http://grur.de.

- Bundesjustizamt Deutschland : www.bundesjustizamt.de.
- European Union Court of Justice: www.curia.eu.int.
- Bundesgerichsthof Deutschland : www.bundesgerichtshof.de.
- Bundespatentgericht Deutschland : www.bpatg.de.
- England and Wales High Court (Patents Court): www.bailii.org/ew/cases/EWHC/Patents/.
- European Patent Office : www.epo.org.
- Deutsches Patent- und Markenamt : www.dpma.de.
- United Kingdom Intellectual Property Office. www.ipo.gov.uk.
- http://thespcblog2.blogspot.com/.

PROTECTION OF DRAWINGS AND PATTERNS IN INTERNATIONAL LAW

OVIDIA JANINA IONESCU*

Abstract

Intellectual property occupies a fundamental place in the legal field, namely it represents the creation, development and evolution of society, with implications in all areas of activity. In recent time, highly advanced technology and the evolution of society in all fields, including in terms of designs, needs expeditious protection, considering also the amazing development recorded in this regard. In order to be protected, designs (and others) should benefit from such protection not only in the country of origin; namely, protection must be ensured internationally, otherwise it would not have the desired effect and the aim sought, meaning that the rightful authors would no longer enjoy all the rights they have over their creation.

This paper aims to specify the applicable international intellectual property laws, namely on protection of designs, the main objective of these legal regulations, and some detailing considered emblematic to be mentioned, our country's accession to these international bodies, as appropriate, or their applicability into the national legal framework. Thus, the goal consists in identifying and detailing the protection that the designs enjoy at international level, respectively the international legislation implementation in the domestic legal framework, and our accession to the international organizations, or amending domestic legislation so as to correlate with the international laws, that is to protect intellectual property through this procedure, including the significance of these international regulations on protection of designs, both nationally and internationally.

Keywords: *protection, designs, models, national and international law, legislation implementation.*

Introduction

The field covered by the theme of this study is represented by intellectual property seen at an international level, in the sense of making a brief presentation of significant legislative evolutions, as well as of its implementation at national level. The importance of this study resides in the fact that such work aims at pointing out the effect of international enactments on domestic legislation predominantly concerning the protection of drawings and patterns. Thus, the envisaged objective is to give due consideration to these regulations, and to question their enforcement at domestic level. Drawings and patterns pertain to the field of intellectual property and do not need any special protection, as they are the products of our intelligence, the proof of development and evolution. Creation in general has these traits, and this category integrates and identifies itself with them. Without creation we would be so much poorer, and evolution, both technological and of any other kind, would be greatly affected. This study understands to respond to the undertaken goals by presenting a detailed account of international regulations and correlate domestic norms in relation therewith. The subject matter is well known, as most studies deal with the topics presented herein, or contain references that are made to such matters, and it is also impossible to talk about an international protection of intellectual property without referencing the facts outlined in this study.

1. Necessity of international legal regulations

Just as Yolanda Eminescu emphasized, quoting Marcel Plaisant, "*creators' rights have an international nature, the spirit of which is a reflection of the collective soul of one nation, and, at the same time, of humanity and of an epoch of civilization*"[1].

* PhD, "Nicolae Titulescu" University, INTELLECTUAL PROPERTY LAW (ovidiaionescu@yahoo.com).

[1] Yolanda Eminescu, *Protecţia desenelor şi modelelor (The Protection of Drawings and Patterns),* Lumina Lex, Publishing House, Bucharest, 1997, page 64, apud Marcel Plaisant, *Traité de droit conventionnel international concernant la propriété industrielle*, Sirey, Paris, 1949, pages 5 and 8.

The protection of industrial creation internationally had started to take place after the first half of the XIX-th century based on certain *Bilateral Conventions*[2] providing for the mutual recognition of rights, but they were not widely encompassing enough, nor did they observe a certain uniform standard. Today, it can be stated that these *Convenions* have managed to partially set forth certain general principles ensuring a minimal equity and equality between the nationals of signatory states. Romania concluded such *Conventions* with Greece, Italy, Great Britain, Yugoslavia, Czechoslovakia, Spain, Hungary, France, Belgium, Switzerland, and so on and so forth.[3]

Likewise, the *Convention for the Protection of Factory Brands and Trademarks,*[4] concluded between Romania and France, which, at Art. 1 provided that: "*Romanian subject in France and French people in Romania shall enjoy the same protection as all other nationals as regards factory brands and trademarks, i.e. the various signs which serve for differentiating products of an industry or trade, such as: name under a special form, trade names (denominations), printed texts, stamps, seals, reliefs, vignettes, numbers, covers, and similar*" or *The Arrangement on Repressing Goods' Fake Indications of Origin*[5]*,* which, at Art. 1, stipulated that "*Any product bearing a fake indication of origin, in which one of the two contracting States or a locality situated in one of them, might be, directly or indirectly, shown as country or place of origin, shall be confiscated when imported into each of the two States*".

Moreover, it is worth mentioning the *Convention for the Protection of Industrial Property and Factory Brands*[6]*,* concluded between Romania and Belgium, which, at Art. 1, provided that: "*Belgian citizens in Romania and Romanian citizens in Belgium shall enjoy, in regards of factory brands and trademarks, the same protection just as nationals*" or the *Trade Convention*[7] concluded with Switzerland, which, at Art. 5, highlighted that: "*with respect to factory brands or trademarks and the other names assimilated to the factory brands or trademarks by the laws of the country where they had to be registered, the industrialists, producers and traders settled in Romania shall enjoy in Switzerland, and the industrialists, producers and traders settled in Switzerland shall enjoy in Romania, the same protection as the nationals or subjects of the most favored nation. The Romanians from Switzerland and the Swiss from Romania will have to fulfill the formalities prescribed by the laws and regulations governing this matter*".

This brief description of the first conventions concluded by Romania, which included also clauses regarding the protection of drawings and trademarks, cannot be concluded without mentioning also the *Trade Convention* concluded with Austro-Hungary on 22 June 1875, which contained a provision according to which citizens of the two states would enjoy, while on the other's territory, the same protection as their nationals "*for everything that was connected with factory brands as well as drawings and patterns of any kind*", and the *Trade Convention Concluded with*

---

[2] Such conventions were concluded by France with England in 1852, 1861 and 1881, with Spain in 1853, and 1880, with Luxembourg in 1856 and 1865, with Italy in 1862, and 1864; Germany concluded conventions with Spain in 1880, with Italy in 1858, with the Netherlands in 1858, with Portugal in 1866 and so on.

[3] For more details, see Florian Porescu, Vasile V. Longhin, Paul I. Demetrescu, *Legea mărcilor de fabrică şi de comerţ, Comentar şi jurisprudenţă (Law on Factory Brands and Trademarks, Comments and Case Law),* Eminescu S.A. – Institute for Graphic Arts and Publishing House , Bucharest, 1937, pages 241-249.

[4] Published in the Official Gazette of 31 March/12 April 1889, apud Florian Porescu, Vasile V. Longhin, Paul I. Demetrescu, *op.cit.,* pages 241-242.

[5] Published in the Official Gazette of 27 February/11 March 1895, apud Florian Porescu, Vasile V. Longhin, Paul I. Demetrescu, *op.cit.,* pages 243-244.

[6] Published in the Official Gazette of 24 May 1881, apud Florian Porescu, Vasile V. Longhin, Paul I. Demetrescu, *op.cit.,* page 241.

[7] Published in the Official Gazette of 19 February/3 March 1893, apud Florian Porescu, Vasile V. Longhin, Paul I. Demetrescu, *op.cit.,* pages 241-241.

Germany in 1877, which was to be applied once the protection of "*patterns, drawings and trademarks*"[8] was adopted in Romania.

Therefore, it was necessary to have, at international level, a protection of industrial creations, protection which is currently done by mutual conventions concluded between these countries, which set forth a few general principles ensuring minimal equity and equality between the nationals of signatory states, as well as by Regulations adopted at international and European level whereby attempting to harmonize the legislation regarding intellectual property, being essential for the economy to institute, both at community, and international level, a system aimed at protecting drawings and patterns that could be more accessible and better adjusted to market necessities.

The drawing or pattern of a product is the element which increases its commercial value and makes it sell better. That is why, in the conditions of the economic globalization and international circulation of goods, it was necessary that a drawing or pattern be protected, both at community and international level. The protection given to a drawing or pattern guarded the holders who registered the respective drawing or pattern, as the case may be, and gave them the exclusive right to file an opposition against any kind of copy or unauthorized imitation of the respective drawing or pattern by any third parties. Consequently, the protection contributed to guaranteeing an equitable income from investments and the sale of individualized goods based on drawings or patterns, acknowledged and protected at international level.

The limitation of the protection of drawings or patterns to the territory of the various states may be an obstacle in the way of the free circulation of goods, reason for which it was necessary to create, at international level, a unified system for obtaining the protection of a drawing or a pattern, to ensure international protection.

The protection of drawings and patterns contributed to the development of commercial activities and to encouraging the export of national products, thus boosting economic development.

2. Common legal regulations regarding the protection of drawings and patterns in conventional law

2.1. The Paris Convention of 1883 on the protection of industrial property

Considering that, as already mentioned above, the clauses of the *Conventions* concluded between states regarding the mutual recognition of rights, were not widely scoped enough, nor did they observe a certain uniform standard, this system became insufficient and other more efficient forms of cooperation started being sought after.

Thus, the first discussions regarding the necessity of certain regulations and international Unions in the field of industrial property took place on the occasion of the universal Exhibition in Wien of 1873, the Trocadero Congress of 1878, and the International Paris Congress of 1880[9].

As mentioned in the Romanian specialized literature[10], "*the development of transports and, especially of railway transports, was at the root of the internationalization of trade and its practices*". As a result of the internationalization of trade, with a view to facilitating the receipt of

---

[8] Alexei Bădărău, Petru Ciontu, Nicolae Mihăilescu, *Din istoria protecţiei proprietăţii industriale în România (From the History of Industrial Property Protection in Romania)*, OSIM Publishing House, Bucharest, 2003, page 258. See also Alexei Bădărău, Nicolae M. Mihăilescu, *Mărcile de fabrică şi de comerţ în România. Intinerar cronologic (Factory Brands and Trademarks in Romania. Chronological Itinerary)*, OSIM Publishing House, Bucharest, 2008, pages 29-31.

[9] Viorel Roş, *Dreptul proprietăţii intelectuale (Intellectual Property Law),* Global Lex Publishing House, Bucharest, 2001, pages 41-42; Ioan Macovei, *Tratat de drept al proprietăţii intelectuale (Intellectual Property Law Treatise)*, C.H. Beck Publishing House, Bucharest, 2010, page 13.

[10] Viorel Roş, Octavia Spineanu Matei, Dragoş Bogdan, *Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale. Mărcile şi indicaţiile geografice (Intellectual Property Law, Industrial Property Law, Trademarks and Geographical Indications)*, All Beck Publishing House, Bucharest, 2003, page 13 (This work will be referred to, herein below, as *Mărcile şi indicaţiile geografice (Trademarks and Geographical Indications)*).

protection over industrial property rights outside the country of origin, at 20 March 1883, a number of 11 founding states of the Union[11] concluded the "*Paris Convention for the Protection of Industrial Property*". This first convention in the field of industrial property came into force on 7 July 1884.

The Paris Convention was revised several times, as follows: in Brussels on 14 December 1900; in Washington on 2 June 1911, in the Hague on 6 November 1925; in London on 2 June 1934; in Lisbon on 31 October 1958 and, the last time, in Stockholm on 14 July 1967. Subsequently, the Paris Convention was amended in 1979. At each conference organized for revising the convention, various regulations had been introduced and a Revision Act had been adopted and, save for the ones concluded at the Revising Conferences from Brussels in 1900 and Washington in 1911, which are no longer valid, all the other acts still preserve their enforceability, despite the fact that the greatest majority of countries are now signatories of the Stockholm Act of 1967.

Romania adhered to the Paris Convention for the protection of industrial property, revised in Brussels on 14 December 1900 and Washington on 2 June 1911, by means of Law – Decree No. 2641 of 17 June 1921, ratified by the Law of 27 March 1924. Later on, by means of Decree No. 427 of 19 October 1963, Romania adhered to the revised texts from the Hague, London and Lisbon, and by Decree No. 1177 of 28 December 1968[12] it ratified the form revised at Stockholm on 14 July 1967.

As shown at Art.1 para 2), the object of the legal protection that the Convention ensures is represented by industrial property, comprising inventions, utility patterns, **drawings or patterns, factory brands, trademarks and service marks**, names of origin and indications of origin, trade names and the repression of unfair competition.

Further to reviewing the text of the Paris Convention, as also mentioned in the specialized literature[13], it could be stated that its main provisions may be subdivided into four big categories:

- provisions comprising material law regulations guaranteeing a basic right, known as the *right to national treatment*, in every member country. The principle of national treatment means that every country which has adhered to the Paris Convention must provide, for the citizens of the other member countries, the same protection it provides to its own citizens[14]. The principle of national treatment, formulated instead of the principle of mutuality, as specialized legal literature evinces[15], has been "*a truly revolutionary principle for the epoch when it has been adopted*".

- provisions setting forth a basic right, known as the *Union priority right*. By "*priority right*" it is understood a person (or its successor or successors in rights) which filed a registration application and registered an industrial property right in one of the member countries of the Paris Union, who may request and benefit from protection in all other member states[16]. In general, the previous request the priority of which is claimed, must be a registration application submitted in prior[17].

---

[11] The 11 founding states state of the Union are the following: Belgium, Brazil, Switzerland, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Serbia and Spain. On 7 July 1884, when the Convention entered into force, the following countries have adhered also: Great Britain, Tunis and Ecuador.

[12] Published in the Official Bulletin No. 1 of 6 January 1969.

[13] Ciprian Raul Romiţan, *Protecţia penală a proprietăţii intelectuale (Intellectual Property Penal Protection),* All Beck Publishing House, Bucharest, 2006, page 28.

[14] Fore more details, see Yolanda Eminescu, *Tratat de proprietate industrială. Creaţii noi (Industrial Property Treaty. New Creations)*, vol. I, Academiei Publishing House, Bucharest, 1982, pages 138-139; Ion Cameniţă, *Protecţia invenţiilor prin brevete (Protection of Inventions by Patents)*, Academiei Publishing House of RSR, Bucharest, 1977, page 254 *et seq*.

[15] Viorel Roş, Octavia Spineanu Matei, Dragoş Bogdan, *Mărcile şi indicaţiile geografice (Trademarks and Geographical Indications),* p.14.

[16] See Art.4 of the Paris Convention.

[17] Ioan Cameniţă, *Protecţia internaţională a proprietăţii intelectuale (International Protection of Intellectual Protection),* Litera Publishing House, Bucharest, 1982, page 112.

- provisions defining a certain number of common material law regulations, containing either rules regarding rights and obligations of individuals or legal entities, or regulations claiming or allowing member countries to adopt laws according to such regulations[18];

- provisions referring to the administrative framework and which comprise the final clauses of the Paris Convention[19].

The Paris Convention is considered to have been, until the adoption of the Agreements regarding the aspects of intellectual property rights related to trade (the TRIPS Agreement)[20], the most important convention in the field of industrial property[21].

By the Paris Convention, the International Union for the Protection of Industrial Property (the Paris Union) was created, with its seat in Geneva. According to Art. 12 of the Convention, each of the countries in the Paris Union have the obligation to set up a special industrial property service (in Romania, the special industrial property service is the State Office for Inventions and Trademarks - OSIM[22]), as well as a central office for receiving deposits, for relaying to the public, the invention patents, utility patterns, **drawings and patterns,** and **factory brands or trademarks**. This service will also edit a special official periodical publication publishing the names of the holders of the granted patents (with a brief description of the patented inventions), and **the registered trademarks**. In Romania, OSIM edits and publishes the Official Bulletin for Industrial Property (BOPI) in five sections: BOPI – The Invention Patents Section[23]; **BOPI – The Trademarks and Geographical Indications Section**[24]; **BOPI – The Drawings and Patterns Section**[25]; BOPI – New Species of Plants Section[26], and OPI – Applications for European Invention Patents with extended effects, according to the provisions of Law No. 32/1997[27].

---

[18] See Art. 5-12 of the Paris Convention.

[19] See Art. 13-30 of the Paris Convention.

[20] This Agreement is part of Appendix 1C to the Agreement for setting up the World Trade Organization, concluded in Marrakech on 15 April 1994, published in the Official Gazette of Romania, Part I, No. 360 bis of 27 December 1994.

[21] For further details regarding the organizational structure, see Ioan Macovei, *Tratat de drept al proprietăţii intelectuale (Intellectual Property Law Treatise)*, C.H. Beck Publishing House, Bucharest, 2010, pages.13-16.

[22] The State Office for Inventions and Trademarks is a specialized body of the central public administration, a unique authority in Romania ensuring industrial property protection, in compliance with the national legislation in this field, and with the provisions of the international conventions and treaties Romania is a part to, in accordance with the provisions of G.D. No. 573/1998 on the organization and operation of OSIM, as amended, Art. 68 of Law No. 64/1991 on invention patents, as republished, Art. 96 of Law No. 84/1998 on trademarks and geographical indications, as republished, and Art. 48 of Law No. 129/1992 on drawings and patterns, as republished. OSIM's organization, operation and tasks are stipulated in G.D. No. 573/7.09.1998 on the setting up and operation of the State Office for Inventions and Trademarks, amended by GD No.1396/2009.

[23] It has 12 annual issues and comprises the summaries of the patent applications and granted patents, as well as various information on the changes occurred in the legal status of patents, the lists of industrial property advisors attested by OSIM and other useful information. See Gheorghe Bucşă, Tiberiu Popescu, *Dicţionar ilustrat de proprietate intelectuală (Illustrated Dictionary of Intellectual Property),* OSIM Publishing House, Bucharest, pages 48-49.

[24] It has 12 annual issues and includes a table with registered trademarks, the list of registered trademarks, the table comprising withdrawal or limitation, upon request, errata, decisions of the examination commission, oppositions etc. For more details, see Gheorghe Bucşă, Tiberiu Popescu, *op.cit.,* pages 50-51.

[25] It has 12 annual issues, and comprises the registration requests for drawings and patterns submitted to OSIM, the lists of registered certificates, any amendments in terms of legal status etc. For more details, see Gheorghe Bucşă, Tiberiu Popescu, *op.cit.,* pages 49-50. For further research, see also Ştefan Cocoş, *a,b,c-ul protecţiei şi valorificării proprietăţii industriale (The ABC of Protection and Capitalization of Industrial Property)*, Rosetti Publishing House, Bucharest, 2004, pages 210-212).

[26] It has one quarterly issue and contains the applications for patents related to species, proposed names and accepted names, patents for granted species, in force, or decisions offered by licenses for the exploitation of species, and other specialized information such as, for example, Law 255/1998 on the protection of new species of plants, regulation form, technical norms for the examination of species etc. (http://www.osim.ro/publicatii/editura/2001-1.htm).

[27] It comprises the applications for European invention patents with extended effects in Romania, according to the provisions of Law No. 32/1997, European invention patents with effects in Romania, and various information regarding the changes occurred in the legal status of patents (http://www.osim.ro/publicatii/editura/2001-1.htm).

2.2. The Convention for instituting the World Intellectual Property Organization

The Convention for instituting the World Intellectual Property Organization (OMPI) was signed in Stockholm on 14 July 1967, and is the legal instrument whereby regulating international cooperation in the field of intellectual property. The Convention for the setting up of OMPI entered into force on 26 April 1970.

The World Organization for Intellectual Property is one of the 16 specialized agencies from within the system of organizations of the United Nations (ONU), statute obtained as a result of an Agreement[28] concluded between OMPI and ONU, and headquartered in Geneva. OMPI is continuing the activities of the Reunited International Offices for Intellectual Property Protection (BIRPI), which represented the reunited secretariat of the Paris Union, for industrial property, of the Bern Union, for copyrights. Romania ratified the Convention for the institution of OMPI by Decree No. 1175 of 28 December 1968[29], and on 26 April 1970, it became a member of this inter-governmental international body[30].

Art. 2 of the Convention specifies what is understood by intellectual property, the text making express reference also to drawings and patterns, as well as to factory brands, trademarks and service marks. Thus, according to Art. 2 para. VIII, intellectual property "*designates the rights referring to literary, artistic and scientific works; the performances of artists who interpret pieces of art and the ones of executing artists, phonograms and radio broadcasts; inventions in all human activities; scientific discoveries;* ***drawings and patterns****;* ***factory brands, trademarks, and service marks****, as well as trade names and trade denominations, protection against unfair competition and all other rights related to intellectual activities in the fields of industry, science, literature and art*".

According to Art. 3 of the Convention, the World Organization for Intellectual Property has the following main objectives: to promote the protection of intellectual property in the world through the cooperation between states, in collaboration with any other international organizations, specialized agencies and UN bodies, to ensure the administrative cooperation between intellectual property unions. To achieve its objectives, OMPI favors the conclusion of new international treatises, as well as the harmonization of national legislations, provides technical and legal assistance to emerging countries, centralizes and disseminates all information regarding the protection of intellectual property, provides services easing up the international protection of intellectual property, proceeds, if need be, to performing registrations, on such matters, and publishes the information regarding the registrations, facilitating also an ample administrative cooperation between member states. The World Intellectual Property Organization proclaims the universal value of intellectual property, which imprints the world's evolution, contributes to societal progress and plays an important role in long-term economic, social and cultural development[31].

---

[28] The Agreement entered into force on 17 December 1974, when it was unanimously approved by the UN General Meeting by Resolution 3346 (XXIX).

[29] Published in the Official Bulletin No. 1 of 6 January 1969. When submitting the ratification instruments, Romania declared that: "the provisions of Art. 5 and 14 of the Convention for the instituting of OMPI are not in compliance with the principle of treaties universality according to which all states are entitled to become a party to multilateral treaties regulating issues of general interest".

[30] When submitting the signing instrument, Romania declared that: "The provisions of Art. 5 and 14 of the Convention for the institution of OMPI, signed in Stockholm on 14.07.1967, are not in compliance with the principle of treaties universality according to which all states are entitled to become a party to multilateral treaties regulating issues of general interest" (Gheorghe Bucşă, *Protecţia desenelor şi modelelor industriale (The Protection of Industrial Drawings and Patterns)*, Tribuna Economică Publishing House, Bucharest, 2000, page 63).

[31] For further research, see: Dragoş Stoenescu, *Organizaţia Mondială a Proprietăţii Intelectuale. Documentar (The World Organization for Intellectual Property. A Documentary)*, Politică Publishing House, Bucharest, 1980, p. 9 *et. seq*.; Ion Enache, *Apărarea drepturilor de proprietate intelectuală în practica internaţională (Defending Intellectual Property Rights in International Practice)*, The National Institute for Information and Documentation, Bucharest, 1991, page 20 *et seq*..; Mirela Romiţan*, 40 de ani de la semnarea Convenţiei de instituire a Organizaţiei Mondiale a Proprietăţii Intelectuale (40 Years Since the Signing of the Convention Instituting the World Intellectual Property*

2.3. The Agreement on the Setting Up of the World Trade Organization (the TRIPS Agreement)

The TRIPS Agreement is part of Appendix 1 C to the Agreement regarding the setting up of the World Trade Organization, concluded in Marrakech on 15 April 1994, and is destined to regulate the incidence of the intellectual property rights on trade. In the sense of the TRIPS Agreement, the expression "*intellectual property*" designates all categories of intellectual property making the object of sections 1-7 of its IInd part, namely: copyrights and other connected rights; **factory brands or trademarks**; geographical indications; **drawings and patterns;** patents; configuration blueprints (topographies) of integrated circuits; the protection of undisclosed information.

The TRIPS Agreement instituted a set of fundamental principles, such as: ensuring legal protection as minimal norm (Art. 1.1); the principle of national treatment (Art. 3); the principle of the treatment of the most favored nation (Art. 4)[32].

According to Art. 1 of the Agreement, members will be able, without this being an obligation, to enforce, in their national legislations, procedures whereby realizing an efficient protection against any act that might prejudice intellectual property rights.

Section 4 (Drawings and patterns), from Part II of the Agreement focuses on certain regulations regarding the requirements that must be met by these objects of industrial property in order to benefit from protection.

Thus, according to Art. 25, "*Members will provide for the protection of drawings and patterns created independently and which are new or original. The members will be able to determine if the drawings and patterns are not new or original if they do not differ significantly from known drawings and patterns or from combinations of elements of certain known drawings and patterns. The members will be able to rule that such a protection does not extend on to the drawings and patterns dictated essentially by technical or functional grounds (para. 1). Each member must act in such a way that the provisions regarding the guaranteeing of the protection of textiles drawings and patterns, especially concerning any cost, examination or publication, do not compromise unreasonably the possibility to request and be granted such protection. The members will be free to fulfill this obligation as regards industrial drawings and patterns or by means of the legislation on matters of copyright*".

Furthermore, according to art. 26, "*the holder of a protected drawing and pattern has the right to prevent third parties acting without his/her consent from producing, selling or importing items that behave like or contain a drawing and pattern which is, totally or substantially, a copy of such protected drawing and pattern, when the respective acts are done for commercial purposes* (para.1). *The members will be able to provide for limited exceptions regarding the protection of drawings and patterns, provided that they do not prejudice, in an unjustifiable manner, the normal exploitation of the protected drawings and patterns, nor cause any unjustified prejudices to the legitimate interests of the holder of the protected drawing and pattern, paying heed to the legitimate interests of third parties* (para. 2). *The duration of the offered protection shall be of at least 10 years*" (para. 3).

Section 2 (Factory brands or trademarks) from Part II of the Agreement focuses on certain regulations regarding the requirements that must be met by factory brands or trademarks in order to benefit from protection.

Organization), in "Revista română de dreptul proprietăţii intelectuale" ("The Romanian Review for Intellectual Property Rights ") No. 1/2007, pages 7-14; Florea Bujorel, *Dreptul proprietăţii intelectuale (Intellectual Property Law),* Universul Juridic Publishing House, Bucharest, 2011, pages 32-34.

[32] For a more in-depth analysis of this Agreement, see Cristiana I. Stoica, Răzvan Dincă, *Consideraţii teoretice şi practice referitoare la efectele Acordului TRIPS asupra sistemului de drept românesc (Theoretical and Practical Considerations on the Effects of the TRIPS Agreement on the Romanian Legal System)*, in "Revista de drept comercial" ("The Commercial Law Review") No. 7-8/2001, pages 168-200.

Thus, according to Art.15 para1) of the Agreement, "*Any sign, or any combination of signs, capable of differentiating one product or one service of an enterprise from the ones of other enterprises, may represent a factory brand or trademark. Such signs, especially words, including names of persons, letters, digits, figurative elements, and color combinations, as well as any combination of such signs, shall be susceptible to be registered as factory brands or trademarks. In the cases in which certain signs are not, in themselves, likely to distinguish pertinent products or services, the members will be able to subordinate the registrability of the distinctive character acquired by use. The members may request, as a condition for registration, that the signs should be visually perceptible*".

At the same time, according to Art.16 para 1), "*the holder of a registered factory brand or trademark will have the exclusive right to prevent any third parties acting without his/her consent from using, during their commercial operations, identical or similar signs for products or services that are identical or similar to the ones for which the factory brand or trademark is registered, should such use generate a risk of confusion. In case of using an identical sign for identical products or services, the existence of the risk of confusion shall be presumed. The rights described above shall not be detrimental to any previous existing right, and shall not affect the possibility that the members have to subordinate the existence of the rights to usage*".

It is also worth mentioning the provisions of Art.16 para 2) according to which "*Art. 6 bis of the Paris Convention (1967) shall be applied, mutatis mutandis, to the services*[33]*. So as to determine whether a factory brand or trademark is notoriously known, the members shall consider the notoriety of that brand in the segment of the respective public, including the notoriety of the member in question, achieved as a result of promoting the respective brand*". Moreover, in para 3) of the same article, it is provided that "*Art. 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, also to the products or services which are not similar to the ones for which the factory brand or trademark are registered, provided that the usage of the respective brand or trademark for these products or services should indicate the connection between these products or services and the holder of the registered trademark, and if such usage would risk damaging the rights of the holder of the registered trademark*".

Every member state will grant to the nationals of the other member states a treatment which shall not be less favorable than the ones granted to its own nationals in terms of the protection of intellectual property, subject to the exceptions already provided for, as the case may be, in the Paris Convention (by the Stockholm Act of 14 July 1967) and the Bern Convention (by the Paris Act of 14 July 1971).

Based on the provisions of Art.41, of Part III – of the Agreement (Section 1 – General Obligations), "*the members will grant to the holders of the rights access to the civil legal proceedings aimed at ensuring the observance of intellectual property rights covered hereby. The defendants shall have to be informed in due time by means of a sufficiently precise written notice indicating, among others, the fundamentals of the claims. The parties shall be authorized to be represented by an independent legal advisor, while the procedures shall not impose any excessive requirements in terms of obligatory personal appearance. All the parties in such cause shall be appropriately habilitated to justify their claims and present any pertinent elements as evidence. The procedure will include a method of identifying confidential information, except for the case in which such method is contrary to existing constitutional provisions*".

[33] According to Art.6 „Countries of the Union agree to refuse or invalidate the registration, or prohibit, by complementary measures, the usage, without the authorization of the competent bodies, either as factory brands or trademarks, or as elements of such trademarks, of blazonry, flags and other state emblems for the countries of the Union, of the signs and official seals for control and guarantee adopted by them, as well as the imitation of any heraldry signs".

Mention should be made of the provisions of Art. 61 of Section 5, titled "*Criminal Procedures*", According to which "the states will be able to provide for criminal procedures and sanctions that are applicable at least for the deliberate acts of counterfeiting factory brands or trademarks, or of pirating, which breach any copyrights, and which are committed for commercial purposes".

Romania ratified this Agreement by Law No. 133/1994 for the ratification of the Marrakech Agreement on the setting up of the World Trade Organization, of the International Agreement on Beef, and of the International Agreement on Dairy Products, concluded at Marrakech on 15 April 1994[34].

3. Regulations regarding the protection of drawings and patterns in conventional law

3.1. The Bern Convention of 1886 for the protection of literary and artistic work

As shown in the specialized literature, drawings and patterns situate themselves somewhere at the "*crossroads between art and industry*"[35], being known, both in our law, and in the one of other countries, under the name of "*applied art*"[36] or "*ornamental creations*"[37].

Due to their complex nature, *Yolanda Eminescu believed that,* by destination and reproduction manner, they pertain to industrial property rights and, by the nature of the creative effort, to copyrights[38].

As to all the above, we deem that it is worthy to also present a few considerations on the necessity and adoption of the Bern Convention of 1886 for the protection of literary and artistic work which, at Art. 2 para 1) provides that applied art work belongs to the category of "literary and artistic work".

At 9 September 1886, a number of 8 states, in capacity of founding members (Belgium, Switzerland, France, Germany, Italy, Great Britain, Spain and Tunis), adopted the "*Bern Convention for the Protection of Literary and Artistic Work*", the oldest international treaty in the field of copyrights. The Convention entered into force on 5 December 1887, and, on 4 May 1896, it was amended and completed by means of an Addendum and an Interpretative Statement, signed in Paris. The contracting countries are constituted in the "*Union for the Protection of Copyrights on Literary and Artistic Work*".

The Convention made the object of several successive revisions, as follows: the Berlin Act of 13 November 1908, completed at Bern on 30 March 1914; the Rome Act of 2 June 1928; the Brussels Act of 26 June 1948; the Stockholm Act of 14 July 1967; the Paris Act of 14 July 1971, amended on 28 September 1979.

Romania adhered, with some reservations, to the Convention, in the format revised at Berlin by Law No. 152 of 24 March 1926, with effects as of 1 January 1927. Subsequently, in 1995, Romania waived the reservations formulated at the Bern Convention, which mainly had to do with the duration of the rights and the competence in litigations, having as object the construal and enforcement of the Convention. By Law No. 77/1998 for the adherence of Romania to the Bern

---

[34] Published in the Official Gazette of Romania No. 360 of 27 December 1994.

[35] Yolanda Eminescu, *Protecţia desenelor şi modelelor industriale. Drept român şi comparat (The Protection of Industrial Drawings and Patterns. Romanian and Comparative Law)*, Lumina Lex Publishing House, Bucharest, 1997, page 7.

[36] For further research, see Viorel Roş, Dragoş Bogdan, Octavia Spineanu Matei, *Dreptul de autor şi drepturile conexe. Tratat (Copyrights and Other Related Rights. A Treaty),* All Beck Publishing House, Bucharest, 2005, pages 140-149.

[37] For more details, see Michel Vivant, Jean-Michel Bruguière, *Droit d'auteur*, Dalloz, Paris, 2009, pages 107-108.

[38] Yolanda Eminescu, *Protecţia desenelor şi modelelor industriale. Drept român şi comparat (The Protection of Industrial Drawings and Patterns. Romanian and Comparative Law)*, *op.cit.,* page 7.

Convention for the protection of literary and artistic work of 9 September 1886[39], Romania adhered to the revised form of the Convention by the Paris Act of 1971, and amended in 1979.

The Bern Convention for the protection of literary and artistic work is grounded on two basic principles, *i.e.: the national treatment principle*, or of assimilating foreign nationals of the Union with nationals, and *the principle of unionist treatment*, or *of minimal protection,* that member states are obliged to provide in this field[40].

3.2. The Arrangement from the Hague regarding the international deposit of drawings and patterns

The Arrangement from the Hague was adopted on 6 November 1925 and entered into force on 1 June 1928. According to the provisions of this Arrangement, through the agency of a single international deposit registered with the International Office of OMPI, the entitled persons are allowed to **obtain the protection for one or several drawings and patterns in several states**[41].

The international deposit is deemed to have been drafted at the date when the International Office received the application in accordance with all legal requirements, the charges paid at the same time with the application, and the photos or any other graphic representations of the drawing and pattern were received or, if not received simultaneously, at the date when the last of these formalities was fulfilled. The registration bears the same date.

According to art.5, the international deposit consists of an application, one or several photos or any other graphic representations of the drawing and pattern, as well as the proof of paying the charges provided for in the regulation.

The application must contain the following: the list of contracting states whereby the applicant requests that the international deposit should produce effects; the designation of the object or objects into which the drawing or pattern is intended to be incorporated; if the applicant wishes to claim the priority provided for at Art. 9, the specification of the date, state and deposit number giving rise to the ownership right[42]; any other information provided for by the regulation. The application may also comprise: a brief description of the characteristic features of the drawing and pattern; a statement with the name of the real author of the drawing and pattern; an application for postponing publication as provided for at Art. 6 para 4)[43]. The application may enclose counterparts or models of the object that the drawing or pattern is incorporated into.

According to Art.11, of the Arrangement from the Hague, the duration of the protection agreed by a contracting state for the drawings and patterns making the object of an international deposit cannot be of less than 10 years starting with the date of the international deposit, if the latter was subjected to a renewal, or 5 years as of the date of the international deposit in the absence of a renewal. Nevertheless, if, by virtue of the provisions of the national legislation of a contracting state examining the novelty, the protection starts from a date from before the one of the international

[39] Published in the Official Gazette of Romania No. 156 of 17 April 1998.

[40] For further research regarding the Bern Convention, see Yolanda Eminescu, *Opera de creaţie şi dreptul. O privire comparativă (The Creative Work and the Law. A Comparative View),* Academiei Publishing House, Bucharest, 1987, pages 199-208.

[41] For further research regarding the Arrangement from the Hague, see also Silvia Vincenti, *EU accession to the Hague Agreement and its consequences,* in „Gazzette", No. 56/2008, pages 77-87, Yolanda Eminescu, *Protecţia desenelor şi modelelor industriale. Drept român şi comparat (The Protection of Industrial Drawings and Patterns. Romanian and Comparative Law)*, *op.cit.*,pages 69-75.

[42] According to Art. 9, „If the international deposit of the drawing or pattern is made in a period of 6 months as of the date of the first deposit of the same drawing or pattern in one of the member states of the International Union for the Protection of Industrial Property, and if the priority is claimed for the international deposit, the date of priority is the one of the first deposit".

[43] According to Art. 6 para. 4), at the applicant's request, the publication may still be postponed for the duration of the period he/she requested, but this period cannot exceed 12 months as of the date of the international deposit. Nevertheless, if a priority is claimed, the starting date of such period is the priority date.

deposit, the minimal durations provided for in the previous paragraph are calculated by paying heed to the starting point of the protection in the respective state. The fact that the international deposit is not renewed but once does not affect in the least the minimal duration of the protection thus defined.

The Arrangement was revised in London on 2 June 1934, in the Hague on 28 November 1960, and was completed by the Addendum of Monaco of 1961, the Complementary Stockholm Act of 1967, and the Geneva Protocol of 1975, as amended in 1979 and 1999.

Romania adhered to the *Arrangement from the Hague* on the international deposit of industrial drawings and models of 6 November 1925, revised by means of the Hague Act of 28 November 1960, completed by the Complementary Stockholm Act of 14 July 1967, as amended on 2 October 1979 by Law No. 44 of 28 April 1992 for the adherence of Romania to the Arrangement from the Hague regarding the international deposit of industrial drawings and patterns, of 06.11.1925, as subsequently amended and completed[44].

3.3. The Locarno Arrangement on the international classification of drawings and patterns

The Locarno Arrangement was concluded on 8 October 1968 and entered into force on 27 April 1971. This Arrangement **instituted an international classification of drawings and patterns** the purpose of which is, mainly, to facilitate thematic documentary research aimed at determining the world level stage of the creation of drawings and patterns in a certain field. The international classification of drawings and patterns comprises a list of classes and subclasses, as well as an alphabetical list of products in which the drawings and patterns are incorporated, indicating the classes and subclasses in which they are distributed, as well as some explanatory notes.

The list of classes and subclasses is the one attached to this Arrangement, subject to the amendments and completions that the Experts' Committee, set up in accordance with Art. 3, may bring.

Thus, in compliance with the provisions of Art. 3 of the Locarno Arrangement, "*Every country of the special Union is represented in the Experts' Committee, which is organized as per the procedure regulations adopted with a simple majority by the represented countries. The Experts' Committee adopts the alphabetical list and explanatory notes with the simple majority of votes of the countries in the special Union. The proposal to amend or complete the international classification may be done by the office of every country of the special Union or by the International Office. Any proposal made by an office is communicated by it to the International Office. The proposals from the offices and the International Offices are transmitted by the International Office to the members of the Experts' Committee within maximum two months before the session of the Experts' Committee wherein the respective proposals are to be discussed about. The decisions of the Experts' Committee regarding the adoption of the amendments and completions following to be brought to the international classification shall be taken with the simple majority of the votes of the countries in the special Union. However, if the decisions result in the setting up of a new class or the transfer of products from one class to another, unanimity is mandatory. Every expert is entitled to vote by correspondence. In the case in which a member country did not appoint a representative in a certain session of the Experts' Committee, or if the appointed expert did not express his/her vote during the Session or in a period provided for by the procedural rules of the Experts' Committee, it is deemed that the respective country has accepted the decision made by the Experts' Committee*".

In Romania, the State Office for Inventions and Trademarks classifies the applications according to the 9th edition of the Locarno Classification, which comprises 32 classes[45].

---

[44] Published in the Official Gazette of Romania No. 95 of 15 May 1992, and republished in the Official Gazette of Romania No. 8 of 14 January 1994.

[45] At the web address: http:// oami.europa.eu/ows/rw/resource/documents/RCD/eurolocarno/eurolocarno

Romania adhered to the Locarno Arrangement on the international classification of drawings and patterns by Law No. 3/1998 on the adherence of Romania to the Arrangements instituting an international classification in the field of industrial property[46], despite the fact that it had enforced this classification ever since 1993.

As domestic doctrine also mentions, "*intellectual creation can hardly be constrained by territorial limits, as it naturally has an international vocation. Spiritual products of the human genius defy any barrier set in the way of free circulation, and modern means of information and communication favor such circulation. (...) Spiritual products must be protected outside the borders of the nation of their creator, when they are used in line with their vocation, on the territory of some other states (...)*".[47]

As regards the notion of drawing and pattern, it is necessary to add that, at international level, in this field, two notions are used, which have the same meaning, nevertheless, *i.e.*: in "common law", English-speaking countries, the term of "design" is used, while in French-speaking countries, the notion of "drawing and pattern" is in use, the latter case being also applicable to Romanian law.

As shown in the above, drawings and patterns are known both in our law, and in the law of other countries, under the name of "*applied art*" or "*ornamental creations*". Due to their complexity, in terms of destination and reproduction manner, they pertain to industrial property rights, whereas through the nature of the creative effort, they belong to copyrights .[48]

The historical origin of the right over drawings and patterns explains the ambiguous character of their current status, which, at the same time, pertains to copyrights and intellectual property rights, "*but still, this derivative of the right is today one of the most dynamic of all intellectual properties*."[49]

Drawings are a bi-dimensional creation, and are distinguished and differ from a pattern, which is a tri-dimensional creation.

This derivative of intellectual property is situated at the border between industrial property right and copyright, fact which has also given rise to the reasoning that: "*the aesthetic aspect of the drawings and patterns brings them closer to copyrights, while the utilitarian and technical side brings them closer to invention patents, while the manner in which they can be used sometimes assimilates them to trademarks*"[50] .

The need to harmonize the protection of intellectual property at the level of the European Union fostered the creation of special regulations; respectively they have laid the basis of a communion between European enactments, including as regards their applicability.

Thus, being based on Directive No. 98/71/CE of the European Parliament and Council of 13 October 1998 regarding the legal protection of industrial drawings and patterns, the Council Regulation (CE) No. 6/2002 of 12 December 2001 on Community drawings or patterns was issued, which is obligatory in all its elements, and is applied directly in all member states, thus ensuring a special legal protection for the creations in the field of industrial aesthetics to encourage individuals creators, favor innovation, the development of new products and investments in producing them, respectively "*a unified system for obtaining a Community drawing and pattern, to benefit from a uniform protection, which could produce uniform effects on the whole territory of the Community*".[51]

With a view to enforcing the provisions of Regulation (CE) No. 6/2002, the Commission Regulation (CE) No. 2245/2002 din 21.10.2002 was adopted.

---

[46] Published in the Official Gazette of Romania, Part I No. 10 of 14 January 1998.

[47] Viorel Roş, Dragoş Bogdan, Octavia Spineanu Matei, *Dreptul de autor şi drepturile conexe Tratat (Copyrights and Other Related Rights. A Treatise),* 2005, Bucharest, All Beck Publishing House, page 24

[48] Yolanda Eminescu, *Protecţia desenelor şi modelelor industriale. Drept român şi comparat (The Protection of Industrial Drawings and Patterns. Romanian and Comparative Law), cit. supra,* page 7.

[49] Andre Bertrand, *Marques et brevets dessins et modeles,* Belfond, Paris, 1995, page 20.

[50] Andre Bertrand, *Marques et brevets dessins et modeles,* Belfond, Paris, 1995, page 20.

[51] Council Regulation (CE) No. 6/2002 of 12 December 2001, Art. 1.

These Regulations contain the necessary provisions for the development of the registration procedure for a Community drawing and pattern, and for the administration of the registered Community drawings and patterns, for the appeal procedure against the decisions of the Office, and for the procedure of cancelling a Community drawing and pattern, respectively a detailed identification of these procedures.

The Directive mentions that the Community drawing or pattern should answer, as much as possible, to the needs of all economic sectors of the Community and that, if the protection of the Community drawings and patterns was limited to the territory of the member states, even if the legislations of these states are similar or not, this would determine a possible segregation of the domestic market for the products which contain a drawing and pattern that makes the object of some internal rights held by various persons. If this happened, free circulation would be obstructed, an undesired fact in the opinion of the member states, and thus the creation of a Community drawing and pattern that was directly applicable in every member state with protection at Union level is absolutely mandatory, this being the only way in which, by presenting a unique application in front of the Office for harmonization within a domestic market, a unique procedure based on a unique legislation – only in this way is it possible to obtain the protection over a drawing and pattern on the territory of the Member States.

In the opinion of the French professor André Marie Lucas[52], "the main priority in the field of the protection of intellectual property for the member states should be represented by the harmonization of the definitions on such matters, at European level,, since, at the present moment, there is a problem in this respect, in the sense that definitions are not the same in all countries, and, therefore, when applying an international scheme, the product envisaged to be protected cannot find the same applicability, considering this situation. Thus, in order to be able to apply some international legislative norms at a domestic level, it is first needed to modify domestic legislative norms and only then can European legislation be enforced".

The edifying example given by the reputed French professor pertained precisely to the field of intellectual property, respectively the definition of copyrights. In Romania the author is believed to be the one who creates or realizes a piece of work, while in France, for instance, through the author of a film, for example, they do not understand to refer to the person who made the film, since, in this case, the person who made the film is the producer. Consequently, as Professor André Marie Lucas stated: "*the definition of copyright must be harmonized across the European Union*".

The protection of drawings and patterns is obtained for products from the most various of economic sectors, some of them with a shorter economic duration, and for which it is advantageous to obtain protection without going through all registration formalities, and for which the duration of such protection is not vital. On the other hand, there are sectors for which the registration is advantageous through the higher degree of legal certainty it offers, such sectors requesting the protection of drawings and patterns for a longer time, in accordance with the predictability of the life duration of the products on the market.

Conclusion

The main directions approached in the present study are: identifying common legal regulations regarding the protection of drawings and patterns in conventional law, identifying regulations regarding the protection of drawings and patterns in conventional law, as well as highlighting the importance of harmonizing national and international regulations in such a way that the same product can be protected in the same manner in any of the countries of the European Union and further away. The contemplated impact to be achieved by this study consists in the acknowledgement of the importance of legal regulations on the protection of drawings and patterns.

[52] Study presented within the „CKS - Challenges of the Knowledge Society", the 6-th edition organized by Nicolae Titulescu University in the period 11-12 May 2012.

For future research in the field of intellectual property, it would be recommended to approach a theme concerned with the contents of the right over drawings and patterns, both at domestic and worldwide level, which implies, however, intensive researches of the proposed theme.

References

- Viorel Roş, Octavia Spineanu Matei, Dragoş Bogdan, - „Mărcile şi indicaţiile geografice" ("Trademarks and Geographical Indications").
- Viorel Roş, Dragoş Bogdan, Octavia Spineanu Matei – „Dreptul de autor şi drepturile conexe". Tratat ("Copyright and Other Connected Rights"). A Treatise, All Beck Publishing House, Bucharest, 2005.
- Viorel Roş, Octavia Spineanu Matei, Dragoş Bogdan – „Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale. Mărcile şi indicaţiile geografice" ("Intellectual Property Law. Industrial Property Law. Trademarks and Geographical Indications"), All Beck Publishing House, Bucharest, 2003.
- Viorel Roş - „Dreptul proprietăţii intelectuale" ("Intellectual Property Law"), Global Lex Publishing House, Bucharest, 200.
- Yolanda Eminescu - „Protecţia desenelor şi modelelor" ("The Protection of Drawings and Patterns"), Lumina Lex Publishing House, Bucharest.
- Yolanda Eminescu – „Tratat de proprietate industrială. Creaţii noi" ("Industrial Property Treatise. New Creations"), vol. I, Academiei Publishing House, Bucharest, 1982.
- Yolanda Eminescu – „Protecţia desenelor şi modelelor industriale. Drept român şi comparat" ("The Protection of Industrial Drawings and Patterns. Romanian and Compared Law"), Lumina Lex Publishing House, Bucharest, 1997.
- Ioan Macovei – „Tratat de drept al proprietăţii intelectuale" ("Intellectual Property Law Treatise"), C.H. Beck Publishing House, Bucharest, 2010.
- Florian Porescu, Vasile V. Longhin, Paul I. Demetrescu – „Legea mărcilor de fabrică şi de comerţ, Comentar şi jurisprudenţă" ("Factory Brands and Trademarks Law. Comments and Case Law"), Eminescu S.A. Publishing House – Institute for Graphic Arts and Publishing House, Bucharest.
- Alexei Bădărău, Petru Ciontu, Nicolae Mihăilescu – „Din istoria protecţiei proprietăţii industriale în România" ("From the History of Protecting Industrial Property in Romania"), OSIM Publishing House, Bucharest, 2003.
- Alexei Bădărău, Nicolae M. Mihăilescu – „Mărcile de fabrică şi de comerţ în România" Itinerar chronologic ("Factory Brands and Trademarks in Romania. Chronological Itinerary"), OSIM Publishing House, Bucharest, 2008.
- Ion Cameniţă – „Protecţia invenţiilor prin brevete" ("The Protection of Inventions by Patents"), Academiei RSR Publishing House, Bucharest, 1977.
- Ioan Cameniţă – „Protecţia internaţională a proprietăţii intelectuale" ("The International Protection of Intellectual Property"), Litera Publishing House, Bucharest, 1982.
- Michel Vivant, Jean-Michel Bruguière - „Droit d'auteur", Dalloz Publishing House, Paris, 2009.
- Andre Bertrand – „Marques et brevets dessins et modeles", Belfond Publishing House, Paris, 1995.
- „CKS - Challenges of the Knowledge Society", the 6th edition held at Nicolae Titulescu University between May 11-12, 2012.

COPYRIGHT PROTECTION FOR CREATIVE INDUSTRIES: COMPARISON AMONG CHINA AND EUROPE

CRISTINA ORTEGA NUERE[*]
SILVIA MARIA GONZÁLEZ[**]

Abstract
The impact and creativity has increase in the last years in Europe. It was focused by an United Nations report on creative economy in 2008 .Cooperation and trade in goods and services has increased. Today, the EU is the biggest destination for China's exports and the second supplier to China. For the EU, China is the second trading partner, after the United States.
Based on current agreements between the two continents, we can mention the following documents that justify our research: The bilateral issues and cooperation, including people-to-people exchanges in 2011[1]; EU-China Youth Policy Dialogue about education, culture and youth policies;[2] The EU-China high level people to people dialogue, celebrated in Chengdu, 2012.[3] EU-China Business Summit, which took place in September 2012, in Brussels.[4] The EU is committed to strengthening its partnership with China, as demonstrated by the fourteenth EU-China summit that took place in Beijing, 2012.[5] Also there are some forums and conferences that are relevant for our research such as, the EU- China high level cultural forum celebrated, in Brussels 2010;[6] Beijing in 2011; the Louvre in 2012,[7] and the China- EU Seminar on cultural and creative industries cooperation.[8]
The rights of intellectual property law are more vulnerable in the cultural and creative sector.For this reason, it is essential that we protect ideas and designs; they are the new creations and they need to be sheltered. In this article, we are going to explain what intellectual property (IP) law is, specifically copyright, and how it began to appears in China in order to understand the concept of copyright
To gather this information, we will discuss the copyright protection for creative industries in China. And we will do a brief comparison about the copyright protection for creative industries in EU, including legal mechanisms in EU that relates to China. The methodology is the investigation and examination of documentation and we will elaborate a diagnose to observe the main differences between the Chinese and European legislation.
In the end, we will summarize the previous material, and draw a conclusion.

Key words: *Creative industries, copyright, China, Europe, EU-China agreements*

---

[*] Cristina Ortega Nuere, PhD, ENCATC President, European Network Leader in Cultural Management and Cultural Policy Education. Institute of Leisures Studies. University of Deusto (Cristina.ortega@deusto.es).
[**] Silvia María González Fernández, PhD Candidate in Leisure and human development at University of Deusto (Silviamaria.gonzalez@gmail.com).

[1] EU and China set to boost co-operation on education, culture, youth and research (2011). Accessed December 20, 2012. http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2011/20111023_en.htm

[2] Education & culture: EU and China launch people-to-people dialogue. 2012.Accessed December 20,2012. http://europa.eu/rapid/press-release_IP-12-381_en.htm?locale=en

[3] EU-China Youth Policy Dialogue. Accessed December 29, 2012. http://euchinayouth.eu/wp-content/uploads/YOPOD_Action_Plan_for_EU-China_Cooperation.pdf

[4] 15th EU-China Summit (2012).Accessed December 20,2012.http://www.ibec.ie/IBEC/DFB.nsf/vPages/Trade_and_international_relations~Asia_Business_Network~china-eu-china-business-summit-20-september-2012-brussels-23-10-2012?OpenDocument. Further information : http://eeas.europa.eu/china/summits_en.htm

[5] European commission Report: EU-China High level people to people dialogue. Accessed December 26, 2012. http://ec.europa.eu/education/external-relation-programmes/china_en.htm

[6] EU- China cultural Forum 2010. Accessed December, 27, 2012. http://ec.europa.eu/culture/news/first-eu-china-high-level-cultural-forum-brussels_en.htm

[7] EU china high level transultural forum. Accessed December 27, 2012. http://www.euchinaculturalforum.com/

[8] EU-China Seminar of cultural cooperation. Accessed December 28, 2012. http://ec.europa.eu/culture/eu-china/events/event_172_en.htm

Introduction

Few economic sectors have research as much economic potential in China and the EU as the cultural and creative industries. (CCIs) have over the past few years. China is leading Asia in the development of a creative economy. Its cultural sector contributes to 2.45% of Chinese GDP, rising 6.4% higher than the growth of the general economy. European CCIs are worth 2.6% of the EU´s GDP and generate 654 billion € in 2003, much more than the car manufacturing industry. [9] We can say that copyright in the creative markets is "the soul" of the creation to prevent plagiarism. It is the incentive for the creation. And it is for that, there is a local and global trade through the copyright mechanism, the piracy has a huge impact on these industries, and that is why copyright is a necessary tool to protect the profits of these industries. Europe believes that with the directives, regulations, rules, and normative that protects designs and copyright law, the piracy could decrease in a near future and the talent will rise again. [10]The European Union admits it has cost the creative industry over 185 billion Euros in employment alone in 2008, that's why the observatory of counterfeiting and piracy created in Europe has offered a competition called "hands off my design."[11]

This article will explain the impact of copyright law in the creative industries between China and the European Union and the opportunities for trade and exchange among both continents. The importance of this topic is on the agenda of many international organizations. (UNESCO,[12] WTO[13], UNCTAD[14], WIPO[15]). The procedure of the methodology consists in content analysis of the Chinese legislation and the main differences in the Chinese and European legislation concerning copyright in the creative and cultural industries. Also we will support the analysis in the main organizations and treaties that exist in both continents that are important for this topic. For example; The UNCTAD is his 2008 report on the creative economy has mention:

"It has the potential to generate income, jobs and export earnings while at the same time promoting social inclusion, cultural diversity and human development. This is what the emerging creative economy has already begun to do as a leading component of economic growth, employment, trade, innovation and social cohesion in most advanced economies. The creative economy also seems to be a feasible option for developing countries"[16] "

Policies must therefore be designed to support all forms of innovation, not only technological innovation. Specific approaches may also be needed for innovative services with high growth potential, particularly in the cultural and creative industries".[17][18]

---

[9] KEA."China EU creative industries mapping. December 2010." Accesed January 23, 2013. http://www.keanet.eu/report/china%20eu%20mapping%20exec%20sum%20english.pdf.

[10] European Patent office report. " Scenarios for the future".2007.22-30,106 110.http://www.marcasepatentes.pt/files/collections/pt_PT/1/178/EPO%20Scenarios%20For%20The%20Future.pdf

[11] "Intellectual property rights : Winners of "Hands off my Design. Accessed on January 01, 2013.http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/93&format=HTML&aged=0&languge=en&guiLanguage=en,

[12] United Nations,Educational, Scientic andCultural Organization. (UNESCO). More information available on UNESCO report 2009. What is and what it does. Accessed January 03, 2013.http://unesdoc.unesco.org/images/0014/001473/147330s.pdf

[13] Word trade Organization. (WTO). Accessed January 03, 2013.More information available on http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

[14] United Nations conference on trade and development. (UNCTAD). Accessed January 03, 2013. More information available on : http://unctad.org/en/Pages/Home.aspx

[15] Intelectual Property Organization. (WIPO): Accessed on January 03, 2013. More information available on: http://www.wipo.int/about-wipo/en/

[16] UNCTAD (Conferencia de las Naciones Unidas sobre Comercio y Desarrollo) 2008, *Creative Economy: Report 2008*, New York, ONU. Accessed February 18,2013.http://unctad.org/en/Pages/Publications/Creative-Economy-Report-(Series).aspx.

[17] European Commission . Europe 2020 Flagship Initiative Innovation Union, Brussels, 6.10.2010, COM (2010) 546 final. 2010.18.

Is the role of copyright important for the development and exchange in the creative and cultural industries (ICC)?

In April 2012, the commission has written a report "policy handbook"[19] in which notes the importance that creative and cultural industries have in the world economy. It says: "Cultural and creative industries are in a strategic position to promote smart, sustainable and inclusive growth in all EU regions and cities, and thus contribute fully to the Europe 2020 Strategy, which is the EU's growth strategy for the coming decade".[20]

The copyright has experienced a process of harmonization worldwide through the Berne Convention, which is now coordinated by WIPO that negotiates with international treaties. For example; the diplomatic conference on the protection of audiovisual performances, in 2011.[21]

China has developed his copyright system since the adhesion of the WIPO in 1980. Currently, China is leading the market. In the last two parts of this paper we will explain the importance of the creative industries in China and Europe and why copyright is so important for both in the commerce. China is as potential future second worldwide in 2017[22], it will be very important for trade and development of creative industries. China has moved to design in china to create in China, and there are many opportunities for business between China and Europe.[2324]

Creating opportunities in the creative industries sector between China and Europe:

Copyright is a part of intellectual property (IP) law. Intellectual property law refers to some of the rights related to ideas and innovations. Most countries agree that some inventions and creative works must be protected in a legal form. This is because the vast majority of workers and owners should be entitled to receive some benefit from the fruits of their labor. If they are guaranteed protection, they maintain incentives to innovate, otherwise creativity is discouraged. For this reason, IP law is divided into two big branches, industrial property and *copyright*.25

Since the adhesion of the P.R China to the World Intellectual Property Organization (WIPO) in 1980 and the entry in the World Trade Organization (WTO) in 2001, the protection of intellectual property rights (IPR) has been an issue of rising importance for new legislation.26Also the Agreement on Trade Related Intellectual Property Rights 1994 (TRIPS) and the Berne Convention on Literary and Artistic Works of 1886 has helped china to increase the cooperation abroad.[2728]

---

[18] We remember the creative industries concept. The world cultural industry refers to those industries that combine the creation, production and marketing of creative content that is tangible and cultural by nature. These contents are usually protected by copyright, and may take the form of a good or service. The ideas and designs need to be sheltered; it is for that the copyright concept is important for this industry. We can mention the UNESCO : Understanding creative Industries report: pp 3. http://portal.unesco.org/culture/es/files/30297/11942616973cultural_stat_EN.pdf/cultural_stat_EN.pdf

[19] EC (2012), Working Group of EU Members States Experts, *Policy Handbook*, Brussels, April 2012.Accessed February 29, 2013. http://ec.europa.eu/culture/our-policy-development/documents/policy-handbook.pdf

[20] *Ibid*., p. 3.

[21] Diplomatic conference on the protection of Audiovisual performances. (2012). Accessed on February 18, 2013. http://www.wipo.int/meetings/en/details.jsp?meeting_id=25602

[22]Chamber of commerce and industry of the Russian federation report. China to become world's biggest economy. February,11, 2013. Accessed February 25, 2013. http://eng.tpp-inform.ru/princple_theme/845.html

[23] Creative Industries in China. Opportunities for business. Uk trade& investment report. London. 2008. Accessed February 25, 2013. http://www.cbbc.org/guide/downloads/uktilondon_creative

[24] Dr Zhen Ye. Wales- China Creative industries forum. Mega trends in China's creative industries report. 2009. http://waleschinacreativeindustries.net/wp-content/uploads/DrZhenYepaper1.pdf

25 Xhu, Yuquan. Concise Chinese law. Beijing, China Law Press 2007,81.

[26] Zhang, Yuwing; Gebhardt Inmanuel. Chinese intellectual property law. Comparative cases studies part 2. Department of treaty and law. Volume V Ministry of commerce PRC advisory service to the legal reform is china..(1997). 102-103

[27] Montgomery, Lucy; Fitzgerald, Brian F. "Copyright and the Creative Industries in China". International Journal of Cultural Studies 9(3) (2006): 407-418

Trade in copyright between the P.R China and other countries are increasing rapidly and therefore require protection on both national and international levels. With the international trade in copyright growing at an annual rate of 50% during the period between 1994 and 1999 and continuing to grow, copyright protection requires new legislation to keep up with technical developments, such as through the use of the internet. In spite of the described development, Chinese Copyright Law (hereinafter *CCL*) was amended in October 2001 for the first time. The revision mainly incorporated the necessary changes due to the accession of the PRC to the WTO and the requirements of the Accession Protocol.

In Feb. 2010, *CCL* was revised for the second time and went into effect on Apr.1, 2010. Notably, the amendment to Article 4 contained in the *CCL* (2nd Revision) was adopted primarily in response to recent findings by a WTO panel that China's denial of copyright protection of certain censored works was inconsistent with its TRIPs Agreement obligations.[29] Copyright protection is now extended to all "works," without regard to restrictions on publication and distribution that are imposed by PRC authorities under other laws and regulations (these restrictions are unaffected by the amendments).

In 2006, the council of international Affairs and External Relations in Brussels, (Council 2771), had begun searching solutions of global problems and China played a key role, The EU and China have important commitments and responsibilities whose base is the United Nations.

The Council welcomes the agreement reached in September 2006 to set up negotiations with China as a Partnership and they have signed a cooperation Agreement. This agreement began to cover all aspects of bilateral relations, including the strengthening of the agreements between the two continents, supports dialogue, cooperation and integration in East Asia considering that this agreement could promote stability and prosperity and that will lead to further progress towards resolving territorial disputes in the region. The cooperation with China aimed at strengthening stability in East Asia, including through multilateral mechanisms such as the Regional Forum of the Association of Southeast Asian Nations (ASEAN) and the Asia-Europe Meeting (ASEM), and the role of China as a country host the seventh summit ASEM7. On that date the Council recognizes that trade and economic relations are an increasingly important element between the EU and China. It is very probable that the extraordinary growth of exports, imports and Chinese investment in recent years continue to occur in the immediate future. This represents both a challenge and an opportunity. The challenge for the EU, and for China, is to manage and deepen relationships on a sustainable, predictable, and balanced. The best way to overcome this challenge is the association, through cooperation and common standards and mutual agreements.

Currently, in the creative industries sector China and Europe has signed so many action plans in 2012. For example: EU-China Youth Policy Dialogue in Chengdu, 23 of February of 2012[30]. Furthermore, China and Europe has agreed an EU-China high-level people-to-people dialogue in 2012, in Beijing[31]. EU diplomatic relations with China were established in 1975 and are governed by the 1985.[32] On the other hand, EU-China trade and cooperation agreement and seven other legally binding agreements were reached on those years. China has emerged as the world's third economy,

---

[28] The original version of the Berne Convention for the Protection of Literary and Artistic Works dates from 1886.

[29] See *Report of the Panel－China C* "Measures affecting the protection and enforcement of intellectual property rights." WT/DS362/R .(2009). 41 Accessed December 13, 2012. http://www.worldtradelaw.net/reports/wtopanels/china-iprights(panel).pdf

[30] Education & culture: EU and China launch people-to-people dialogue. 2012.Accessed December 20,2012. http://europa.eu/rapid/press-release_IP-12-381_en.htm?locale=en

[31] Eu- China high level people to people dialogue 2012. Accessed December, 20, 2012. http://ec.europa.eu/education/external-relation-programmes/china_en.htm

[32] W. John Morgan& Tujnman, Albert. "Europe and China: a new era of cultural contact and cooperation in education." European Journal of Education,Vol. 44, No. 1. (2009) 1-142.

after the EU and the US, the biggest exporter in the global economy, and an increasingly important political power. EU-China trade has risen dramatically in the last decades. The EU remains China's biggest trading partner while China is now close to becoming the EU's largest trading partner as well.[33]

Also, on December 19, 2012, China-Central and Eastern Europe Cooperation Secretariat held its annual meeting in Diaoyutai State Guesthouse in Beijing. At the meeting, progress that has been made in cooperation between China and Central and Eastern European countries was reviewed and plans made for the Secretariat's work in 2013.[34].

We have to mention as well that Europe and China has signed in 2012 many cultural agreements and forums and seminars in which copyright has a relevant part. For example, the "High level cultural forum" and 3rd edition that took place in Beijing in November to cooperate in culture.[35]

The history and prospect of China's Copyright Law

Since the late 1980's China has taken major steps in the legislation improving its copyright law. The Chinese desire to open their doors to trade in order to encourage foreign direct investment.

There was no copyright norm in Chinese feudal history. Copyright was a purely western concept that was introduced in China in the 20th century under pressure from the western countries. On the other hand, the concept of copyright is contrary to the Chinese and Confucius culture, and is contradictory with the Marxist socialist ideology.36 Chinese law always encourages the society over the interests of individuals.

China has one of the most distinct and deep philosophies, which is essentially contradictory with the notion of copyrights.37. History indicates that China was ahead of Europe when it came to printing techniques that had been invented in the middle of the 11th century. China has an incredible traditional culture, and Confucianism was so basic to feudal Chinese philosophy and social conduct that is almost contradictory to the notion of copyright.

"As a legal concept, copyright seems even less attuned to the Chinese concept of law with its reluctance to rely upon rigid codification and abhorrence of litigation. The traditional Chinese conception of law is so different from the western concept that it has often been described as a rejection of the idea of law ".38

Confucianism always believes in the concepts of equality and individuality, and provides a basic premise for claiming copyright. Confucianism believed that past experiences were indispensable for personal moral growth. Confucius said: "I transmit rather than create, I believe and I love the ancients."[39] He believed that intellectual knowledge, as a whole, was the common heritage of all Chinese. They monopolized authority based on the wisdom of the past, spent time on literature, and tried to express them through art.

---

[33] European Union. EU-CHINA SUMMIT (Beijing, 14 February 2012) .EU RELATIONS WITH CHINA. n this context, the 2012 EU-China Year of intercultural dialogue aims to enhance cultural relations and cooperation and was officially launched on 1 February. Activities will include not only artistic exchanges, but all forms of people-to-people contacts and mobility contributing to mutual understanding. More information on the activities can be found at: http://ec.europa.eu/culture/eu-china/intercultural-dialogue-2012_en.htm. Accessed January 3, 2013.

[34] Vice Foreign Minister Song Tao Attends Annual Meeting of China-Central andEastern Europe Cooperation Secretariat. Ministry of Foreigners Affairs of the people´s Republic of China. December, 12, 2012. Accessed January, 4, 2013. http://www.fmprc.gov.cn/eng/zxxx/t1000583.shtml.

[35]High level cultural forum.Beijing. 2010. Accessed January 05, 2013. http://ec.europa.eu/culture/eu-china/index_en.htm

[36] Ploman, E.W and Hamilton, L.C, copyright, London, Routledge&Kegan Paul,(1980) 140.

37 Qu, Sanqiang .To understand the copyright in China. Copyright in China. 2002.4-8.

38 Ploman and Hamilton..see supra note 4 , at 142.

[39] Early models of collaboration before the eighteen century. Accessed February 03, 2013. http://mako.cc/academic/collablit/writing/BenjMakoHill-CollabLit_and_Control/x243.html. More information available on Chinese Intelectual property protection.http://www.123helpme.com/view.asp?id=35245

In China, the protection of printers, publishers and authors on occasions by means of official prohibitions had remained unchanged for more than eight hundred years, although in the Ming Dynasty this form of protection seems to have been suspended for some time. Neither written law for the protection of copyright nor clauses in statute law have been discovered. 40. By the 17th and 18th centuries, with the European industrial revolution, Europe had begun to develop a concept of copyright. Nevertheless, as early *as 800 years ago China had some definitive notions regarding the idea of copyright or, intellectual property.* The stamp, first appearing between the years 1190 to 1194 would read: this book was published and distributed by the Cheng Family of Meishan, *any reproduction without permission is forbidden.* The notice is strikingly similar to the modern copyright notice --© "All rights reserved". The question might still be raised, then: why has there been no copyright law in China for such a long time? [41] When the west pressured China to open its doors to trade, they had to make special concessions and foreigners were permitted to live in Guangdong and Macao to do business with licensed Chinese intermediaries, known as the Hong. 42 After the Opium War (1839-1842) the social contradictions and conflicts with China became more intense. Prior to the opium war, there was a little foreign investment in China and trade was confined to items, such as opium, tea, raw silk, sold as bulk commodities instead of under brand names. 43

In the second half of the 19th century, the western economic involvement in China expanded. At the same time, the infringements of intellectual property, such as foreign trade names and trademarks began to work. 44 To protect the interest of foreigners, the Qing government commenced a series of negotiations regarding protection of copyright. China did not have universal national laws to deal with the problem of copyright infringement. So, as China began to industrialize, they also began to duplicate the copyrighted works of foreigners. China did not provide any legal protection for copyrights until 1910. In 1928, the KMT government promulgated its first copyright law. In 1949, the People's Republic of China was founded.45 The copyright law changed and the nation had been influenced by the Mao ideology, and the creation of literature and art had to serve the overall social interest. *46*. During the Cultural Revolution, (1967-1977) China made no progress at all in improving its copyright scheme. On the contrary, many aspects of copyright protection regressed considerably. Almost all kinds of what the west would consider creative literature were regarded as bourgeois liberalism and restricted from publication and dissemination.47 From 1979 to 1985, the administration responsible for publication drafted a succession of administrative regulations with respect to copyright protection. The interim provisions declared by the Ministry of Radio and Television in 1982 also emphasized that the rights of authors, performers and audio-radio recorders would be protected in effective ways. The copyright law in 1990 was promulgated and after these regulations they created the protection of computer software. The law is enacted according to the Chinese Constitution with the aim to protect the copyright of the authors and the creative workers, as

[40] Chengsi,Zhen and Pendleton, Michael. Copyright law in China. 1990. 16

[41] See Zhou Lin,Copyright Law In China, ,accessed January 24, 2013. http://www.chinaiprlaw.com/english/forum/forum59.htm

42 Described in Fairbank, J.K, Trade and diplomacy on the china coast: the opening of the treaty ports, (Cambridge. Harvard University Press, 1953), 45.

43 Gardella, R. " Boom years of the Fukien Tea trade, 1842-1888" in May E, and Fairbank, J.K. America´s china trade in historical perspective: the Chinese and American performance, council on East Asian studies, (Cambridge, Harvard University 1986), .69.

44 See also Allen G and Donnithorne A:" Western entreprise in far eastern economic development", (New York, Mcmillan 1954). 61.

[45] Id. at .33.

46 See 1967, quotations of Chairman Mao Tse-tung, People´s Publishing House, Beijing, 1973.

47 Qu, Sanqiang.supra note 5, at p. 40.

inventors or designers in their literary, artistic and/or scientific works related with the copyright, in order to encourage them to continue to innovate and develop a better world. 48

Understanding Chinese copyright. Definition and analysis.

Copyright is defined as the personal right and property right legally enjoyed by authors and creators of literary, artistic and scientific works. This law stipulates that the copyright includes two categories; spiritual right and economic right.49

Art. 6 of the *CCL* provide that copyright arises at the date when creation of the work is complete. Para. 2 and 3, Art 21 provide that the term copyright of a work owned by an employer, or the copyright in a film, television broadcast, photograph, video or sound recording is 50 years from the date of publication. If the author is the owner of the copyright, the term is the life-time of the author plus 50 years after his death, in the case of published work. According to para. 1, Art. 2, foreign works receive the same treatment as works created by Chinese persons and entities. Any work of a foreigner or stateless person published for the first time and within the territory of China shall enjoy copyright in accordance with this Law. (See para. 2-4, Art. 2, *CCL*). Art. 8 of the Implementing Regulations of the Copyright Law of the People's Republic of China (*hereinafter Implementing Regulation*) also provides that where works of foreigners or stateless persons are first published outside the territory of China and then, within thirty days, published in the territory of China, the works shall be deemed to have been simultaneously published in the territory of China., but the moral rights will be perpetual.50.

Copyright Object, Subject and Content

Works are the result of intellectual creation in the literary, artistic, and scientific fields and may be reproduced in a material form in accordance with Art. 2 of *CCL* and the *Implementing Regulation* formulated by the state council in 2002. They have to follow three requirements:

- They should be the expression of ideas and feelings.
- They should be original
- They should be able to be reproduced in a material form.

The subject of the copyright enjoys the rights and bears the obligations of the copyright. It has three categories: includes the natural person, legal entity or other organizations that create the works: the authors. Second category includes the natural person, legal entities or other organizations, besides the author, who enjoy the copyright. The third category includes the natural person, legal entity or other organizations that is entitled to the copyright by trust contract or service the contract.

The object of the copyright refers to literary, artistic, and scientific works protected by copyright law.

---

[48] Copyright Law of the People's Republic of China" (Revised in 2010) UPDATED: June 1, 2010 NO. 20 MAY 20, 2010. Accesed December 12, 2012. http://www.bjreview.com.cn/document/txt/2010-06/01/content_275779.htm

Adopted in the 15th meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990 and revised in the 24th meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001 in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the first time and in the 13th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on February 26, 2010 in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the second time.

[49] "China law guideline in protection of intellectual property rights." China Council For the Promotion of International Trade Law Department (China market press. 2006). 1.

[50] Zhang, Yuwing and Gebhard Inmanuel. Chinese intellectual property law. Comparative cases studies part 2. Department of Treaty and Law. Ministry of commerce PRC advisory service to the legal reform is china. Volume V. (1997). 113.

What is protected?

The legal term work is defined in Art. 2 of the *Implementing Regulation* as an intellectual creation which is in the field of literature, arts or science, displays originality and is capable of reproduction in a certain tangible form

Art. 3 of *CCL* supplemented by Art. 4 of the *Implementing Regulation* identifies particular categories of works as including:51 Literary works; Oral works; Musical, dramatic and choreographic works; Acrobatic works; Works of fine arts and architecture; Photographic and cinematographic works; Graphic works and software works.

Copyright Limitations

The Chinese Copyright Law imposes two limitations on the exercise of copyright by its owner, namely fair use and statutory license Fair Use Consistent with the Copyright Law 2001, 12 kinds of fair uses have been identified(Art.22, CCL). As a civil law country, *CCL* provides detailed circumstances for "fair use" in legislation, and the court may exercise the interpretation rights only according to the specific circumstances set forth in *CCL* and cannot rule "fair use" under other circumstances beyond the scope set by *CCL*.

Statutory License .The statutory license includes that where the copyright owner has not declared that the work concerned is forbidden to be exploited by others, a newspaper or periodical may reprint or print an abstract of the work which was published in another newspaper or periodical (see Para.2, Art.33,CCL), and work published may also be exploited for public performance or for the production of a sound recording, video recording, radio program or television program; but subject to the payment of remuneration (see Art.37,40&43,CCL).

Related Rights China's Copyright Law protects not only works by traditional copyright (author's right), but also subject matters other than works by "related rights". Related rights mean "rights and interests related to copyright". According to Art.26 of *Implementing Regulation*, the so called "rights and interests related to copyright", as mentioned in China's Copyright Law (see Art.1) and these regulations mean the rights enjoyed by publishers in the typographical arrangements of their books or periodicals published, the rights enjoyed by performers in their performances, the rights enjoyed by producers of sound recordings and video recordings in their sound recordings and video recordings and the rights enjoyed by radio and television stations in their broadcast radio or television programs. (Art 34, 36, 38 CCL).

Copyright Infringement and Enforcement

Chinese Copyright Law enumerates acts of infringement in Art. 47 and 48. According to Item (1) to (11), Art. 47 of *CCL*, one who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology, or paying compensation for damages, depending on the circumstances. The copyright administrative departments under the local governments shall be responsible for investigating and handling infringements of copyright, with prejudice of the social and public interests, as enumerated in Article 47 of the Copyright Law. The copyright administrative department under the State Council may investigate and handle copyright infringements that are of nationwide influence (Art. 37, *the Implementing Regulation*).

According to Item (1) to (8), the Art. 48 of CCL says: one who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringements, eliminating the effects of the act, making a public apology, or paying compensation for damages, depending on the circumstances; where he damages public interests at the same time, the copyright administration department may order him to cease the act of tort, may confiscate his illegal gains, confiscate and destroy the reproductions of infringement, and impose a fine on him; if the case is

[51] Yuwing ,Zhang; Gebhardt, Inmanuel.Author: Chinese intellectual property law. Comparative cases studies part 2. Department of treaty and law. Ministry of commerce PRC advisory service to the legal reform is china. Volume V. (1997). 104-105

serious, the copyright administration department may also confiscate the materials, instruments, equipment, etc. mainly used to make the reproductions of infringement; where his act has constituted a crime, he shall be investigated for criminal liabilities in accordance with the law.

Copyright enforcement

Protection against copyright infringements and the enforcement of copyrights may still prove to be a difficult task in the PRC. However, the situation changed when China entered the WTO. Copyright can be enforced by administrative or judicial means.

Administrative Action

With respect to the infringement of copyright, with prejudice of the social and public interests, as enumerated in Article 47 of the Copyright Law, the copyright administrative departments may impose a fine not exceeding three times the amount of the illegal business turnover. When it is difficult to calculate the amount of illegal business turnover, it may impose a fine of no more than RMB 100,000 Yuan (Art. 36, *the Implementing Regulation*).

Judicial Enforcement

According to Art 55 of *CCL,* a dispute over copyright may be settled by mediation or be submitted for arbitration to a copyright arbitration institution under a written arbitration agreement concluded between the parties concerned, or under the arbitration clause in the copyright contract. In fact, the copyright infringement disputes shall be settled via mediation. If the mediation fails, it should be submitted to the court. Also, in the copyright contract disputes, it must be sent to the arbitration organization (designated in the clauses of the contract). In the case of no clauses or arbitration agreement, the concerned party goes directly to the court.52. The courts in China are divided into basic courts, Intermediate Courts, High Courts and the Supreme Court. The court where the initial dispute is brought is known as the court of first instance, while the appellate court is known as the second instance court. This appellate system is similar to that which is in place in the United States. In major metropolitan areas, the intermediate court will be the court of first instance for many of the intellectual property cases. Jurisdictions in major metropolitan areas, such as Beijing, Shanghai and Guangzhou handle the majority of intellectual property cases. Because of this specialized capability and the associated protection existing largely only in major metropolitan areas, there should be a heightened awareness among companies in China with regard to where they bring claims in Chinese courts. Venue, as such, becomes a very important issue when litigating intellectual property claims in China

Creative industries in China

What is the first idea that comes to mind when someone asks us about the creative industries? What can we understand about this? Are Cultural industries the same as creative industries? According to UNESCO, culture must be considered to be the distinct spiritual, material, intellectual, and effective identity that characterizes a society or social group and encompasses, in addition to literature and art, lifestyles, the way to live together, value systems, traditions, and beliefs. The term cultural industries concern those industries that merge the creation, the production, and the commercialization of creative contents which are cultural by nature. All of these contents and designs are protected by copyright and they can take the form of a good or a service. (These industries normally include printing, publishing, multimedia, audiovisual, phonographic and cinema, crafts, and design). However, the creative industries are involved with more activities than the cultural industries. This includes architecture and advertising, so, in general, creative industries are those that have an artistic and creative element.

Chinese government has banned an official definition that differentiates core peripheral and culture related industries. (10th five-year plan, 2002). However, this exists with other classifications developed by large cities, such as Beijing and Shanghai.

[52] China law guideline in protection of intellectual property rights. China market press. 2006.6

Inside the cultural industries there are many associations that were created to transmit ideas and create initiatives. Also, they want to unify their rights and have more power in their decisions. Of the categories that we can frame in art are the following: Architecture, customs and traditions, theater, music, literature, visual arts, dance, crafts, audiovisual, multimedia and digital culture.

Chinese and European cultural and creative industries are important sectors (they contribute 2.45% and 3% to the Chinese and EU GDP's, respectively), and account for a growing portion of trade between the two zones. Europe and China are important partners and their cultural exchanges are still to be fully developed. In this table we can check the different contributions to each economy:[5354]

Figure 1. GDP in EU and China

Economic data	EU	China
Turnover	More than € 654 billion in 2003	€ 47.6 billion in 2006
Value added to GDP	2.6% of EU GDP in 2003	2.45% of GDP in 2006
Employment	In 2004, almost 6 million people were employed = 3.1% of total employed population in EU27	In 2006, 11.32 million employed = 1.48% of total employed population
Trade	The export of cultural services from the EU 27 to China has increased, growing from € 31 million in 2004 to € 49 million (+58%)	China has become the third largest exporter (€ 3.7 billion) and the sixth largest importer (€ 2.2 billion) of cultural goods in the world in 2005
Contribution to growth	12.3% higher than growth of the general economy	6.4% higher than growth of the general economy

Source: Creative industries working paper.2012

Over 70% of total exports of cultural products are produced by foreign-funded enterprises. The cultural exports from the U.S., EU, and Hong Kong account for more than 85% of China's export of cultural products, with the share from the Guangdong province accounting for over 70%. Of China's total exports of cultural products, 50% are videogames, 30% are sculpture and visual arts products, while exports of products with real Chinese content account for no more than 15%10**.** [55]

Currently, the added value of China's cultural industry has increased 25.8% and now represents 2.75% of GDP, as counted by the National Bureau of Statistics. The Minister of Culture expects this to represent 5% of the GDP, as this trend continues to rise. A more detailed review of events shows that profits in sectors, such as-film, exceed 1,600 billion. Another business in design, digital animation, architecture and performing arts continues to grow, to the extent that the bank of China has supported the creation of capital funds and successful companies to take public stock market.[56]

Currently, as is being developed jointly by the General Office of CPC Central Committee and the General Office of the State Council, the reform plan of China cultural development for the period between 2011 and 2015, defines the development of cultural industry how to make it a pillar in the global economy. Also, China will intensify the union between effective copyright enforcement

[53] China and Europe Trade. Accessed on Jan.2, 2013. http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/china/index_en.htm

[54]China EU bilateral Trade and Trade with the World.. 2012. Accessed February 20, 2013. http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113366.pdf

[55] http://culture360.org/news/mapping-the-cultural-and-creative-sectors-in-the-eu-and-china/ Accessed on Jan, 22, 2013.

[56] China to develop cultural industry into pillar one. Accessed January.22,2013. http://www.chinaipr.gov.cn/newsarticle/news/government/201202/1280107_1.html.

administrative and judicial protection, stop the different kinds of infringement and piracy actions and raise the awareness of the whole society in copyright protection. Lastly, the country will develop other industries relevant to copyrights.

What is the main purpose of the legislation? Releasing the potential of the creative industries in Europe

The European Competitiveness Report, dated in 2010, told: "Innovation and competitiveness in the creative industries" as one of the four factors that determine the competitiveness of the EU in world market".[57] The ICC´s are innovative and they are catalysts for innovation.[58] In conclusion, the EC has defined SCC sector as one of the key sectors of the new European Agenda 2020:

"We must strengthen the potential for growth and innovation in the creative industries, we must take action"[59].

Thousand of designs, pictures, and photographs are copied and when the plagiarism is discovered, their company's designers, and the company itself, lose their prestige and credibility. We need to protect the talent, so the European Union (EU) decided to create a regulation and law that could protect the inventions and the drawings of the designers and artists.

Attempts to harmonize copyright law in Europe can be dated back to the signature of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. All Member States of the European Union are signatories to the Berne Convention, and compliance with its provisions is now mandatory before accession. The first important step taken by the European Economic Community (EEC) to harmonize copyright laws came with the decision to apply the common standard for copyright protection of computer programs, enacted in the directive on computer programs in 1991. A common term of copyright protection, 70 years after the death of the author, was established in 1993 as the duration of the Copyright Directive.

The application of the directives on copyright has been rather more controversial than many other subjects, as shown by the six trials for non-transposition of the Copyright Directive. Traditionally, copyright laws vary considerably among Member States, especially among common law jurisdictions (Cyprus, Ireland, Malta and the UK) and civil law countries. Changes in copyright law have also become linked to the protests against the WTO and globalization in general.

The main treaties concerning copyright and relative rights are as follows:

- Berne Convention for the Protection of Literary and Artistic Works (WIPO)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- Agreement on Trade-Related Intellectual Property Rights (WTO)
- WIPO Copyright Treaty (WIPO)
- WIPO Performers and Phonograms Treaty (WIPO)

The European copyright law is based in the following directives:

- COUNCIL DIRECTIVE 93/83/EEC OF 27 SEPTEMBER 1993 on the coordination of certain rules concerning copyright and rights related to copyright in the field of satellite broadcasting and cable retransmission. Transposed into Spanish law by Law 28/1995, which is now part of the IPL.

- DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 MARCH 1996 on the legal protection of databases. The term of protection of this right "sui generis" is 15 years.

---

[57] European Commission (2010), *European Competitiveness Report 2010*, Brussels 28.10.2010, Commission Staff Working Document, SEC (2010)Volume 1. 1276 final. Accessed February, 27, 2013.http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1276:FIN:EN:PDF

[58] *Ibid*., p. 5.

[59] Ibid., p. 14.

- DIRECTIVE 98/71/EC of the European Parliament of the council of 13 October 1998 on the legal protection of designs.

- DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF JUNE 8, 2000 on certain legal aspects of the services of the information society, in particular electronic commerce in the internal market.

- DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2001[60] on the harmonization of certain aspects of copyright and rights related to copyright in the information society. Confers on authors the right to authorize public communication and distribution in all its forms.

- DIRECTIVE 2001/84/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 SEPTEMBER 2001 on the right for the benefit of the author of an original artwork. Establishes an inalienable right, the author of original artwork to participate in certain percentages in resales involving art market professionals.

- DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2004. This directive requires member states to take specific procedural measures to ensure the possibility of obtaining evidence (for example; distribution networks of illegal products) and the efficiency of judicial decisions (interim measures), and determine the scope of compensation.

- DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 on rental right and lending right and certain rights related to copyright in the field of IP. Recognizes rights of performers, phonogram producers and film and broadcasting.

- DIRECTIVE 2006/116/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 concerning the term of protection of copyright and related rights. Amended by Directive 2011/77/EU, the European Parliament and the Council of 27 September 2011, cited below.

- DIRECTIVE 2009/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 APRIL 2009 on the legal protection of computer programs. Establishes the obligation to protect computer programs as literary works, with a minimum of 70 years harmonized protection.

- 2011/77/EU DIRECTIVE OF 27 SEPTEMBER, THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2006/116/EC of 12 December on the term of protection of copyright and certain related rights. Extend the term of protection of the rights of performers, and sound recordings from 50 to 70 years after the death of the owner or the date of posting.[61]

There are important differences from country to country in the Europe. We do not have enough time to analyze in this paper more deeply to observe the heterogeneity of the legislation between European countries. The main difference among them is the manner in which moral rights and economic rights under copyright are interpreted in relation to each other, with important

[60] "Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society **".** Official Journal L 167 , 22/06/2001 P. 0010 – 0019. Accessed January 25, 2013.

*h*ttp://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

[61] Conclusiones del Consejo y de los Representantes de los Gobiernos de los Estados miembros reunidos en el seno del Consejo, sobre el plan de trabajo en materia de cultura (2011-2014) *Diario Oficial n° C 325 de 02/12/2010 p. 0001 – 0009.* Accessed January, 03, 2013.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:325:0001:01:ES:HTML.

consequences for alienability and its limits in the fields of both moral rights and economic rights.[626364]

The European Union believes it has cost the creative industry over 185 billion Euros in employment alone in 2008, that's why the observatory of counterfeiting and piracy created in Europe has offered a competition called "hands off my design."[65]

Main treaties and mechanism related with China copyright legislation

To comply with the topic of this paper, it is not necessary to discuss in detail the EU copyright law, so this paper will focus on the main difference with China and how the system works there in general.

Very few economic sectors have revealed as much economic potential in China and the EU as the cultural and creative industries (CCIs) have over the past few years. China is leading Asia in the development of a creative economy. Its cultural sector records € 50.32 billion of value added, contributes to 2.45% of Chinese GDP, registering growth 6.4% higher than growth of the general economy. European CCIs are worth 2.6% of the EU's GDP and generate a turnover of more than € 654 billion (2003), much more than that generated by the car manufacturing industry (€ 271 billion in 2001) and by that of the ICT manufacturers (€ 541 billion in 2003).

There is no law that can protect an idea which has not yet been expressed. Hence, copyright does not protect ideas. In Europe and Spain, Copyright is a legal concept describing *rights given to creators* for their literary and artistic works, which include books, music, works of fine art, such as paintings and sculpture, as well as technology-based works, such as computer programs and electronic databases. *A work does not need to be published or 'made available to the public' to be protected***.** It is protected from its creation.

Culture also contributes to social cohesion. The development of cultural and creative industries is intrinsically linked with brand strategies. Copyright in Europe provides not only the same economic rights as those in China, but also they include the same moral rights as in China, including:

- ✧ *the right of paternity* (the right to claim authorship of the work); and
- ✧ *the right of integrity* (the right to object to any distortion, mutilation, modification, or other derogatory action in relation to the said work, which would be prejudicial to the author's honour or reputation).[66]

There is no better way to demonstrate the power of the publisher over the intellectual property under his control than to provide examples of how the unscrupulous use of it can deprive creative workers of their fair rewards.

What we can conclude about the economical aspects in the cultural and creative industries in Europe?

Value Added to EU -GDP.

---

[62] R. Rosenthal Kwall, The Soul of Creativity – Forging a Moral Rights Law for the United States, Stanford. 2010.

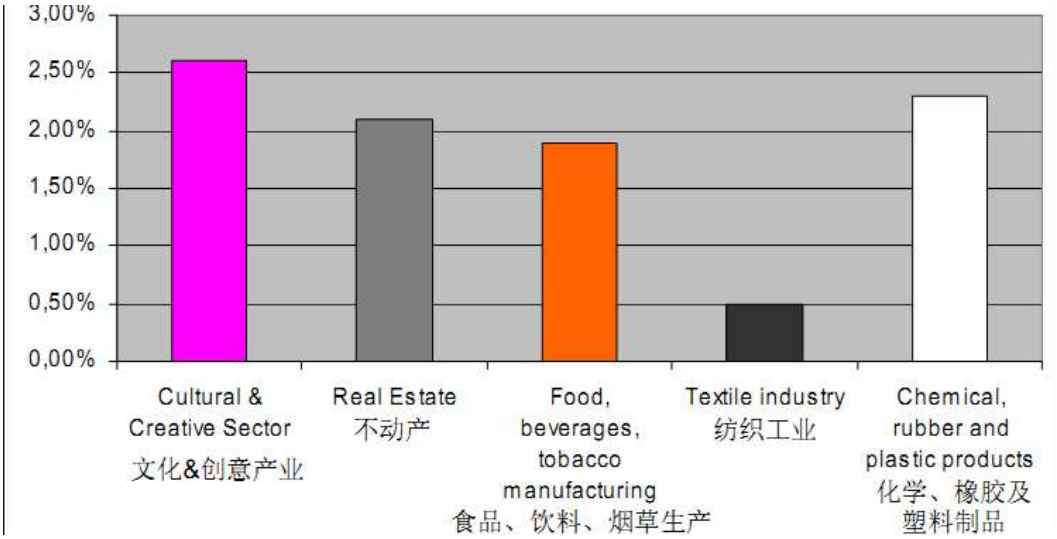
[63] See in particular, A. Dietz, Legal Principles of Moral Rights (Civil Law). General report, in: ALAI (ed.), Le droit moral de l'auteur/the moral right of the author, Congress of Antwerp (1993), Paris 1994. 54- 6o

[64] Dietz, Adolf. Chinese Copyright System: Anglo-American or Continental European model? International Forum on the Centennial of Chinese Copyright Legislation. Renmin University of China. Beijing. 2010.

[65]Intellectual property rights : Winners of "Hands off my Design" competition announced. Accessed January, 03, 2013.

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/93&format=HTML&aged=0&language=en&guiLanguage=en,

[66] Managing Intellectual Property in the Book Publishing Industry A business-oriented information booklet Creative industries – Booklet No. 1 World intelectual organization. 2011. 15 and 27-30



Source: Kern Philippe, KEA. IPR. Workshop.2011.

We can observe in the graph that Chinese CCI is one of the most important sectors that add GDP to the country. European CCIs (Cultural and Creative Services) are equal in value to (or simply "are equal to") 2.6% of the EU's GDP, and produce a turnover of € 654 billion (2003), much more than that which is produced by the car manufacturing industry (271 billion66 in 2001**)** and by ICT manufacturers (€ 541 billion in 2003)[67]. Overall, the growth of CCIs in 1999-2003 was 12.3% higher than the growth of the general economy[68]. Almost five million people work in the cultural sector (2005), or 2.4% of the active population in the EU27[69] (6 million if we include people working in cultural tourism[70]).

However, Europe and China ensure their full development in particular through a better use of IP. The economic overview still needs to improve:

- Developing statistics and collaborating more with each other,
- Collecting data, especially cultural and creative SMEs.
- The spilling over effect - for example on tourism or ICT, new devices for cultural, such music or videos.

In some cultural aspects, China and Europe's creative industries suffer the same problems as those in the U.S., domination and oligopolistic behaviours. Also, they suffer piracy.[71] 30% of books

[67] *Restoring European economic and social progress: unleashing the potential of ICT*", a report for the Brussels Round Table (BRT) by Indepen, Brussels, January 2006. Accessed January, 25, 2013. http://www.indepen.uk.com/docs/brt-main-report.pdf

[68] KEA, *The Economy of Culture in Europe*, Study completed for the European Commission – DG Education and Culture,2006- Accessed January 25, 2013.http://ec.europa.eu/culture/key-documents/doc873_en.htm

[69] EUROSTAT, Cultural Statistics, 2007.Accessed January 26, 2013. http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-77-07-296/EN/KS-77-07-296-EN.PDF

[70] Media Consulting Group, *The Potential for Cultural exchanges Between the EU and Third Countries: the case of China*, Study prepared for the European Parliament – Directorate General for Internal Policies, 2009. Accessed January, 26, 2013.

[71] Pricewaterhousecoopers, global Entertainment and media Outlook 2009-2013- Accessed January 27, 2013. http://www.pwc.es/en_ES/es/sectores/entretenimiento-medios/gemo/assets/informe-gemo-09-13.pdf

sales are pirated and 95% of CDs are of pirate origin. In Europe, it is estimated that piracy will cost 1.2 billion jobs and 240 € billion in lost profits by 2015.In Europe, small and medium size companies are 99% of the total enterprise and provide one third of the employment. On the other hand, architects tend to be self employed. They need to take more risk and invest in talent.

In Beijing, Shangai and Shenzen, local authorities that exist under the municipal government comply with laws and regulations that affect banks, tax, and copyright rules. The local government collaborates with the creative industry leadership groups for the big projects.

The national government applies the different rules and laws and the different administrative measurements. The state administration of radio, TV, and film has the role of planning, legislating, and supervising the audiovisual sectors. They also act as agents, because GAPP manages the state owned publishing companies. GAPP also approves publication licenses for periodicals, books, and music. [72] China has to focus more on the international cultural impact via the creation of a platform of cooperation. Also, they have to export more cultural products that are created in China and not just made/manufactured/produced in China. They have to reinforce domestic brands and cultural companies. Chinese industry has another problem; some people do not want to convert cultural industries into businesses and profit making companies.

Globalization and Europe are becoming closer everyday, mixing and generating new expressions and lifestyles. Digital networks become a perfect cultural space. Chinese Statistical Bureau and Culture Bureau with Eurostat should consider a joint development project. [7374]The public sector provides notably to the cultural and creative activities, but its contribution is difficult to grasp. It has an impact via public funds[75], but also through reducing VAT, or by giving fiscal advantages to attract private donations and sponsorship.[76] The overall economic and social weight of the cultural and creative sectors is, however, largely underestimated.

What can do copyright for China and Europe.

Right now, we have an idea of how we can relate the copyright and the Chinese creative industries and why it is so important for these kinds of companies. The copyright is not only important for the license, but it is really significant for those companies that always generate profits using designs and those in which the first product or service made is the original one, and the core of the company. We are going to explain and demonstrate why copyright is so important for the creative industries.

First of all, we can check which kind of companies inside the creative industries contributes more to the GDP. As we can see in the graphic, the press and literature in China contributes 40% to the GDP, afterwards comes the visual and cinema industry with a total of 23%, and in third place, we have radio and television contributing 12%.

---

[72] Media Consulting Group, the potencial for cultural exchanges between EU and Third countries. The case of china, study prepared for the European parliament. 2009. http://www.marcasepatentes.pt/files/collections/pt_PT/1/178/IPR2%20-%20Mapping%20the%20Cultural%20and%20Creative%20Sectors%20in%20the%20EU%20and%20China.pdf

[73] http://www.eucopyright.com/en/why-should-i-register-my-work-if-copyright-protection-is-automatic, accessed on Feb, 20, 2013.

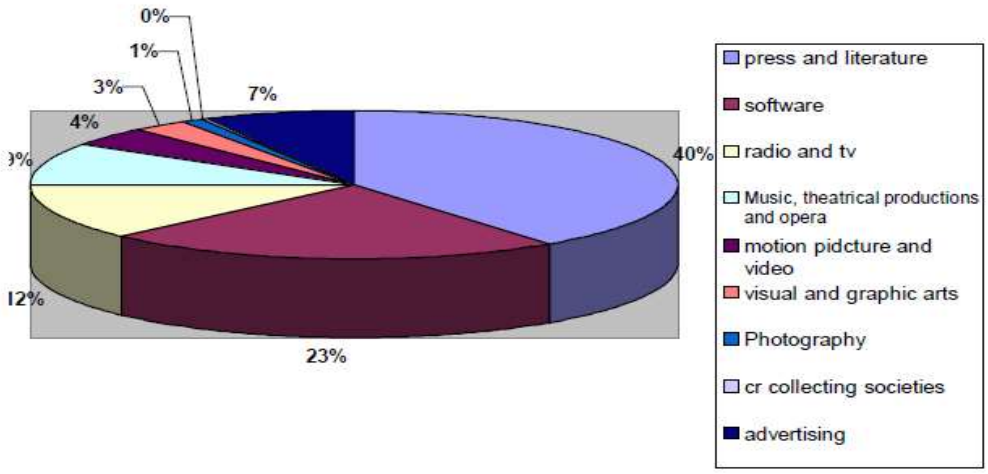
[74] http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm, accessed on Feb, 20, 2013..

[75] The estimated total public expenditure is € 46.6 billion, varying from 0.5% to 1% of national GDPs. KEA, *The Economy of Culture in Europe*, 2006. Accessed January 28, 2013. http://www.keanet.eu/ecoculture/studynew.pdf

[76] Although no comprehensive assessment at EU level exists, in the UK, for instance, private support represented around 5% of the total public support to culture in 2004. KEA (2006) – see presentation footnotes in previous studies

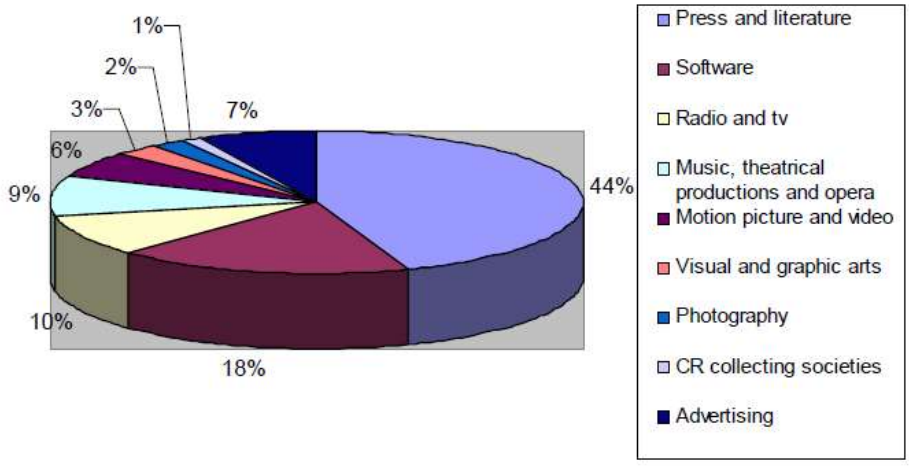
GFK Consultancy, Study conducted for the German Federal Board of Performing Arts Sector, 2004.

Figure 2 Contribution to the PGD Industry。



Source: Source: WIPO.Nantong, China, January 13-14, 2011

Figure 3. Contribution to employment by Industry



Source: WIPO.Nantong, China, January 13-14, 2011

By looking at the above charts, we can analyze that 44% of employment belongs to the press and literature sector, while 18% belongs to the visual and graphic arts industry, and in the third place comes radio and TV. We can check to make sure that this coincides with the previous graphic showing the GDP.[77]

Thanks to copyright tool, we can control the exploitation of the product on the market. Without this tool to protect inventions, all findings would be copied when sold on the market. When it comes to musical performances, choreography, and theatre, this is very important, because the first

[77] Gantchev, Dimiter. The role of the copyright in the creative industries. WIPO:China. 2011.21-32

showing, their work would lose its value because other competitors would have no fear of copying it without any scruple. Intellectual property law encourages creators and designers and is an incentive to create. The creator not only designs to commercialize his work, but often times is not even thinking about the profits, but rather thinking that his work will make history, and this must be protected. Therefore, many times it is for the act of pure innovation, rather than thinking solely for profit**.** [787980]

The creative industries are, therefore, not only economically valuable, but also function as a catalyst and provider of intangible value in other ways to the organizational processes, relationships, and dynamic and diverse economic sectors. These industries range from something as simple as designing clothing using local knowledge to something as complex and cutting edge as computer chips in Silicon Valley. In the creative economy, industry and services are increasingly merging. As mentioned by Pernille Askerud, to analyze the Asian situation: Increasingly, the cultural industry and information concerned new sectors of production and distribution (for example, production in Beijing or creative clusters entertainment in Shanghai.)[81]

We have to remember Ramanathan and the politics consideration about the document of the PCC in 2002 that said:" we have to improve the socialist culture and attend the spiritual and cultural needs under the conditions of a market economy."[82]

Nowadays, UNESCO in an article tries to make us understand that for example, Hong Kong,(Special Administrative Region of China), and Singapore, have been rising in analyzing the creative industries sector in an effort to keep their economic dynamism. Both cities have produced detailed studies; for example, a study on Creativity Index, Hong Kong and Economic Contributions of Singapore's Creative Industries, of the role and scale of the creative economy, largely adopting the analytical models developed in the UK and adapting them to take account of their local specificities. Shanghai, the most high-profile of China's more rapidly modernizing cities, is well aware of the potential of the creative industries for economic growth and in 2006 planned to initiate a comprehensive city and district mapping exercise upon which future policy decisions will be based. Furthermore, Shanghai's Creative Industry Centre is currently conducting research in cooperation with the Shanghai Intellectual Property Administration into the creative industries sector as well as a research project on how to make full use of IPRs to promote the growth of creative industries. In order to harness the opportunities offered by the creative industries, governments first need to undertake thorough mapping and statistical research to better understand them.[83]

The Agreement on Aspects of Intellectual Property Rights Related to Trade (TRIPs Agreement) may promote a significant increase in the level of protection and enforcement of intellectual property rights in developing countries. The critical issue for the cultural and creative industries is that of the copyright and related rights, especially the need to increase national law copyright and institutions. The absence of collecting societies in many developing countries is a crucial problem. The issue of protection of traditional knowledge related to cultural expressions and folklore has not yet received much attention. It is expected that loopholes in the IPR regimes will be fixed internationally by the World Intellectual Property Organization (WIPO). The Development

---

[78] Brian Fitzgerald, Copyright and the Creative Industries in China, http://eprints.qut.edu.au/2961/1/2961.pdf, Accessed on Jan, 23, 2013.

[79] Montgomery, Lucy; Fitzgerald, Brian F. (2006). Copyright and the Creative Industries in China. International Journal of Cultural Studies 9(3): 407-418

[80] Ronan Deazley. Copyright in Historical Perspective, or Six Observations in Search of an Act. University of Glasgow.2010. Accessed on Jan, 23, 2013. Available in http://www.ipr2.org/storage/Deazley966.pdf

[81] www.tdctrade.com/alert/cba-e0705e.htm Accessed January, 28, 2013-

[82] http://www.cityfringe.gov.uk Accessed January, 29, 2013.

[83] Art. UNESCO.Understanding Creative Industries Cultural statistics for public-policy making.7-8

Agenda of WIPO should review the issues of IPRs to assure the interest of developing countries development issues related to intellectual property rights.[84]

Copyright is a'bundle'of exclusive rights awarded by law to the authors of literary, artistic or musical works for a limited duration of time. Copyright protects the original expression of idea with the "soul"

Copyright law guarantees that the owner has the right to control the use of his work.

Copyright allows receiving remuneration for using the works (see Para.2, Art. 10, *CCL*)

We can define copyright as a set of economic and moral rights given to the authors to control the use of their works. It is a financial mechanism to compensate creators that is also the basic pillar for these kinds of industries and multinationals. We can say that copyright is in the creative markets in which the demand of these markets has specific characteristics, such as unpredictable consumption. There is a local and global trade through the copyright mechanism, they are income dependant and piracy has a huge impact on these industries, and that is why copyright is a necessary tool to protect the profits of these industries.

Besides, there are some problems that a creative industry has when one tries to enter into the market, some examples being low entry barriers, high fixed cost for creation and the low marginal cost of delivery, excess of supply, and the uncertainty of distribution of the products to the final customer. Likewise, the different products are a handicap, because they increase the cost in the production. They cannot generate economies of scale. [85]

Conclusion

As a conclusion, we can say that the culture and the new Communications marketing is so important nowadays, but how can they project the new inventions, the new culture, and creations, without losing Chinese culture, or how can they innovate and develop a country without taking the risk of losing its culture and traditions? Through the legislation and copyright, the folklore is an issue that also needs be protected and is still not really researched.

China is developing its relationship with the rest of the world really fast. China has undergone historic changes. As a new, emerging nation, it will stay unswervingly on the road of peaceful development and unflinchingly implement the opening-up strategy that will lead to mutual benefit and a win-win outcome. Therefore, this path differs widely from the beaten track of the Big Powers throughout history, and this also represents the nation's contributions to the world.

Secondly, China can contribute to the world in differents aspects as: its historical culture, which is one of the unique cultures around the world that has continued unbroken for thousands of years. Also, China has a long standing culture of being very independent and unique, which is the sole culture around the world that has remained uninterrupted for thousands of years. Due to the heavy influence of western culture on the world during the last few centuries, in general, there is a greater overall understanding of western culture throughout the world. Western culture refers to the culture of European origin. The term "Western culture" is used very broadly to refer to a legacy of social norms, ethical values, traditional religious belief and practice.To date, people in the world know very well the enormous contributions made by Western culture to the world, but no culture is perfect, there are always some shortcomings and disadvantages. Therefore, in a sense, the complex problems of the world have a lot to do with the shortcomings of Western culture.

Western culture is based on the civilization of Christendom, in which good and evil, beautiful and ugly things, and the legitimacy and heterodoxy are diametrically opposed to each other and cannot be reconciled.

---

[84]. Edna dos Santos-Duisenberg.The entry into force of the provisions of intellectual property rights. UNCTAD, E-Newsletter, No. 5, May 2007.74.

[85] Giné, Jaume . China, del right to copyright. Economia exterior. Número 53. 2010.4-15.

The world, however, is vivid, colorful and richly-endowed, and it cannot be simply deemed as either black or white. People in China 2000 years ago put forth an outlook of harmony with differences as they came to realize that it was impossible to get rid of diversity, and began to recognize it and proceed to co-exist with it.

The globalization phenomenon allows information to spread extremely rapidly, and sometimes this creates the risk of losing traditions and customs. The function of the copyright is to protect the author's creativity. Naturally, copying something is not always a bad thing; however, from an economical point of view, it is normal that the owner and designer or author of the creation wants to be protected. For this reason, copyright incentivizes the creation and creativity of the work.

Europe is more culturally diverse and as a developed continent already has an artistic and literary culture that is consolidated. Here in Europe, they copy programs and buy copyrights to perform TV shows similar to those in the United States, but people have plenty of cultural products and exposure, so they can simply choose the medium of entertainment, for example," that suits them the best"

In addition to being an essential driver of cultural diversity in Europe, these industries which include notably architecture, archives and libraries, artistic crafts, audiovisual (such as film, television, video games and multimedia), cultural heritage, design, festivals, music, performing arts, publishing, radio and visual arts make up one of Europe's most dynamic economic sectors.[86]

One of these industries is so dynamic and changes so fast that to invest in design is almost too risky for some of the new companies if they want to make profit in a long term. This industry is fashion, and one day it can be up and then follow down. They have to adapt extremely fast to the new market and environment, so the legislation is still developing and improving. Now, the designers do not have to go to the office to protect the design, or the artist does not have to go to the copyright office to pay a fee for the registration. If they can prove that the design or creation or picture is made by them, it is not necessary to register. This is a really good point to save the handwork and save money. Otherwise, there would be problems with fakes and plagiarism everyday in the new globalized market. The small and medium sized companies are fighting to survive everyday and they are constantly encountering difficulties and obstacles that they must overcome. The current economic crisis is also having an adverse effect on these industries, making it even more difficult for them to access the resources that they need to finance their activities and adapt to the new environment.

That is why The European Commission has elaborated the Green Paper (2010) to promote and encourage the entrepreneurial spirit in this industry. Perhaps, the main problem has always been that it has taken so long to prioritize and establish appropriate guidelines for the assistance and encouragement in this sector.

Furthermore, as part of the implementation of the European Agenda for Culture:

- A Group of experts from Member States has been working on the topic since 2008. Its mandate is now focusing on the strategic use of EU support programs, including structural funds (in 2011); export and internationalization support strategies (in 2012-2013); and good practices on financial engineering for SMEs in cultural and creative sector - A Civil Society Platform set up in 2008 produced policy recommendations, in 2010 and is currently working on topics, such as financing and taxation; Regional cohesion; Digital environment; Mobility; and Education and skills.[87].

In general terms we can conclude that both continents are working hard to promote the creative industry because this industry is not only a way to generate wealth, but is a tool to promote peace and tolerance between countries. Culture is a guarantor of peace and a basic component of the international relations. It is for that we need to promote it, to preserve and develop.

---

[86] Accessed February, 20, 2013.http://ec.europa.eu/culture/our-policy-development/cultural-and-creative-industries_en.htm

[87] Accessed February, 20, 2013.Green paper information: http://ec.europa.eu/culture/our-policy-development/cultural-and-creative-industries/green-paper_en.htm.

THE PRINCIPLES OF TAXES ADMINISTRATION

VIOREL ROŞ*

Abstract
In the management of taxes and contributions are involved three categories of professionals: government officials, economists and lawyers. Somehow or another, everyone involved decide on a significant part of the taxpayers' income and wealth who constitute the state's budget revenues. Therefore, the basic rules of tax administration should be known by everyone, including the taxpayers. And they must be applied uniformly. This requires their knowledge.

Keywords: *taxes, principles, tax administration, equitable, fair.*

Introduction

The need of principles in taxation

Nevertheless, as we know, a principle is the general rule, the basic rule or the general compulsory conduct line rule which nobody cannot avoid, only in and on the basis of an exception expressly provided by the law and that permits it.

Even that we like it or not, the state is interested in everything that people do. The state is a *habentes causam* for all our acts and facts. But we are ourselves interested in and for all that the state where we are living is doing, and taxation is the material expression of this interest.

The state and the taxpayers are in extremely complicated legal, economic, social and political relations. Each other are following, from different positions, their individual and social wellbeing, and between them should be developed a true partnership. This partnership is a modality in which it can be developed a lot of activities in the interest of the both parties, reciprocally favorable, and that is supposed to, except the right and honest intention, fully trust each other, respect, cooperative attitude, conformity between engagements and actions, making compatible the interests for the common wellbeing.

Although taxation is a field in which in Romania (also in other countries) the trust in the both partners (the state and taxpayers), which represent also the subjects of the tax law report, it was and it is extremely low, the lack of trust between them has a long history, which has made deep wounds. At the origin of the taxes most probably there is the plunder. Today taxes are just a more evaluated plunder, because it is, same as its gender, a wealth and/or income dispossession, only now the taxes are made under the law dispositions, not on the sword threat. But even at the shelter of the law, the state is still behaving as a cruel plunderer towards the taxpayer and its interests. It behaves with cruelty or without conscience, and in this way the attitude of the state raises a lot of questions regarding the fact if the state knows its own interests.

The abusive attitude of the state generates normal resistance reactions related to the Revenue Service on behalf of the taxpayers (the normal reaction is, as we know, the tax evasion), so the state is in a permanently and sometimes declared conflict with the taxpayers. The state responds to the denial, the resistance on the excessive taxes, and the escape of the taxable items in the underground, with a more suffocating regulation, with a more discretionary application of the law and with an inadequate treatment applied to the taxpayers, which in fact are the ones that make the state "living". According as the fiscal burden becomes more difficult to bear and the civic sense of the tax is less visible, the statement that the state (the modern states, not the revolute ones!) and the taxpayer are in a partnership, is as in the time of Justinian[1] same utopian (according to the Financial Law – Digests,

* Professor, PhD, "Nicolae Titulescu" University, Bucharest (viorelros@asdpi.ro).

[1] Justinian Digests have a chapter called "the tax law", that comprises rules both for fiscal debtors and for the federal agents to which was recommended *"to behave same as parents with their children, to be wise ruling the*

Justinian was asking to his federal agents to behave with the taxpayers as the parents with their children, even that in fact the taxpayers could only choose between death and the tax paying). The statement justifies Louis Aragon ascertained fact: ***"there are only two ways to govern: the power and the ruse!"***

It is obvious that there is a need for a new kind of relations between the state and the taxpayers! The tension between these two partners must be reduced, if it cannot be annihilated, and this having in mind the fact that the state cannot survive without the taxpayers, and, the taxpayers, social beings, cannot fulfill themselves without the state. The first step for a normal relation between the state and the taxpayers is to recognize that the taxpayers are not only taxes and contributions payers, but partners of the state which have the obligation to pay their taxes and also have rights. This is a normal situation because also the state – the fiscal authority has not only rights, but also obligations. The fiscal partnership cannot be the result of a convention, it has to be the result of the law, and it presumes identifying the rights and the obligations, accepting them, respecting the rights of the partner and accomplishing the obligations. Truly, only in this way it can be done a partnership between the state and the taxpayers. It is what we propose in the following: identifying the rights and the obligations of the parties in the procedure of administering the taxes.

10 years ago, the state seemed disposed to a reposition in its report with the taxpayers, since in the tax laws adopted in 2003, it made a number of rules, taxation and taxes administration principles which, if it were been better formulated, if it were been respected and properly interpreted and applied, they would be capable of conferring the state - taxpayer relationship other dimensions than those with which the State has accustomed us.

Undoubtedly the Romanian legislator was influenced at that time by the solutions and positions expressed by Romanian and foreign academics and by the importance they attach to the principles. Not so much, of course, in order that the Romanian legislator to assume the principles formulated by Adam Smith and Adolph Wagner, although they are simple and clear. And always adding to them (compare in this sense the codes adopted in 2003, with the last ones in effect: you'll see how instable the tax legislation in Romania these years was!), including its principles and formulated them in a way that causes surprise and confusion, because enable tax authorities to abuse the law and to interpret it at their will.

To recognize the need for principles, to state them in the tax laws and to require to be implemented by state agencies and the taxpayers is still an important step. And we regard it as such.

We all have to admit that taxation principles are useful for the subjects of fiscal law relations (substantive and procedural), because if they are known and applied, they *"bring an element of flexibility in applying the law; are to prevail the spirit of the law its letter, it's the common sense and justice on the mere technical by allowing to penetrate beyond the positive law, to the profound aspirations of our legal order"*[2]. But they are necessary because the state finances are governed and managed by different profile institutions (political, administrative, judicial) and with interests that do

---

disputes, to protect the innocent ones, to punish according to the law the ones that were not paying the taxes, to not take bribery". Quote Gh. D. Bistriceanu, Romanian fiscal system, University Publishing House, 2008, p. 12. The Byzantine Empire dispose of a well tax system adjusted by the Cappadocian John, Justinian treasurer, thus it is told that in that period the taxpayers which were not paying their taxes or were making the national treasury empty, or they were dyeing, so sometimes the taxpayers where choosing death as the final fiscal form resistance. As it is known, the excessive rate of the taxes during Justinian period, even that the taxes were used in order to reconstruct the empire, have generated general complaints and culminated in the year 532 with a popular revolt, which was stop with cruelty by the emperor. No wonder that at the death of Justinian the population was very poor, but very happy for Justinian death, and forgot the great achievements of the emperor.

[2] Pierre Pescatore, quoted by R. Bufan and his assistants, p. 63. P. Pescatore was a judge at the European Court of Justice for 18 years and has an important theoretical and practical contribution to the development of Community law.

not always coincide (for example: different interests of the government and the parliament), running with different backgrounds (economists, lawyers, specialists in public administration, etc.). Or, at least in principle, the institutions involved and their officials should agree, they should talk in the same "language" about this phenomenon so complicated and so important to the state and taxpayers.

As for their consistency, quality and efficiency in and for the practical work, we are not the only ones disappointed. The doctrine in other European countries where such principles are developed in law states that ***"the legal principles of taxation are far from being a coherent whole, even if some of them have constitutional value"***[3]. Should not be surprising that a lot of Romanian authors are critical regarding the way in which the principles of taxation are formulated in the tax laws in our country. But all authors agree that the right of taxation, taxation and tax law should be based and meet a few basic principles; although everyone knows even that the principles are formulated, some of them in the Constitution, others in special laws, are not always respected.

These principles are especially useful in a tax system such as in Romania today, characterized by inconsistency and unpredictability due to too many legislative changes which do not meet even the basic rules of adoption of such amendments. Principles should be properly and clearly formulated and adapted to the realities of Romania, because they, their respect and their correct implementation, are essential conditions for the development of the Romanian tax law. That is why it is necessary to dwell on them, not before stating that the legislature and theorists do not have a common view on principles, not even for their enunciation.

Taxes, fees and contributions administration principles under the Fiscal Procedure Code

The legal framework for the administration of taxes and fees imposed by the Fiscal Code is set by the legislation on the tax procedures, namely the Fiscal Procedure Code[4], which deals **within its introductory part with the principles for the management of taxes and fees.**

Examining the tax administration principles formulated in the Romanian Fiscal Procedure Code, however, we find that in reality, not all so named like this by the legislature are principles, that some are unnecessary and others are formulated incorrectly, that they do not only address to the tax administration bodies but also to the taxpayers and by the way in which their content is explained they offer rights to the state agents that can make possible an improper conduct of the state agents and such obligations that do not prevent the abuse.

At the same time, comparing the tax administration principles formulated in the Fiscal Procedure Code, the fundamental principles set out in the **Code of Ethics of the public fiscal administration operating in taxpayer assistance**[5], it appears that apart from the principle of equality, for the authors of the Code of Ethics, none of the principles of tax administration does not seem to be really important, do not seem to have a serious meaning and do not seem to be accepted as principles of the Ministry of Public Finance since all the other fundamental principles set out in the Order approving the Code of Ethics are different from the Fiscal Procedure Code[6].

---

[3] M. Bouvier – Public Finances, p. 588.

[4] The Romanian Fiscal Procedure Code is based on a draft prepared by German specialists after the German Tax Procedure Code. It was adopted in haste, by GEO no. 92/2003, in order to enter into force simultaneously with the Fiscal Code adopted by Law no. 571/2003.

[5] Approved by Order no. 137 of 19 January 2004 for approving the Code of Ethics of the public tax administration operating in taxpayer assistance, published in the Official Gazette no. 66/2004.

[6] The fundamental principles formulated in the Code of Ethics are: i) The principle of equality; ii) The principle of non-discrimination; iii) The principle of access to public information; iv) The principle of free tax assistance to taxpayers; v) Principle of transparency; vi) The principle of adaptation to the requirements of the tax authority to the taxpayers demands; vii) The principle of respect and consideration to the taxpayers; viii) The principle of confidentiality.

1. The principle of uniform application of the law (article 5 Fiscal Procedure Code)

According to article 5 of the Fiscal Procedure Code, **the tax authority** is obliged to apply uniformly the tax legislation in Romania, following a correct assessment of taxes, contributions and other amounts owed to the general consolidated budget. In reality, the principle of uniform application of the law as expressed in the Fiscal Procedure Code merely repeats almost useless, but especially unfair, in our point of view, **the constitutional principle of legality**, which is required to be respected equally by legislature, the tax authority and the judicial authority.

It is useless because it only repeat a general rule of conduct for the state bodies and officials, but also is incorrectly formulated as referring only to the tax, it may be understood that other authorities and the persons with responsibilities in the area of taxation, should not be kept to comply with this principle. Or the obligation to respect and to enforce of the fiscal law is a general one: of all the state organs and officials.

But the principle is not correctly formulated and it appears to formally limit the application field only to **"the correct assessment of taxes, fees and contributions"**, while according to article 1 paragraph 3 of the Fiscal Procedure Code, the management of taxes, fees, contributions and other amounts owed to the general consolidated budget includes *"all the activities carried on by the tax authorities in relation to: a) tax registration; b) declaration, **setting**, **verification and collection** of taxes, fees, contributions and other amounts owed to the general consolidated budget; c) **settling the disputes against the administrative fiscal acts"***. And, in our opinion, we don't believe that the intention of the legislature was to limit the scope of the principle of uniform application of the law, exclusively to the "fiscal body" and to **"the correct establishing"** of the taxes, fees and contributions.

In accordance with article 6 of the Fiscal Code, by the Order no. 877/2005[7] of the Minister of Public Finance was established within the Ministry of Finance, the Fiscal Central Committee, which has the responsibility **for making decisions about the uniform application of the Fiscal Code**, and pursuant to article 4 of the Fiscal Procedure Code, by the Order no. 1995/2007[8] of the same Minister, within the National Agency for Fiscal Administration Commission was established the **Commission for fiscal procedures**, which is responsible for **making decisions on the uniform application of the Fiscal Procedure Code**. Both commissions adopt decisions (each for their field of expertise) which are published in the Official Gazette.

The decisions taken by the **Central Fiscal Commission** represent **documents with interpretative value**, and, according to the order by which the commission was established, they *"are applicable from the date of entry into force of the legislative act considered in resolving each case"* and the Commission's decisions are *"binding and enforceable against the whole staff of the National Agency for Fiscal Administration and its subordinate bodies, from the date of publication"*.

Of course, to the legislature cannot be opposed the Commission's interpretation done by decisions, which is held in the legislative process only by the limits which are set by the Constitution. But these decisions may be opposed to judges and judicial bodies?

Regarding the judges, the answer can be only one: the interpretation of the law made by the fiscal body, if it doesn't comply with the will of the legislature, obviously it cannot hold and cannot be invoked as required. Moreover, the judge as an independent interpreter of the law can find the very existence of the conflict between the law that must apply and the Constitution and he can cause, even ex officio, the constitutionality control of the law (which may, of course, be challenged by the parts) by notification to this end, of the Constitutional Court[9].

---

[7] Replaced by Order no. 1318/2008 of the Minister of Public Finance, which was replaced by Order no. 183/2010, which was replaced by Order no. 1765/2011.

[8] Replaced by Order no. 1765/2011.

[9] See article 146 of the Constitution and the Law no. 47/1992, as amended, and also the comments on them.

But regarding the bodies with judicial activity, their independence is limited by the quality of the tax administration institutions employees, quality which is obliging them to fully implement the decisions of the two commissions. From this point of view, the tax officials and the bodies with jurisdictional activity will not even be able to avail of the provisions of article 13 of the Fiscal Procedure Code ("Interpretation of the law"), which provides that the interpretation of the tax laws should respect the will of the legislature as expressed in the law.

2. Exercising the right of discretion, freedom of management and the abuse of rights

The tax continues to be associated with coercion and oppression because it is undeniably a burden. This kind of the tax reveals the legal definition of it when speaking about it as being a *"compulsory levy, without consideration and grant, in order to meet the general interest needs"*. Sure, a different burden than robbery, taxes, tribute or requisition which preceded it and to which compared are considered a progress, but how big are the differences between taxes and levies that preceded it? The tribute, the toll were rise with the sword in hand. The tax is payable, usually willingly, and in case of refusal, are used more subtle forms of coercion and less violent: execution by seizure or sale of the properties of the tax debtor. Thus, the tax appears as an evolved tribute and some authors are even considered it as a "liberal technique" because *"is the mean to make citizens to contribute to society's needs and the needs of their own leaders, leaving them most of freedom"*[10].

The taxes, no matter how compelling they are, they should be viewed with understanding, because they and only they allow the operation of the organized societies. Therefore, whether we pay them out of conviction or because we cannot evade to their payment (even when we subtract we are risking criminal sanctions), as long as the states' economies are not sufficiently developed, and the monetary resources are not sufficient to that people should be free from the burden of taxes, they will continue to be part of our lives. And as long as they exist, the taxes and trough taxes we will limit the individual freedom, and it will be limited the freedom of the business management.

But how and why this limitation of our freedom through taxes is produced? The answer seems simple: the state raises a part of our incomes and property and wishes that the amount that is taking to be as high as possible. And in order that this amount to be as high as possible, the state restricts us the possibility to decrease the taxable matter, assuming the right to control our acts and deeds which we tend to ease our fiscal burden and to reconsider them, sometimes, according to its interests.

2.1. The ideally taxable economic reality

The state, the fisc and the legislative power, in particular, have their eyes pointed to the economic reality, because this is the matter that can be taxed, it is rooted in that and keeps them alive. In fact, however, between economic and legal reality, between taxable reality and taxed reality are significant differences for many reasons, some of which are attributable to the State, other to the taxpayers. The state and the tax authorities' aim, of course, to tax the reality and not the appearance, but the state should do the same even when the reality is less favorable than the appearance.

The state is interested on the economic reality in many respects: **it determines** by the way in which regulates social relations, **it develops** or, conversely, **makes it backwards** through its policies and measures it adopt and implement, but also **through manner and efficiency with which it manages the revenues**, of which the most important are taxes, fees and contributions.

The legal position of the State in relation to tax law, however, is difficult to classify: a third part towards the private legal relationships in which they engage the taxpayers, the state is interested in these relationships because they generate taxable matter and because the state is the eternal creditor (rarely, the state is the debtor) of its taxpayers, to which most often is linked only by relations of citizenship, without this connection to be absolutely necessary for them to have the tax debtor position. The state became a kind of an associate of each business, of each working individual and to each individual household from which raise a share of profits, income or wealth.

[10] G. Ardant, The history of tax, quoted by M. Bouvier.

But apart from the fact that the state has, directly from the power of the law, the tax credit position, the state also enjoys other privileges: not only has the law on his side (which he himself do it), but also the public force (which he also organizes and maintains), and regarding the legal tax law, governed by rules of public law, the parties are not on equal footing, the taxpayer is the one who, according to the tax law has a disadvantage to the state. The taxpayer has an obligation (fundamental duty) to pay taxes, in return for which, however, the state is not subject to consideration. In principle, to the obligation of the taxpayer to pay the tax does not correspond to a concomitant right. Of course, not this is the case of taxes and contributions, the first ones, due to the service provided by a public institution, and the contributions in order to return, in various forms (pensions, benefits, health care) to the payers.

Interested in the reality that tithed and its claims and having a discretionary power, the state has given itself also a right to control this economic reality, the acts and the facts of the taxpayers, the state has taken a right to appreciate these acts and deeds and a right to decide for itself whether these acts and deeds are in accordance with the regulations that also he has adopted and which really gave us the consent trough the representatives sent to Parliament. A power that authority often faces abuses and in front of which the defenses of the taxpayers are less.

In fact, however, nowhere in the world the states do not tax all that, theoretically, could be taxed but not only what, in fact, should be taxed. The taxable reality and the taxed reality are different things. State seeks to take as much as he can; the taxpayers seek to give as little as they can and each act according to his purpose. Therefore, to the economic reality of taxes always stands with more or less success, the legal reality, but from the latter one is a part, unfortunately, the different treatment of taxpayers and the benefits (not always, rightly) granted to some of the taxpayers by the state itself. The unmeasured greedy character of the state, in its quest for resources, it is opposed the tax resistance in various forms: some legal, some illegal.

Between these extremes there is only the middle way characterized by moderation, proportionality, dialogue, respect for the law and for the rights of others, equality before the law and authority, individual and trade freedom. And the justice is called to curb the excesses of any side of the tax law and to punish them.

2.2. Exercising the right of discretion and proportionality

Because the state is interested in the economic reality, it is recognized to the state, with a principle value, a right of judgment on the acts and deeds of the taxpayers. The principle formulated in article 6 of the Fiscal Procedure Code ("the exercise of the right of discretion") **is not found in any other regulation**, and its explanation in the Romanian Fiscal Procedure Code seems likely to establish **not a normal rule of conduct**, but a provision which can **assign to the tax authority a right and a discretionary appreciation power**.

Indeed, according to article 6 of the Fiscal Procedure Code, "***the tax authority is entitled to determine***, within the limits of its duties and competences, ***the relevance of the fiscal facts and to adopt the solution permitted by law, based on the complete findings on all relevant circumstances enlightening"***.

The agreement between the conduct of public officials and their decisions, on the one hand and the law, on the other hand, it is the duty of any officer, authority or magistracy and not just of the fiscal agent, an obligation rooted in the principle of legality, the latter being a fundamental principle in all legal systems for all branches of law. A principle established also by article 1 paragraphs 3 and 5 and article 16 paragraph 2 of the Romanian Constitution, which requires the observance of the law by all its recipients: citizens and the state, meaning by the state, its institutions and its officials. Therefore, the principle of the pre-eminence of the law should be an integral part also from the administrative and fiscal culture.

In a democratic state, the pre-eminence of the law appears as a response to the need for legitimacy, and it is necessary for the exercise of the public power. Collection of taxes, fees and contributions is vital for any state (because allows its operation), but their good management cannot

be an end in itself, but a means to materialize the rule of law in the sensitive area of taxation, which is part of our lives, both as a society and as individuals.

In the Community law, **the legality and not the exercise of discretion right, is regarded as a principle of good administration**, the idea being formulated in Recommendation CM/Rec(2007)7 of 20.06.2007 of the Committee of Ministers of the Council of Europe, addressed to Member States of the Council Europe on good administration. Article 2 of this recommendation referring to the principle of legality in the administration, which includes also the tax administration, has the following form:

*"(1) The public administration authorities **act to comply with the law**. They **can not take any arbitrary measure, even in the exercise of a discretionary power**.*

(2) It complies with all national and international rules and general principles of law that regulates their organization, operation and activity.

*(3) They **act according to the rules of jurisdiction and procedure required** by the legal dispositions governing their activity.*

*(4) They **exercise their powers for reasons of fact and law which justifies their use and with the purpose** to which **these powers were attributed to them"**.*

It follows that, in accordance with the rules of the national law, but also with those of the Community law, among the conditions of legality of the administrative acts are those that relate to their issue by the competent authority, on the basis and the enforcement of the law, because between the administrative acts and law there is a subordination report. And the Constitutional Court ruled constantly, in line with our Constitution and the case law of the ECtHR and the ECJ that the legality should be the foundation of all legal relations of the rule of law and the rule of law governs the entire activity of the public authorities.

But even if we admit, however, that the exercise of the discretion right of the tax authorities, as stated in the Fiscal Procedure Code, has the value of a principle, then we must also show that **this appreciation right can just only be limited**, because where **the right of citizen is starting, the appreciation right of the administration is ending**.

Even where the legislature uses phrases that give the appearance of discretion power assigned to the tax administration (for example the use in the law of the words "may", "is entitled" etc.), it can't be interpreted as a freedom or a power outside the law, but one of its limits. For the respect of the principle enshrined in article 16 paragraph (2) of the Constitution, the exercise of discretion right cannot be conceived outside the law. In any case, the exercise of discretion right by the tax authority, in violation of the limits of the jurisdiction, or in violation of tax law or the rights and freedoms of citizens, constitute a breach of the principle of legality and is a manifestation of excess power.

There are situations in which the tax authority is required and not just the justification to appreciate, but for the legislature seems to be no difference between the obligation to estimate and the justification to estimate. Thus, article 67 (estimated tax base) of the Tax Procedure Code, paragraph (1) provides that "*If the tax authority **can't assess the tax base, it must estimate it**. In this case we have to consider all the relevant data and documents for the estimation. Estimation is to identify those elements that are closest to the fiscal facts"* and paragraph (2) that *"Where, according to law, the tax authorities **are entitled to assess the tax base**, they will take into account the market price of the transaction or taxable property, as defined by the Fiscal Code"*.

The Fiscal Code provides situations when the fiscal authority (but also the taxpayers, for example article 81 of the Fiscal Code[11]) is required to make the necessary estimations, particularly

[11] Article 81 - Declaration of Estimated Income from the Fiscal Procedure Code have the following content:

(1) The taxpayers and unincorporated associations, which are starting a business activity during the fiscal year, are required to submit to the tax authorities a statement of revenues and estimated expenditures for the fiscal year to be achieved within 15 days date of the event. An exception to the provisions of this paragraph, are the taxpayers who receive income on which the tax is levied by deduction at source.

with regard to determining the taxable matter and its assessment when the taxpayer does not establish personal and sometimes strict criteria and limits and on which the tax may be estimated. Thus, in article 67 paragraph (2) is set as the criterion for assessing the tax base, the market price of the transaction or property. In the case of the tax documents of the economic agents that are lost, destroyed or damaged, article 213 of the Fiscal Code establish a strict rule: first, they are obliged within 30 days of the registration of loss, destruction or damage to reconstruct, based on the accounting records, the duty relating to such transactions. When not reconstituted the tax obligations of the economic operator, *the competent tax authority* ***will establish such amount by estimation, multiplying the number of the lost, destroyed or damaged documents with the media delivery excise invoices entered in the last 6 months of activity before aware of the loss, destruction or deterioration of fiscal documents***.

Things get complicated, however, when and if the tax authority shall recognize the right to assess the qualification of legal operations, interpretation of contract terms, the possibility of invoking the invalidity of legal acts etc. When, for example, his right of discretion is exercised in respect of acts or operations that are deemed to be terminated or carried out in accordance with the law and in good faith, and interpretation has different consequences in terms of tax obligations. The tax authority it could, for example, qualify a joint venture agreement as being, in reality, a lease contract under the word that this is the correct interpretation of the transactions of the parties? Could the same fiscal authority to declare as null a contract clause under the pretext that violates a mandatory provision of law or that the act is done to evade the law? Could be that the tax authorities can do only that a judge can do: to establish the simulation, nullity, to interpret the will of the parties or to conclude that the real will is not matching the declared will act?

To not recognize to the tax authority any right to assess the legality of acts and operations, means, of course, not just to deprive the tax authority from the right and opportunity to repress itself from the obvious acts of tax evasion, but putting it in a position to helpless witness to their multiplying by reproduction of the tax evasion process by other taxpayers. To recognize it a right of unlimited discretion, mean to jeopardize the legal relations and to remove even the presumption of good faith of the parties in legal documents and tax liability arising. To refuse to the tax authorities any right of assessment may have the effect of creating conditions for avoiding the payment of taxes or to conceal taxable matter through legal fireworks may not be the subject to the judicial review. To accept it unconditionally means leaving the taxpayers as secure victims of the authority.

We believe that in the exercise of the discretion right, the fiscal authority is bound by **the principle of proportionality and reasonableness**, in agreement with the use of law cannot be discretionary and the assessments, conclusions and its measures cannot be arbitrary. **The fiscal body must act in fulfilling its responsibilities, reasonable and balanced, and its decisions must ensure a fair proportion between the aim pursued and the means employed to achieve it.** The limits in which the fiscal authority had acted, can't escape to the judicial review.

2.3. Exercising the right of freedom versus the freedom of management

Exercising the right of assessment and the active role of the fiscal authority may not generate directly the examination or the influence of the taxpayers' fiscal activity and management, regardless of their quality (individual or legal entity, national or foreign), the nature of capital (private, state,

---

(2) The taxpayers who obtain income from rental and leasing of personal property must submit a statement of estimated income within 15 days of the conclusion of the contract between the parties. The declaration of the estimated income is handling at the same time with the contract between the parties.

(3) The taxpayers which in the previous year realized loss and those who have earned income for periods of less than the fiscal year, and those who, for objective reasons, expected to achieve revenues that are at least 20% from the previous fiscal year have to file at the same time a declaration of income and the estimated income statement.

(4) The taxpayers that determine the net income based on income norms and those for which the expenditure is determined in the flat rate system and opted for the determination of net income in real system shall submit, with the application of options, the estimated income statement.

mixed, local, foreign) etc., opposing to such a management intervention **the principle of freedom of administration** (management) **or the prohibition of the interference in the business management**.

The freedom of management means the right of the taxpayer who has **to act and to take management decisions that will result in reducing the tax burden, the lowest tax payment**. The principle of freedom of management is a creation of judicial practice, the priority belonging to (apparently) the Belgian and French courts, but which is found in the U.S. Supreme Court. In the doctrine, however, the idea is old and is found in a form quite close in content, long before, in "The Wealth of Nations" by Adam Smith (resumed in recent works) and applied to the U.S. Supreme Court decision mentioned before, which we will return.

The fiscal management has become for all taxpayers, an art, and a science, an industry that speaks more and even aggressive, of the „tax strategies", of „ optimizing the decisions with a fiscal impact", of „de-taxing", of "tax-planning" and even of "the eulogy that must be brought to the fiscal ability". It is recognized today that, as in the common law (civil and commercial), using concepts such as "the good father of a family" or "the prudent and circumspect administrator" in tax matters is a "good fiscal management" or a "good financial management".

The authority is everywhere, abusive and excessive, and in a permanent dispute with disgruntled taxpayers from the burden of increasing fiscal burden imposed on them by the states which continuously are looking for taxable items and for methods to increase its part. Therefore cannot be any coincidence that the science has taken a steady position and there was not only the service of the authority - who gave arguments to justify the law enforcement right, but also for improving the means and methods of taxation, criticizing and demonstrating the excesses and negative consequences - but also in the service to taxpayers, which offered solid arguments not to justify their inutile resistance tax forms, more or less violent, such as riots, antifiscale movements or illegal tax evasion in order to reduce with the means and to the shelter of the law, the tax burden which presses too much on them.

France is a good example in this way, because it is not the only country in the world who at the mid last century gave the world one of the most efficient taxes (value added tax), or the country that has experienced all the forms of tax resistance: the violent riots and evasion, by nation-wide movement (the poujadism and the nicoudism are the latest and most popular)[12], but also the country where a valuable and abundant doctrine justifies the right of taxpayers to reduce, without violating the law, the tax burden. Thus, recent French doctrine states that ***"if paying taxes is an honorable duty, the good father of a family and the good administrator also have a duty to pay the lowest tax possible, to choose the path with less taxes"***[13], and that ***"wanting to pay the highest taxes, may be for some a proof of holiness or heroism, but most will be convinced that it is, rather, a sign of lunacy, and in any case not a model of good father worth following***"[14]. But almost the same Adam Smith was expressing himself, two centuries ago, in England, and his arguments will be taken and developed by the U.S. Supreme Court judges.

The freedom of management does not exclude, but rather requires the inclusion of taxation in the calculation of tax management decisions of any taxpayer. Knowledge of the tax law by the

[12] France experienced after the World War II, two spectacular rebellions against the Revenue Service. First, in the 50s, also known as the "small riot of the bout queries" (like the peasant uprising in previous centuries), led by Pierre Poujade, a small stationery products trader, who created the "Union of Merchants and Craftsmen" and that sent the Parliament elected in 1956 an important number of parliamentarians. His movement, without a program, started in southern France and swept across the country, dressed also violent actions. The second was led by Gerard Nicoud, debuted in 1969 and had as its starting point an upmarket area of France. The adherents have created a Steering and Defense Committee, dressed also violent actions against both the Revenue Service and some politicians. Quote M. Bouvier, Public finances, p. 603.

[13] Patrick Serlooten, Business Fiscal Law, Precis Dalloz, 2006, 5th edition, p. 25.

[14] Maurice Cozian, Specific business tax, Litec, 2007, 31 edition, p. 534.

taxpayers and the tax burden resting upon them is necessary not only so that they can fulfill numerous tax purposes, but also for their decisions to be consistent with the interest to pay the lowest tax as possible, taking into account the tax liabilities they generate, sometimes the law itself giving to the taxpayers, specifically, the right to opt for one or another decision[15]. But even when the law does not expressly say, the decisions with tax consequences on the contributors may be restricted only by the mandatory provisions of law. For everything that is not expressly forbidden by law, is allowed also in the tax matters.

In a proper application of this principle, the fiscal authority cannot substitute itself to auditors or censors and cannot judge the quality or the results of the activity, even weak, of the managers of the company, not for the financial or trade management. The fiscal body cannot give management lessons to the taxpayers, not even when their decisions are wrong, any company - to be established to make profit no loss - having the right to make bad business. Company administrators can do anything in the interest of society and it is in the interest of society, even in the Romanian Fiscal Code, article 3 letter b), but granting to the taxpayers not the right to ***"follow and understand the tax burden they bear***", but the one to ***"determine the impact of their decisions on the financial management of their tax burden"***. Applications of this principle we find, moreover, in the corporate law that allowed only reviewing the legality of decisions of general meetings, and not the control of their opportunity and the case law in this area is consistent in this regard.

The principle of freedom of management requires that:

a) Taxpayers have the right to refuse, pure and simple, to make taxable matters by inactivity, by refusing to work, to obtain income or taxable income, by refusing to invest their savings or interest and bearing deposits in banks. It is noteworthy, however, that this effect (underperformance taxable matter) occurs through excessive taxation, the taxpayers are not interested in creating a taxable matter, because it is seized in (almost) entirely by the state. In this case, however, the bear and other wrong consequences of fiscal policy, because inactivity increases the number of assisted persons, hence the need for state resources, but also increases the pressure on active taxpayers that the state must make to cover the deficit and/or the need for resources, thus creating a vicious circle.

b) Taxpayers have the right to choose the path that generates the lowest tax burden. Thus, taxpayers may choose to make loans - thus increasing their spending - and when they have internal resources, have the right to manage and keep unproductive economies, have the right to acquire the property needed for the activity not at the lowest prices on the market etc. The State which, through authority unreasonable measures because they are contrary to economic realities, seeks to increase the taxable matter of the taxpayers by limiting, for example, the deductible expenses, get the opposite result expected because, on the one hand the profit for that calculated tax is not real, and secondly, because such policies are causing escapist behaviors, the whole matter being subtracted from taxes, or attitudes of abandonment of the activities, or to increase in another way the expenses and to reduce taxable matter.

c) Taxpayers have the right, uncensored by state authorities, to make mistakes, to do business or bad investments, and spend their money to non-profit and to oppose their decisions to the tax administration authorities. Wrong decisions can be censored and punished in all cases, only by those with whom the decision-maker is bound by relations under which he is liable to result, and in relation to the State, represented by the tax authority, the taxpayer has not, in principle, such obligations and cannot be penalized for not producing profit or taxable matter.

In such a case, the taxpayer might find however, if, for example, it was granted to him facilities of payment, or when the taxpayer being in insolvency proceedings has been proposed and

[15] For example, for the technological equipment depreciation, i.e. machines, tools and plants, as well as computers and their peripheral equipment, the taxpayer may elect to straight-line depreciation method, diminishing or accelerated, and in the case of any depreciable asset, the taxpayer may choose the linear or regressive depreciation method. See article 24 letters b) and c) of the Fiscal Code.

approved a reorganization plan that does not realize, the situation is governed by article 177 of the Fiscal Procedure Code.

2.4. Economic reality, freedom of management and the abuse of rights

The reason of the tax law is to provide the legal framework for determining the taxable and tax matter and to ensure the collection of revenue. That is, in a strict interpretation of the fiscal law, any attempt to reduce the payable taxable matter and the due tax can only be a violation of the law, and the act not be seen only as an act in the fraud of the law. In other words, since taxation is based on the economic reality, the tax administration has not only the tempted, but also the obligation to oppose this economic reality to a "legal reality" which reduces the taxable matter.

However, the tax law provides that a taxpayer must pay the highest tax possible, leaving it the right to choose among several possible paths, the one that generates the lowest tax obligation. In addition, **it should be recalled the fact that if the taxpayer does not pay taxes, is not his reason for being, same the state's largest tax collection as possible is not his reason for being**. Furthermore, **collecting the largest possible tax from taxpayers, except that it can be only for a short time, can have only a single and catastrophic result for the state: the disappearance of taxable matter and of the taxpayers**. Therefore, **the endless dispute between the state and the taxpayer, except that should be seen and accepted as a normal thing, is generating positive effects because it is the only way to generate positive effects, to temper the excesses of the parties and to contribute to the recovery of tax laws**.

Taxpayers, therefore have the freedom to manage an individual household or their business according to their interests, have the uncensored right to do business in a good or bad way, have the right to exploit the law and its shortcomings for their own interest and **have the right to do whatever the law does not expressly prohibit**. They have the right to choose among all possible ways, the one that generates the least tax.

However, the freedom of management recognized to the taxpayers cannot be used as to its shelter the rights of others to be disregarded, can't be made in the third parties fraud of interests, or to defraud the law. Exercising in good faith the constitutional rights and liberties is a fundamental duty for every taxpayer.

But how does it is manifested the bad faith, the abuse of rights, the fraud made in the third interests and fraud in the fiscal law? It is the taxpayer the one who tried to reduce the tax burden through legal arrangements provided and permitted by law, a criminal? And who has the right to decide that a taxpayer has reduced legally the tax burden or did it in violation of the law? Who and how can draw the line between the conduct permitted by the law and the punishable one? Can this right be attributed to an organ or an official of the tax authority, or is the exclusive attribute of justice to say right?

The abuse of law, which is the legal antonym of good faith, is a concept lacking a legal definition, an indeterminate concept, identified only casuistic in concrete situations. The lack of legal definition makes more sensitive the fiscal body position, but also of the taxpayer, except that does not have many ways to defend against interpretation by the tax authorities of his acts and the law, is placed, in the fiscal right report, in an inferiority position.

As a general rule, the fraud is an act of deception by the debtor to the creditor, the latter one reduces his heritage or causes or increases his insolvency. Whenever an act is concluded with the intent to deceive a third party, we are in the presence of a fraudulent act. Fraud, which merges with bad faith and abuse of rights, can take many forms (doctrine identified 11 forms of fraud), but likely classified into three broad categories: ***i)*** fraud committed by one side over the other Contracting Party (*de re ad rem* fraud), who has no interest in tax matters; ***ii)*** concerted fraud in order to deceive third parties who are aliens in report to the act (*de persona ad personam* fraud) and ***iii)*** fraud consisting in concealing of an act done by parts in order to evade a legal obligation (fraud)[16].

[16] See D. Gerasimos, Bona fide in the civil legal relations, Academy Publishing House, 1981, p. 91.

In case of the first two forms of fraud, ***the author or the authors act with the intent to harm another person: the co-contractor or the third party creditor***, the latter may be a natural or a legal person. In these cases, the author or the authors have the knowledge that the fraudulently act cause an injury to the co-contractor, or, where applicable, to the third party (creditor).

In the case of **the fraud to the law**, the malicious intent ***aims to circumvent the legal imperative requirements in order to purloin their application, by conscious and voluntary adoption of means which are lawful in their appearance but pointed against the obligations of legally binding rules***. The fraud to the law does not constitute a direct violation of the law, but a roundabout of it, trough the deviation of the legal provisions from their purpose.

The fraud to the law contains two elements: one material and objective, which is the process used, which in itself is not against the law, and the second, intentional, which comprises the essence of this type of fraud, which is the avoidance or evasion of an application of a determined legal text. **The fraud to the law meets and is usually committed in order to deceive the government bodies**, category which the tax authorities are belonging.

But when a legal act is done in order that the parties or just one of them to evade the payment of the tax obligations, **such act will be considered completed the law fraud or in the fraud of the interests of a third party** to the legal act concluded, namely the state, which is the tax creditor?

The obligation to pay the tax, when the event occurred or should occur, it is a legal obligation and the legal document completed in order to avoid the payment of the tax, it is an act done in the fraud of interests of the state, as tax credit, and in the fraud of the law, which establishes the obligation to pay tax on taxable material produced or that should occur. In other words, when the legal act concluded seeks to tax evasion, the fraud of interests of third parties (the State) and law fraud are in fact one and the same.

In the common law, the first **form of fraud (damage counterparty)** is punishable by the court by annulling the sly, at the request of the party who had been injured in his rights[17] and the nullity is relative, so it can be invoked within the general limitation period of three years.

If the fraud is done in order to deceive others, the fraudulent act, act in concert of the parties[18], may be terminated by the Paulian action (set aside). Such action, which seeks to protect the rights of creditors (general lien) against the bad faith of the debtor (not against his negligence) manifested by fraudulent acts will allow the action and will void the fraudulent act to the creditor. When the debtor's assets decreased as a result of **material facts**, which occurred outside his will, the creditor who feels harmed doesn't have access to a Paulian action, because there isn't the fraud concert against his action.

The category of acts that can be challenged by a Paulian action is very high, including both unilateral acts and acts of reciprocal obligations, such as donations, sale, abandoning a duty, overpayments, voluntary assignment, giving a full prescription and even the judgments obtained by the debtor defrauding his creditor etc. But from the principle that **in order to promote the Paulian action should be a reduction of the debtor wealth**, results that **if the debtor refuses to be rich, the Paulian action is inadmissible**, and this conclusion is important and has application in tax matters.

In the common law, the penalty for the acts committed for the fraud of law is the absolute nullity, but this can only be applied by the courts.

What will be the penalty and who will apply it, when the fraud to the law concerns the application of the tax law? If a court should be invested (either a civil or a criminal action), its right to declare the absolute nullity of an act made to defraud the law, at the request of the tax authority,

---

[17] See for more explanations D. Cosma, The general theory of juridical act, Scientifically Publishing House 1969.

[18] In the case of the onerous documents should be a complicity of the co-contractors in order to fraud the interests of third parties. Bona fide purchaser is protected, unless he acquired free of charge. D. Cosma, The general theory of juridical act, Scientifically Publishing House 1969, p. 355.

we believe that it can't be challenged because has an interest and therefore has a right and procedural capacity. In the case of criminal proceedings, the court is obliged to decide, ex officio, the total or partial abolition of documents, meaning also the ones committed to the fraud of law (which, of course, if the criminal actions contains facts of the law fraud in the most serious of them: crime).

Can the tax authority to control, to find the fraud, to judge and to apply the penalty or it stays exclusive the attribute of justice, who's right and power in the fiscal matter nobody contest? But we have seen that the law confers to the fiscal authority a right (exaggeratedly high) of discretion. But appreciation right is not the same as the right to find the possible fraud and to decide and apply the penalty, even if the penalty is one of "do not consider" a transaction, act, etc., because between "to not consider a transaction" and deciding that the transaction is void, through its effects, there is no difference. In fact, the theory of right abuse is the one that justifies the right of the fiscal body to retrain the acts and deeds of the taxpayers according to their economic purpose, and this right of the Revenue Service is a restriction of the enterprise management freedom.

To detect between the fraudulent act and the normal and legal management act, but also between what the law allows or stops, it is not an easy task, not a task that can be given to anyone, because it requires not only profound knowledge (legal and economic), but also experience and good faith. Here it proves the importance of the right of discretion and the limits in which it can be admitted.

Relevant for the power granted, under our Fiscal Code, to the tax authorities and for the exercise of discretion right, are the provisions of article 11 (Special provisions for the implementation of the Tax Code), which provide that:

(1) In determining the amount of a tax or charge for the purposes of this Code, the tax authorities ***may disregard a transaction that does not have an economic purpose or may reclassify the form of a transaction in order to reflect the economic substance of the transaction****.*

(1^1) The tax authorities ***may not consider a transaction*** *done by a taxpayer which was declared inactive by order of the National Fiscal Administration Agency president.*

(1^2) Also, ***are not considered by the tax authorities the transactions made with a taxpayer declared inactive*** *by order of the National Fiscal Administration Agency president. The procedure for declaring inactive the taxpayers will be determined by order. The list of the declared inactive taxpayers is published on the website of the Ministry of Finance - National Fiscal Administration Agency website and will be made public in accordance with the requirements set by order of the National Fiscal Administration Agency president.*

(2) ***As a part of a transaction between related parties, the tax authorities may adjust the amount of income or expense of any of the persons, as necessary, in order to reflect the market price of the goods or services supplied in the transaction****. The market pricing of transactions between related parties it is used one of the most appropriate of the following methods:*

a) price comparison method by which the market price is determined based on prices paid by other people who sell goods or services comparable to independent persons;

b) cost-plus method by which the market price is determined by the cost of the good or service provided by the transaction, plus appropriate profit margin;

c) the resale price method, by which the market price is determined based on the resale price of the good or service sold to an independent person decreased with the expense of the sale, other expenses of the taxpayer and a profit margin;

d) any other method recognized in transfer pricing guidelines issued by the Organization for Economic Cooperation and Development.

2.5. Taxation of the income obtained from illegal activities

The state does not seem interested in morality when it comes to his income, so that is the reason for which the income obtained from illegal activities is taxable. Of course the tax on the revenue from illegal activities is due when the illicit income will not be taken by the state as a result of special confiscation, for example.

Taxation of the income from illicit activities is justified also in the light of the principle of equality before the law and the authorities: if all income done in a professional context is taxed, how could remain untaxed the income from illegal activities. But if we admit that the income from illegal activities is taxable like the income resulted from a professional legal context, then we must admit that the expenses incurred on those revenues (illicit) are deductible.

In our law there is no express provision relative to the taxation of income obtained from illegal activities. It is believed, however, that the taxation of income obtained from illegal activities is possible under article 19 of the Tax Code, which governs the computation of taxable profit, and describes the tax base as represented by ***"the income from any source"*** (....) "***minus the non-taxable income"*** and that the ***"to the determining of the taxable income are taken into computing other similar income and expenses according to the rules of use"***, which means that also for the illegal income, the taxable income is calculated as the difference between income and deductible expenses. Budget laws also contain applications of this rule, where they provide that the illicit income are taxable and even predict the amounts to be collected under this head. For example, Law no. 11/2010, the state budget for 2010, in Annex no. 1 (detail no. 1), estimated state revenues from the taxation of illicit commercial activities in the amount of 129 thousand lei, but also the budgetary laws from the previous years contain similar dispositions.

3. The active role (article 7 Fiscal Procedure Code)

In our system of law, **the principle of the active role of the judge**, without being implicit in the Code of Civil Procedure[19], was and is considered a fundamental principle of the civil process, a principle under which the judge, whose essential function to rule the law in the conflict between the parties and in the matter that he was referred, can not leave the process to the whims of the parties, *"cannot take the sphinx position which helpless assists not to the judicial duel, but to a massacre, and he should be active in the process in order to ensure a procedural balance between the parties and thus the principle of equality"*[20].

According to Professor Ion Deleanu, from the attribute of justice as "public service" drift "formalizing" the civil trial, which implies an active role of the judge, a role that does not mean impartiality or interference in the area of parties' rights and interests[21]. In respect of this principle, the judge must give the exact qualification of the demand that he is judging in relation to its content, to lead the process, to invoke violations of mandatory rules, to give guidance to the parties, to demand explanations to the parties, to order ex officio samples, to mitigate the application of some restrictive legal dispositions, through the application of other legal provisions[22].

Criticized, especially by judges, as was alleged and admitted excessively as a reason for the extraordinary appeal, which could be promoted under article 329 of the former Code of Civil Procedure, till the abolition of this form of appeal[23] only by the General Attorney, the principle of active role proves to be useful and still needed because makes from judges the law keeper and the mediator of particular interest with the public interest, provides transparency and flexibility to the process, help the celerity of the case and the quality of justice and is likely to give the procedure the advantages which results from the parties' public dialogue with the judge. But judges and often the parties are reluctant to this principle. Judges fear of not exhibit, the parties because any active intervention of the parties it may seem that the judge demonstrates partiality.

---

[19] See article 129 Civil Procedural Code, it is considered to be implicit.

[20] See in this sense V.M. Ciobanu, Theoretical and practical treaty of civil procedure, National Publishing House, Volume I, pp. 125-136.

[21] I. Deleanu, Treatise of Civil Procedure, Volume I, second edition, p. 9.

[22] M. Tăbârcă, Civil procedural Right, volume I, p. 66-73.

[23] The Law no. 59/1993, which replaced it with the institution of the appeal on points of law.

The principle of the active role of the authority has been adopted and adapted in the management of fees, taxes and contributions field, in which two categories of obligations are in place: ***i)*** of the tax authority face to the taxpayer and ***ii)*** the tax authority in relation to its basic task: to correctly determine the position of the taxpayer and the tax burden that lies it. In this sense, article 7 of the Fiscal Procedure Code provides that:

i) The fiscal body shall notify the taxpayer of the rights and obligations laid down in the procedure according to the tax law and to guide the taxpayer in the application of tax laws for filing returns and other documents and to correct the statements or documents, whenever necessary. Assistance is done as a result of taxpayers request or at the initiative of the tax authority.

ii) The fiscal body is entitled to examine ex officio, the status quo, to obtain and use all the necessary information and documents for the correct determination of the taxpayer's tax situation, in the analysis made will be identified and taken into account all relevant circumstances of each case. It also provides that the tax authority is required to objectively examine the facts and the right to decide on the nature and volume of examinations, depending on the circumstances of each case and the legal limits.

The principle of the active role of the tax authority is in a conditioning relationship with the exercise of the discretion right, which results from the two texts explaining the law (article 6 and article 7 of the Fiscal Procedure Code). To assess the relevance of facts and adopt a legal solution, based on complete findings revealing all the circumstances, the tax authority must exercise its active role. Conversely, having an active role, fulfilling his obligations under this principle of tax administration, the tax authority may exercise the right of discretion and can adopt the right solution permitted by law, his decision must be based on evidence and their findings and be motivated (Article 66 Fiscal Procedure Code).

4. The official language in the fiscal administration (Article 8 Fiscal Procedure Code)

Article 8 of the Fiscal Procedure Code merely reaffirm the principle enshrined in article 13 of the Constitution, which states that in Romania, the official language is Romanian, and then details it.

According to article 8 of the Fiscal Procedure Code, the official language of the tax administration is Romanian. When to the tax authorities are handle in petitions, justified documents, certificates or other documents in a foreign language, the tax authorities will require that they be accompanied by certified translations into Romanian.

According to article 8 paragraph (3) of the Fiscal Procedure Code, legal dispositions regarding the use of the national minorities languages are applying properly also in the tax administration. Provisions to which the reference is made are those of Law no. 215/2001, of the local public government, which in article 19, provided that in the territorial administrative units where citizens belonging to national minorities have a share of over 20% of the total population, the fiscal authorities will provide to the citizens belonging to national minorities the right to address oral or written in their language and will communicate to them the responses both in Romanian language and mother tongue. The administrative acts are drawn mandatory in the Romanian language.

5. The right to be heard (Article 9 Fiscal Procedure Code)

Introducing with principle value in the tax administration, the duty of obedience to the taxpayer by the tax authority is undoubtedly a step in the procedure regulated by the Fiscal Procedure Code in force since 2004, because prior to that, the taxpayers **were just having the right to sign with "objections" the control acts of the fisc**[24]. However, the opinions expressed in doctrine, in this issue, are to the antipodes: while some authors consider that *"the right to be heard is, rather, an*

[24] See, in this regard, Law no. 105/1997 for solving the objections, appeals and complaints on the amounts found and applied through control or tax documents issued by the agents of the Ministry of Finance.

optional one"[25], others think that listening to the taxpayer is mandatory and constitutes a measure of its protection, a measure likely to strengthen the position of the taxpayer in relation to the fiscal body[26].

The law excludes any possibility of interpreting: obedience of the tax payer by the fiscal authority, before taken the decision is mandatory in order to give the taxpayer the opportunity to express its views on the facts and circumstances relevant to the decision and the establishment of some exceptions to this rule, not only strengthen it, but make it clearer and less likely to challenge or ignore.

Through exception to the obligation of obedience to the taxpayer, the tax authority is not obliged to conduct its hearing when:

a) causes a delay in taking the decision which endangers the real fiscal situation related to the taxpayer obligations that have to be carried on or in order to take other measures prescribed by law;

b) the facts presented will change slightly the amount of the tax claims;

c) the information presented by the taxpayer, which he gave in a declaration or an application, are accepted;

d) is to be taken for enforcement.

It follows that, except some specifically cases provided by law, the listening of the taxpayer is mandatory. Compliance by the tax authorities of this obligation must result from the act itself (the tax authority, accompanied by a declaration of the taxpayer), as, its disobedience in exceptional cases must be substantiated and be mentioned in the document prepared by the tax authority.

The absence of proof regarding hearing of the taxpayer is penalized, unless the limited cases of exception provided by law, the cancellation of the tax administration act, the requirement of obedience is one of the conditions for the validity of the act.

6. Obligation of cooperation (article 10 Fiscal Procedure Code)

In the fiscal procedure, whose purpose is to regulate the tax administration, the tax authorities and the taxpayers alike, have rights and obligations: the rights of the fiscal authorities are obligations of the taxpayer and the rights of the taxpayer are obligations of the tax authority. The tax payer obligation to cooperate with the tax authority is the reverse of the obedience obligation. If the tax authority is required to hear the taxpayer before making a decision, the taxpayer is in turn obliged to cooperate with the tax authorities in order to determine the tax status quo.

For the fulfilling of the cooperation obligation, the taxpayer must present entirely the known facts, as reality and to indicate the evidence means which are known. Also, the taxpayer is obliged to take measures to procure necessary evidence by using all legal and effective opportunities available to him. The taxpayer has the burden the proving acts and deeds which were the basis of his statements and any application to the tax authorities (article 65 paragraph 1 of the Fiscal Procedure Code).

According to article 58 of the Code, the husband / wife and the relatives of the taxpayer to the third degree may refuse to provide information, conducting surveys and submission of documents. The fiscal body shall notify the persons concerned of their right to refuse to provide information.

May refuse to provide information about the data that they acquired in their work: priests, lawyers, notaries, tax advisors, bailiffs, auditors, accountants, doctors and psychotherapists and their assistants and the participants to their work, except for the information regarding the fulfilling of their tax obligations established by law in their task. Except priests, others before shown can provide information, with the consent of the person about whom the information was requested (article 59 paragraphs 1-3 of the Fiscal Procedure Code).

---

[25] Emilian Duca, Commented Fiscal Procedure Code annotated edition, Law Publishing House, 2010.

[26] Bufan Radu and his collaborators, The tax treaty, Lumina Lex Publishing House, 2005.

We note that tax law is inconsistent with the provisions of other laws (for example: the law of lawyers, art. 11, which requires that the lawyer must keep the professional secrecy) and only apparently imposed on subjects the right to choose the conduct to follow. This, because the article 59 paragraph 4) states that "In derogation from the provisions of the above, in order to clarify and establish the actual fiscal situation of taxpayers the special departments of local public administration have the power to require information and documents with fiscal relevance or to identify the taxpayers or the taxable or taxed matter, as appropriate, and **public notaries, lawyers, bailiffs**, police, customs, community public services driving licenses and vehicle registration, community public services for issuing passports, community public services for the evidence of persons and any other entity that has information or documents relating to taxable goods or taxed, as applicable, or the people who have contributors quality, **they are obliged to provide them free of charge**".

As regards the cooperation between authorities, it is governed by articles 60-63 of the Fiscal Procedure Code as follows:

a) The public authorities, public institutions and those of public interest, local and central, and also the government devolved departments will provide information and documents to the tax authorities at their request. To the purposes of this code, the tax authorities can access online the database of those institutions for the information set based on a protocol (article 60).

b) The public authorities, public institutions and those of public interest are obliged to cooperate in achieving the purpose of the tax law. The tax authority requesting collaboration is responsible for the legality of the request and the requested authority is responsible for data (article 61);

c) The cooperation between public authorities, public institutions and those of public interest is achieved within their duties according to law. If the public authority, public institution or the one of public interest refuses the collaboration, the public authority superior to both bodies will decide. If such authority does not exist, the decision will be taken by the higher authority than the one required (article 62).

d) Based on the international conventions, tax authorities will cooperate with tax authorities from other states. In the absence of an agreement, the tax authorities may grant or seek cooperation from other tax authorities of another state on the basis of reciprocity (article 63).

Applications of the taxpayer's obligation to cooperate with tax authorities we find also in other texts. Thus, for example, article 65 (burden of proof in proving facts tax) provides that "the taxpayer has the burden of proving acts and deeds which were at the basis of his statements and to any request to the tax authorities".

7. Tax secrecy (article 11 Fiscal Procedure Code)

Disclosure of information that the fiscal administration officials collect in exercising their duties can prejudice the taxpayers. Therefore, the law (article 11 of the Fiscal Procedure Code) established for civil servants from the tax authorities, including people who do not have this quality, the obligation of secrecy on the information they hold as a result of service duties.

The information on taxes, contributions and other amounts owed to the general consolidated budget may only be submitted to:

a) the public authorities to fulfill the obligations prescribed by law;

b) the tax authorities of other countries, based on mutual terms of agreement;

c) the competent judicial authorities according to law;

d) in other cases provided by law.

The transmission of fiscal information in situations other than those noted above is permitted while ensuring that they do not clear the identity of any person or entity.

The authority receiving tax information is required to keep the secret of the information received.

Failure to keep the secret attracts the responsibility according to the law.

8. Good faith in the fiscal law (article 12 Fiscal Procedure Code)

The Constitution provides four fundamental duties of citizens: ***i)*** loyalty to the country, ***ii)*** defense of the country, ***iii)*** the obligation to contribute through taxes and contributions to the public expenditure and ***iv)*** **the exercise of rights and freedoms in good faith**.

In fact, in accordance with article 57 of the Constitution, *"the Romanian citizens, foreign citizens and stateless persons shall exercise their rights and liberties in good faith, without violating the rights and freedoms of others".* As results of its contents, the constitutional provision codifies two principles: *"bona fides"* and „*neminem laedere*".

Good faith, however, as you know, is not just a legal principle but also a moral principle aimed for the exercise of the rights and freedoms itself, regardless of the manifestation on a legal basis of the rights and freedoms of other law subjects. But as enshrined the constitutional principle relates exclusively to the individuals (Romanian citizens, foreigners and stateless persons) who need to exercise their rights and liberties in good faith, without violating the rights and freedoms of others. It follows that the provisions of article 57 of the Constitution does not apply to public representatives, who may be punished for their wrongful acts and abusive conduct by other jurisdictional mechanisms.

This does not exclude from the rules of conduct of the state agents and public authorities the obligation of reasonableness and good faith in the exercise of their duties, but such obligation does not derive from the Constitution but from the obligation of the state (through its institutions and its officials) to respect and guarantee the exercise of the rights and freedoms of citizens, where the exercise of these rights may be restricted is regulated by article 53 of the Constitution[27].

The legislature felt the need to emphasize for the tax law report parties, that the relationships between them (the taxpayer and the tax authority) must be based on good faith, in order to achieve the requirements of the law. It is, we believe, an affirmation of the idea of the partnership between the state and the taxpayer subsumed to attaining the tax law scope rather than the interests of the taxpayer.

We have seen that legal antonym of good faith is the abuse of law. In respect of the principle of good faith, if the tax authority is not acting on good faith in relation to the taxpayers, it commits an abuse of law. But the possibility of sanctioning such an act, it seems hard to imagine.

[27] Article 53 of the Constitution (Restriction of certain rights or freedoms) provides that:

(1) The exercise of rights or freedoms may only be restricted by law and only if necessary, as appropriate, for: the defense of national security, public order, health or morals, rights and freedoms of citizens; conducting criminal instruction; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster.

(2) Restrictions may be ordered only if necessary in a democratic society. The measure must be proportionate to the situation that caused it, to be applied without discrimination and without prejudice to the existence of the right or freedom.

HARMONIZING PHASE OF THE ROMANIAN LEGISLATION REGARDING PERFORMERS' RELATED RIGHTS

MARIANA SAVU*

Abstract

The Copyright System as established by the Bern Convention for the Protection of Literary and Artistic Works[1], did not provide the necessary protection to those "parties" involved in bringing the work to the public, although it represented a major role in promoting the work. So it was necessary for the legal protection to be regulated in order to allow them to benefit from the entire moral and economic attributes resulted from their work. To remedy the absence of protection due to copyright applicable traditional rules, a new protection system was created: that of related rights[2]. On international level, this led to the adoption in 1961 of the ***Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations****[3], considered in the literature[4] as arising of the Bern Convention, alongside the TRIPS Agreement and the WIPO Treaties in this filed.*

Keywords: *TRIPS Agreement, New Regulations in the field of Related Rights regarding Performers, Implementation of WIPO Performances and Phonograms Treaty, Protection of Performers, Beijing Treaty on Audiovisual Performances.*

Introduction

The Rome Convention is the result of a long-lasting process[5] initiated in 1928 during the Review Conference of the Bern Conference. The success of Rome Convention was not as strong as that of its model, the Bern Convention[6]. The difficulty to adhere to the Bern Convention was the result of the great diversity of national legislation, some still ignoring the establishment of special regulations for related rights, and others only partially acknowledging the related rights' system[7], thus explaining the small number of states that have joined the Rome Convention compared with the number of those that joined the Bern Convention[8].

The Convention covers 3 categories of holders of related rights[9]: performers, phonogram producers and broadcasting organizations.

---

* Attorney at Law, Ph. D candidate (email: liliana.savu@credidam.ro).

[1] Adopted on September 9th, 1886, completed in Paris on May 4th, 1896, reviewed in Berlin on November 13th, 1908, completed in Bern on March 20th, 1914, reviewed in Rome on June 2nd, 1928, reviewed in Brussels on June 26th, 1948, reviewed in Stockholm on July 14th, 1967 and in Paris on June 24th, 1971 and amended on September 28th, 1979.

[2] Also referred to as „neighboring rights", according to doctrines and jurisprudence – see André Lucas, Henri-Jacques Lucas, *"Traite de la propriété littéraire et artistique"*, 3 édition, Lexis Nexis, 2006, p. 695. Along with the adoption of TRIPS Agreement, the „neighboring rights" term has been largely replaced with that of „related rights", and nowadays both terms are used.

[3] Concluded on November 26th, 1961 and to which Romania adhered by Law no. 76/1998 (Official Gazette no. 148/14.04.1998).

[4] See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 979.

[5] See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 982.

[6] See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 983. For instance, France adopted the Rome Convention only in 1987.

[7] See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 983.

[8] Only 91 States adhered to the Rome Convention (See Annex no. 1 – p. 46), compared with 166 States, which adhered to the Bern Convention.

http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17
http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15

[9] Art. 1.

Unlike the Bern Convention, the Rome Convention lays down precise definitions of the protected persons[10]. Thus, the performers are defined as follows[11]: actors, singers, musicians, dancers and other persons, who represent, sing, recite, declaim, play or otherwise perform literary or artistic works. The definition of performers is not a restrictive one[12] as that of phonogram producers[13] or of broadcasting organizations[14], being the only one upon which the Contracting States may, by the national legislation, extend the protection provided by the Convention to the artists who do not perform literary r artistic works[15].

In the specialty literature[16] it was considered that the minimum protection offered to the performers by the Convention is relatively modest; thus the rights granted to the performers by the Convention mainly refer to the fact that they can prevent any fixation or recording of their unfixed live performances, so any movie or sound recording could not be performed without the approval of the performer. In practice, this means that a performer can have an exclusive contract with a production company for the recording of his/her performances. Once the recording has been made, the performer may prevent its reproduction: when the original fixation was made without his/her consent, when the reproduction is made for other purposes than those for which the performer already gave his/her consent; if the recording is permitted by national law for certain purposes[17]. Thirdly, the performers may prevent broadcasting or communication to the public of their live performances, if they have not authorized such ways of using their performances. This right is applicable only upon live performances, and not upon those where the performance used for broadcasting or for communication to the public is already broadcasted or made from a fixation[18].

The rights of broadcasting or communication to the public of fixed phonograms offered to the public for commercial purposes are established as rights to an equitable remuneration[19].

The modest protection offered by the Convention to the performers considers, on one hand, the fact that some States do not have to acknowledge them as exclusive rights, and, on the other hand, the States are free to establish or not, by their national legislation, *"the methods by which the performers shall be represented in terms of the exercise of their rights, when a greater number of them share the same performance"*[20]. As appreciated within the specialty literature[21], the Convention itself inflicts its own limits as it reduces protection in audiovisual broadcasting[22].

---

[10] A se vedea *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984.

[11] Art. 3 (a).

[12] See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984.

[13] Referred to as "restrictive" in the specialty literature (see *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984);

[14] Referred to as "double restrictive" in the specialty literature (see *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984).

[15] Art. 9.

[16] See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1003; H. Desbois, A. Francon, A Kerever, *"Les conventions internationales du droit d'auteur et des droits voisins"*, Dalloz, 1976, p. 281.

[17] Art. 15 (1):

a) when it comes to private use;

b) when using short parts, while reporting current events;

c) when having an ephemeral fixation, made by a broadcasting organization through its own means and for its own shows/broadcasts;

d) when it is used only for education or scientific research.

[18] Art. 7.

[19] Art. 12.

[20] Art. 8.

[21] *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1004.

[22] Art. 19: Without taking into account any other provisions of this convention, the provisions of art. 7 shall cease to be applicable as soon as a performer will be given his/her consent for his/her performance to be included in an image fixation or or in an image and sound fixation.

Actual Content

1. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

The related rights system was introduced for the first time in the Romanian legislation[23] by the Law no. 8/1996 regarding copyright and related rights[24], based on the Rome Convention[25].

The Law no.8/1996 (art. 92)[26] translates into a clear manner the coexistence rule[27] of the copyright with the related rights as provided by art. 1 of the Rome Convention: *"The protection provided by this Convention leaves intact and does not affect in any way the protection of copyright upon the literary and artistic works. Consequently, none of the provisions of this Convention shall be construed as affecting this protection"*.

The performers' definition provided by the Rome Convention was taken by Law no. 8/1996 (art. 95) as follows: **actors, singers, musicians, dancers and other persons who present, sing, dance, recite, declaim, play, perform, direct, conduct or execute in any way a literary or artistic work, a show of any kind, including folklore, varieties, circus or puppet shows**.

Performers' definition involves a detailed analysis:

- For instance, the director of a theatre play or of a show (including opera or operetta) is included in the category of performers, unlike a movie or audiovisual work director who, according to art.66 of Law no.8/1996, is considered as author of the same. Including the director of a play or a show seems to have originated in the provisions of the above mentioned art. 9 of Rome Convention, the same being also practiced at the level of other EU countries, for instance France, although art. 9 of the Convention refers in its title to the circus and variety artists.

- Within the specialty literature, performers' definition from Law no. 8/1996 was not construed as a whole, it was seen either declarative[28], or limitative and in accordance with the text of the Rome Convention (art. 3)[29]. In other States, for instance in France[30], the definition seems to be clearer and more restrictive: *"except the additional/auxiliary performers [31](extras) considered as such according to the professional usage, the performer is the person who presents, sings, recites, declaims, plays or performs in any other manner a literary or artistic work, a variety, circus or puppet show"*.

- Including variety and circus artists within the performers' category, although they do not perform or execute a spiritual work[32], is also motivated based on the provisions of art. 9 of the Rome Convention.

- The difference in tone between the notion of "performing artist" and that of „performer"[33] takes into account the fact that the first applies to artists playing individually a song (soloists) and to

---

[23] Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *"Copyright and Related Rights - Treaty",* All Beck Printing House, 2005, Bucharest, p. 461.

[24] Amended and supplemented by Law no. 285/2004, O.U.G. no. 123/2005 and Law no. 329/2006.

[25] The Rome Convention ratified by Romania by Law no. 76/1998 for Romania's accession to the Rome Convention (1961) for the protection of performers, of phonogram producers and of broadcasting organizations.

[26] Copyright related rights shall not affect copyrights. Drepturile conexe dreptului de autor nu aduc atingere drepturilor autorilor. None of the provisions of this title shall be construed as a limitation of exercising the copyright.

[27] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 463.

[28] Ioan Macovei, *"Intellectual Property Right",* 2nd Edition, C.H. Beck Printing House, 2007, Bucharest, p. 388.

[29] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 466.

[30] Art. L. 212-1 from the Intellectual Property Code.

[31] For instance, the performer who read the scenario within a movie. The auxilliary artist (extras) differs from performer, not only by the complementary, accesory feature to his/her role, but above all because his/her personality does not translate into his/her performance

[32] Ciprian Raul Romiţan, Mariana Liliana Savu, *"Performers' Rights"*, Universul Juridic, Bucharest, 2008, p. 53.

[33] Which difference does not exist in the common (Anglo-Saxon) law, the used terminology being that of "performer".

those performing works (actors), while the second applies to the artists collectively performing musical compositions (conductors, musicians in a group etc). Of course, a performing artist can also be a performer. During the deliberations on the Rome Convention, it was agreed that leaders of instrumental or vocal bands should be included in the performers' category.

- Long debated in the specialty literature is the extras' category[34]. Some authors assert that both theatre and movie extras are not considered as holders of related rights, the boundary between an extra and a real performer being determined by professional usages[35]. On the other hand, other authors state that extras might be included in the category of holders of related rights, provided that their role and position in the general assembly of the show is essential for transmitting the message and for unambiguously causing its transmission[36].

Given the existing examples in other EU countries, such as France, that extras cannot be considered as performers, it is argued, on the one hand, ancillary, complementary to their performance and, on the other hand, on the exhaustive nature of the definition of performers as it is provided by the Law no. 8/1996.

- Another category of artists who raised issues in practice is that of those who "recite". Normally, according to the definition, reciting means saying aloud, from one's memory, a text (poetry or prose). So, recitation involves a text, and not any kind of text, but a poem or a fragment of prose, meaning an intellectual property right. The same is also the solution implemented by Law no. 8/1996, namely: *„(...) recites (...) a literary or artistic work (...)"*. As a consequence, those who present news/weather/various radio or TV shows cannot be included in performers' category. Of course, one can counter-argue by the fact that such a person brings his/her personal contribution to the recitation activity, but what is recited, within the presented cases, does not constitute a work of intellectual creation. However, that activity does not involve further asset exploitation, so those people cannot be granted adequate remuneration.

Given the foregoing, it is necessary to frame and analyze the category of performers from case to case, as well as to develop at the national level some codes of conduct[37] with the professional associations and organizations of performers, which are designed to contribute to the enforcement of the related rights of performers.

Performers' right to an equitable remuneration for broadcasting and communication to the public of their performances and interpretations as provided by the Rome Convention (art. 12) is translated in the Law no. 8/1996[38]. As well as, the exclusive property right to authorize or prohibit the fixation of his/her performance or execution, understanding by fixation: *"incorporating sounds, images or sounds, and images or their digital representation on a support which allows them to be perceived, reproduced or communicated to the public by using a device"*.

Compared with copyrights and with the collective management forms, *de lege ferenda* is necessary to analyze art. 96 and art. 123^1 - 123^2 of the Law no. 8/1996 referring to the property rights of performers and their management forms. Thus, both for the performers and the phonogram producers the right for making available to the public of their phonograms and performances is separately covered by the property rights, but this right is not provided by articles 123^1 - 123^2 , which refer to the collective management forms, either mandatory or optional, covering only the public communication right. In this respect, detrimentally to the performers, it was concluded that such a right is not mentioned under any of the forms of management and thus it should be managed based on a special mandate. Such an opinion is inacceptable in relation to the provisions of art. 96.

---

[34] See extensive *Ciprian Raul Romiţan, Mariana Liliana Savu*, op.cit., p. 51-53.

[35] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 466.

[36] Ligia Dănilă, *"Extras – subjects of related rights or just a background?",* Romanian Magazine for Intellectual Property Right no. 4/2007, p. 20-25.

[37] Art. 139 paragraph (19) of Law no. 8/1996, with subsequent amendments and supplements.

[38] Art. 98 paragraph (1) items g)-g)[1].

Consequently, *de lege ferenda* is necessary to distinctively regulate the right of making available to the public, i.e. to amend art. 15 of Law no. 8/1996, as well as to include this right within the category of the optionally managed rights, i.e. to amend art. 123^2 of Law no. 8/1996.

However, *de lege ferenda* is necessary to correlate art. 123^1 paragraph (1) item f) regarding the right to an equitable remuneration which is acknowledged for the performers and phonogram producers for the communication to the public and broadcasting of commercial phonograms or of their reproductions, with art. 123^2 paragraph (1) item f) regarding the right to an equitable remuneration which is acknowledged for the performers and phonogram producers for the public communication and broadcasting of phonograms published or reproduced for commercial purposes. In fact it creates a false distinction between commercial phonograms and the phonograms published for commercial purposes, when, in fact, such a distinction does not exist, because all phonograms are published for commercial purposes[39]. This is the meaning of the definition of phonograms, according to art. 3 item b) of the Rome Convention and with art. 103 of Law no. 8/1996[40], and in compliance with the provisions of WIPO Performances and Phonograms Treaty (art. 2(e), 8, 9, 12, and 13), in the sense that they consider that only fixed copies of the phonograms may be put into circulation as tangible objects. *De lege ferenda*, in order to eliminate any prejudice brought to the performers as a result of their use, appears more than necessary to define the phonograms published for commercial purposes. Such a legislative proposal may be regulated as follows: At the art. 106^5, insert after paragraph (4), a new paragraph (5) with the following content: *„For the purposes of this Law, it shall be deemed that a phonogram is published for commercial purposes when its copies are offered to the public in a sufficient quantity."*

The analysis of the implementation of Rome Convention into the Law no. 8/1996 leads us also to the art. 8 of the Convention, which considers the methods that States can adopt, by which the performers will be represented in terms of the exercise of their rights, when a greater number of them share the same performance. Correlatively, Law no. 8/1996[41] establishes that the interpretation or performance of a work is collective, if the individual performances form a whole, without the possibility, given the nature of the performance, to assign a distinct right to any of the participating performers upon the overall interpretation or performance. In order to exercise their exclusive rights regarding the authorization provided at art. 98 of Law no. 8/1996, the performers participating collectively in the same performance, such as members of a musical band, a choir, an orchestra, a ballet or a theatre troupe have to empower in writing a representative among them, with the consent of their majority, except the director, conductor or soloists.

Limiting the voting right of performers who participated in a joint performance or execution to a single vote by an assigned representative (art. 129 paragraph 2, 2nd Thesis), seems to have originated in the above Rome Convention, but it cannot be justified by the notion of exercising the rights because it takes into account the exercise of the property rights, meaning those to authorize and prohibit, or of the right to an equitable remuneration. As long as this rule is constituted by a holder of rights who granted a mandate to the collective management organization, i.e. one vote within the General Assembly,[42], then the legal provision by which performers who participated in a joint performance or execution have a single vote by their assigned representative seems to be a limitation of their right to vote. *De lege ferenda*, this provision might be removed from the Law no. 8/1996 or provided in the statutes of the collective management organizations in this field, also taking into

[39] Art. 106^5 paragraph (1) referres to the phonograms published for commercial purposes.

[40] It is considered a sound or phonogram recording, the fixation of sounds from a performance or of otger sounds or of digital representation of these sounds, other than in the form of a fixation incorporated in a cinematographic work or in any other audiovisual work.

[41] Art. 99.

[42] Art. 129 paragraph (2).

consideration the draft Directive regarding collective management[43] according to which any restriction regarding members' rights to attend to and vote within the General Assembly must be acceptable and pro rata and should be based on the following criteria: duration of membership and remunerations paid or payable to a member in relation to a certain financial period of time. These criteria shall be provided in the Statutes of the collective management organizations and shall be made available to the public.

The provisions of Law no.8/1996 regarding performances of an artist based on an individual employment contract are in accordance with the international regulations, and the property rights transferred to the employer should be expressly provided for in this employment contract. This provision is also in compliance with those regarding the agreement on transfer of economic rights[44], which must include, among others, the transferred rights in detail.

Analyzing the implementation of the provisions regarding performers within the Romanian legislation leads us to one of the gaps in the Law no. 8/1996. Thus, the Law does not refer to the transfer of exercise of performers' property rights subsequently to their death. The art.97 of Law no. 8/1996 refers only to performer's moral rights, which exercise, according to the civil law, is transferred by inheritance after the performer's death, on an unlimited period of time. If there are no heirs, the exercise of such rights shall go to the collective management organization that manages the rights of the performer or, where appropriate, to the organization having the largest number of members from that field. These provisions are compliant and correlated to the ones regarding authors (in art. 25) only regarding the moral rights; there is no such provision for the property rights. *De lege ferenda*, is necessary to supplement art. 97 paragraph (2) of Law no. 8/1996 with specifications regarding the property rights, as follows: *"After the death of performer, his/her exercise rights under the art. 96 and art. 98 are transmitted by inheritance, as per the civil law, on an unlimited period of time. If there are no heirs, the exercise of such rights shall go to the collective management organization that manages the rights of the performer or, where appropriate, to the organization having the largest number of members from that field"*.

As stated in the specialty literature[45], in absence of heirs, the collective management organization is granted only the exercise of the rights, meaning the right to authorize or prohibit performances' use, in accordance with the property rights as provided by art. 98. This means that the said collective management organization shall authorize such use under art. 98, shall collect appropriate remunerations and shall distribute such remunerations to the members of the collective management organization, according to the provisions of the Statute, and withholding the appropriate administrative fee. Practically, any other activities, in contradiction with said activities of a collective management organization are in conflict with provisions of the art.134 align. (2) lit. f) *("the amounts resulting from unclaimed and undistributed remunerations deposited in bank deposits or from* ***other operations within the limits of its object of activity****, as well as those obtained by way of loss or damage as a result of or related to copyright or related rights infringements,* ***are entitled to and distributed to right holders and may not be considered as revenues of the collective management organization****"*) and paragraph (3) of Law no. 8/1996 (*"****The remunerations collected by the collective management organizations are not and should not be treated as their revenues****"*).

---

[43] On July 11th, 2012, the European Commission adopted the draft Directive on the collective management of copyright and related rights and on the multi-territorial licensing of the rights upon musical works concerning their online use on the internal market.

[44] Art. 41.

[45] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 299.

Another important element determined in practice by the accession of Romania to the Rome Convention was the possibility of the collective management organizations[46] to represent, based on reciprocity agreements, the rights of artists from abroad.

2. TRIPS Agreement – Trade Related Aspects on Intellectual Property Rights

2.1. History

After the Rome Convention, two significant developments were registered in the related rights field: the first one considers the appearance in 1994 of the TRIPS Agreement, and the second one by adopting in 1996 the WIPO Performances and Phonograms Treaty.

The TRIPS Agreement[47] is part of the Agreement establishing the World Trade Organization (WTO), signed on April 15th, 1994 in Marrakesh, which Agreement is administered by WTO. It terms of intellectual property, the Annex IC is relevant to this Agreement which provides minimum standards for various regulations in the field of intellectual property, regulations that have to be applied in the WTO Member States. At the same time, TRIPS represents one of the most important multilateral instruments concerning the globalization of the rules in the field of intellectual property, and as far as the copyright and related rights are concerned, this agreement includes many provisions that are to be found in the Bern Convention[48].

Adopting the TRIPS Agreement represented an important step for the protection of neighboring/related rights[49], being considered in the specialty literature[50] as a large-scale text as its applies to both copyright and related rights and to other intellectual property rights (trademarks, designs and models, patents and so on). The agreement involves many features compared to traditional conventions[51]: the first derives from its purely economic logics of free competition, similar to that of Community law, the importance of the commercial interest of states; the second derives from the "modernist ambition" of the Agreement to cover various gaps criticized in the classical conventions for their lack of realism and their failure to adapt to new technologies; the third derives from the strictly "journalistic" feature of the Agreement, implementing a more efficient regulatory system than the one in the conventional agreements.

The Agreement has not been adopted in order to replace the Rome Convention; this is stipulated in art. 2.2 which shows that TRIPS does not affect any of the obligations of contracting states under the Rome Convention. The TRIPS Agreement regulates the national treatment, but does not require WTO member states to join or to implement the Rome Convention, instead establishes a set of minimum protection standards[52] that member states must implement and which are similar to those provided by the Rome Convention; in this respect in the specialty literature[53] it was stated that in this manner the Agreement came closer to the substance of the Rome Convention. Thus, art. 14 regulates the rights of performers, phonogram producers and broadcasting organizations, but with some important changes:

---

[46] CREDIDAM, within AEPO-ARTIS, signed bilateral agreements for reciprocal representation with partner collective management organizations.

[47] The Agreement entered into force on January 1st, 1995 providing, for mandatory application, flexible periods by signatory countries, ranging from a year as a general term and up to five years for developing and transitory countries (valid period even for Romania) and to ten years for less developed countries. Except articles 3, 4 and 5 of TRIPS agreement which had to be applied also by Romania under the general term of entry into force with mandatory applying term of 1 year (i.e. from January 1st, 1996), the remaining TRIPS articles became mandatory for Romania as of January 1st, 2000. This Agreement was ratified by Romania through the Law no. 133/1994 for the ratification of Marrakech Agreement regarding the establishment of World Trade Organization.

[48] http://www.orda.ro/default.aspx?pagina=208

[49] Starting with this date they were also called as „related rights" (into English).

[50] *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1008.

[51] *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1009.

[52] Art. 14.

[53] *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1026.

- the producers of phonograms are guaranteed the right to rent their phonograms, which means that they can authorize or prohibit the rental for commercial purposes to the public of the original or copied phonograms.

- the term of protection granted to performers and phonogram producers was modified, thus it could not expire before the expiration of the 50 years period from the end of the year when the performance took place, i.e. when the fixation was made.

The Agreement contains important provisions regarding enforcement measures and disputes settlement.

As far as performers are concerned, according to art. 14.1, they are able to prevent unauthorized fixation of their performance in a sound recording, for instance on a CD. Fixation right under the Agreement applies only to audio fixations, not to audiovisual ones. This means that artists should be able to prevent the unauthorized recording of their concerts, but actors do not have the same opportunity to prevent the unauthorized filming of their performances. At the same time, artists are able to prevent the reproduction of such fixations of their performances, as well as the broadcasting and communication to the public of their live performances.

Art. 14.6 refers to exceptions and limitations to the rights of performers, which are in accordance with the Rome Convention, such as, for instance, the private copy.

Given the above, the standards imposed by the Rome Convention were improved by the TRIPS Agreement as far as the performers are concerned.

General obligations imposed on States by the TRIPS Agreement regarding the enforcement measures are: administrative and civil measures, ways of appeal, provisional measures, measures provided to the states' borders and criminal proceedings.

2.2. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

The TRIPS Agreement was implemented by the Law no. 8/1996 regarding performers, the legislation being harmonized at this level: duration of protection, rights, limitations, exceptions and sanctioning measures. Regarding the latter aspect, it is necessary to **analyze legal liability for infringement of the rights of performers**[54]. This subject matter is incorporated by the Chapter III, Section II, art. 138^7-145 of the Law no. 8/1996, with subsequent amendments and supplements.

Infringement of performers' rights incurs civil liability, either administrative or criminal, as appropriate[55], and artists may request to the Court to order, as applicable: the acknowledgment of their rights, determining the violation of the said rights and the compensation for caused damages. In **determining damages**[56], the Court has to take into consideration the criteria provided by art. 139 paragraph (2) of the Law no. 8/1996; however, to avoid any wrong construe of this article, *de lege ferenda*, it should consider the following wording:

"In determining compensations, the Court takes into consideration:

a) criteria such as negative economic consequences, especially the lost profits, unjust profits made by the offender and, when appropriate, other elements beside the economic factors, such as moral damages incurred by the right holder;

b) if the criteria set out at item a) above can not be applied, there will be granted damages representing three times the amounts which would have been legally payable for the type of use subject to the illegal act."

For full coverage of the property or moral damage and in order to eliminate the exposure to danger, the performers may ask the Court to order the implementation of any of the **remedies** provided by art. 139 paragraph (14) of Law no. 8/1996: submission of returns achieved by the

[54] *Ciprian Raul Romiţan, Mariana Liliana Savu*, op. cit., p. 111-122.
[55] Art. 138^7 paragraph (1).
[56] Defending the rights by the means of civil law.

unlawful act, destroying the equipment and tool owned by the perpetrator, shutdown/removal from the market/commercial circuit and spreading the information about the decision of the Court.

Precautionary measures may be ordered by the Court pursuant to art. 139 paragraph (3) and the following of the Law no. 8/1996 and they are divided into 5 categories: for preventing an imminent damage (provision of security, payment of fines), providing for damage repair (measures taken upon movable and immovable assets, blocking bank accounts and so on), seizure or surrendering to competent authorities the goods suspected of infringement of a right in order to prevent their introduction on the commercial market, measures to ensure evidence or findings of a state of facts[57], seizure of objects and documents that constitute evidence of the infringement of rights[58].

The administrative liability is provided at art. 139^2 – 139^4 of Law no. 8/1996, with subsequent amendments and supplements. For the performers, the administrative offenses provided at art. 139^2 are applicable, namely:

d) if users fail to comply with the provisions of art. 130 item h);

e) in case of fixation of their artistic performances or of broadcasted radio or TV shows without the consent of the holder of rights acknowledged by this law.

The administrative punishments provided at art. 139^2 are also applicable to legal persons. If the offender, a legal person, performs activities which involve, according to its object of activity, the communication to the public of works or products bearing copyrights and related rights, the penalties limits are twice increased. Administrative offences and sanctions are found and applied by officers or police agents within the Minister of Administration and Internal Affairs with relevant expertise in this field. The offender can pay, within 48 hours of receipt of the minutes of finding the offence, half of the minimum fine provided.

The art. 139^4 paragraph (1) of the Law no. 8/1996, is problematic in practice: Constitute an offence, if not a crime, and they are punishable by a fine of RON 10.000 up to RON 50.000 and seizing pirated-goods or access control pirated devices, the facts/acts carried out by natural or legal persons authorize to allow access inside the premises, to the equipments, to the transportation means, to private goods or services, in order for another person to commit an offence or violation provided by this law – in the sense that the listed facts are minor, if not criminal, or there can be no facts that would constitute, at the same time, offenses and crimes, because the degree of social danger of an act is determined only by the legislator, when regulating certain acts as crimes and others as offences[59]. In this regard, it is necessary for *de lege ferenda*, to appropriately amend art. 139^4 paragraph (1) of Law no. 8/1996.

Defending performers' rights by means of criminal law[60] includes analyzing the offences' content regarding the related rights of performers and the defense procedural means. As a general rule for such offences to exist, is that **acts are performed without the authorization or consent of performers**[61]. The active subject might be any natural or legal person who fulfills the requirements provided by law for criminal responsibility and the passive subject is the representative of the performer.

This subject matter is incorporated by art. 139^6, art. 139^8, art. 140 and art. 143 of Law no. 8/1996, with subsequent amendments and supplements. Thus constituting crimes **the facts carried out without the consent of the holders of related rights: making available to the public**, including via Internet or by other computer networks, of products bearing related rights[62], so that the

[57] Art. 139 paragraph (6).
[58] Art. 139 paragraph (10).
[59] Bucharest Court of Justcie, Decision no. 1866/1998.
[60] *Ciprian Raul Romiţan, Mariana Liliana Savu*, op. cit., p. 119-122.
[61] *Ciprian Raul Romiţan, Mariana Liliana Savu*, op. cit., p. 119.
[62] Art. 140 paragraph (2): We understand by products bearing related rights any artistic fixed performances, phonograms, videograms and shows or services of programs owned by broadcasters and TV organizations

public can access them freely at any place or at any time elected individually; **reproduction** of products bearing related rights; **distribution, rental or import** on the internal market o products bearing related rights, other than the pirated-goods[63]; **public communication** of products bearing related rights; **broadcasting** products bearing related rights; **cable retransmission** of products bearing related rights; **fixation for commercial purpose** of artistic performances or of broadcasted radio or TV programs.

Given the issues raised in regulatory practices as crimes of some facts provided by art. 140 of Law no. 8/1996, with subsequent amendments and supplements, *de lege ferenda*, it should be necessary the regulation as offences (art. 139^2) of the following facts: the public communication of phonograms and performances without paying the equitable remunerations due to producers of phonograms and performers, as well as the possession of pirated goods at the premises of legal entities, to be used for unauthorized public communication.

3. Implementation of WIPO Performances and Phonograms Treaty[64]

3.1. History

An important aspect not covered under the TRIPS Agreement was the need to update the substance of related rights regarding the online use based on digital technology and Internet. This was regulated by WIPO Performances and Phonograms Treaty, signed on December 20th, 1996[65]. The number of states (90) that have ratified the Treaty is compared with that of the countries that have ratified the Rome Convention (91)[66]. The principle of national treatment provided by the Rome Convention is also overtaken by WPPT (art. 4) and as we can see from its title, it takes into account only performances and phonograms, not the radio and television organizations.

WPPT includes **updated definitions** (art. 2) of those provided by the Rome Convention:

- **performers**[67]: actors, singers, musicians, dancers or other persons who present, sing, tell, declaim, play, perform or execute in any way a literary or artistic work, or folkloric expressions.
- **publishing a fixed performance or a phonogram**[68] - making available to the public copies of fixed performances or copies of a phonogram with right holder's consent and provided that the copies are made available to the public in a sufficient quantity;
- **broadcasting**[69] - wireless transmission of sounds or images, or of sound or their representation, for the public to receive them; this term also covers such a transmission via satellite; transmission of encoded signals is treated as broadcasting if the decoding means are provided to the public by the broadcasting organization and based on its consent;
- **communication to the public of a performance or phonogram**[70] - transmission to the public by any means, otherwise than by broadcasting, of sounds coming from a performance or of sound or representation of sounds fixed on a phonogram. For the purposes of art. 15, the expression 'communication to the public' includes to make audible to the public either the sounds or the representation of sounds fixed in a phonogram.

Considering the above, the influence of new technologies upon the definition of broadcasting and communication to the public, is obvious.

---

[63] Art. 139^6 paragraph (8): We understand by pirated goods: all copies, no matter the support they are on, including covers, recorded without the consent of the holder of rights or of the person legally authorized by him/her, and which are directly or indirectly, totally or partially copied from a products bearing copyrights or related rights, or from their packaging or covers.

[64] Hereinafter referred to with the English abbreviation WPPT.

[65] Ratified by Romania by the Law no. 206/2000.

[66] See Annex no. 2 – p. 47.

[67] Art. 2 item a).

[68] Art. 2 item e).

[69] Art. 2 item f).

[70] Art. 2 item g).

It is interesting the specification of folklore expressions in the definition of performers, as they are from the adoption moment of WPPT, explicitly introduced in the definition, being a signal indicating that related rights play an important role in the protection of unrecorded cultural expressions. Performers play a vital role in communicating these expressions to the public, thus protecting their performances and any records made in this occasion indirectly protect folklore.

The rights granted to performers are the **moral ones** (**the right to paternity** – of pretending to be mentioned as such, unless the use of the performance requires the omission of this specification; **the right to integrity** – of being against any distortion, mutilation or other modification of its performances that would damage his/her reputation) and, additionally, **WPPT updates the property rights upon performances**:

- **unfixed ones**: the performer has the exclusive right to authorize fixation of his/her performance, and consequently, the exclusive right shall also be applied upon the right of broadcasting and communication to the public, unless the said performance is a broadcasted performance.

- **fixed ones**:

- **the reproduction right**[71] - the performers enjoy the exclusive right to authorize the direct or indirect reproduction of their performances fixed on phonograms, regardless the way or form of reproduction.

- **the distribution right**[72] – the performers enjoy the exclusive right to authorize the making available to the public of the original or copies of their performances fixed on phonograms, either by sale or by any other transfer of property. None of the WPPT provisions bring prejudice to the possibilities that the contracting parties have for determining any conditions under which the exhaustion of the distribution right applies after the first sale or after another transfer of property operation of the original or of a copy of the performance or of the fixed performance, carried out with the consent of the performer.

- **the rental right**[73] – the performers enjoy the exclusive right to authorize the commercial rental to the public of the original and copies of their performances fixed on phonograms, even if they were previously distributed by the performers themselves or with their consent.

- **the right of making available to the public**[74] – the performers enjoy the exclusive right to authorize the making available to the public, by wire or wireless means, of their performances fixed on phonograms, in such a manner that anyone could access them at a place and at a time elected individually. This provision covers on-demand services, for instance consumers can select from their personal computer at home a performance, anytime they choose.

- **the right to an equitable remuneration for broadcasting and communication to the public**.

The protection term provided under WPPT[75] is of 50 years, calculated from the end of the year during which the performance was fixed on a phonogram.

The limitations and exceptions[76] provided for the protection of performers must be of the same nature with the ones provided in respect of copyright protection upon the literary and artistic works, of course with the observance of the 3 steps: in certain special cases, when they do not affect to the normal use of the performance and no unjustified harm is caused to the performer's legitimate interests.

[71] Art. 7.
[72] Art. 8.
[73] Art. 9.
[74] Art. 10.
[75] Art. 15.
[76] Art. 16.

WPPT requires[77] to Member States to provide an adequate legal protection and effective legal punishments against neutralization of the efficient technical measures used by the performers within the exercise of their rights and which, as far as their performances are concerned, restrict their achievement of acts that are not authorized by performers or allowed by law.

At the same time, WPPT provides[78] obligations regarding information on rights management[79]. Thus, the States must provide adequate and effective legal punishments against any person who carries out one of the following acts aware or, as far as the civil punishment are concerned, having reasonable grounds to believe that such an act shall involve, enable, facilitate or conceal the impairment of a right under the WPPT:

- Suppresses or changes, without authorization, any information regarding rights management that is presented in electronic form;

- Distributes, imports for the purpose of distribution, broadcasting, communication to the public or makes available to the same, without being authorized, performances, copies of fixed performances or copies of phonograms, aware of the fact that the information referring to right management, inan electronic form, was suppressed or changed without authorization.

3.2. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

Harmonization of the provisions of Law no. 8/1996 with the WPPT was performed under the Law no. 285/2004[80] amending and supplementing the Law no. 8/1996.

Also reiterated by the provisions of WPPT and of Law no. 285/2004 amending and supplementing the Law no. 8/1996, **single equitable remuneration due to performers** is an intellectual property right[81], and it is due for the direct or indirect use of phonograms published for commercial purpose or of their reproductions by broadcasting or by any method of communication to the public[82].

Harmonization with the WPPT regarding the technical protection measures was conducted according to **Chapter III „Protection measures, procedures and punishments", Section I "Technical protection measures and information regarding rights management", art. 138[5]-138[6] of Law no. 8/1996**. Thus, the performer may establish technical measures of protection of the rights acknowledged by law. By technical measures[83] we understand the use of any technology, any device or component which, by its normal operation, is designed to prevent or to restrict acts that are not authorized by the right holders. Technical measures are considered as effective when the use of any work or of any other object of protection is controlled by the right holders by applying an access code or a protection procedure, such as encryption, coding, scrambling or any transformation of the work or of another object of protection, or by a copying control mechanism, whether the measures meet the objective of protection. The right holders who have established technical measures of protection are required to make available to the beneficiaries of the exceptions provided by the law the necessary means for legal access to that work or to any other object of protection. The foregoing shall

[77] Art. 18.

[78] Art. 19.

[79] Art. 19 paragraph (2): By expressing the information regarding the rights management we understand the information which allow us to identify the performer, the performance, the phonogram producer, the holder of any right upon the performance or upon the phonogram or information regarding the conditions or methods of use of the performance or phonogram, as well as any number or code representing such information or information about the terms and conditions of use or interpretation of execution or phonogram, and any numbers or code that represent such information, when any of these items of information is associated to the copy of a fixed performance or to the copy of a phonogram, or it appears in connection with the communication to the public or making available to the public of a fixed performance or a phonogram.

[80] Published in the Official Gazette no. 587 on June 30th, 2004.

[81] *Ciprian Raul Romiţan, Mariana Liliana Savu*, op. cit., p. 124.

[82] Art. 106[5] of Law no. 8/1996.

[83] Art. 138[5] paragraph (2).

not apply to protected works which are made available to the public according to the contractual provisions agreed between the parties, so that everyone in the public can have access to them in any place and at any time chosen individually.

At the same time, the holders of rights, including performers, may provide in an electronic format associated to a work or to any other object of protection, or within the context of their public communication, information regarding the rights management[84]. In this respect, by information regarding the rights management we understand any information provided by the right holders which allows the identification of a work or of any other object of protection, belonging to the author or to another right holder, as well as the conditions and methods of use of that work or of any object of protection, as well as any other number or code representing such information[85].

In relation to the draft Directive regarding the collective management of copyright and related rights and multi-territorial licensing of rights in musical works in terms of online use on the internal market, which as indicated by its title refers only to musical works, the development of digital rights management systems, governed by the WPPT, becomes increasingly necessary in order to serve authorization rights, to secure payments, tracking behavior and enforcement of rights[86].

The Development of new digital technologies and the Internet, which now has become the most important factor in the spread and use of works and products bearing related rights, determines the need of a mutual effort from all the right holders as well as from all the involved factors such as: collective management organizations, governmental bodies, users, consumers. In this way, performers' rights shall be defended and managed in an effective manner, without any prejudice to them. One first step taken by CREDIDAM[87] in this field consists of developing the Methodology for fixing the remuneration due to the holders of related rights for the public communication of commercial phonograms via online or mobile services. This Methodology covers the use by communication to the public, without the possibility of free downloading, without (3 categories depending on the number of phonograms: 1-20 phonograms – RON 5, 21-200 phonograms – RON 7, 21-1.000 phonograms – RON 10, over 1.000 phonograms – RON 20) generating or not revenues[88] for the users; users being considered any natural or legal person who communicates to the public commercial phonograms via online or mobile services and who are responsible for the contents of the web page. In this manner it distinguishes between services offered to the public hearing.

4. Implementation of European Directives in the field of Copyright and Related Rights.

Eight Directives were adopted at European level in the field of copyright and related rights:

a) The Directive 91/250/CEE of the Council of May 14th, 1991 on the legal protection of computer software, published in the Official Journal of the European Communities no. L 122 dated May 17th, 1991;

b) The Directive 92/100/CEE of the Council of November 19th, 1992 on the rental and lending right and certain copyright related rights in the field of intellectual property, published in the Official Journal of European Communities no. L 346 dated November 24th, 1992, amended by the Directive 2006/115/CE of the European Parliament and of the Council dated December 12th, 2006;

c) The Directive 93/83/CEE of the Council of September 27th, 1993 on the harmonization of certain provisions regarding copyright and related rights applicable to satellite broadcasting and cable

[84] Art. 138[6] paragraph (1).
[85] Art. 138[6] paragraph (2).
[86] European Commission Communication of April 19th, 2004.
[87] Together with the collective management organization UPFR (The Union of Phonogram Producers in Romania).
[88] See Annex no. 3 – p. 48.

retransmission, published in the Official Journal of the European Communities no. L 248 dated October 6th, 1993;

d) The Directive 93/98/CEE of the Council of October 29th, 1993 on the harmonization of the protection duration of copyright and certain related rights, published in the Official Journal of the European Communities no. L 290 dated November 24th, 1993;

e) The Directive 96/9/CE of the European Parliament and of the Council of March 11th, 1996 on the legal protection of databases, published in the Official Journal of the European Communities no. L 077 dated March 27th, 1996;

f) The Directive 2001/29/CE of the European Parliament and of the Council of May 22nd, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, published in the Official Journal of the European Communities no. L 006 dated January 10th, 2002;

g) The Directive 2001/84/CE of the European Parliament and of the Council of September 27th, 2001 on the resale right for the benefit of the author of an original work of art, published in the Official Journal of the European Communities no. L 272 dated October 13th , 2001;

h) The Directive 2004/48/CE of the European Parliament and of the Council of April 29th, 2004 on the enforcement of the intellectual property rights, published in the Official Journal of the European Communities no. L 157 dated April 30th, 2004.

The last legislative acts, including the drafts, adopted by the European Commission in the field of copyright and related rights are:

- The Directive 2011/77/UE of the European Parliament and of the Council regarding the amendment of Directive 2006/116/CE on the term of protection of copyright and certain related rights[89].

- The Directive 2012/.../UE of the European Parliament and of the Council on certain permitted uses of orphan works[90].

- The draft Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works in terms of online use on the internal market[91].

Of the relatively large number of adopted Directives, it results a particularly high interest at the EU level in order to regulate in the best conditions of copyrights and related rights.

4.1. Analysis of the European Directives regarding Performers.

The Directive 93/83/CEE of the Council of September 27th, 1993 on the harmonization of certain provisions regarding copyright and related rights applicable to satellite broadcasting and cable retransmission regulates the mandatory collective management for the cable retransmission right, including for the performers, i.e. only by the means of collective management organizations[92]. If there are several collective management organizations, which manage rights in this category, the right holder may assign by himself/herself the organization empowered to manage his/her rights, and the right holder may claim his/her rights over a period of time which shall not be less than 3 years.

The Directive 93/98/CEE of the Council of October 29th, 1993 on the harmonization of the protection duration of copyright and certain related rights provides at art. 3 a protection term

---

[89] Analyzed below.

[90] http://register.consilium.europa.eu/pdf/en/12/pe00/pe00036.en12.pdf - adopted on October 4th, 2012, it has not been published yet in the Official Journal of the EU.

[91] Adopted on July 11th, 2012 by the European Commission:
http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf.
Currently, as procedural phase, the draft was submitted to the European Parliament in order to express its position and oppinion.

[92] Art. 9.

of 50 years for performers beginning with the performance date, calculated from January 1st of the year following the generating performance[93].

The Directive 2001/29/CE of the European Parliament and of the Council of May 22nd, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, regulates for the performers:

- the reproduction right[94] – the exclusive right to directly or indirectly, temporarily or permanently authorize or prohibit by any means and in any form, in whole or in part.

- the right of making available to the public[95] by wire or wireless means, in such a manner that the public could access them at any place and any time they choose. This right is not exhaustible by any action of communication to the public or making available to the public[96].

- exceptions and limitations – the most important and effective regarding the payment of remuneration is: the private copy (art. 5).

- obligations as to technological measures (art. 6).

- obligations concerning rights-management information (art. 7).

The Directive 2004/48/CE of the European Parliament and of the Council of April 29th, 2004 on the enforcement of the intellectual property rights[97] regulates regarding performers:

- performers' entitlement to apply for the application of the measures, procedures and remedies (art. 4).

- the presumption of holder of related rights for performers (art. 5).

- the measures for preserving evidence (art. 7).

- the provisional measures (art. 9), corrective measures (art. 10), injunctions (art. 11), alternative measures (art. 12), damages and legal costs (art. 13-15).

The Directive 92/100/CEE of the Council of November 19th, 1992 on the rental and lending right and certain copyright related rights in the field of intellectual property, published in the Official Journal of European Communities no. L 346 dated November 24th, 1992, amended by the Directive 2006/115/CE of the European Parliament and of the Council dated December 12th, 2006 regulates for performers:

- the entitlement as holder of rental rights (art. 3).

- the unwaveble right of performers to an equitable remuneration (art. 5)

- the exclusive right to authorize or prohibit fixation of their performances (art. 7).

- the exclusive right to authorize or prohibit the broadcasting and communication to the public of their performances (art. 8 paragraph 1), as well as the right to an equitable remuneration when a phonogram published for commercial purpose or its reproduction is used for the purpose of broadcasting or for any communication to the public (art. 8 paragraph 2).

- the distribution right (art. 9).

- the limitations and exception (art. 10).

4.2. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

Harmonization of the provisions of Law no. 8/1996 with the European Directives in the field of copyright and related rights was carried out under the Law no. 285/2004 for the amendment and supplementation of Law no. 8/1996 and of OUG no. 123/2005 approved by the Law no. 329/2006 on

[93] Art. 8.
[94] Art. 2.
[95] Art. 3.
[96] Art. 3 alin. (3).
[97] The harmonized provisions, in conformity with the Directive 2004/48/CE of the European Parliament and of the Council of April 29th, 2004, on the enforcement of the intellectual property rights, shortly named Enforcement Directive, was analyzed at an earlier point.

the approval of Government's Emergency Order no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights[98].

Concerning **the Directive 93/83/CEE of the Council of September 27th, 1993 on the harmonization of certain provisions regarding copyright and related rights applicable to satellite broadcasting and cable retransmission**, it was harmonized at the level of Law no. 8/1996, including as far as the mandatory collective management of the cable retransmission is concerned for artists' performances. Thus, according to art. 123^1 paragraph (1) item g) in the Law no. 8/1996: the collective management is mandatory for exercising the cable retransmission right, which means that collective management organizations also represent those right holders who did not grant an empowerment[99]. At the same time, under the Directive, the holders of copyrights or of related rights, including the performers, may exercise their rights for authorizing or prohibiting the cable retransmission only through a collective management organization[100].

The remuneration amount regarding copyright and related rights is determined by a methodology negotiated between the collective management organizations for copyright and related rights and the cable distribution associative structures. Also, by the transposition of the Directive provisions, in case of cable retransmission is provided optional mediation procedure performed by one or more mediators selected by the parties so that their independence and impartiality can not be questioned. The Mediators task is to assist negotiations and notify proposals to the parties.[101] It is the only property right, the only case in the Law no. 8/1996, for which such a procedure of optional mediation is provided. The mediation does not preclude arbitration procedure provided by Law no. 8/1996, mandatory under art. 131^2 paragraphs (3)-(9).

From the calculation of remuneration payable for cable retransmission, according to art. 121 paragraph (2) of the Law no. 8/1996, are excluded the mandatory cable retransmission programs, according to the law (must carry). *De lege ferenda*, the previously mentioned paragraph must be deleted in order to avoid prejudicing the right holders.

According to the **Directive 93/98/CEE of the Council of October 29th, 1993 on the harmonization of the protection duration of copyright and certain related rights**, **the** art. 102 of Law no. 8/1996 provides that the duration of the property rights of performers is of 50 years after the date of the performance. However, if the fixation of the performance is lawfully published or lawfully communicated to the public within this period, the duration of rights shall be of 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. Duration shall be calculated beginning with January 1st of the year following the performance which generated the right.

The Directive 2001/29/CE of the European Parliament and of the Council of May 22nd, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, transposed into the Law no. 8/1996, represents one of the most important legal acts adopted at the UE level and regarding technology development, implementation of a harmonized framework on all new forms of exploitation of copyright and related rights. Recital 9 of the Directive restates the need for a higher degree of protection of copyright and related rights, since such rights are crucial for the intellectual creativity. Protection of these rights provides maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the general public. At the same time, recital 10 of the Directive specifies appropriate reward for authors and performers in order for them to continue their artistic and creative work.

For the purposes of the European Directives in this field, including the Directive on the harmonization of certain aspects of copyright and related rights in the information society, in

[98] Published in the Official Gazette no. 657 on July 31st, 2006.
[99] Art. 123^1 paragraph (2).
[100] Art. 121 paragraph (1).
[101] Art. 121 paragraph (3)-(4).

accordance with **art. 98** of Law no. 8/1996, **the performers have the following exclusive property rights to authorize or prohibit**:

- the fixation of their performances;
- the reproduction of fixed performances. By reproduction[102], we understand achieving all or part of one or more copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including realization of any sound or audiovisual recordings of a work such as and its temporary or permanent storage by electronic means.
- the distribution of fixed performances. By distribution[103], we understand the sale or any other type of transmission, either binding or for free, of the original or copies of a work, as well as their public availability. According to the provisions of the Directive, the distribution right is exhausted with the first sale or with the first transfer of ownership upon the original or copies of a work, on the internal market, by the right holder or with his/her consent.
- the rental of fixed performance;
- the lending of fixed performance;
- the import for the internal market sale of fixed performances;
- the broadcasting and public communication of his/her performance, except when the performance has already been fixed or broadcasted, in which case performers are entitled only to an equitable remuneration;
- the making available to the public of fixed performances, so that they can be accessed in any place and at a time individually chosen by the public;
- the cable retransmission of fixed performances.

As far as the **private copy** is concerned, this has turned many changes in the Law no. 8/1996, and currently it represents[104] the reproduction of a work without the consent of the author, for personal use or for the use of a normal circle of a family, provided that the work would have been previously disclosed to the public, and the reproduction is not contrary to the normal use of the work and does not prejudice the author or the holder of the rights of use. In the case of private copy, for the support on which sound or audiovisual recordings can be performed or on which reproductions can be performed for the works graphically expressed, as well as for the devices designed for making copies, a compensation shall be paid, which is to be distributed to the right holders category as follows:

- in the case of supports and devices for recording sound copies, through analogue processes, 40% of the remuneration turns, in negotiable parts, to the authors and to the publishers of recorded works, **30% turns to performers**, and the remaining 30% turns to the producers of sound recordings;
- in the case of supports and devices for recording audiovisual copies, through analogue processes, the remuneration is equally divided between the following categories: authors, **performers** and producers;
- in the case of copies registered by digital processes, on any type of support, the remuneration shall be equally divided between the beneficiaries corresponding to each of the categories previously provided, and, within each category, as agreed.

The dynamics of private copy and of adequate remuneration is still subject to mediation at the European Commission level[105], making the future of private copy rather uncertain. Our opinion is

[102] Art. 14 of Law no. 8/1996.
[103] Art. 14^1 of Law no. 8/1996.
[104] Art. 34 din Legea nr. 8/1996.
[105] http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm
António Vitorino, former Portugal Defense Minister and former European Commissioner for Justice and Internal Affairs was appointed as mediator. On October 3rd, 2012, took place a new series of consultations attended to by several associations of the collective management organizations in Europe, including AEPO-ARTIS. The consultations focused on topics such as: the category of payers, professional uses, transparency, methodologies regarding determination of prices and alternative methods to the remuneration for private copy. The probable term when the mediator will submit his recommendations to Commissioner Barnnier is November/December 2012.

that for fulfilling the aforementioned objectives of the Directive regarding the harmonization of certain aspects of copyright and related rights in the information society it is necessary to maintain the notion of private copy and its corresponding remuneration, thus achieving a fair compensation of right holders for the use of their works and products bearing related rights, which cannot be monitored. Since in this matter, as stated in the specialty literature[106], the Romanian legislator established a legal license, this should be maintained in order to ensure a high level of protection of copyright and related rights.

In relation to the persons who must pay compensatory remuneration for private copy, i.e. in accordance with art. 107 paragraph (2) of Law no. 8/1996, manufacturers and/or importers of media and devices, *de lege ferenda*, it is necessary the supplementation of the legal provisions also with the intra-communitarian operators, as follows: *"The compensatory remuneration for private copy is payable for the media and devices referred to in art. 34 paragraph (2), whether the method used is analogical or digital, both by the manufacturers and importers in Romania and by the operators which introduce on the Romanian market and distribute such media and devices within the intra-communitarian area"*. At the same time, through the correlation with the provisions of the Law no. 8/1996 which provides for the renegotiation of the methodologies every three years, *de lege ferenda*, the enlisting regarding the media and devices subject to compensatory remuneration for private copy and the amount of such remuneration should also be renegotiated every 3 years, and not every 2 years, as currently provided.

In relation to the notion of communication to the public as regulated by the Directive (art. 3) and harmonized at the level of the Law no. 8/1996, the following remarks should be taken into account[107]:

- the notion covers all the communications to the public when not present at the place where the communication originates;

- the Law no. 8/1996 (art. 15) does not specially lists the representation in the methods of use by communication to the public, but representation is included in the definition of the communication to the public, so, also for those communications where the public is present at the place where communication originates.

- there are two methods of communication to the public, meaning: either the public is present at the place where the communication originates or the public is not present where the communication originates, and in the latter case we have here the right of making available to the public, so the public is potentially appreciated "in abstracto", not "in concreto".

- as the notion of "public" is not defined, then it has to be understood in a very broad sense, as opposed to that of the „normal circle of a family", applicable for the private copy, the latter being regarded[108] as outdated, obsolete, difficult to operate with and apply in the age of information.

Considering the above mentioned, the continuous harmonization at the Community level appears as a necessity, including in Romania, in order to meet such technological challenges and to ensure the best defense in terms of intellectual property rights.

5. New Regulations in the field of Related Rights regarding Performers.

5.1. Directive 2011/77/UE of the European Parliament and of the Council for the Amendment of the Directive 2006/116/CE on the Term of protection of Copyright and Related Rights.

5.1.1. Analysis.

On October 11th, 2011, there has been published in the Official Journal of the European Union[109]: the Directive 2011/77/UE of the European Parliament and of the Council of September

[106] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 476.
[107] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 263-268.
[108] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 308.
[109] Nr. L 265/5.

27th, 2011 for the amendment of Directive 2006/116/CE, on the duration of protection of the copyright and related rights, the so called "Time Directive"[110]. The new Directive, which extends the protection duration of property rights for performers, is in this respect a real victory for the performers and it is another important step to the acknowledgment of their rights[111]. The Directive was adopted by a majority of Member States; Belgium, the Czech Republic, the Netherlands, Luxembourg, **Romania**, Slovakia, Slovenia and Sweden **voted against it**, and Austria and Estonia abstained from voting.

The purpose of the Directive was to bring at the same level the protection duration for the property rights of performers with those of authors[112]. Thus, the Directive extends the term of protection for sound recordings (performances fixed on phonograms) in the European Union **from 50 to 70 years** beginning from the date on which the registration was for the first time published or communicated to the public. Consequently, the term of protection for the performers whose performances are included on a sound recording is also extended from 50 to 70 years. Extension of the term of protection will allow performers to gain remunerations for a longer period of time and, anyhow, for their lifetime[113].

At the same time, extending the term would also bring benefit to the producers who will generate additional revenue by the selling disks both online and in stores[114].

The Recital 4 of the Directive also specifies another aspect of how important is to extend the term of protection, and also the socially acknowledged importance of the creative contribution of performers which must be reflected in a level of protection that acknowledges their creative and artistic contribution.

The Directive guarantees that the performers who receive a nonrecurring remuneration also enjoy the extension of the term of protection. This means that non-featured performers, who do not enjoy remunerations for the exploitation of their recordings, are granted a firm right to benefit an **annual additional remuneration** from the producer of the recording (after the 50 year period of time of the term of protection). The right to benefit an annual additional remuneration may not be waived by the performer[115].

The producer of the recording (before deducing the costs) has to give 20% of the incomes from the reproduction, distribution and making available to the public of the sound recording, percentage that will be managed by the collective management organizations[116] and distributed (at least) once per year[117]. The member States guarantee that the phonogram producers should provide, upon request, to the performers who are entitled to receive the annual additional remuneration any information required for the payment of such remuneration[118].

When calculating the overall amount intended for the payments one should not take into account the revenues gained by the producer from renting the recordings, the revenues resulted from broadcasting and communication to the public or from compensatory remuneration for private copy

---

[110] The draft for the amendment of the Directive 2006/116/CE was signed by the European Parliament and by the European Union Council on September 27th, 2011.

[111] http://www.credidam.ro/cgi-bin/cdd_site/cdd.cgi?act=det_event&evid=23

[112] http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm

[113] This clarification is particularly important because, as stated in Recital 5 of the Directive, performers generally start their careers young and the 50 year term applied upon the fixation of their performance often does not protect their performances throughout their entire lifetime. As a result of this fact, some performers face a lack of incomes toward the end of their lives.

[114] http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm

[115] Art. 3 paragraph (2b).

[116] This obligation has to be guaranteed by the Member States - Art. 3 paragraph (2d).

[117] Art. 3 paragraph (2c).

[118] Art. 3 paragraph (2c), 2nd Thesis.

(based on the fact that in most EU countries and on the European legislative acts, such uses are subject to the remuneration already distributed between performers and producers).

The Directive introduces the provision „use it or lose it"[119] applicable if the producers of recordings fail to provide for sale on the market sufficient quantities of copies of a sound recording or they do not make them available by wire or wireless technical means (for 50 years after the first publication), then **the performers have the firm right to terminate the contract concluded with that recordings producer**. This right may be exercised if the **producer**, although it has been notified by the performer about his/her intentions to terminate the contract, **fails to fulfill for a year any of the exploitation acts**. If there are many performers in a recording, they can terminate their contracts in accordance with the applicable national legislation.

The Directive also includes a "clean slate" provision[120] for contracts whereby performers transfer their own right based on royalties for the exploitation right. According to this provision, **a percentage of the royalty or remuneration shall be paid to the performers, any unrecovered advances being recovered during the extended period.** Moreover, the Member States should be able to provide that certain clauses of the contracts that establish recurrent payments **can be renegotiated**. The Member States should have procedures at hand **in case those renegotiations fail.**

The Member States must implement the Directive (legislative acts and lawful acts) until November 1st, 2013 and must communicate immediately to the European Commission the texts of these provisions[121]. At the same time, the Member States must communicate to the European Commission the texts of the main provisions of the national law, which they adopt in the field covered by the Directive[122].

By November 1st, 2016, the Commission has to present before the European Parliament, the Council and the European Economic and Social Committee a report regarding the implementation of the Directive, taking into account the development of the digital market, accompanied where appropriate by a proposal for the additional amendment of the Directive 2006/116/CE[123].

By a statement[124] of AEPO-ARTIS[125] they show that this umbrella organization of the collective management organizations for European performers shall develop recommendations regarding the implementation of the provisions of the Directive, taking into consideration that the method by which the national legislation of each Member State will be essential for the effective implementation of the Directive.

The European Commission shows[126] that only in the UK almost 7.000 performers would suffer damages in the next 10 years, if the Directive had not been adopted, because most of these performers are not well known stars, who have earned millions of Euro along their careers. On the contrary, there are thousands of session musicians[127] who contributed to the production of sound

[119] **"Use it or lose it" -** Art. 3 paragraph (2a).
[120] "**Clean slate".**
[121] Art. 2 paragraph (1).
[122] Art. 2 paragraph (2).
[123] Art. 3.
[124] http://www.aepo-artis.org/pages/7_1.html
[125] The purpose of the Association of European Performers' Organizations, among others, is the development and insurance of the acknowledgment for the collective management of performers' rights across Europe, the development of the cooperation between the collective management organizations for the performers across Europe or the growing importance of protection of performers' rights. Currently, AEPO-ARTIS reunites 31 collective management organizations in Europe - http://www.aepo-artis.org/pages/14_1.html, including ADAMI and SPEDIDAM in France, Dyonisos and Erato in Greece, BECS in UK or AISGE in Spain.
[126] http://ec.europa.eu/internal_market/copyright/docs/term/110910_memo_copyright_performers_en.pdf
[127] Musicians employed for a single sound recording and paid only once, in full, at the time of audio recording.

recordings during the 50's or 60's. The Impact Assessment[128] carried out by the European Commission previously to the adoption of this Directive, shows that extending the term of protection will offer the artists additional annual revenues ranging from de Euro 15 to 2.000.

5.1.2. De lege ferenda

Given the implementation deadline of the Directive by the Member in the States, namely until November 1st, 2013, the Directive should be expeditiously translated Romanian legislation. Within the current context when in Romania are organized consultations regarding the amendment and supplementation of the Law no. 8/1996[129], the translation of Directive appears to be more as necessary and appropriate. ***De lege ferenda*, translating the Directive into the Romanian legislation must consider first:**

- the extension of protection duration of performers rights from 50 to 70 years;

- a distinctive regulation of the contract to be concluded between producers and performers for artistic performances fixed in phonograms.

At the same time, ***de lege ferenda*, the following amendments and supplements of Law no. 8/1996 are required:**

- Art. 102 paragraph (1) shall be amended with the following content:

"The Duration of property rights of performers is of 70 years from the date of performance."

- At Title II *Rights Related to Copyright and sui-generis rights*, after Chapter III[1] *Rights of Producers of Audiovisual Recording*, insert a new Chapter, Chapter III[2] *Common Provisions for Performers and Producers of Sound and Audiovisual Recordings – the Transfer Contract concluded between phonogram producers and performers OR at Chapter IV Common Provisions for Authors, Performers and Producers of Sound and Audiovisual Recordings,* after article 112[1], insert a new article (or more articles), article 112[2] and the subsequent, with the following content:

"(1) If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as «contract on transfer or assignment»).

(2) The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer.

(3) Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.

---

[128] http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf

[129] As a result of the legislative proposal for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, registered to the Senate of Romania under no. L212/23.04.2012, consultations were organized between the collective management organizations, including CREDIDAM , UCMR-ADA, PERGAM, DACIN-SARA or VISARTA, considering mutual proposals for the amendment and supplementation of Law no. 8/1996. At the same time, the Romanian Office for Copyright (ORDA) requested to the collective management organizations to transmit their proposals concerning the amendment and supplementation of the Law no. 8/1996.

(4) Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual additional remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

(5) The overall amount to be set aside by a phonogram producer for payment of the annual additional remuneration referred to in paragraph (4) shall correspond to 20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

(6) The phonogram producers must provide, upon request, to the performers who are entitled to receive an annual additional remuneration specified at paragraph (4) any necessary information for ensuring the payment of such remuneration.

(7) The right to obtain an annual additional remuneration, as specified ar paragraph (4), is managed by the collective management organizations.

(8) If a performer has the right to a recurrent remuneration, neither the advance payments, nor the discounts defined in the contract will not be deductible from the payments toward the performer following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

(9) Unless expressly otherwise agreed, a contract on transfer or assignment concluded before November 1st, 2013 shall be deemed to continue to produce effects even following the date when the rights of the performer would have ceased to be protected.

(10) The contracts on transfer or assignment by which a performer is entitled to recurrent payments and which are concluded before November 1st, 2013 can be amended following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public."

The effects of extending the protection duration of performers rights, in terms of their remuneration, can not be currently quantified, but they will certainly contribute to the strengthening of the „related rights institution"[130], in general, and to "mitigate piracy, in order to ensure the communication of the works to the public, as well as the means of existence of those who put their talents to serve the consumers of their works, for those who made an occupation from communicating the works in order to be able to recover investments"[131], in particular.

5.2. The Beijing Treaty on audiovisual performances[132]

5.2.1. Analysis

On June 24th, 2012, the Diplomatic Conference of the World Intellectual Property Organization (WIPO)[133] adopted the Beijing Treaty on Audiovisual Performances. David Kappos, head of USPTO[134], said about the Treaty that it is a win both for the creative industry in the audiovisual field and for the labor market, allowing the forces of the two areas to work even more

[130] Viorel Roş, Univ. Prof. Dr. - Preamble, *"Performers Rights"*, Ciprian Raul Romiţan, Mariana Liliana Savu, Universul Juridic, Bucharest, 2008, p. 7.

[131] Viorel Roş, Univ. Prof. Dr. - Preamble, *" Performers Rights"*, Ciprian Raul Romiţan, Mariana Liliana Savu, Universul Juridic, Bucharest, 2008, p. 7.

[132] The translation from English of the Beijing Treaty on audiovisual performances is unofficial and it is made by the author.

[133] Meeting in Beijing from June 19th to 26th, 2012.

[134] United States Patent and Trademark Office.

closely in fighting global piracy. The head of the U.S. Copyright Office, Maria Pallente, said that the Treaty represents an important step forward for the protection of performances worldwide.

Both the International Federation of Actors (FIA) and the International Federation of Film Producers Associations have also supported the Treaty, with the desire to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible and to facilitate the enforcement of private contracts and collective agreements around the world[135].

For WIPO adopting this Treaty basically meant the revival of the organizations' activities in the field of copyright and related rights, because, except for amendments to existing treaties, since 1996 there was not adopted any other treaty in the field[136]. WIPO Officials stated[137] about this Treaty that, for the first time during the evolution of related rights, the Treaty will provide to performers the necessary protection in the digital environment. The Treaty will also help to protect performers' rights against the unauthorized use of their performances in the audiovisual environment. The impact of the Treaty will strengthen the property rights of actors and of other performers and can provide them additional revenues resulted from their work. At the same time, the Treaty will provide the international legal frame for the audiovisual industry.

Of WIPO 184 members, 48 of them signed the Treaty and 122 signed the "Final Act" of the Treaty, essentially stating the participation of the Member States of WIPO in the negotiations and recognition of the outcome, i.e. adoption of the Treaty. Romania, although attended the Diplomatic Conference in Beijing, has signed neither the Treaty nor its Final Act.

The Conference was attended by 156 members, plus 6 Intergovernmental organizations and 45 non-governmental organizations, accounting the highest turnout ever for a WIPO Diplomatic Conference.

The European Commission stated that the Treaty sets rules that will ensure an accurate protection and remuneration of actors and will allow their performances to be made available to the public either by distribution or through physical supports such as DVDs or via Internet[138]. The Commissioner Michel Barnier said that the Treaty is very important and that actors are the ambassadors of cultural expressions and exchange. They have to be able to earn their living from their artistic contributions, because without the means to express themselves, no cultural expression would be possible.

Treaty negotiations began in 1996, when the so called WIPO Treaties ragardign the Internet were adopted[139]: WCT (WIPO Copyright Treaty[140]) and WPPT (WIPO Performances and Phonograms Treaty[141]). These Treaties' targets were the singers, musicians and other performers, but not actors. In 2000 was organized a Diplomatic Conference on the adoption of the Treaty in the audiovisual field, but it failed because of art. 12 of the draft Treaty, regarding the transfer of rights. The U.S., sustained by India, insisted on the provisions regarding the transfer of rights, meaning that major film producers felt that they need to ensure their ability to distribute movies at global level. EU was against this provision of the Treaty. Thus, this issue became for more than 10 years one of the most important on the agenda of WIPO Committee regarding Copyright and Related Rights[142].

The Beijing Treaty regarding the audiovisual performances includes a number of 30 articles. Any Member State of WIPO may become a part of this Treaty. Intergovernmental organizations may

[135] https://www.eff.org/deeplinks/2012/07/beijing-treaty-audiovisual-performances

[136] http://www.ip-watch.org/2012/06/29/wipo-lauded-for-new-beijing-treaty-on-audiovisual-performances/

[137] http://www.wipo.int/pressroom/en/articles/2012/article_0013.html

[138] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/490&format=HTML&aged=0&language=EN&guiLanguage=en

[139] WIPO Internet Treaties.

[140] http://www.wipo.int/treaties/en/ip/wct/index.html

[141] http://www.wipo.int/treaties/en/ip/wppt/index.html

[142] WIPO Standing Committee on Copyright and Related Rights (SCCR) *(IPW*, WIPO, 24 June 2011).

become parties if this Treaty if they declare that they have responsibilities in the field of action of the Treaty and if their national legislation covers the provisions of the Treaty. The European Union can also be party of this Treaty.

The Treaty is open for signature by eligible parties within 1 year after its adoption, performed within 3 month period of time after 3 eligible parties have deposited instruments of ratification or accession to the Treaty. According to WIPO information, the Treaty has not entered yet into force.[143]

The Beijing Treaty on audiovisual performances was adopted taking into account, inter alia, the following desires of the contracting parties:

- to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible;

- the need to include some new international rules for the purpose of providing proper solutions to the questions resulting from the economic, social, cultural and technological development;

- the impact of the development and convergence of information, as well as of communication technologies upon the production and use of audiovisual performances;

- the need to maintain a balance between the rights of performers on their audiovisual performances and the public interest, especially in terms of education, research and access to information;

- the WIPO Performances and Phonograms Treaty (WPPT) does not extend the protection provided to performers upon their audiovisual fixed performances.

Regarding the relation between the Treaty and other conventions and treaties in this field, none of the provisions of this Treaty shall derogate from existing obligations of the Contracting Parties as established under the WIPO Performances and Phonograms Treaty (WPPT) or under the International Conference for the Protection of Performers, Phonogram Producers and Broadcasting Organizations. The protection established by this Treaty has no effect upon the protection provided for literary and artistic works, and as a consequence none of the provisions of the Treaty shall be construed as prejudicing such a protection.

Art. 1 paragraph (3) of the Treaty sets very clearly the fact that This Treaty shall not have any connection with treaties other than the WIPO Performances and Phonograms Treaty (WPPT), nor shall it prejudice any rights and obligations under any other treaties.

The Treaty also presents 4 definitions necessary for its adoption:

- performers[144] – actors, singers, musicians, dancers, and other persons who act,[145], sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

This definition also includes performers who perform a literary or artistic work which is created or fixed for the first time during a performance.

- audiovisual fixation[146] - means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.

- broadcasting[147] - means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

---

[143] http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=841
[144] Art. 2 lit. (a).
[145] Termenul utilizat în Tratat este de „act" – care se referă la a juca (teatru).
[146] Art. 2 lit. (b).
[147] Art. 2 lit. (c).

- communication to the public[148] - means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation.

The beneficiaries of the protection provided by this Treaty[149] are the performers who are nationals of the Contracting Parties and of other contracting parties, as well as performers who are not nationals of a Contracting Party, but who have their habitual residence in one of them. Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided by this Treaty. This requirement does not apply to a Contracting Party to the extent that another Contracting Party applies the exclusive right or the right to an equitable remuneration or to authorize broadcasting and communication to the public of performances fixed on audiovisual fixations only on certain uses or will restrict the application in another form. A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party, with respect to the exclusive rights or the right to an equitable remuneration or to authorize broadcasting and communication to the public of fixed performances, to those rights that its own nationals enjoy in that other Contracting Party.

The Treaty also indicates[150] the moral rights enjoyed by a performer for his/her live or fixed performance:

1) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance;

2) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations. Concerning this right, the Treaty also makes certain clarifications: considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications provided for this right. Consequently, this right has to be construed only for the changes that are objectively prejudicial to the performer's reputation in a substantial way. The mere use of new technologies is not equivalent to the changes provided in this regard.

The legal management of the moral rights under the Treaty is part of the standard legal management for this type of rights: they cannot be alienated, i.e. even after the transfer of property rights, they remain in the possession of the performer; after the performer's death they will be maintained at least until the expiry of the property rights and shall be exercised by persons or institutions authorized by the legislation of the Contracting States.

The moral rights of performers as regulated by Law no. 8/1996 (art. 96), according to the French system, including the right to claim the acknowledgment of authorship on his/her own performance, the right to claim his/her name or pseudonym to be indicated or communicated in every show and every use of his/her performance and the right to demand respect for the quality of his/her performance and to oppose to any distortion, falsification or other significant change in the performance or any breach of his rights, which would seriously damage his honor or reputation. As shown in the specialty literature[151], the right of disclosure and withdrawal, regulated for the authors, cannot be withheld for performers, because in case of disclosure right, the performance of the artist is equivalent to the disclosure of his/her work, and in case of withdrawal right, a performance act once

[148] Art. 2 lit. (d).
[149] Art. 3.
[150] Art. 5.
[151] *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei*, op. cit., p. 467.

carried out it cannot be withdrawn. In other words, the right of disclosure and of withdrawal is not of the nature of the creation – performance – made by the performer.

The Romanian Jurisprudence[152] reveals many cases where the Court found the violation of the moral rights of performers, especially of the right to demand respect for the quality of his/her performance and to oppose to any distortion, falsification or other significant change in the performance or any breach of his rights, which would seriously damage his honor or reputation and the Court ordered compensations for the breach of moral rights of performers.

Regarding property rights, art. 6 of the Treaty refers to the exclusive economic rights of performers in their unfixed performances, such as: the right of broadcasting, the right of communication to the public, except when the performance is already broadcasted, and the fixation right.

On fixed performances the performer shall have the following property rights:

a) Right of reproduction[153] (direct or indirect, in any form or manner). This right and its exceptions shall be totally applied in the digital environment and especially for the use of digital performances. Thus, the storage of a protected performance in a digital form in an electronic environment constitutes an act of reproduction as defined by the Treaty.

b) Right of distribution[154] (through sale or other transfer of ownership). The Contracting Parties are free to determine when this right becomes worn, respectively after the first sale or another transfer of the right on the original or a copy of the performance fixed with performer's consent. This right refers exclusively to the fixed copies which may be put into circulation as tangible objects.

c) Right of rental[155] (for commercial purpose, immediately after the distribution of audiovisual fixations by or subsequently to performer's authorization). The Contracting Parties are exempt from this obligation unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of the performer. This right, just like the distribution right, refers exclusively to the fixed copies which may be put into circulation as tangible objects.

d) Right of making available to the public[156] (through wire or wireless means in such a way that the public may access it from a place and at a time individually chosen by it).

e) Right of broadcasting and communication to the public[157]. Regarding these rights, the Contracting Parties may notify the Director General of WIPO, if they will establish a right of equitable remuneration for the direct or indirect use of the fixed audiovisual performances for broadcasting or communication to the public. The Contracting Parties may also declare that they will set conditions on the national legislation for the exercise of the right to an equitable remuneration. Any Contracting Party may declare that it will apply these provisions only regarding certain uses of the fixed audiovisual performances or that it will limit their applying in another manner or that it will not apply these provisions at all.

The Treaty also includes provisions regarding the transfer of rights[158]. Thus, the Contracting Parties may provide in the national legislation that as long as the performer consented to the fixation

---

[152] The most well known such cases are: Oana Pellea vs. Gigi Becali – during the president's election campaign in 2004, when he used images with Amza Pellea (a great Romanian actor), broadcasting without consent a video at the local televisions containing images from the Romanian history movie „Mihai Viteazul" („Michael the Brave"), video which damaged the public image of the actor Amza Pellea. The daughter of Toma Caragiu (great Romanian actor) vs. Golden Pages – TV commercials in which there were used images from the movie "Operaţiunea Monstrul" („The Monster Operation") with Toma Caragiu, damaging the public image of Toma Caragiu.

[153] Art. 7.

[154] Art. 8.

[155] Art. 9.

[156] Art. 10.

[157] Art. 11.

[158] Art. 12.

of his/her performance, the right of reproduction, broadcasting and communication to the public will be owned or exercised by or transferred to the producer of the audiovisual fixation, subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law. Thus, the national legislation may regulate the written form of the contract between the producer and the performer and that it should be signed by the two contracting parties or by their duly authorized representatives. Independent of the transfer of exclusive rights described above, national laws may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, including for the right of making available to the public, of broadcasting and communication to the public.

Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions[159] as they provide for in connection with the protection of copyright in literary and artistic works. Of course, limitations and exceptions must be provided for special cases, not to breach the normal use of the performance and not to unreasonably prejudice the legitimate interests of the performer[160].

The term of protection[161] granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed.

The Treaty also sets obligations regarding technological measures[162] and information regarding the rights management[163]. Thus, the Contracting Parties must provide the legal protection and effective measures against the circumvention actions of the technological measures used by the performers in connection with exercising their rights and which represent restrictive acts regarding their performances and which are not authorized by the performer or permitted by law. These provisions must be construed by correlation to those regarding limitations and exceptions, in the sense in which the contracting parties may adopt effective and necessary measures in order to ensure that the beneficiaries can enjoy the limitations and exceptions provided by the national legislations; where technological measures were applied to a audiovisual performance and the beneficiary has legal access to that performance under circumstances in which the holders of right did not take effective measures of protection in relation to that performance in order to authorize the beneficiary to enjoy the limitations and exceptions provided by the national law. Without prejudice to the legal protection of an audiovisual work in which the performance is fixed, the obligations regarding the technological measures are not applicable to the unprotected performances or to those which are not protected anymore according to national laws.

By information regarding the rights management we understand information identifying the performer, his performance or the holder of any right on the performance, or information regarding the terms and conditions of use of performance and any numbers or codes representing such information, when any of these information elements is attached to a fixed audiovisual performance[164].

Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Treaty:

a) to remove or alter any electronic rights management information without authorization;

b) to distribute, import for distribution, broadcast, communicate or make available to the public, without authorization, performances or copies of performances fixed in audiovisual fixations

[159] Art. 13.
[160] Art. 10 of the WIPO Copyright Treaty is applied mutantis mutandis to the art. 13 in the Treaty.
[161] Art. 14.
[162] Art. 15.
[163] Art. 16.
[164] Art. 12 of the WIPO Copyright Treaty is applied mutantis mutandis to the art. 16 of the Treaty.

knowing that electronic rights management information has been removed or altered without authorization.

The protection provided by this Treaty must be applied to the fixed performances existing at the moment of entering into force of the Treaty and to all the performances that will appear after the Treaty entering into force, for each of the Contracting Parties. The Contracting Parties may notify WIPO that they will not apply the provisions of the Treaty regarding the right of reproduction, broadcasting and communication to the public (one, many or all) of the audiovisual performances existing at the moment of entering into force of the Treaty. If one of the Contracting Parties will apply such a notification, then other Contracting Parties may limit the application of the provisions of the Treaty regarding the right of reproduction, broadcasting and communication to the public of the performances carried out after the entering into force of the Treaty, for that Contracting Party.

The Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in unlawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of complying with the moral rights and the rights of reproduction, broadcasting and communication to the public after the entry into force of this Treaty for the respective Contracting Parties.

The Contracting Parties undertake to adopt, in accordance with their national legal systems, the measures necessary to ensure the application of this Treaty and shall ensure that the sanctioning procedures are allowed under their national legislation so as to ensure effective action against any act of infringement of rights covered by this Treaty.

The Treaty also contains administrative provisions regarding the establishment of a General Assembly of the Contracting Parties[165] that shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty; it shall also decide the convocation of any diplomatic conference for the revision and supplementation of this Treaty.

5.2.2. De lege ferenda

Adopting the Treaty in the Romanian legislation, *de lege ferenda*, has to take into account:

- to insert the folklore expressions in the definition of performers: actors, singers, musicians, dancers and other persons, who represent, sing, recite, declaim, play, perform, direct, conduct or perform in any other manner literary or artistic works or folklore expressions, any kind of show, including folklore, varieties, circus or puppet shows.

- to define audiovisual fixations, according to art. 2 item b) of the Treaty, as follow: the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device, for instance by supplementing art. 98 and introducing a new paragraph, the paragraph (2^1).

- to distinctively regulate the right of reproduction, distribution, rental, broadcasting, communication to the public and making available to the public of audiovisual performances. As mentioned above to the previous chapter, a distinctive regulation of the right of making available to the public appears more than necessary, in the conditions under which the Beijing Treaty itself distinctively regulates such right (art. 10) from the right of communication to the public (art. 11).

- to apply national treatment, meaning to those performers who are nationals of the Contracting States.

- to correlate the moral rights of performers also for their audiovisual performances.

- the provisions of the Treaty regarding the transfer of rights involves a **corresponding change in art. 101 of the Law no. 8/1996** by including the right of broadcasting, communication to the public and making available to the public: Unless provided otherwise, the performer who participated in an audiovisual work, an audiovisual recording or a sound recording, is presumed that he/she will give to its producer, in exchange for an equitable remuneration, the exclusive right to use

[165] Every contracting party, a State, will have one vote in the Assebly and will vote only per se.

his/her fixed performance by reproduction, distribution, import, rent, lending, broadcasting, communication to the public and making available to the public.

- to correlate the limitations and exceptions for audiovisual performances, complying with the rule of the 3 steps: to be expressly provided by law, not to contravene to the normal use of the performance and not to prejudice the interests of the performer.

- the protection duration of 70 years of the performers' rights for audiovisual performances, in accordance with the "Time Directive" and with the Beijing Treaty which provides that the terms of protection shall be of at least 50 years computed from the end of the year in which the performance was fixed.

- to correlate the provisions regarding the technological measures and those regarding DRM with those regarding the audiovisual performances.

At a formal level, implementing the Treaty in the Romanian legislation does not seem to raise too many issues, as the Copyright and related rights law already includes such provisions. There can be analyzed, by correlation with the "Time Directive", the implementation of a special Chapter in the Law no. 8/1996 dedicated to the contract regarding the cinema works and other audiovisual works with special provisions on the audiovisual performances or a distinctive regulation within the provisions referring the performers.

In practice, it persists the problem[166] of performers who participated in the making of the Romanian movies created before 1996 that are currently reproduced on DVDs. In such circumstances, even if rights were transferred to the producer or achieved by an employment contract, at that time the main use being by public communication through public projection in a cinema, and by no means, through uses determined by technical development such as the reproduction on DVDs. In order to regulate this situation, the right to reproduce audiovisual performances should be included at least in the category of the collectively managed rights on a voluntary basis or draft agreements on a minimum period of 5 years, providing due remunerations, should be elaborated with the producers, based on the model of the French system.

Conclusions

The Analysis carried out in this Report reveals a high degree of harmonization of the Romanian law with the international treaties and conventions and with the EU Directives in this field. From this point of view, the Law no. 8/1996 regarding copyright and related rights is a good example for the legislation of other states and one of the most comprehensive within the EU[167]. Certainly, as for any legal frame, the Law no. 8/1996 involves some supplements and amendments regarding performers which were detailed in the previous paragraphs. The analysis on the harmonization phase revealed, on one hand, amendments and supplements to the Law no. 8/1996 related to its drawing up and correlation and, on the other hand, amendments and supplements related to the substance and nature of performers' related rights.

---

[166] In 2008, the daughter of Toma Caragiu brought to justice TVR Media because the latter reproduced and marketed the Collection "Momente de aur - maeştrii comediei: Toma Caragiu" („Golden Moments – Masters of Comedy: Toma Caragiu") without paying the appropriate remuneration to the heir in accordance with the revenues earned by TVR Media. The Court had admitted the petition of the heir and decided for her to receive a proper compensation. The same happened to Ştefan Bănică junior for "Momente de aur - maeştrii comediei: Ştefan Bănică senior" („Golden Moments – Masters of Comedy: Ştefan Bănică senior"). Doina Petre, the actress playing Veronica in the movie with the same title, received compensation from CNC and Campion Film SRL, for nonpayment of related rights. In June 2008, Doina Petre (Lulu Mihăescu) brought to justice the Natioal Center for Cinematography (CNC) and SC Campion Film SRL, claiming to be paid approximately RON 70.000 as "compensation for nonpayment of related rights during the period 2003 to 2008", as a result of marketing the DVD including the movies "Veronica", "Veronica se întoarce" („Veronica is back"), "Saltimbancii" („The Tumblers") and "Mama".

[167] *Ciprian Raul Romiţan, Mariana Liliana Savu*, op. cit., p. 140.

However, the continuous process of harmonization is determined both by the dynamics of new technologies and use of products bearing related rights, as well as by the legislative evolution; an example in this sense is, on one hand, at the Community level, by the adoption of **Directive 2011/77/UE of the European Parliament and of the Council on the amendment of the Directive 2006/116/CE regarding the term of protection of copyright and of certain related rights**, and, on the other hand, at international level, by the adoption of the **Beijing Treaty on Audiovisual Performances**. At the same time, **the draft Directive on Collective Management** is of real interest for the collective management dynamics, including that of performers.

Multiple efforts are needed for harmonizing the Law no. 8/1996 with the two legal acts previously mentioned, both on the part of the authorities in this field, as well as on the part of the collective management organizations, but the real **challenge will be to find the best solutions for their implementation**.

Thus, in case of Directive 2011/77/UE of the European Parliament and of the Council regarding the amendment of Directive 2006/116/CE on the term of protection of copyright and related rights and of certain related rights there should be established, inter alia, as follows:

- For the annual additional remuneration:
  - o Who is the producer responsible for making the payment?
  - o Whom are the performers who enjoy remuneration?
  - o Centralization of the information regarding the 20%.
- For the „use it or lose it" provision:
  - o There has to be a written proof of notification (i.e. the registration of notification)
  - o The need to make available the physical copies, as well as the need to make them available online to the public has to reveal the market reality.

The Beijing Treaty on Audiovisual Performances should not be construed as a model, but as a set of minimum standards of protection regarding the national treatment provided by every Member State. At the same time, compared to the situation of the states that have implemented the WPPT, one should be relatively optimistic toward the number of states that will adopt this Treaty. From this point of view, to better protect the rights of performers, WIPO has to encourage the states to adopt the WPPT and the Beijing Treaty on audiovisual performances. At the international level, WIPO strategy in this field should be changed and improved in order to limit the loss for performers.

A particular attention should be paid to the draft Directive regarding collective management, as it does not take into account the specificities of the activity of the collective management organizations for performers, because in the digital environment the collective management organizations for performers represent the most important link between right holders and users. Collective management organizations do more than just collect and distribute remunerations, so they play a vital role in protecting performers' rights.

The analysis of harmonization phase also reveals a legislative issue at the level of the *acquis communautaire*, i.e. the protection provided to performers is weaker compared to that provided to authors. Consequently, the performers have a weaker position in the negotiations with producers or users.

All these aspects should be taken into account also in Romania in order to achieve the best possible protection of performers' rights.

Annex no. 1

Statistics on the Total Number of States that acceded to the Rome Convention[168]

Year	The number of states that acceded
1970	10
1980	22
1990	34
2000	67
2012	91

Among the States that acceded to the Rome Convention there are[169]: Albania, Argentina, Armenia, Austria, Azerbaijan, Barbados, Belgium, Brazil, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, the United Arab Emirates, Switzerland, Estonia, Finland, France, Germany, Greece, Italy, Japan, Lithuania, UK, The Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russia, Slovenia, Spain, Sweden, Turkey, Ukraine, Hungary, Venezuela.

Annex no. 2

Statistics on the Total Number of States that acceded to the WIPO Performances and Phonograms Treaty [170]

Year	The number of states that acceded
2002	37
2012	90

Among the States that acceded to the Rome Convention there are [171]:

Albania, Argentina, Armenia, Austria, Azerbaijan, Barbados, Belgium, Brazil, Bulgaria, Canada, Croatia, The Czech Republic, Denmark, the United Arab Emirates, Switzerland, Estonia, Finland, France, Germany, Greece, Italy, Japan, Lithuania, UK, The Netherlands, Norway, Poland, Portugal, The Republic of Moldova, Romania, Russia, Slovenia, Spain, Sweden, The United States of America, Turkey, Ukraine, Hungary, the European Union, Venezuela

Annex no. 3

Remunerations provided for the communication to the public of commercial phonograms to be found in storing media available at the user's web address (URL), consisting of their listening by the public, with income generated for the user.

[168] Official data given by WIPO: http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=17&lang=

[169] Official data given by WIPO: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17

[170] Official data given by WIPO: http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=20&lang=en

[171] Official data given by WIPO: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17

	Monthly no. of listenings			
	≤ 300.000	300.001 – 600.000	600.001 – 1.000.000	≥ 1.000.001
Nr. of phonograms used per month				
1-500	RON 50 /ogc	RON 100 /ogc	RON 100 /ogc	RON 200 /ogc
501-1.000	RON 75 /ogc	RON 150 /ogc	RON 225 /ogc	RON 300 /ogc
over 1.000	RON 100 /ogc	RON 200 /ogc	RON 300 /ogc	RON 400 /ogc

References

- **Books** (in order of specification)
- André Lucas, Henri-Jacques Lucas, *"Traite de la propriété littéraire et artistique"*, 3 édition, Lexis Nexis, 2006.
- H. Desbois, A. Francon, A Kerever, *"Les conventions internationales du droit d'auteur et des droits voisins"*, Dalloz, 1976.
- Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *"Copyright and related rights - Treaty",* All Beck Publishing House, 2005, Bucharest.
- Ciprian Raul Romiţan, Mariana Liliana Savu, *"Performers' Rights"*, Universul Juridic, Bucharest, 2008.
- **Articles** (in order of specification)

- 1. Ligia Dănilă, *"Extras – subjects of related rights or just backgrounds?",* Romanian Magazine for Intellectual Property Law - no. 4/2007.

- **Web sites** (in order of specification)
- **www.wipo.int**
- **www.orda.ro**
- **www.credidam.ro**
- **www.ec.europa.eu**
- **www.aepo-artis.org**

COLLECTIVE MANAGEMENT OF THE RELATED RIGHTS OF PHONOGRAM PRODUCERS

ANDREEA IULIA STRATULA*

Abstract
The collective management activity of intellectual property rights has grown lately globally, it is very challenging for all market players. Also, the legal framework must be carefully analyzed and interpreted because in the middle, there are many rights holders as regards their property rights.
Because until now there is no European Directive to apply uniform to all collective management organizations, the activity is governed more by principles which are found in different Directives.

***Keywords**: phonogram, collective management, equitable remuneration, exclusive right, producer*

Introduction

I will analyse the collective management activity for neighbouring rights of music producers, I will consider the need of such activity and the impossibility of the administration of such rights individually. Our legislation is not very clear so it is necessary to interpret the community and international provisions.

Legal frame:

I. Community decisions: Directive 92/100/CEE, Directive 2001/29/CE and Directive 93/83/CEE

II. Decisions provided in the international treaties and conventions which Romania affiliated to: Convention from Rome and OMPI Treaty

The right of phonogram producers to the equitable remuneration by broadcasting and public performance of their phonograms

The right of phonogram producers to the compensation remuneration for the private copy of works reproduced upon the sound recordings

The exclusive patrimony right of phonogram producers to the cable retransmission of their own sound recordings

The exclusive patrimony right of phonogram producers to prohibit or authorize the reproduction of their own sound recordings exclusively for the purpose of public performance

I. Community decisions

Directive 92/100/CEE of the Council from 19.11.1992 regarding the rental and loan right and certain related rights to the copyright in the field of intellectual property provides in its preamble the considerations *(19) because it is necessary to introduce a regime that ensures an equitable remuneration, to which it cannot be renounced, for the authors and interpreters or performers, who must have the possibility to entrust the management of this right to a collecting organization that represents them, (21) because this equitable remuneration must take into account the importance of the relevant authors' and interpreters' or performers' contribution to the phonogram or movie but also (25) because the member states may foresee, for the rightholders of related rights, more protective decisions than those provided at Art. 8 of the current directive,* under these conditions, the Directive provides at *Art. 4 that the right to an equitable remuneration cannot make the object of a renouncement.*

* Attorney at Law, Bucharest Bar Association, copyright specialization (Andreea.Stratula@upfr.ro).

Also, the directive provides at par. (3) of the same Art., that the management of the right to obtain an equitable remuneration may be entrusted to certain collecting organizations, representing authors or interpreters or performers and at par. (4) that the member states may regulation if and in what extent the management by the collecting organizations of the right ***to obtain an equitable remuneration may be imposed****, as well as from whom this remuneration may be required or requested.*

With respect to the broadcasting of phonograms from the radio and television organizations, but also with respect to their public performance, the Directive provides at *Art. 8 Broadcasting or television and public performance par. (1) that the member states provide for the interpreters or performers the exclusive right to authorize or prohibit the broadcasting or television by radioelectric waves and public performance of their performances,* ***except for the case whereby the performance is itself broadcasted/ television or performed starting from an attachment*** *and at par. (2) of the same art. that the member states provide a right to ensure that a sole equitable remuneration is paid by the user, when a* ***phonogram published for trading purposes, or a reproduction of this phonogram****, is used for the purpose of a broadcasting/ television through the radioelectric waves or for any public performance and that this remuneration is divided among the interpreters or the relevant performers and phonogram producers. In default of an agreement between the interpreters or the performers and phonogram producers, the member states may establish the conditions of the remuneration distribution among them.*

Directive 2001/29/CE of the European Parliament and of the Council from 22.05.2001 regarding the attenuation of certain issues of the copyrights and related rights in the informational society.

Taking into account the following considerations of the Directive:

(23) the current directive must attenuate in a wider extent the copyright over the public performance acts. This right must be understood in a wide respect, as covering any communication to the public that is not present in the provenience place of communication. This right includes any transmission or transmission, of any kind, of a work to the public, by cable or without cable, ***including the broadcasting****. This right should not include any other act.*

(26) with respect to the distribution by the broadcasting and television organizations, with the services on request, of their radio and television programs, ***including the music of the trading phonograms*** *as integral part of them, it has to be encouraged the conclusion of collective license contracts to facilitate the recovery of involved rights.*

(30) the rights provided in the current directive may be transferred or may make the object of certain license contracts, without affecting the relevant internal legislation regarding the copyright or the related rights.

(61) the Directives 92/100/CEE and 93/98/CEE should be amended to conform to the provisions of OMPI Treaty regarding the interpretations or performances and phonograms.

The Directive provides at *Art. 3 The right of public performance of works and the right to make available for the public of other protected objects*

Par. (1) The member states provide the exclusive copyright to authorize or prohibit any public performance of their works, by cable or without cable, including to make available for the public their works, so that anyone to be able to access them from any place and any time.

Par. (2) The member states provide the exclusive right to authorize or prohibit the making available for the public, by cable or without cable, so that anyone to be able to access them from any place and any time:

a) For the interpreters or performers, of the attachments of their interpretations or performances;

b) For the phonogram producers, of their phonograms;

c) For the producers of the first attachments of movies, of the original and copies of their movies;

d) For the broadcasting or television organizations, of the attachments of programs distributed by them, independently if the distributions are wired or wireless, including by cable or by satellite.

And at Art. 5 par. (2) letter b) of the same Directive no. 2001/29/CE it is provided that "*the states may provide exceptions and limitations from the reproduction right provided at Art. 2 [...] for reproductions on any support, issued by a natural person for its personal use and for the purposes that are not directly or indirectly trading, with the condition that the rightholders receive equitable compensations."*

The latter article must be interpreted in considering the item 38 of the Preamble of Directive (item 38) whereby it is shown the fact that "*The member states should be allowed to provide an exception or limitation from the reproduction right for certain reproduction types of audio, video and audio-video materials for its personal use, accompanied by an equitable compensation. Such an exception may involve the introduction or maintenance of remuneration systems in order to compensate the prejudice caused to the rightholders.*"

Directive no. 93/83/CEE of the Council from 27.09.1993 regarding the coordination of certain decisions regarding the copyright and the related rights applicable to the distribution of programs by satellite and cable retransmission

Taking into account the considerations of the Directive:

(24) because the harmonization of the legislation foreseen in the current directive involve the harmonization of decisions that warrant a high level of protection for the authors, interpreters or performers, the phonogram producers and the broadcasting and television organizations; because this harmonization should allow the broadcasting and television organizations to profit from the differences between the protection levels by moving the activities in the detriment of audiovisual productions;

(28) because, in order to avoid that the interventions of third rightholders over certain elements of programs to prohibit the good development of contractual agreements, it is required to be foreseen, by the obligation of requiring from a collecting organization, an exclusive collective performance of the authorization right, in the extent that the features of cable retransmission require it; because the authorization right as that rests intact and only its performance is regulated in a certain extent, which involves the fact that the transfer of right to authorize a cable retransmission rests possible; because the current directive is not reflected on the exercise of moral rights;

The Directive provides at Art. 9 *(1) that the Member states to ensure that the right of copyright holders and of the related rights to grant or refuse the authorization of a cable operator for the cable retransmission of a show cannot be performed but by a collecting organization.*

(2) Unless the holder did not entrust the management of his rights to a collecting organization, the collecting organization that manages the rights of the same category may be considered empowered with the management of his rights. If there are several collecting organizations that manage the rights of this category, the holder may appoint himself the collecting organization that will be considered empowered to manage his rights.

II. Decisions provided in international documents which Romania affiliated to

According to Art. 15 par. 1 of the Worldwide Organization Treaty of Intellectual Property regarding the interpretations, performances and phonograms, ratified by Romania by Law no. 206/2000

The interpreters or the performers and the phonogram producers have the right to an equitable and sole remuneration if the phonograms published for trading purposes are directly or

indirectly used for broadcasting or for any kind of communication to the public", and according to par. 4 of the same article " the phonograms made available for the public by wire or wireless means, so that anyone is able to access them at the place and time individually chosen, are considered as phonograms published for trading purposes.

According to the International Convention at Rome for the protection of interpreters or performers, of the phonogram producers and of the broadcasting organizations, ratified by Romania by the Law no. 76/1998

Art. 3 *In respect of the current convention, it is understood by:*

b) phonogram - any exclusively sound attachment of the sounds resulting by a performance or other sounds;

d) publication - making available for the public, in a sufficient quantity, of certain copies of a phonogram;

Art. 12 *When a phonogram published for a trading purpose or a reproduction of this phonogram is directly used for the broadcasting or for any kind of communication to the public, the one that uses it will pay the interpreters or performers or the phonogram producers or both of them an equitable and sole remuneration.*

III. In the light of these community and international decisions, according to internal legislation, the producer of sound recordings may individually exercise his rights over the phonograms or by a collecting organization, based on a mandate.

The rights of the producers of phonograms that may be managed by a collecting organization are:

- The right to equitable remuneration for the broadcasting of their own phonograms
- The right to equitable remuneration for the public performance of their own phonograms
- The right to compensation remuneration for the private copy for the works reproduced upon the sound recordings
- The exclusive patrimony right of cable retransmission of their own phonograms
- The reproduction right of their own phonograms for the purpose of public performance or broadcasting

The first four categories of rights are jointly mandatorily managed, by a collecting organization, given the fact that these are not susceptible to be individually managed, while the last category falls within the collective management by a collecting organization, based on especially granted mandates awarded by the rightholders.

In the internal legislation, three types of managements are provided in the Title III of Law no. 8/1996 amended and completed, as follows:

i. The mandatory collective management, whereby the first four categories of rights are managed, as we showed above – Art. 123^1. This type of management is characterized by the fact that the collecting organization represents all the holders of a creation field, including those that did not grant him a mandate.[1]

ii. Optional collective management, whereby other categories of rights belonging to other holders are managed, like the mechanical reproduction right of music works, belonging to the authors or the broadcasting right of works and artistic performances in the audiovisual field – Art. 123^2. This type of management is characterized by the fact that the collecting organization represents all the holders of a creation field, including those that granted him a mandate, meaning its own members.

[1] *Viorel Ros, Dragos Bogdan, Octavia Spineanu Matei, Dreptul de autor si drepturile conexe, Tratat, p. 492 Formele gestiunii colective*

iii. The collective management based on a special mandate, whereby the last category of rights, above mentioned, belonging to the phonogram producers is managed - the reproduction right of phonograms for the purpose of public performance or broadcasting - Art. 123^3. This type of management is characterized by the fact that the collecting organization represents only the holders of a creation field that granted him a special mandate and only for the object of mandate.

The three types of managements provided in our legislation don't represent all the categories of collective management of the intellectual property rights, the most often met in the legislations of other states being the collective management on an extended repertoire. This type of management is situated between the mandatory and the optional collective management, the collecting organization representing all the rightholders of a certain field, except for those that opted to manage their own rights directly in the relations with the users of their works and that exploit them as that.

During the last period, the collective management activity in the sound recording field has been magnified, on the one hand, due to the importance of this segment in the detriment of the sale activity of musical products, the industry being more and more based on these incomes from secondary use and, on the other hand, due to the development of collecting organizations that activate in the musical field. The proof in this respect is also that the number of collecting organizations in this field - currently 7 compared to 3 such organizations that were operating only 5-6 years ago.

Not the same is the situation of collective management in other creation fields, too, referring here especially to the audiovisual field, especially to the movies, where the rightholders have good exploitation receipts of the rights, individually, so that, in the broadcasting field, at least, the need of such a collective management is not justified. Further, in the audiovisual field, the collective management is only mandatory in the case of cable retransmission rights of audiovisual works (movies) and in the case of private copy of the works reproduced upon audiovisual recordings.

IV. The right to equitable remuneration recognized to the phonogram producers for the broadcasting and public performance of their recordings by broadcasting and television bodies is mandatorily collective managed [2]

This issue results by the corroboration of several law texts, as follows: Art. 105 par. 1 letter f) of Law no. 8/1996 amended and completed, recognizes the exclusive patrimony right of the phonogram producers to authorize or prohibit the broadcasting and public performance of its sound recordings, except for those published for trading purpose, *case that it only has the right to equitable remuneration.* In accordance with this Article, Art. 106^5 par. (1) of Law no. 8/1996 provides that for the broadcasting or by any public performance way, the interpreters or performers and phonogram producers have the right to a sole equitable remuneration, being in fact taken over the provisions of Art. 12 of the Convention at Rome and of Art. 15 par. 1 of the OMPI Treaty above mentioned. This equitable remuneration is established according to Art. 106^5 par. (2) and (3) of Law no. 8/1996, meaning by a methodology negotiated by the involved parties (rightholders, by the collecting organizations and users, by the professional associations) or established according to the special procedure provided by law - by institutionalized arbitrage near the Romanian Office for the Copyrights, and after the establishment of tariffs included in the methodology, the collection is issued by the collecting organizations.

The essence of equitable remuneration, as well as the circumstance that, both according to the national and community law, and international treaties, this remuneration is collected by the

[2] *Mihaly Ficsor, Gestiunea colectiva a drepturilor de autor si conexe, 2010, Universul Juridic, p.85, 212. From the practical point of view, the remuneration right or the exclussive right of interpreters of performers and of the phonogram producers regarding the broadcasting and communication to the public of their performances registered on phonograms or of their phonograms, is similar to that of the issuance rights of composers and of the script writers that have been examined above. It results that this right of interpreters or performers and of the phonogram producers cannot be issued but by an appropriate collective management system.*

collecting organizations, has as base the protection of related rights of phonogram producers by ensuring an equitable remuneration and by ensuring the right to refer to the collecting organizations for the recovery of this remuneration (Art. 129¹ of Law no. 8/1996), but also by ensuring the use of phonograms within the radio and television programs as culturing and information free access, under the conditions that it is proven (but it is also presumed from the community law and the treaties which Romania takes part to) that the individual management of the related rights is impossible (both for the rightholders who cannot check the use degree of their own works and for the radio and TV organizations that cannot conclude direct license contracts with all the holders), ensuring this way a correct balance between the rights and interests of related rightholders, as well as between them and the rights and interests of users (radio and television organizations).

V. The right to the compensation remuneration to the phonogram producers for the private copy of works reproduced upon the sound recordings is mandatorily managed collectively[3]

This right results as mandatorily collectively managed by a collecting organization results by the provisions of Art. 107^{1} of Law no. 8/1996 amended and completed, and at Art. 107 it is widely described the way that this right will be collected, by the establishment of a *"List"* of machines and supports established by the issuance of copies. The internal provisions don't represent but the transcript of the provisions of Art. 5 par. (2) letter b) of the Directive no. 2001/29/CE above mentioned.

However, the right to the compensation remuneration for private copy is mandatorily collectively managed, for all the rightholders both for the works reproduced upon sound recordings and for the works reproduced upon the audiovisual recordings, by a sole collective organization. It is also the single management case where the organization is not liable to the issuance of a license as non-exclusive authorization, this case the payment of right not being made to the collective organization by the one who makes the copy (even if it is included in the price or support that allows the copy) but by the importer or producer of such machines and supports, so that it is not imposed, not justified the licensing or authorization procedure.

VI. The exclusive patrimony right of phonogram producer to authorize or prohibit the cable retransmission of their own sound recordings

The mandatory collective administration of this right is provided as that in our legislation for all the rightholders at Art. 121 par. (1) of Law no. 8/1996, decisions that transcript the text of Directive 93/83 provided at Art. 9 par. (1), above mentioned.

The decisions according to which the cable distributors were exempted from the payment of copyrights and related rights for the mandatorily cable retransmitted programs (*must carry*) have been abrogated, given the admission of the non-constitutionality exception of par. (2) of Art. 122 by the Decision of Constitutional Court no. 570/2010.

Also, by the Decision of the Appellate Court Bucharest no. 263A/2010 published in the OG by the ORDA decision no. 327/2010 it was established that the rights for cable retransmission will be collected by a collecting organization for each creation field and not by a sole collective organization, for all the copyright and related holders.

On the other hand, the provision of an exclusive patrimony right to authorize or prohibit the cable retransmission of certain works protected under the conditions whereby, for the broadcasting by televisions of the same works, it is provided a right to equitable remuneration, it seems to me entirely inappropriate for the practical conditions and impossibly to apply, as long as the cable operator does not intervene in the content of a television body, taking over as that in its entirety. If a

[3] *Mihaly Ficsor, Gestiunea colectiva a drepturilor de autor si conexe, 2010, Universul Juridic, p.95, 246. The national legislation that introduced tributes for the private copy provide that these cannot be pretended but by the collective organizations.*

holder may prohibit the cable retransmission of his work and may not prohibit the transmission by television of that work (112^1 of Law no. 8/1996), the right to prohibit the cable retransmission rests without an object.

VII. The exclusive patrimony right of phonogram producers to authorize or prohibit the exclusive reproduction for the purpose of public performance of his own phonograms

This collective management form falls within the collective management based on a special mandate, provided at Art. 123^3 of Law no. 8/1996 amended and completed, given the exclusive character of the reproduction right provided in the case of phonogram producers at Art. 105 par. 1 letter a) of Law no. 8/1996 and, certainly, his express non-falling within the other collective management forms.

THE MACROECONOMIC EVOLUTIONS IN THE ROMANIA DEVELOPMENT REGIONS IN THE CURRENT ECONOMIC - FINANCIAL CRISIS

MARIANA BĂLAN[*]
EMILIA VASILE[**]

Abstract
Disparities between the regions of Romania as within them were both in the run-up to accession of Romania to the European Union as well as after 1 January 2007. This phenomenon has gained momentum due to the impact of economic restructuring, especially in the areas of monoindustriale, whose population has been affected by unemployment as a result of the closure of unprofitable State enterprises.
The impact of the financial and economic crisis on economic growth at the level of the eight development regions of Romania did not produce modifications in their rankings after the index of regional disparity, even though for some, its value increased compared to 2006 or 2008.
The paper presents a comparative analysis of the evolution of macroeconomic indicators in the development regions of Romania in the period 2006-2011.

Keywords*: development regions, territorial-administrative structures, regional disparities, aging, education level*

Introduction

In the last decade there have been major changes in the world economic system, due mainly to the economic development of the Central and Eastern European countries, but also the commitment of the paths of economic development of countries with large populations (China and India approx. 1/3 of the world's population). In this context, balance the markets of energy resources, raw materials, capital, labour and the global ecological balance have been and will be affected

Highs in several developed countries, fluctuations in oil and gas prices, inflation, crisis in the agro-food sector, the crisis in the financial markets, reducing the pace of economic development in some countries are aspects of regulating phenomena/regulating an economy " increasingly global".

The global impact of the financial crisis on the real economy was felt strongly, and the economy as a whole, has been affected by a substantial growth slowdown that has affected the population, companies and jobs. Under these conditions, the growth of world GDP went down from 5.3 percent in 2010 from 3% in 2011.

The global financial crisis has generated a global crisis and places of work. Among the macroeconomic indicators, unemployment is reflected directly in the daily life of citizens than GDP, budget deficit, inflation, exchange rates or interest rates. The global economic crisis has led to a "dramatic increase" in the number of those who have lost their jobs, and those with low wages.

The domino effect was felt in the European financial system, as well as in American also. At national and international level were developed numerous bailouts, which have included a wide range of measures, from grants and equity participation up to the nationalisation of financial institutions in crisis, giving public guarantees of bank deposits insurance, etc.

In a difficult international conjuncture, Romania continued in 2011 aimed at stabilising the macroeconomic policies. 2011 has seen a slight recovery on the labor market conditions amid the resumption of economic growth and of the entry into force of the new labour code in May. Thus, the

[*] "Athenaeum" Univesity - Professor, PhD; Senior researcher – Institute for Economic Forecasting-NIER, Romanian Academy, Bucharest (mariana_prognoza@yahoo.com).
[**] Professor, PhD, Rector of "Athenaeum" University – Bucharest (rector@univath.ro).

number of persons employed in the economy has reversed the downward trend observed in the period 2009-2010, but the pace of growth during the year was modest. ILO unemployment trends in each of the developing regions of Romania reflects the persistence of difficulties encountered by certain categories of persons (e.g., young inexperienced workers without qualifications) in finding a job, amid a moderate pace of economic growth and structural failures and rigidities of the labour market (still a significant share of employment in agriculture of subsistence,low emphasis placed in the system of education on the development of practical skills, the persistence of global imbalances between supply and demand of manpower at the regional level, etc.).

The basic aim of the regional development policies is to reduce territorial disparities, achieving a balance between the levels of economic and social development of the various regions. A goal of regional policy, specific to this period, shall be to facilitate structural adjustment and sectoral restructuring processes support and economic revival, reconstruction and boosting the competitive ability of the regions to support the processes of European integration. Most countries, including the developed ones, faced with regional disparities and, in consequence, apply strategies and regional development policies. For its part, Romania is the sum of the inner regions, so the overall growth of Romania depends on the evolution of these regions.

The eight development regions of Romania presents certain particularities in terms of their economic structure, what makes certain sectors to play a decisive role in their future development. The economy of the regions in the South of the country (South-East, South, South-West Oltenia) is influenced by the evolution of the agricultural sector, it owns in these areas a significant proportion of over 15%, which makes in the years with harsh conditions for agriculture gross domestic product growth to be influenced negatively. There are also regions with significant tourist potential (the Bucovina region in North-Eastern region, coastal and Danube Delta in the South East region, etc.), economic developments of these being influenced and level of use of this potential. Another peculiarity is the areas where mining play an important role (Jiu Valley basin of South-West Oltenia) and whose economy has been affected as a result of the restructuring process of goal to mining sector.

The impact of the financial and economic crisis on economic growth at the level of the eight development regions of Romania did not produce modifications in their rankings after the index of regional disparity, even if for some, its value has increased ahead of 2006.

Brief overview of the evolution of macroeconomic indicators in the major regions of Romania

Administrative-territorial structure of Romania consists of 320 towns (of which 103 municipalities) and 2861 common and 12957 villages[1].

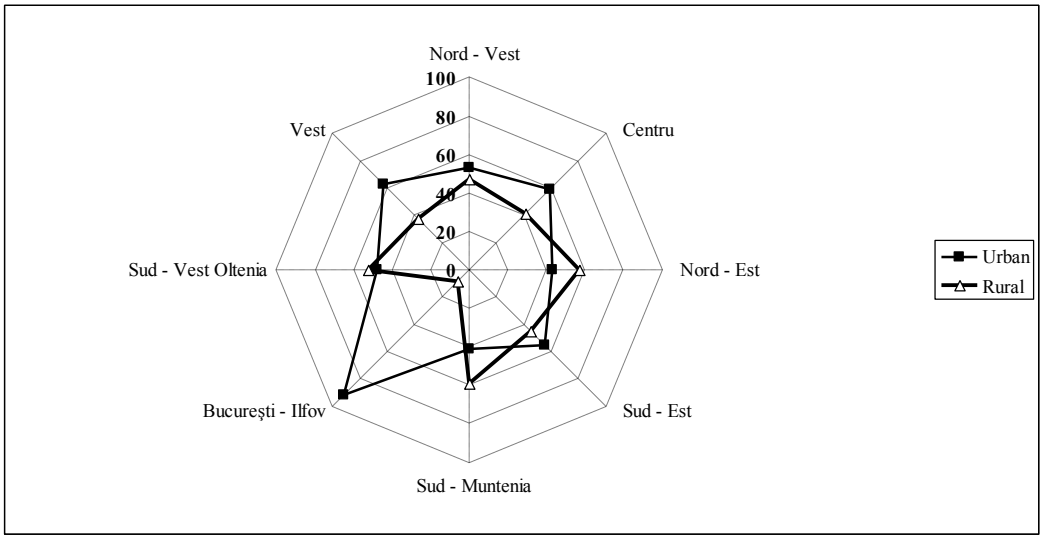
In 1998 it was approved the law No. 153 concerning regional development, legislation setting out the framework, objectives and institutional competencies and specific policy instruments for regional development in Romania. In order to achieve the objectives of regional development policy, law No. 151\1998 has enabled the establishment of the eight development regions corresponding to NUTS II-statistical level, through voluntary association of counties.

In terms of population density, there are differences between regions. Without taking into account the Bucharest-Ilfov Region which has 1.237, 7 inhabitants\/km2-as a result of this urban agglomeration of the capital-the largest population density is recorded in the North-East Region (100,3 inhabitants\/km2), and the lowest population density is in the region of Western Romania (59.6 inhabitants\/km2)-the region with the greatest population decrease and mountainous part on a large part of the surface.

[1] Romanian Statistical Yearbook 2012 Table 1.8

Degree of urbanisation of regions is also somewhat different. With the exception of the Bucharest-Ilfov Region, the most urbanized regions are the Western Regions (62.7% of urban population), Center (59.2%), Southeast (55%), and Northwest 53,1% urban population with (see Figure 1).

Figure 1 Population, in territorial, on average, to July 1



Source: Romanian Statistical Yearbook 2012, Table 2.32, National Institute of Statistics

Instead, in the Northeast Region and in the entire southern part of Romania: Muntenia and Southern Regions Southwest still prevails rural population, which are large areas of lowland areas where companies are farming activities (Figure 1).

After decades the number of inhabitants of cities has registered a significant increase in the period 1990-2010, the urban population has seen a trend of continuing growth in all developing regions.

The main cause of the decreasing of the urban population was both migration to rural areas, as well as outside the country. This was caused by the economic downturn as a result of which some of the inhabitants have left the towns of which remained without jobs. In parallel to the decrease of the urban population have contributed and other demographic phenomena (e.g., negative natural increase) but their magnitude was much lower. As a result of these developments, the ring network structure has changed: increased the number of small cities and towns issue has decreased. A relatively balanced distribution in the territory of the towns remained a distinctive feature for the network of villages.

Statistics show that Romania has entered the transition process with a relatively low level of regional disparities, compared with other Member States or candidate countries. They have rapidly increased especially between Bucharest and the rest of the country.

The disparities between regions and within them have gained momentum because of the impact of economic restructuring, particularly in monoindustriale areas whose population has been affected by unemployment as a result of closing unprofitable State enterprises but also because of the economic and financial crisis. Among these may be mentioned the regions border with Moldova and Ukraine and the less developed regions along the Danube.

Based on data provided by the National Institute of Statistics of regional disparity index was calculated for the period 2005-2010 (Table 1) using the relationship $\frac{PIB_{reg}/loc.}{PIB_{na}/loc.} \cdot 100$

Table 1 *Regional Disparity Index*

	2005	**2006**	**2007**	**2008**	**2009**	**2010**
Regiunea						
North-West	0.938	0.936	0.964	0.900	0.912	0.893
Center	0.980	0.997	1.014	0.949	0.969	0.959
North-East	0.667	0.645	0.639	0.618	0.628	0.614
South-East	0.864	0.850	0.810	0.798	0.803	0.822
South-Muntenia	0.828	0.838	0.816	0.821	0.853	0.830
Bucharest-Ilfov	2.213	2.193	2.228	2.493	2.360	2.379
South-West Oltenia	0.776	0.781	0.782	0.745	0.761	0.767
West	1.127	1.163	1.157	1.094	1.097	1.131

Source: Romanian Statistical Yearbook 2007-2012, authors' calculations

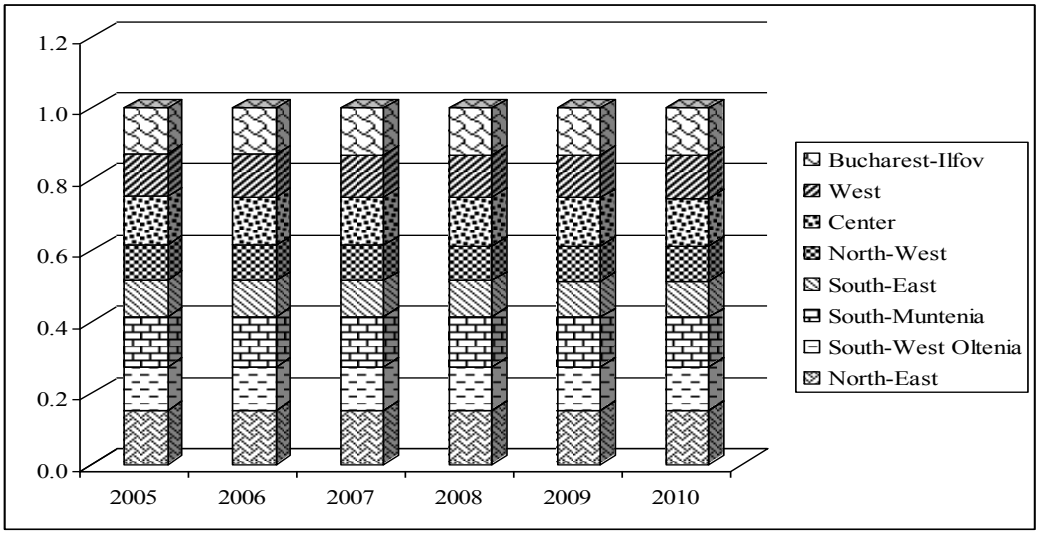
Analysis of the data in Table 1 reveal declines recorded by the North-Eastern regions (from 2005 to 0,667 0,614 in 2010) and Center (in 2005 the 0,980 0.959 in 2010) and the leap of Bucureşti-Ilfov (from 2,213 in 2005 to 2,379 in 2010).

The impact of the financial and economic crisis on economic growth at the level of the eight development regions of Romania in 2010 has not produced significant changes in their rankings after the regional disparity index even if all its value has dropped significantly from 2005.

Estimates of *labor force* at the regional level, during the period 2005-2010 have taken into consideration the disparities still exist but with a downtrend due to economic differentials within the regions.

For the *employed population* at the level of all eight development regions have experienced a slight increase. In terms of regional differences are slight decrease in each region. The maximum values are registered in the North-East (which holds approximately 15% of total employment), and the minimum values in the Northwest region (around 8.5% of total national employment) (Figure 2). Bridging the gap was due to the fact that the level of employment has increased in all regions of the country.

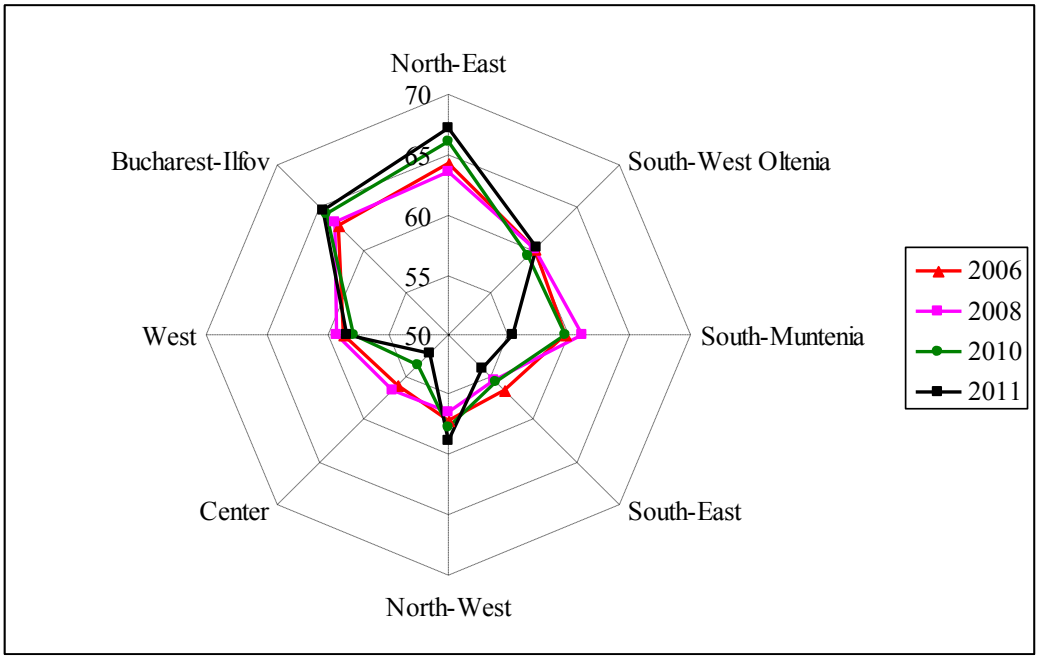
Figure 2 Disparity index of employment to the national average



Source: Romanian Statistical Yearbook 2007-2012, authors' calculations

It also has improved *employment* in less developed regions where the rate of employment is sharper than in the other (Figure 3). Thus, in 2010 compared to 2006, in the North-East it grew by 3 percentage points while in the South-Muntenia region decreased by 4.3 percentage points. Year 2006 only in South West regions, Northwest Bucueşti-Ilfov and put the growth of the employment rate.

Figure 3 Evolution of the employment rate on major development regions of Romania during 2006-2011



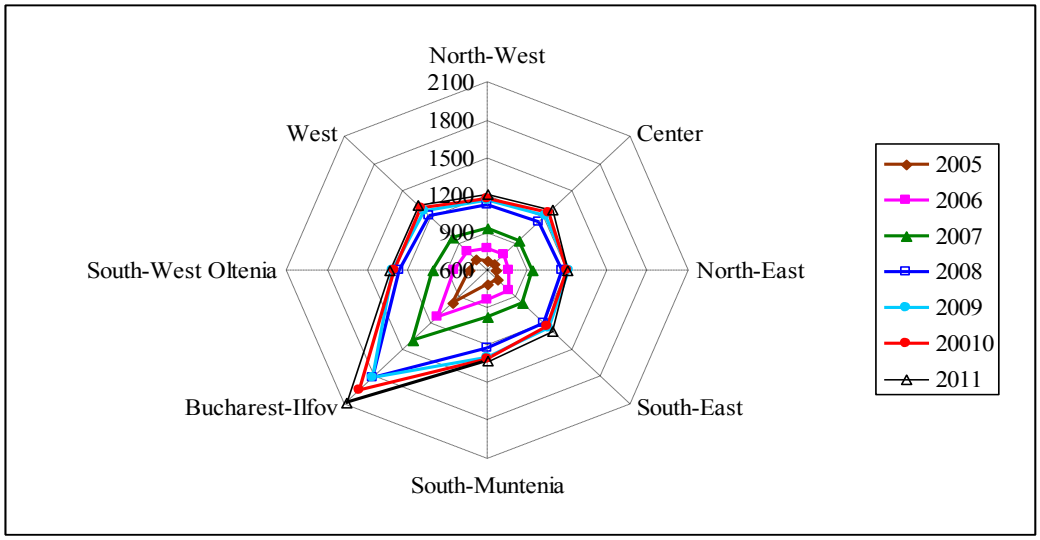
Source: authors' calculations based on data from Statistical Yearbook of Romania 2007-2012

In 2011 the North East Region with 14.3% to help fill the country with total while the highest rate of employment in agriculture, forestry and fisheries of 20.3%. At the opposite pole lies West region as contributing to the total occupation of the country with only 9.7%.

In terms of *net monthly average nominal wage* discrepancies of regions began to diminish during the reporting period, however, the ranking of the regions from the point of view of the major changes that have been known. So if in 2005 the level of earning net monthly average nominal in the Center represent the level of 67.67 earning net monthly average nominal in Bucharest-Ilfov Region in 2011 the lowest nominal average monthly net salary was registered in the northeast (57.47% level is only earning net monthly average nominal in Bucharest-Ilfov Region).

2005-2011 has registered an increase of earning net monthly average nominal at NACE in the section for each region (Figure 4) territorial disparities of income, however, are complemented by maintenance discrepancies in terms of unemployment, even though this phenomenon has seen a reduction in recent years.

Figure 4 *Evolution of net monthly earnings at NACE section*



Source: authors' calculations based on data from Statistical Yearbook of Romania 2007-2012

During the period 1992-2011 the Romanian population decreased 6.3%. *The decrease in Romania demography* is due to demographic powerful fertility decrease, increased death rate and emagration (especially during the period 1991-1992).

South-Muntenia region and Nord-Est have the largest share of the population aged 65 years and over in the total population (16.97% 16.63% respectively with effect from 1 July 2011). Most of the young population is registered by the Northeast Region, where, on July 1st 2011 saw 19.95% population aged 0-14 years, negative record is owned by the West region with a share of the young population of 8.83%. If the country register a surplus of young population towards the old there are regions where this proportion is reversed: Bucharest-Ilfov South-Muntenia, Southwest, Southeast and West.

However the demographic dependency rate recorded the highest values in the North-East Region because of the high level of the "pressure" of young people aged 0-14 years of age over adults – over 20.65% while highest pressure exerted by the elders to record in the Southwestern regions of Oltenia and Muntenia South that 14 elderly per 100 adults, respectively, 7.8 14 elderly per

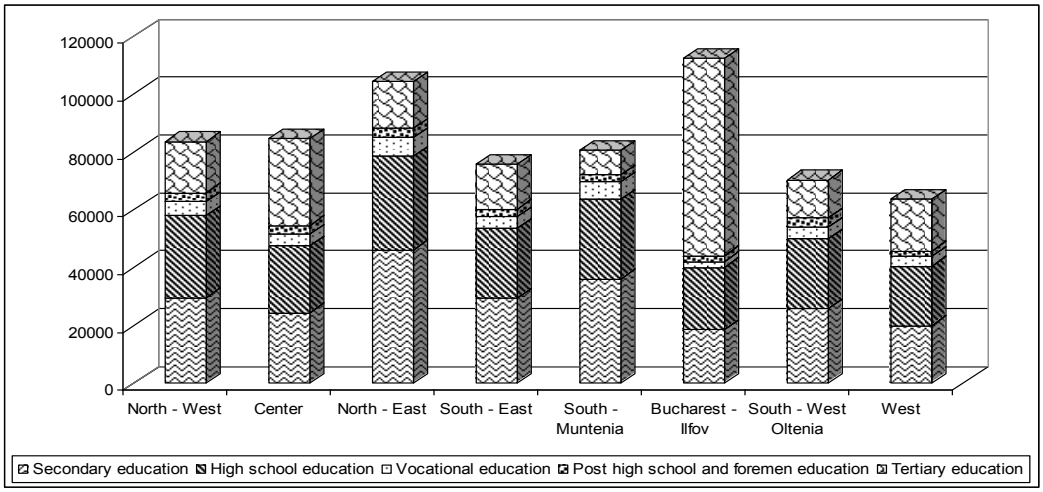
100 adults. Bucharest-Ilfov region although noticed for the number and share of the aged from the viewpoint of demographic dependence present a good situation because the proportion of adults was the highest in the whole country. The capital has always been a pole of attraction power in internal migration due to the degree of social and economic development of the area.

At the regional level, in 2011, the *life average* is 75,55 years in Bucharest-Ilfov Region and 73,31 in the West region, a strong difference is given by the residence area and gender. Spread the greatest gender difference was almost 8 years for women in South-Muntenia Region, while the on average the strogest differentiation was registered in Bucharest-Ilfov Region (2.58 years in favor of urban population). Note the difference in extremely small (0.68) between life average in the West region, which shows the living conditions almost similar on the two types of habitat.

The regional profile, *education level*, with the largest increase in terms of the school population included is higher education, particularly since the 2000s, after the appearance of private education and dissemination of public and private education through open universities or their subsidiaries in the cities.

Regarding the distribution of the population enrolled in tertiary education in development regions, in the academic year 2010/2011, in Bucharest-Ilfov Region was 30.91% of all enrolled students. The share of students in the North-Western Regions, North-East, Center and West is about 11.34% and 14.6% (Figure 5). These regions constitute immigration centres for other regions, in terms of higher education. In Bucharest, the share of the population the higher education tuition is much higher than in the case of other types of schools, the majority of the school population registered in this type of education coming from southern and Eastern regions, regions with lower weights of school population registered in higher education.

Figure 5 Number of graduates in territorial and levels of education, school/academic year 2010/2011



Source: authors' calculations based on data from Statistical Yearbook of Romania 2007-2012

Working abroad is an important source of income for a significant part of the population. Currently, one out of ten households receive income from international migration. Households with migrants have a larger number of long term assets compared to households which have the same socio-economic profile, but without experience of migration.

Nationwide, about 10% of the volume of each type of investment over the past five years is realized with the help of international migration. In terms of the type of expenditure – the most

important are the investments in housing (expansion/modernization and construction or purchase), followed by the purchase of household appliances, cars and other goods. Productive activities financed with money from migration are different depending on the environment in the rural residential – money is invested mainly in agriculture, while the type in urban environment money is invested in other types of businesses.

The intensity of the phenomenon were stressed especially after 2002, together with the liberalisation of movement in the Schengen area for Romanians. Currently, the phenomenon of temporary migration for working abroad is approximately three times higher than in 2002.

Moldova, Muntenia and Oltenia are historical regions in which temporary labour migration shall prevail over the temporary departure of tourism-sightseeing, more common in Western Transylvania, Dobrudja and Bucharest.

Currently, Italy and Spain are the main destinations of Romanians who work abroad.

Migration flows have a more balanced territorial distribution compared with those of immigration, the main sources of emigration during the year 2011 as the Bucharest-Ilfov region, West, and North-East. Sizes of more modest emigration were recorded during this period in South-Muntenia region and the South-West Oltenia.

If it is natural that areas with a higher unemployment rate than the average to hold greater potential of migration among the workforce, it is found that the Bucharest-Ilfov region, characterized by low numbers of unemployed, is also a major source of emigration, but its features are different from other areas of the country.

In the case of the Bucharest-Ilfov region, a high share in the number of migrants hold that people with a higher professional qualification, who decide to leave the country motivated by increased chances of affirmation and of obtaining very high incomes compared to those in Romania, as well as young people attracted by the prospects of specialization or continuing their studies in better conditions.

There are a number of arguments for further decreasing the final migration in the future, the reduction of temporary migration for work and return a portion of the Romans leave to work abroad:

- Economic recession that continues in Europe, economic growth forecasts are increasingly more pessimistic in countries where most of romanian migrants are concentrate. Construction, which have so far attracted many romanian migrant workers are among the first areas affected by the reduction of economic activity, with negative consequences on the employment of immigrants is already felt. Italy and Spain, two of the key destinations for humane and Romans, are no longer attractive in the present
- The scarcity of labor in the country, especially in the construction and continued growth of salaries, linked to a large extent with this deficit. The emigration of important parts of the work force has created a shortage of labour in many sectors of activity in Romania (construction, textile and footwear, food industry, trade, health, etc.)

Thus, the negative impact it has on the size and quality of the labour force employed in Romania is manifested in several directions: the departure abroad of a significant part of the highly qualified workforce (brain-drain), the brain-brain-win-loss is disadvantageous to Romania under the qualitative aspect, in view of the fact that the skill level of people coming in Romania is lower than those leaving the country ,the processes of brain circulation and brain regain, ageing of the workforce in some sectors (e.g. R & D), which is partly influenced by migration, etc.

At the regional level, there are major disparities in terms of the number of redundant. These variations are due to several factors, among which:

i) The structure of the local economy-economic sectors have been affected in different ways by the crisis-which it is observed and at the level of local/regional economies;

ii) Influence of workers with floating domciliu: big cities such as Iaşi, Cluj, Timisoara and Bucharest drew manpower from the adjacent counties, they are among the first fired at the beginning of the crisis.

However, regionally there were discrepances before the crisis, they have just had a tendency in recent quarters emphasis.

Given the low values of the unemployment rate at the national level, it can be affirmed that the layoffs that occurred in the year 2012 did not produce imbalances in the evolution of unemployment, and the counties that have been confronted with this phenomenon have found solutions for economic recovery reflected and in alleviating problems in terms of employment.

At territorial level, according to data provided by the national employment Agency employment, the number of unemployed grew in 36 counties, the largest increases in residential districts: Alba (with 2.301 persons), Hunedoara (with 1.124), Harghita (with 958), Valcea (with 943), Arges (with 907), Galaţi (with 901) and Vaslui (with 876).

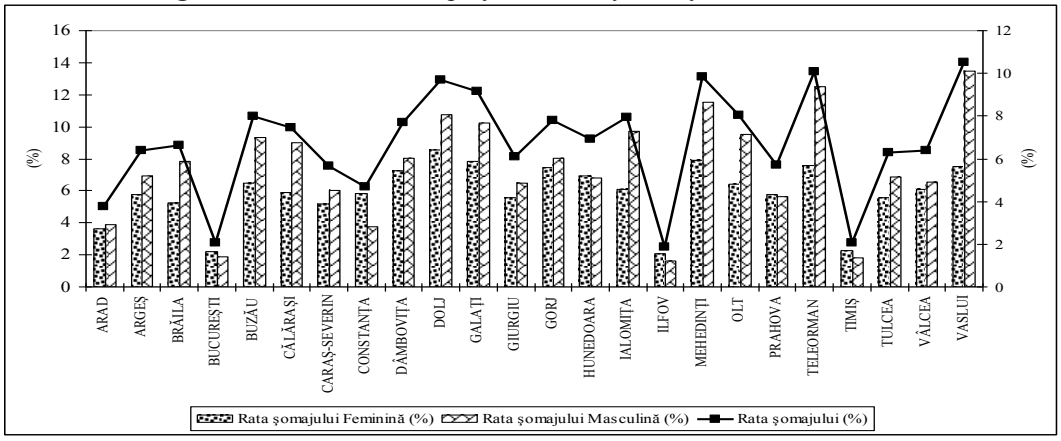
The number of unemployed fell in 5 counties, namely: Buzau (with 313), Maramureş (with 292), Suceava (with 245), Iaşi (with 168 persons) and Ontario (with 38 persons). In Bucharest the number of unemployed fell by 125 people.

The counties with the highest unemployed rate from the total number of unemployed are: Dolj (77,25%), Teleorman (76,86%), Galaţi (73,14%), Satu Mare (73,04%), Iaşi (72,68%), Buzău (70,56%) and Brăila (70,37%).

The unemployment rate fell in the counties: Buzau (with 0,16 pp), Maramureş (with 0,14 pp), Suceava (with 0, 11pp), Iaşi (with 0, 06pp) and Ilfov (with 0, 02pp). In Bucharest the unemployment rate fell by 0, 02pp. The largest increases in unemployment rate were registered in the counties like Alba with 1. 34pp, Ialomiţa 0.74 pp, Harghita with 0.67pp, Hunedoara with 0.68 pp, Vâlcea with 0,57 0pp,Valcea witho. 54pp and Sălaj with 0.50 pp.

The highest levels of unemployment have been achieved in counties: Vaslui (10,48%), Teleorman (10.04%), Mehedinţi (9,80) Dolj (9,69%), followed by counties: Galaţi (9,14 m), Alba (8.71%), Olt (8,01%) and Buzau (7,98%) (Figure 6).

Figure 6 Evolution of unemployment rate by county in December 2012



Source: National Agency for Labour Force Employment

The regions with the highest rates of unemployment were Southwest, South, Southeast and Central rural regions where activities are prevailing. These are regions with pronounced disparities even within them, where, predominantly agricultural counties coexists with the most developed ones Table no.2).

Table 2 Total number of unemployed and the unemployment rate by counties and regions in December 2012

Regiunea/ judeţul	Total şomeri		Indemnizaţie şomaj: 75%		Indemnizaţie şomaj 50%		Someri Neindemnizaţi		Rata şomaj **
	Total	Femei	Total	Femei	Total	Femei	Total	Femei	
Sud-Est	69572	29684	19190	9110	5151	2622	45231	17952	6.62
Sud - Muntenia	87880	36611	23818	9618	8137	3892	55925	23101	7.12
Sud-Vest Oltenia	75565	31391	18298	7473	7312	3725	49955	20193	8.41
Vest	34120	15861	16031	7261	3440	1808	14649	6792	4.03
Bucureşti-Ilfov	25069	13464	9936	5494	1599	804	13534	7166	2.01
Nord -Est	78203	30799	22115	8284	8083	4132	48005	18383	6.18
Nord-Vest	54710	23928	19641	8995	5190	2744	29879	12189	4.52
Centru	68656	29057	21218	9185	5314	2843	42124	17029	6.41

** calculated on the civil active population 01.01.2012, communicated by INS
Source: National Agency for Labour Force Employment

Bucharest regions, West and Northwest, have reached the lowest levels of unemployment, these areas being advantaged by their lower dependence on the primary sector (Bucharest-Ilfov region), and the proximity of Western markets (areas West and Northwest), as well as high capacity they have in attracting foreign direct investment.

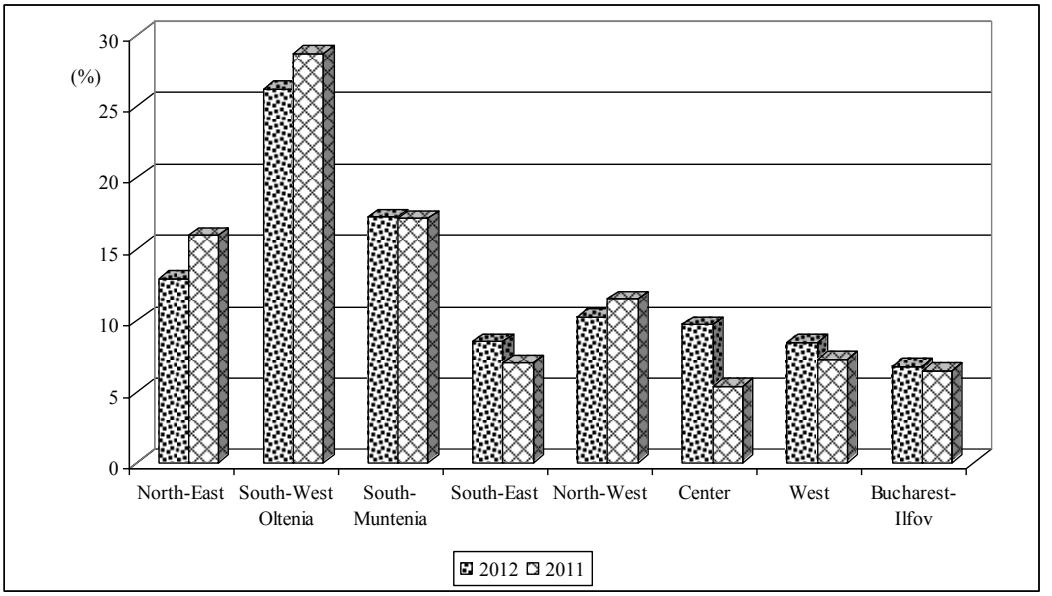
The counties with the largest proportion of the unemployed who receive unemployment allowance in accordance with the Law No. 76\/2002 with secondary education were recorded in the County of Prahova (47.677), with secondary-school studies or post secondary and higher education in Bucharest (3030 persons ,respectively 2392 persons).

At territorial aspect, in 2012, with the highest values both in terms of *the rate and the average annual number of job vacancies* were registered in Bucharest-Ilfov region and northeast (0,73% for each one, and the average annual number of job vacancies was 6.7 thousand vacancies, i.e. 3.6 thousand vacancies). Characteristic of the Bucharest-Ilfov Region is the fact that the annual average number of job vacancies has represented 27% of the number of job vacancies across the country. At the opposite pole, both in terms of the rate and the average annual number of job vacancies at the lowest levels it has known the region South-West Oltenia (0.36%, respectively 1.2 thousand vacancies), followed by the Southeast (0,42% respectively 1.9 thousand vacancies).

The phenomenon of labour migration calls for the development of at least three relevant themes: management of legal migration, fight against illegal migration and the integration of legal migrants into receiving societies.

In order to achieve the general objective " Facilitate the free movement and increase the awareness of workers in EU Member States or the signatories to the agreement on the EEA, as well as in countries with which Romania has concluded bilateral agreements in the field of employment\", the EURES advisers led by EURES and International Relations have offered Mediation in 2011 and 2012, counselling and information services mediationa number of these 16.496, 17.318 persons looking for a job in the European countries (see Figure 7).

Figure 7 Percentage distributions of persons seeking employment in countries of the EU / EEA, mediated by EURES advisers in 2011 and 2012



Source: *Employment, Mobility, Unemployment and Unemployed Social Protection*, Ministry of Labour, Family and Social Protection

Thus, in 2011, the number of workers, for countries with average workers with which bilateral agreements were signed between governmental institutions (Germany, France and Switzerland) was 72.875, while, in the same period of 2007, the number of workers was 37.639, which represents an increase of 35.286 people.

In terms of the area of origin of international workers, both in the year 2011, most applicants have a contract to work abroad originated in geographical area (22.913), which represents 31.4% of the total number of people internationally**.**

Conclusions

Comparative analysis of the evolution of macroeconomic indicators at the level of the eight development regions of Romania have revealed a number of disparities and desprinerea, from which conclusions may be drawn:

- unbalanced development between the West and East of the country;
- economic development followed a West-East direction, the proximity of Western markets acting as a growth promoter;
- chronic underdevelopment is concentrated in the Northeastern Region on the border with Moldova and in the southern regions along the Danube;
- industrial restructurea monoindustriale cities had a strong negative impact on the labour market at regional level;
- migration was more accentuated in 2011 in the Centre;
- restructuring of industry, internal and external migration are factors that have led to the decline of small towns and medium-sized enterprises;
- increasing the proportion of the importance of Bucharest in Bucharest-Ilfov Region compared to the general situation of the development of the other regions.

The process of reducing discrepancies between developed areas and those lagging behind is one of duration and is carried out with small steps. Even if growth rates are higher than in areas with a low level of development, yet not stagnating economies developed regions but are also on an uptrend it is reflected in reduced intensity gaps. For this reason, reducing territorial disparities should be a core component of the National Strategy of regional development, and development Planners to the regions.

References

- *Anuarul Statistic al României – 2007-2012*, Institutul Naţional de Statistică.
- *Buletin Statistic în Domeniul Muncii şi Solidarităţii Sociale*, 2006-2012, Ministerului Muncii şi Solidarităţii Sociale –România, Accesed May 2012, www. mmuncii.ro.
- *European social statistics – Population statistics,* 2011 edition. Eurostat, Accesed November 2011, www. epp.eurostat.ec.europa.eu.
- *Evoluţii în domeniul şomajului şi a protecţiei sociale a şomerilor, în anul 2010-2012*, Agenţia Naţională pentru Ocuparea Forţei de Muncă, Accesed November 2012, www.anofm.ro.
- *Decalaje regionale la orizontul anului 2010*, Comisia Naţională de Prognoză, 5 noiembrie 2009, Accesed January 2013, www.cnp.ro.
- *Strategia de Dezvoltare a Regiunii Vest 2007-2013*, Accesed February 2013, www.oirposdru-vest.ro.
- *Employment, Mobility, Unemployment and Unemployed Social Protection*, Ministry of Labour, Family and Social Protection, Accesed February 2013, www.mmuncii.ro.
- *Strategia Naţională de Dezvoltare Regională 2013-2015*, Ministerul Dezvoltării Regionale şi Construcţiilor, Accesed February 2013, Accesed March 2013, www.mdrc.gov.md.
- *Plan de Dezvolatare Regioanală 2007-2013,* Accesed February 2012, www.adrcentru.ro.
- *Statistici- Agenţia Naţională de Ocupare a Forţei de Muncă,* Accesed March 2013, www.anofm.ro.

SUSTAINABLE INNOVATION - NEW ECONOMIC CONCEPT REQUIRED BY SUSTAINABLE DEVELOPMENT

VIOREL CORNESCU[*]
CECILIA-ROXANA ADAM[**]

Abstract
Following the concept of sustainable development and standard economics, we find innovation presented as one of the most important factors of world economic growth. Although most authors focus their research on sustainable development, this paper will instead focus on sustainable innovation. The paper converges on studying innovation from the perspective of sustainable development and sustains several theoretical results in order to show the importance of adopting innovation process which respects sustainable goals. The paper it is also focused on analyzing the importance of creating sustainable innovative products or services within the constraints of economic, environment and social issues. The paper concludes by enhancing the understanding of the sustainable innovation power in economic environment development, correlated with social and natural environment.

Keywords: *Sustainable innovation, development, sustainability, innovation process, innovative products*

Introduction

In the late 1960s, the National Environmental Policy Act (NEPA), American environmental movement became the progenitor of the contemporary global sustainability movement:

"*…to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans*."[1]

Sustainable development is a concept based on intergenerational equity - that is, the current generation must not compromise the ability of future generations to meet their 'material needs' and to enjoy a healthy environment.[2]

For instance, a desideratum of the sustainable is to create a balance between the apparently opposite objectives of economic growth and environmental protection, with the issues of social equity. Sometimes the solution results of the balancing objective have been disappointing, designed in policy ineffective.

Sustainable development is a normative concept which is incorporating economic, ecological and social objectives. In economic development we have to take into consideration that the *importance of innovation for development is increasing with time*.[3] It is important to understand the importance of innovative process or goods and services in a sustainable development.

The purpose of this work is to identify and analyze from a theoretical perspective the innovations in a sustainable environment by defining the concept of *sustainable innovation*. Based on literature review the current study intends to make understandable the role it plays this topic in economic and natural environment.

---

[*] Professor, PhD, "Nicolae Titulescu" University of Bucharest (cornescuviorel@yahoo.com).
[**] PhD candidate in Behavioral Economics, The Romanian Academy, Bucharest (roxana_adam2004@yahoo.com).

[1] NEPA and Environmental Planning: Tools, Techniques, and Approaches for Practitioners, CRC Press, 2008.

[2] Batie, Sandra S. "Sustainable Development: Challenges to the Profession of Agricultural Economics."Am. J. Agr. Econ. 71:5 (1989) p. 1084.

[3] Verspagen, B. (1991). A New Empirical Approach to Catching up or Falling Behind. *Structural Change and Economic Dynamic, 2* (2), pp. 359- 380.

If sustainable development is *the pursuit of growth subject to environmental constraints*[4] then innovative process can't take place without respecting constraints, furthermore an innovative product or service can't be achieved without respecting the constraints of economic, environment and social issues.

From this perspective, sustainable innovation it is and it will be an important factor which may be consider as a primary need for achieving sustainable development on a long term. Therefore, the paper discusses the interdependence between innovation, environment, social and economic stability, when constraints are implied.

Sustainable Innovation: a linkage between innovation and sustainability concept

Taking into consideration the economic literature and analyzing our society, we note that innovation plays an important role in economy and consumer life. *During the 20th century, innovations have produced revolutionary effects on the locus of capital, labor and productivity – we need only look at the changes produced by the airplane or the computer to convince ourselves of this.*[5]

Innovation is a search process characterized by less regularity in its outcome. Production and innovation are interdependent.[6] Innovation is the key of economic growth and producers are investing in innovative products to increase profits. In our days innovation is an accelerating process, and today's innovative products may become the "old products" of tomorrow.

Along with profit like a primary target, an innovative producer is important to have sustainable goals. In an innovation process is important to have linked targets for issues such as pollution, carbon emissions, social and economic problems. According to John Hagel III, we are in the midst of a vast global flow of ideas, innovations, and opportunities for profit through collaboration.[7] It is important to work "together and to pull out of ourselves more of our true potential, both individually and collectively" like he said, but in addition it is important to work for our present and future welfare without compromising the welfare of the future generations.

Producing innovative products/services in a sustainable development requires a sustainable innovation. Based on scheme of sustainable development: at the confluence of three constituent parts[8], we have identified sustainable innovation like in the next figure:

[4] Batie, 1989:1084.

[5] Jhon H. Holland, Innovation in Complex Adaptive Systems. Some Mathematical Sketches, **Santa Fe Institute**, Sfi Working Paper: 1993-10-062.

[6] Bengt-Åke Lundvall, Product Innovation and User-Producer Interaction, Industrial Development Research Series No. 31 , Aalborg University Press, 1985.

[7] Guy Isaac, Joseph Levy, Alexander Ognits, The Benefits of the New Economy. Resolving the global economic crisis through mutual guarantee, ARI Publishers, Toronto, Edition: January 2013.

[8] Zaman Ghe., Goschin Z., Multidisciplinaritate, interdisciplinaritate şi transdisciplinaritate: abordări teoretice şi implicaţii pentru strategia dezvoltării durabile postcriză, Economie teoretică şi aplicată, Vol. XVII, No. 12(553), 2010.

UCN 2006, *The Future of Sustainability. Rethinking Environment and Development in the Twenty-first Century*, Report of IUCN Renowned Thinkers Meeting, 29 - 31 January 2006. http://cmsdata.iucn.org/downloads/iucn_future_of_sustainability.pdf.

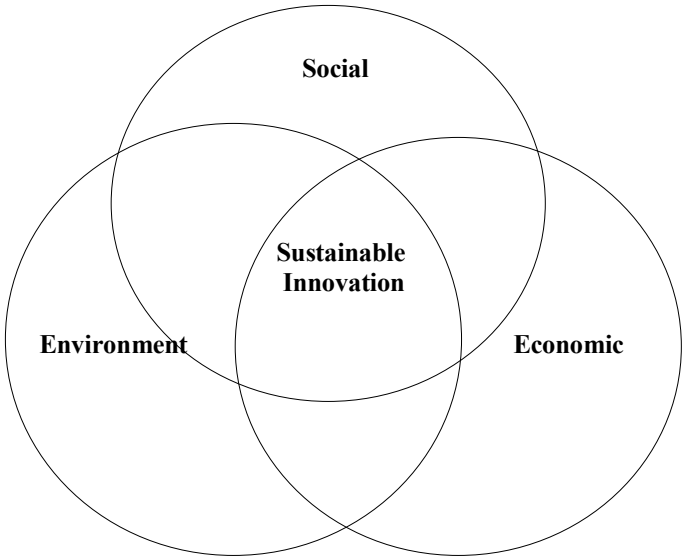


Figure 01: Sustainable Innovation - based on UCN 2006 Source

When we are referring to producer, we speak about individual or organization concerned with the production of goods and services; after all we are dealing with human beings that are taking part in the economic process. In economic process, consumer is not the only human being, behind organization there are and there always be, people. If we imagine the market like a theater play, we can see that all the participants on the market are actors with different role, but in the end there are all human beings. In real life, even if we are producer or consumer, we all face, at global level, with climate changes, deforestation, biodiversity loss and water shortages. These types of changes affect everybody, even if we refer to producer or consumer, consequently we should pay more attention to the concept of sustainable development.

Manufacturing of innovative products is at a stage that needs resources, and it is important to think of them and act in a sustainable manner. To face off the limited supply of natural resources and the impact of growth on the environment, the producer needs to set aspirational goals on a long-run economic growth and to pay more attention to a sustainable production.

Within the area of environmental management, according to United Nations Environment Programme, the Cleaner Production network has stressed the need for the promotion of cleaner production processes and preventive environmental strategies[9].

Innovation and sustainability, in the economic environment, have to be interconnected and in order to ensure long-term success and as well as a healthy economy that takes into account both environmental performance and social responsibility.

According to the OECD[10], new sources of growth and competitiveness need to be identified, including innovation, green growth, knowledge-based assets, and skills *("go structural and go green")* to put our economies back on a strong, inclusive growth path.[11]

[9] UNEP (2012), Global Outlook on SCP Policies: taking action together. (http://www.unep.org).

[10] The Organisation for Economic Co-operation and Development (OECD) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. (http://www.oecd.org).

[11] OECD week2012, New Approaches to economic challenges – a framework paper, Paris, May, 2012

In our days, with new and competitively differentiated products, companies can no longer avoid innovation process; innovations can provide or ensure an important place on the market.

Harmony between the three pillars of sustainable development in innovation process is the best choice in terms of innovation. We can call it "sustainable innovation", which is distinguished from an ordinary innovation by bounding it to the constraints of society, environment and economy. Sustainable innovation is about using innovation to reduce energy consumption, social issues, improve environmental performance and it is a determinant key of economic performance and to our ability to keep innovating. Innovation should be created by taking into consideration the efforts to achieve the goals of sustainable development.

Sustainable innovation is the pulse of economic growth. In sustainable innovation we are studying innovations from more perspectives: technological, economic, environment and societal perspective, to facilitate sustainable societies by producing and consuming in a sustainable way. Therefore, sustainable innovation involves multiple actors such as government, business, educational institutions, groups within society and consumers to use technological goods or service to solve societal issues and to strengthen welfare in the world.

A sustainable innovative system is composed of a series of production practices that are incorporated and interconnected with each another. John Ikerd argues that sustainability is determined by the system as a whole[12]. Such as, to develop an innovative good or service in a sustainable environment involves the working together of more than two factors to produce a better effect than the amount of their individual effects.

Most times, when companies want to innovate or adopt innovations, they overstate the immediate benefits or economic profit in the long-run and they are underestimated the adverse effects, either because they do not know the exact effects of using the innovation in the long term or due to the high costs that would be involve by such an analysis. However without a proper planning, apparently bearing only positive effects, it is possible to observe in time higher negative results, with side effects that could have been avoided by a proper appreciation of these innovations.

In most definitions of sustainability we find long-term benefits to the environment and the economic profitability over a long period of time. The development of new products is the main factor that underlies the requirement suggested by the definition of sustainability and the most important forms it might take it are: innovative process and innovative goods and services.

Sustainable innovative process

An innovative process is the adoption of a new process or a new machine, by the organization, to facilitate the production of goods and services, to obtain the best results from fewer resources in an efficient way and to make the organisation to function in the best way. The innovative process became sustainable when the organisation achieves this improvement by the integration of economic, environmental and social concerns[13].

Innovative processes are complex and often require a large number of different participants, where human engagement is essential. An entrepreneur that organises the implementation of the innovation is like a visionary with a new idea which identifies important needs for organization.

Advancing technological knowledge has been identified as the single most important contributing factor to long-term productivity and economic growth.[14] As has been noted, sustainable innovation processes is different from conventional innovation, it mainly differs in purpose and

[12] Ikerd, John E. "Applying LISA Concepts on Southern Farms or Changing Farm Philosophies" S. J. Agr. Econ. 23:1 (1991), p. 46.

[13] Uwe Fortkamp and Louise Staffas, Integration of sustainability aspects in innovation processes, A survey as part of the SPIN project, IVL Report B2025, January 2012.

[14] Gruber, N., Keeling, C., Bacastow, R., Guenther, P., Lueker, T., Wahlen, M., Meijer, H., Mook, W. and Stocker, T, Spatiotemporal patterns of carbon-13 in the global surface oceans and the oceanic Suess effect, Global Biogeochemical Cycles 13(2), 1999.

direction[15]. For instance, organisations need to invest in a sustainable innovation processes by providing their employees with the right innovation tools or software system, by adopting only those innovations which respect the constraints to achieving sustainable development.

The innovations, which are adopted by the organization, have to enable employees to complete their tasks more efficiently and effectively in the production of goods or services or to improve existing products and processes. These adoptions lead the organisation to higher profits and to sustainable development. However, in some cases, the adaptation of a sustainable innovation processes over the short run suggests lower profit with the expectation that benefits will be achieved over a longer period of time.

Focusing on long-terms objectives by adopting a sustainable innovation processes can improve environmental quality over time, resolve social issues and to enjoy more economic benefits in time. However, the benefits from adopting sustainable innovation in the production process, must be estimated not only in terms of absolute improvement in natural environmental quality, but also in relative terms, relative to what would have occurred if the innovative process have been continued without not implementing a sustainable innovational processes. Furthermore, the consequences on profitability of such sustainable innovation processes must be estimate not only over a time horizon, but also be evaluated relative to the profitability of a conventional innovation processes over the same time horizon[16].

Sustainable innovative goods and services (Sustainable innovations)

The concept of sustainability may be defined like a "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (Brundtland Commission, 1987)[17]

If we link such definition to sustainable innovations, then sustainable innovative goods and services are also based on intergenerational equity. The current innovations (expressed in innovated products or services) of the actual generation, must not compromise the ability of innovating of the future generations, the resource that they need for innovating products (or services) and have to maintain or improve a healthy environment.

In the '80s, Freeman and Perez propose a new way to classify technological innovation: incremental innovation, radical innovation, new technology systems and new technological models. This classification will serve as foundation for a more complex classifications made by Henderson and Clark[18] (1990) who classify innovations using two dimensions: basic concepts - that capture of the impact of innovation on product components and connections between fundamental concepts and components of a product.

[15] Uwe Fortkamp and Louise Staffas, IVL Report B2025, January 2012.

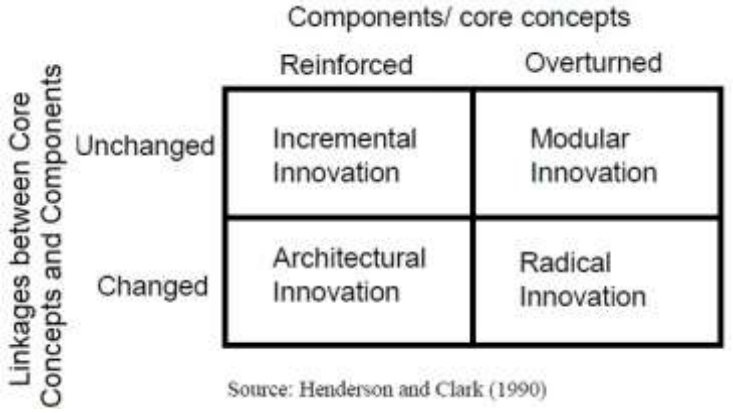
[16] Debertin David L. and Pagoulatos Angelos, Production Practices and Systems in Sustainable Agriculture, 1995.

[17] Report of World Commission on Environment and Development. Our Common Future, 1987.

* World Commission on Environment and Development (Brundtland Commission) published its report in 1987 and presented a new concept - sustainable development. The concept helped to shape the international agenda and the international community's attitude towards economic, social and environmental development.

[18] Henderson R.M. & K.B. Clark, Architectural Innovation: The Reconfiguration of Existing Product Technologies and the Failure of Established Firms, Administrative Science Quarterly, 1990.

Figure 02: Classifications of innovation



As we can see, the degree of the innovation process can begin at a minor level, minimal or incremental improvements, to radical changes modifying our way of thinking about a product or service and how to use it.[19]

Analyzing the classifications made by Henderson and Clark, we define:

Incremental innovation is the simple improvement of the ensemble. Studies about incremental development processes have shown that the efficiency gained over time is more important than occasionally appeared with radical changes.

Modular innovation requires only the change of the fundamental concept. Making changes on the basis of the product but the use remains the same.

Architectural innovation involves only changing the links between product components. Merge several components with different benefits in order to make an improvement, a novelty product, but individually these components remain at the same degree of novelty.

Radical innovation involves the creation of both, new fundamental concepts and some new links. It refers to the creation of unprecedented products.

The major products and services on the market are innovative products or services that consumers adopt in daily life. Correlating with the sustainability constraints, by respect them, it becomes sustainable innovative products and services.

According to Watson (2008)[20] the governments should set general frameworks to encourage more sustainable innovation. He maintains that the government plays an important role in the support of eco-innovation. It is difficult to measure either the outputs (e.g. in terms of economic returns) or outcomes (in terms of successful innovations) of technology support programmes[21] and sustainable innovation support programmes. However, government technology policies have to do more than fund basic research and development, and internalize the social costs of carbon emissions[22]. Governments can promote innovative products or services by introducing strong policies, creating

[19] Leuca T., Inovaţie şi tehnologie, Universitatea din Oradea, Facultatea de inginerie electronică şi tehnologia informaţiei, 2008, pag. 10.

[20] Watson, J. Setting Priorities in Energy Innovation Policy: Lessons for the UK. *ETIP Discussion Paper Series, Belfer Center for Science and International Affairs, Kennedy School of Government, Harvard University*.

[21] Gallagher, K. S., J. P. Holdren, et al. (2006). Energy-Technology Innovation. *Annual Review of Environmental Resources* **31**: 193-237, 2008.

[22] Bonvillian, W. Testimony before Congressional hearing on "Establishing the Advanced Research Projects Agency-Energy (ARPA-E) - HR 364", House of Representatives, 2007.

Subcommittee on Energy and Environment, Committee on Science and Technology.

types of constraints that involve environment, economic and social issues to lead to sustainable innovative products on the market.

To solve market problems complying with social and environment norms, the organisations can use sustainable innovative products. The four kinds of innovation come together in large proportion on the market. Even if we refer to radical innovations or to the others type of product/ services innovation, we know that the economy is characterized by a multitude of new products launched on the market, of which almost 90% of them do not survive[23].

To avoid the failure of the innovative products on the market, investing in creating sustainable innovative products represents, first of all, the manufactures interest by increasing their competitiveness on the market. If we just imagine increasing the number of the producers which are investing more and more in an sustainable innovative process or to create sustainable innovative products, in a long time we will be able to achieve a sustainable development at a global level. A sustainable innovation doesn't represents just a benefit for new generations, hence it represent a benefit for the actual economic environment and for the producers profits by decreasing the number of the products that doesn't survive on the market and dreducing the inefficient use of resources.

A way that All Civil Society Organizations contribute to sustainable consumption and production is to support business in producing and marketing more sustainable products. Consumers can also become agents of change by demanding better quality and more sustainable products and services. [24]

Conclusions

Sustainable innovations should be regarded as a binder between sustainable development, manufacture and consumer. It merges the consumers satisfaction with the aim of manufacturers by meeting the requirements of sustainable development.

The innovative process, chosen by the producer, must be sustainable to generate a long term development on the market without affecting the welfare of the future generations. As has been noted, this type of innovation is the optimal choice for producer, consumer, on the market and for a healthy economy by using the right amount of resources in developing innovative products.

In conclusion, by adopting sustainable innovation process or creating sustainable products and services, the manufacture will avoid high losses, the limited resources will be efficiently used, increasing the benefits of consumer without affecting the innovative "power" of a future generation or their needs.

The relationship between innovation and sustainable development has received relatively little attention because the definitions of the concept of sustainable innovation largely unexamined. The presented work will possibly shed some light on the concept of sustainable innovation and in the future, the authors intend to evaluate the attitudes of producers regarding the problem of innovating in a sustainable environment.

References

- Batie, Sandra S. "Sustainable Development: Challenges to the Profession of Agricultural Economics."Am. J. Agr. Econ. 71:5 (1989) pp. 1083-1101.
- Bengt-Åke Lundvall, Product Innovation and User-Producer Interaction, Industrial Development Research Series No. 31 , Aalborg University Press, 1985.
- Bonvillian, W. Testimony before Congressional hearing on "Establishing the Advanced Research Projects Agency-Energy (ARPA-E) - HR 364", House of Representatives, 2007.

[23] Crawford, C. M. şi Di Benedetto A. , *New products management*, , Ediţia aIX-a, New York, Editura McGraw-Hill/Irwin, 2008.

[24]UNEP (2012), Global Outlook on SCP Policies: taking action together. (http://www.unep.org).

- Daly, H.E.,"Sustainable development from concepts and theory towards operational principles," in K. Davis and M.S. Bernstein (eds) Resources, Environment and Population: Present Knowledge, Future Options, New York and Oxford: Oxford University Press, 1991.
- Debertin David L. and Pagoulatos Angelos, Production Practices and Systems in Sustainable Agriculture, 1995.
- Gallagher, K. S., J. P. Holdren, et al. (2006). Energy-Technology Innovation. Annual Review of Environmental Resources 31: 193-237, 2008.
- Gruber, N., Keeling, C., Bacastow, R., Guenther, P., Lueker, T., Wahlen, M., Meijer, H., Mook, W. and Stocker, T, Spatiotemporal patterns of carbon-13 in the global surface oceans and the oceanic Suess effect, Global Biogeochemical Cycles 13(2), 1999.
- Greenacre P., Gross R. and Speirs J, Innovation Theory: A review of the literature, ICEPT Working Paper, May 2012.
- Guy Isaac, Joseph Levy, Alexander Ognits, The Benefits of the New Economy. Resolving the global economic crisis through mutual guarantee, ARI Publishers, Toronto, Edition: January 2013.
- Ikerd, John E. "Applying LISA Concepts on Southern Farms or Changing Farm Philosophies" S. J. Agr. Econ. 23:1 (1991) pp. 43-52. (p. 46).
- Hartwick, J. M. "Natural Resources, National Accounting and Economic Depreciation". J. of Public Econ., 43, 1990, pp. 291-304.
- Henderson R.M. & K.B. Clark, Architectural Innovation: The Reconfiguration of Existing Product Technologies and the Failure of Established Firms, Administrative Science Quarterly, 1990.
- Poole, M.S., A.H. van de Ven, K. Dooley, and M.E. Holmes, Organizational Change.
- and Innovation Processes, theories and methods for research, ed. O.U. Press. 2000.
- Jhon H. Holland, Innovation in Complex Adaptive Systems. Some Mathematical Sketches, Santa Fe Institute, Sfi Working Paper: 1993-10-062.
- Leuca T., Inovaţie şi tehnologie, Universitatea din Oradea, Facultatea de inginerie electronică şi tehnologia informaţiei, 2008, pag. 10.
- Rennings, K. & Ziegler, A., Environmental innovations and economic success of companies Paper for conference: Green roads to growth in Copenhagen, 2006.
- Nelson, R., The co-evolution of technology, industrial structure, and supporting institutions. Industrial and Corporate Change, 1994.
- NEPA and Environmental Planning: Tools, Techniques, and Approaches for Practitioners, CRC Press, 2008.
- OECD week2012, New Approaches to economic challenges – a framework paper, Paris, May, 2012.
- Report of World Commission on Environment and Development. Our Common Future, 1987.
- UCN 2006, The Future of Sustainability. Rethinking Environment and Development in the Twenty-first Century, Report of IUCN Renowned Thinkers Meeting, 29 - 31 January 2006. http://cmsdata.iucn.org/downloads/iucn_future_of_sustainability.pdf.
- UNEP (2012), Global Outlook on SCP Policies: taking action together. (http://www.unep.org).
- Verspagen, B. (1991). A New Empirical Approach to Catching up or Falling Behind. Structural Change and Economic Dynamic, 2 (2), pp. 359- 380.
- Uwe Fortkamp and Louise Staffas, Integration of sustainability aspects in innovation processes, A survey as part of the SPIN project, IVL Report B2025, January 2012, www.ivl.se.
- Watson, J. Setting Priorities in Energy Innovation Policy: Lessons for the UK. ETIP Discussion Paper Series, Belfer Center for Science and International Affairs, Kennedy School of Government, Harvard University.

EVOLUTION OF THE PHENOMENON INTEGRATION IN LATIN AMERICA (SOUTH AMERICA)

EMILIAN M. DOBRESCU[*]
EDITH-MIHAELA DOBRE[**]

Abstract
With the end of the Cold War, the creation of a South American economic space has become an important priority of regional powers (Brazil, Argentina, Chile), and the great powers after the war, the U.S. and the European Union (the current name).
This integration process has had particular features derived from characteristics of Latin American countries. Multitude of organizations integrative role once again demonstrates the specificity of this process in Latin America to other areas of the world: Africa, Asia, Europe, etc. Contradictory developments phenomenon / Latin American integration process gives substance its characteristic and I will make, probably deeply and future.
The purpose of the work and objectives are: know the main features of the phenomenon in Latin American integrationist
Objectives: following our vision of a historical phenomenon; brief characterization of the most important Latin American organizations, establishing current and future consequences of integrationist phenomenon in this part of the world.

Keywords: *The integration of Latin American countries (South America), The South American integration process, Free Trade Area of the Americas, UNASUR, MERCOSUR*

Introduction

Area covered by the subject of this study is economy specific phenomenon Latin American integrationist. The purpose of the work are know the main features of the phenomenon in Latin American integrationist and the objectives : following our vision of a historical phenomenon; brief characterization of the most important Latin American organizations, establishing current and future consequences of integrationist phenomenon in this part of the world.

The way we respond to the objectives set is way is the description, analytical and synthetic.

Selective bibliography of works consulted our study demonstrates that covers a temporal of 1988 to 2003, which allowed us to produce both the purpose and scope of the work, and especially the development of our approach including the conclusions.

We appreciate that South American integration process is centuries old. It is not the purpose of this study to examine the history of this process. European cities, especially Spain and Portugal, very ambitious way to find new water to colonies in Asia, have discovered the American continent with its two variants - North and South - included in Central and South Americas then, other new colonies and "civilization" (not always the case) the current state today, making Latin America.

In the second part of the last century, after the Second World War were founded integrated socio-economic and cultural Latino American countries and those in South America. International Negotiation under the auspices of GATT (General Agreement on Trade and Tariffs) such as the 1960 Kennedy Round, Tokyo Round in 1970 and then negotiation of the Uruguay Round, concluded in April 1993, are clear examples of the elimination of customs barriers and trade in circulation goods. We appreciate that these negotiations marked were the beginning of the current Latin American

[*] Professor, PhD, Romanian Academy; Scientific Secretary of the Department of Economics, Law and Sociology of the Romanian Academy, Bucharest (dobrescu@acad.ro).
[**] Assistant Lecturer, PhD, "Nicolae Titulescu" University of Bucharest; Associate Researcher of the National Economic Research Institute of the Romanian Academy (edithdobre@gmail.com).

integrationist phenomenon that has changed a lot and will continue to change as more countries and peoples of this continent. Emphasizing nationalism in some South American countries, and in some areas, exacerbating ethnic tensions have accompanied strengthening economic pluralism, social and political, integrationist specific phenomenon.

Dominated economically, militarily and politically by one or a few nations, outside of South America, Latin American states were subject to the power Political own leadership and economic influence are divided entirely. Brazil and Mexico South American continent - on the North American are the only U.S. states, federal principles themselves organized, managed the U.S. model, which were imposed in the rush of many post-war changes. Latin American governments, which for many years have tried to isolate economies today are trying to adopt reforms tailored to the principles of western capitalism. To have succes, these national economies increasingly tend more to integrate into the regional economy (Latin America and then the Americas) and only finally in the global economy. Political and economic alignment among Western industrialized nations, will force them to adapt so.

Trade in goods between nations is well defined differences between these nations - in terms of natural resources, labor skills, consumer tastes. Producing nations in preference those goods and services that are competitive in the whole world nations. International trade is still valid theory of comparative advantage of David Ricardo, developed in the early nineteenth century the principle of national differences in technology. Today, the theory of comparative advantage continues to argue that free trade between nations will maximize global welfare. But nations - and here are poor and South American states - have not yet solved the other principles of movement: the human resources, capital, currency, information and knowledge. Here the South American (Latin American) have the confederation U.S. model, closer geographically, who exercise such a powerful influence on all levels in the area. But the model and the European Union - now an economic entity in search of their identity social, political and cultural, but containing the main cities of South American colonies, Spain and Portugal. And this is a historical advantage seems to exceed that geopgrafic. And if we consider the main share of the population in the U.S. - Latin American and Afro-Asians, have a smashing argument, yet sufficiently well understood deoamenii ordinary and policymakers of countries in the region ...Evolution of Latin American integrationist phenomenon of the last half century may well be understood and followed encapsulating the member organizations and integrating Latin American vocation.

Integrative-oriented groups in Latin America (in alphabetical order)

ALADI

First Treaty of Montevideo in 1960 (there was one in 20 years) birth enshrined Latin American Integration Association (ALADI), an intergovernmental body composed of 12 countries (in alphabetical order) - Argentina, Bolivia, Brazil , Columbia, Chile, Cuba (since 6 November 1981), Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela - but also from other countries and bodies as an observer, observer countries ALADI are (in alphabetical order): China, Costa Rica, Switzerland, Guatemala, Honduras, Italy, Nicaragua, Panama, Portugal, Dominican Republic, Romania, Russia, Salvador and Spain. Among organizations that are ALDI observer: Economic Commission of Latin America (ECLAC), the Organization of American States (OAS) Inter-American Development Bank (IDB), United Nations Development Programme (UNDP), Economic System Latin American (SELA), the Andean Development Corporation (DAC), Interamerican Institute for Cooperation in Agriculture (IICA) and the European Union (EU). Latin American population of ALADI composition is 88 percent of the territory of Latin America and the Caribbean, and 94 percent of the GDP of Latin America and the Caribbean[1].

[1] according to figures provided in 1997 by BID on SELA, Guía from Integración: Asociación Latino Americana of Integración, 1999, http://www.lanic.utexas.edu/project/sela/libro/aladi.htm.

Given the countries and organizations that observer ALADI is the largest integrated group oriented in the Americas, its headquarters are in Montevideo (capital of Uruguay). Its main function is to promote convergence and articulation of various existing integration projects to make the multilateral system functional integration between Member States.

ALENA

Regional Assembly created on 1 January 1994, is a free trade area that operates between the U.S., Canada and Mexico. The main objective was ALENA set of free movement of goods, services, capital, at the express request of the U.S., over a period of about 15 years, without having to involve a common trade policy or economic or legislative harmonization. This understanding obstacles suppress investment and open a market for each state services, banking, insurance, telecommunications, transport, business competition with other foreign partners. Taken together, the three states comprise a market of 386 million consumers and have one enormous economic potential. However, there are fairly large differences between the three countries in terms of economic development: thus, GNP / capita in the U.S. and Canada exceeds $ 25,000, up from $ 4,000 in Mexico.

Achieving this agreement led to an explosion of trade, but there is danger of economic interference can be particularly damaging in terms of Mexico, and the financial and economic crisis in this country may have a negative impact on the U.S. dollar.

CARICOM

It was practically oriented integrative first organization organized between Latin America, in 1973 by Caribbean Free Trade Association (founded in 1965), which comprises 11 small island states and three continental countries of Latin America, who tried to harmonize macroeconomic policies, aviation and hopes to put together a common market.

MERCOSUR

Represents the common market "southern cone" of South America and includes the most important member in our view, located on the continent (in alphabetical order): Argentina, Brazil, Paraguay and Uruguay. Countries possess about 200 million people, or 44% of the population of Latin America and 59% of the territory.

In 1991, the four countries of the customs union between Argentina, Brazil, Paraguay and Uruguay accounted for 76% of the GDP of South America, 67% of its industrial production and 62% of the population. MERCOSUR trade bloc representing the third in the world after the EU and NAFTA, which group the United States, Canada and Mexico. After declaring the customs union, inflation has disappeared regional trade has multiplied three times, making MERCOSUR third world market. Foreign investors "injected" in a $ 50 billion U.S. in anticipation of such FTAA (Free Trade Agreement American), then ZLEA (Free Trade Area of the Americas) described later in the paper, which was to be operational in 2005.

On 26 March 1991 the four countries mentioned above have signed in Asunción (Paraguay), the Treaty on the establishment until December 31, 1994, the Common Market of Southern Cone (Spanish: Cono Sur del Mercado common (MERCOSUR) in Portuguese Mercado Cone comum do Sul (MERCOSUL)). On 14 December 1994, Ouro Preto (Brésil), the project was finally initialed the protocol signed by the presidents of the four MERCOSUR countries grant / MERCOSUL international legal personality. MERCOSUR is not only a common market project is part of the new vision of integrating competitive global economy, but is also the result of development in Latin America in various forms of integrative phenomenon after 80s of last century.

On June 25, 1996 have been associated to MERCOSUR, Bolivia and Chile, and Bolivia asked a customs procedure - by reducing customs duties on its exports to MERCOSUR countries. Chile

needs MERCOSUR countries for its exports, foreign investment and Argentine gas. Also, Peru has begun discussions Association in March 1996 and signed in this free trade agreement.

MCCA

Central American Common Market is one of the oldest organizations with integrating Latin America, arising from the signing of the Charter of San Salvador in 1951. Aims to economic, social and cultural between five Central American countries, which together want better access within the organization structure ALENA.Since MCCA has developed over time (see the paper), ALADI, ANDEAN PACT, CARICOM, SELA, UNASUR, ZLEA and ALENA.

ANDEAN PACT

Founded in 1969, includes five countries - Bolivia, Colombia, Ecuador, Peru and Venezuela - located along the Andean Cordillera. Initially State, Chile withdrew from the organization in 1976. At the eighth meeting in Trujillo (Peru), on 10 March 1996, decided to reorganize institutions: political representation has been created, a permanent general secretariat and other intermediary bodies were structured organization. There is some disagreement among members of the organization: Peru wants a free trade area, and the other four countries want a customs union. Marked by these misunderstandings, Colombia and Venezuela formed with Mexico, "Group of 3".

SELALatin American Economic System - Economic-oriented organization that includes most of the South American continent countries, called in Spanish "Latino-Americano economic system" (also abbreviated SELA). This organization was created within the Inter - American Economic and Social Council (ECOSOC-IA) Economic Organization of the Americas (AEO), following an initiative of Mexico and Venezuela.

Inspired by Success won the Organization of Petroleum Exporting Countries (OPEC briefly in English and OPEP, in French) in 1973, these two countries have proposed other Latin American countries to create a body whose mandate to foster cooperation between countries States to promote regional development more autonomous and establish common positions with major countries of the region in international economic forums, especially in terms of commodity prices.

On October 17, 1975, in Panama, SELA was established through the signing by 25 Latin American countries attended the Convention in Panama. Then, create ALADI and ALENA (described above), not only increased the number of organizations with integrating the region and to promote the emergence of multinationals firms Latin American and especially American phenomenon leading to increased trade and relations between countries of the region and the world. SELA was thus a catalyst favored the opening of Latin American countries to the rest of the world.

UNION SOUTH AMERICAN NATIONS

(In spanish: Unión de Naciones Suramericanas in Portuguese: União das Sul-Americanas Nações, abbreviated: UNASUR, or UNASUL), known until April 2007, like South American Community of Nations.

UNASUR is a regional political and economic organization, founded by 12 countries in South America. It was established on 8 December 2004 in the Peruvian city of Cuzco during the Assembly of III of South American heads of state. The declaration of incorporation have established the following objectives: 1. concentration, coordination and diplomatic policy in the region, 2. convergence between Mercosur, the Andean Community and Chile into a single free trade area. Objectives: a) energy integration and communication întreţările South America, driven by Initiative for the Integration of South American Regional Infrastructure b) harmonization of rural and agri-food policies dezvolare c) technology transfer and horizontal cooperation in scientific, educational cultural and d) increasing the interaction between commercial media and civil society, e) promoting gradual measures, actions and areas of action based on existing institutions.

Meeting of Foreign Ministers of the member countries formulate concrete proposals for action and executive decisions. Meetings of Heads of State are higher courts in political leadership. Their first meeting took place on 29-30 September 2005 in Brazil, and the second meeting - in Bolivia in 2006. Host a meeting of Heads of State holding the Presidency and gives temporary headquarters for a year of organization.

Founding members are member countries of the Andean Community (Bolivia, Colombia, Ecuador, Peru, Venezuela), Mercosur (Argentina, Brazil, Paraguay, Uruguay and Venezuela again). Subsequently, affiliated Chile, Guyana and Suriname. The status of observer countries: Mexico and Panama.

UNASUL started plans of integration of Latin American countries through the construction of a highway linking Brazil to Peru, through Bolivia. So Brazil won out on the Pacific Ocean and Peru - the Atlantic Ocean. Construction took place from 2005-2009, being financed by Brazil - Peru 60% and 40%. He built a pipeline to transport gas joint Natira called Energy Inelulul South American pipeline that Argentina, Brazil, Chile, Peru and Uruguay Peruvian receive natural gas. Binational pipeline is another project aimed at energy integration between Colombia and Venezuela. Construction took place between 2006-2008. Project beneficiary was Venezuelan state oil company PDVSA, and the project cost was 300 million dollars.

FREE TRADE AREA OF THE AMERICAS (FTAA)

An abbreviation of the name of the organization is hard to find, it means Free-Trade Area of the Americas (FTAA) in English, Area Libre Comercio de las Americas (FTAA) in Spanish or areas Libre Echange des Ameriques (ZLEA) in French. Negotiations for the construction of a single market - Free Trade Area of the Americas brought to Miami (USA) in 1994, 34 countries (of which 24 are considered small economy) in the Americas except Cuba. The organization was confirmed in Santiago de Chile in 1998, and "construction" they had to be completed in 2005.

Washington has estimated that the establishment of Free Trade Area of the Americas (ZLEA) opens a new era of cooperation, bringing for the first time the Americas in a common project. Only a small part of Latin American leaders shared and still share this view[2]. ZLEA is called Free-Trade Area of the Americas (FTAA) in English or Area Libre Comercio de las Americas (FTAA) in Spanish.

The strategic objective of the U.S. was to form the largest market in the world, but especially to ensure economic hegemony and hence political, the entire American continent. Washington estimated that ZLEA will open a new era of close cooperation for the first time, the two halves of the Western Hemisphere of the planet around this joint.

The six countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) in Central America, which represents a market of 35 million inhabitants in 2007 negotiating an Association Agreement with the EU. It is known that since 2008, the EU recorded a trade surplus with the region of 8 billion euro[3]. Negotiations on a regional association agreement between Latin American countries, including issues such as political dialogue, cooperation and trade, were suspended in June 2008. Then, in January 2009, the Council authorized the Commission to negotiate a trade agreement with the Andean Community countries, trade ministers from the EU and Central America reached an agreement trade association for years, beyond what It means that markets are will open 100 percent in either direction. Conclusion of negotiations on trade part of the Association Agreement will lead to trade ambitious, comprehensive and balanced between the two parties. The

[2] Janette, Habel, Integration de marche forcee pour les Ameriques, in Le Monde diplomatique, Octobre 2000, p. 12.

[3] * * *, Commercial Association Agreement EU-Central America www.EurActiv.com website, visited on May 28, 2010, at 4:37 p.m.

agreement allows also benefits from export markets such as agriculture, automotive, electronics and alcohol and settlement in the EU restrictions on meat and bananas from Central America.

On 16 March 2012, Member States of the European Union reached a political agreement on a draft decision approving the signing and provisional application of an FTA between the EU on one hand, Peru and Colombia, on the other hand[4]. Agreement, initiated in March 2011, provides for the elimination of high tariffs, technical barriers to trade fighting liberalization of services markets, protection of EU geographical indications and opening of public procurement markets. Understanding includes commitments to strengthen labor standards and the environment, and effective and rapid procedures to resolve disputes and ensure a level playing field for EU action with other competitors in the region, such as the U.S. Based on the principle of regional integration, it shall remain open for signature in the future by Ecuador and Bolivia, the other two members of the Andean Community.

Conclusions

In recent years we are witnessing a forced integration of Latin American countries. The deepening economic integration between nations of the South American continent in many cases led to the erosion of differences between national economies and to "undermine" the autonomy of national governments, the trend does not show signs of stopping. Profound changes in the fields of technology, society and culture of South American Nations brought closer together by reducing real economic distance between them. International economic and political interdependence has significantly improved the living standards of many nations and promises considerable further benefits, says Ralph C. Bryant.

But economic integration imposes many challenges national governments. All these objects present complex economic dimensions, and governments need to understand very well the economic costs and benefits involved. Undoubtedly, the challenges are profound social, political, cultural and spiritual. Strong competition between national political sovereignty and increased cross-border economic integration unmoderated may cause major problems if national policies and international cooperation in this area are poorly coordinated.

Latin American country governments and their presidents seem to have understood that their country's economic integararea is the only solution in the vast concert of globalization.

References

- Baldwin, Robert, *Trade Policy in a Changing World Economy,* Harvester, New York, 1988.
- Bryant, Ralph C., International Coordination of National Stabilization Policies, Brookings Institute, USA, 2007.
- Chesnais, F., Gillies and G., Simonetti, R. (eds.), *The European Integration and Global Corporate Strategies,* Routledge, London, 2000.
- Didier, P., *WTO Trade Instruments in EU Law*, in International Trade Law, Cameron, May, 1999.
- Grynberg, Roman, *Fisheries Issues in WTO and ACP-EU Trade Negotiations*, in Economic Paper Commonwealth Secretariat, 2003.
- Habel, Janette, *Integration de marche forcee pou les Ameriques,* în Le Monde Diplomatique, octobre 2000, pp. 12-13.
- Hoogvelt, Ankie, *Globalization and the Postcolonial World*, Palgrave, 2001.
- Hurrell, A., Woods, N., *Inequality, Globalization and World Politics*, Oxford University Press, 1999.
- Jilberto, A. E. F., Mommen, A., *Regionalisation and Globalization in the Modern World Economy*, Routledge, London, 1998.
- Jones, Robert, *The Politics and Economics of the European Union*, 2nd edition, Edward Elgar, 2001.
- Kenen, Peter, *The International Economy,* Cambridge University Press, 2000.

[4] sursa: Agerpres, 16 martie 2012

- Kerremans, B.; Switky, B.(Eds.), *The Political Importance of Regional Trading Blocs,* Ashgate, Aldershot, 2000.
- Laredo, Armando Toledano, *Integration et democratie,* Editions de l'Universite de Bruxelles de Bruxelles, 1982.
- Mattli, Walter, *The Logic of Regional Integration*, Europe&Beyond, Cambridge University Press, 1999.
- McDonald, Brian, *The World Trading System,* Macmillan Press Ltd, London, 1998.
- Pineda-Lupiac, Napoleon, *Le débat sur les coûts et les avantages de l'integration économique en Amerique Centrale,* Juris Druck et Verlag, Zürich, 1981.
- Siroen, J. M., *La regionalisation de l'economie mondiale,* Paris, Editions La Decouverte, 2000.
- Smith, Alan, *The Return of Europe,* London, Macmillan Press Ltd., 2000.
- Solomon, Robert, *The Transformation of the World Economy,* 2nd edition, Palgrave, 1999.
- Young, M., Regional Trading Block in the Global Economy, Edward Elgar, 1999.

AGENCY THEORY AND OPTIMAL CAPITAL STRUCTURE

MARIA ZENOVIA GRIGORE[*]
VIORICA MIRELA ŞTEFAN-DUICU[**]

Abstract
In the corporate finance, the agency theory tries to explain the behavior of various agents that intervene in the company's funding (managers, shareholders and debt holders) and to analyze the impact of these behaviors on the financial structure.
Accordingly to the agency theory, the optimal financial structure of the capital results from a compromise between various funding options (equity, debts and hybrid securities) that allow the reconciliation of conflicts of interests between the capital suppliers (shareholders and creditors) and managers.
The indebtedness allows shareholders and managers to adhere to same objectives, but causes other conflicts (between managers and shareholders, on the one hand, and creditors, on the other side). The optimal level of indebtedness is the one that allows the minimization of overall agency costs.

Keywords: *agency theory, agency relationship, agency costs, optimal capital structure, equity, debts*

Introduction

The normative agency theory, named also the Principal-Agent Model, has as objective to issue optimal agreements between partners and to explain their behavior as soon as an agency relationship begins. An agency relationship is an agreement in which one or more persons, called principal(s), engages another person, called agent, to perform some service on their behalf which involves delegating some decision-making authority to the agent. The agency theory assumes that the interests of principal and agent diverge.

In a company there are many agency relationships: between shareholders (principal) and managers (agent); between a creditor (principal) and shareholders and managers (agents); between an employer (principal) and employee (agent), etc. The firm can be perceived as an assembly of principal – agent relationships, more or less ranked, in which the agents can also exercise the principal function in other relationships. Every stakeholder or group of stakeholders will attempt to act in order to satisfy its own interests:

- For the principal, the issue is to determine appropriate incentives for the agent and optimal control procedures designed to limit opportunistic action by the agent;
- For the agent, the issue is to relate the effort with the information[1] depending on which the primary judgment from the principal will be made; a great effort that cannot be reported to the principal will be useless but, on the opposite, a small effort will not be well seen.

A company's behavior is comparable to the market's one, meaning that is the result of a complex balancing process.[2]

---

[*] Associate Professor, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (mgrigore@univnt.ro).
[**] Assistant Lecturer, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest, PhD candidate, "Valahia" University of Targoviste (chirita.mirela@gmail.com).

[1] by "information" is needed to understand all the elements that allow an organization to evaluate its members activity (presence, activity reports, financial and accounting statements; management control indicators, reputation etc.).

[2] M. Jensen, W. Meckling, "Theory of the firm: managerial behavior, Agency costs and ownership structure", Journal of Financial Economies, 3-4, 1976, p. 305-360.

In finance, the sources of conflict can be many and relate to the relatively classic financial problems: dividends payment policies, investment decision, determining the optimal capital structure etc.

The structure of the capital can affect two types of conflict of interests:

- Conflict of interests between managers and shareholders;
- Conflict of interests between shareholders and managers, on one side, and creditor, on the other side.

The reconciliation of these conflicts will determine the optimal capital structure that will allow the maximization of company's global value.

1. Equity - debts conflicts and optimal capital structure

An agency problem arises when managers own only a fraction of the shares of the firm. This partial ownership may cause managers to work less vigorously then otherwise and / or to consume more perquisites (luxurious offices, company cars, expensive hotels) because the majority owners bear most of the cost.

The managers can be motivated to act in the interests of the shareholders through contracts that repay the managers by the value of the company's shares. In addition, their decisions can be determined by the desire to keep their professional reputation. However none of these mechanisms is perfect.

The agency theory proposes the indebtedness as way to solve potential conflicts between managers and shareholders. The indebtedness has advantages, as has costs.

The advantages of indebtedness emerge on two levels:

- Indebtedness, through regular payments of capital rates and interest that result from it, becomes a mean of control for managers investment policies;
- Indebtedness allows the shareholders to discipline the managers and hold more information regarding the company's management.

There are three types of costs of indebtedness:

- Shareholders can give up investment projects that have positive net present value, if the difference between these and the present value of the amounts needed to be reimbursed is negative;
- The indebtedness can incite the shareholders to select risky investment projects;
- The costs of shareholders' investigations over the nature of the debts employed by the managers.

In order to maximize the value of the company, through resolving the conflicts of interests, is necessary to be taken into consideration the advantages and costs of indebtedness and own funds recourse.

The first researches in this manner were developed by M. Jensen and W. Meckling in 1976. They highlighted an optimal financial structure resulted from two divergences[2]:

- In the presence of income tax, the managers tend to indebt, because the financial expenses are deductible;
- The indebtedness attracts agency costs of three types: control and justification costs; high risk investments remuneration costs, demanded by the creditors; bankruptcy costs.

Companies thus have interest to indebt until the point on the increase of its value owed to the financed investments will be equal to the marginal costs generated by the indebtedness.

Therefore, the optimal level of indebtedness is the one that allows the minimization of overall agency costs, meaning the costs related to indebtedness and to appeal to external own funds.

[2] S. Rifki, A. Sadq "La structure financière de la firme a-t-elle une influence sur sa valeur?", Problèmes économiques, nr. 2728/2001, p. 28.

The indebtedness allows shareholders and managers to adhere to same objectives.

For managers, the indebtedness has the power to incite to performance. More the company is indebted, more its bankruptcy risk is higher. For managers the bankruptcy means generally losing their jobs, the remunerations and other advantages. This is considered to be a sufficient thread to incite to efficient management that will bring maximum cash-flow in order to reimburse the debt, and to lead to the choice of investments projects with positive net present value. In the absence of indebtedness, the bankruptcy risk is limited but the market will assume that the managers do not aim maximum performance. The value of the company will decrease and, if there exists a managers' co-interest system (remuneration related to the value of company shares), they will lose.

For the shareholders, the indebtedness has a leverage effect over the financial return. In addition to the new shares issue funding, applying to a loan has the advantage that it does not lead to the dilution of the share capital.

Indebtedness generates new conflicts (between shareholders and managers, on one side, and creditors on the other side) and costs: bankruptcy and reorganization costs, costs for surveillance over the managers by the creditors, justification cost for managers to justify in front of creditors.

Allying, shareholders and managers can divert in their advantage part from the company's assets to the detriment of the creditors. For example, they can lead a policy of risky investments or can decide to take a loan from which a part can be redistributed as dividends.

In the situation of a company with high debts reported to the equity, the owners could be tempted by risky investments. Shareholders will practically benefit from all the advantages if the investments turn out to be profitable. The creditors know this situation and can include in the loan agreement articles that can restrain the managers' abilities to conduct risky investment on the duration of the loan agreement.

In order to find solutions for the emerging conflicts between the shareholders and managers on one side and the creditors on the other side, new means to restrain the shareholders and managers to acquire the company's assets must be provided. Therefore there is needed to limit or avoid the decisions that raise the risk of company's assets or lead to sub-investment and tend to reduce the value of existing debts, even though this aspect prevents a decrease of the company's value.

Beside various juridical subtleties that can be inserted in the loan agreements, in practice we also find other solutions[3]:

- Real or insurance guarantees clauses that suppress the temptation of giving up project with positive net present value, but reduce the variation of future cash-flows in order to avoid a transfer of wealth to borrowers.

- Certain loan agreements provide clauses that restrain the liberty of the company's managers to indebt more. This clauses, in generally set a maximum level of certain rates (debts/equity, financial expenses/turnover, debts/gross accumulation margin, chargeability/cash, etc). When these values are exceeded, the loan can immediately become chargeable.

- Paying dividends to shareholders decreases the net assets of the company and so the guarantees for the creditors. Because of this, some clauses have as subject the limitation of dividend payment on the duration of receivables. Also, the reserves distribution or reimbursements of own shares by the company are limited or forbidden.

- Harmonizing of assets and liabilities maturity aims the prohibition of de-investment behavior which, resulting from shareholders refuses to act in the creditors' interests, would have as result the decrease of company's global value.

[3] G. Hirigoyen, J-P. Jobard "Financement de l'entreprise: évolution récente et perspectives nouvelles", Encyclopédie de gestion, Economica, Paris, 1989, p. 1226 – 1228.

- Resorting to indebtedness on short term, constantly renewable, can be assimilated to a long term disguised liability, designed for example to finance the global treasury shortage. But the investment decision becomes later to the short term liability maturity. The creditors have therefore the possibility to sanction at any time the management of shareholders and managers. In consequence, short term indebtedness incites them to seek out more rentable investment projects.

- Convertible to shares bonds or bonds with subscription receipts issuance is another solution to solving the conflicts between shareholders and managers on one side and creditor on the other side. The convertibility clause or the use of the subscription receipt into shares option can determine the current shareholders to change the structure and the portfolio of assets risks in order to increasing the long term profit because this could go to the bond owners, who are potentially shareholders. These clauses can incite to choosing projects that contribute more to the increase of company's value rather that their own interest.

- Resorting to lease can be interpreted as an alternative to giving real guarantees, aiming to the limitation of risks for substitution of assets and sub-investments. However, lease agreement implies specific agency costs. Therefore, the potential costs because the bad maintenance general tendency of leasers can be reduced by a high value guarantee deposit or a flat rate maintenance agreement. Also, the purchase option at the end of the contract can be considered to be an agency cost reduction option.

2. Agency costs depending on funding sources

Determining the optimal financial structure doesn't imply only the settlement of debts and own funds but also determining the part of equity owned by managers and the one owned by other shareholders. Therefore there are three variables:

- S_i = internal own funds (owned by managers);
- S_e = external own funds (owned by other shareholders);
- D = debts

The total amount of own funds is $S= S_i+ S_e$ and the total value of the company is V= S+D.

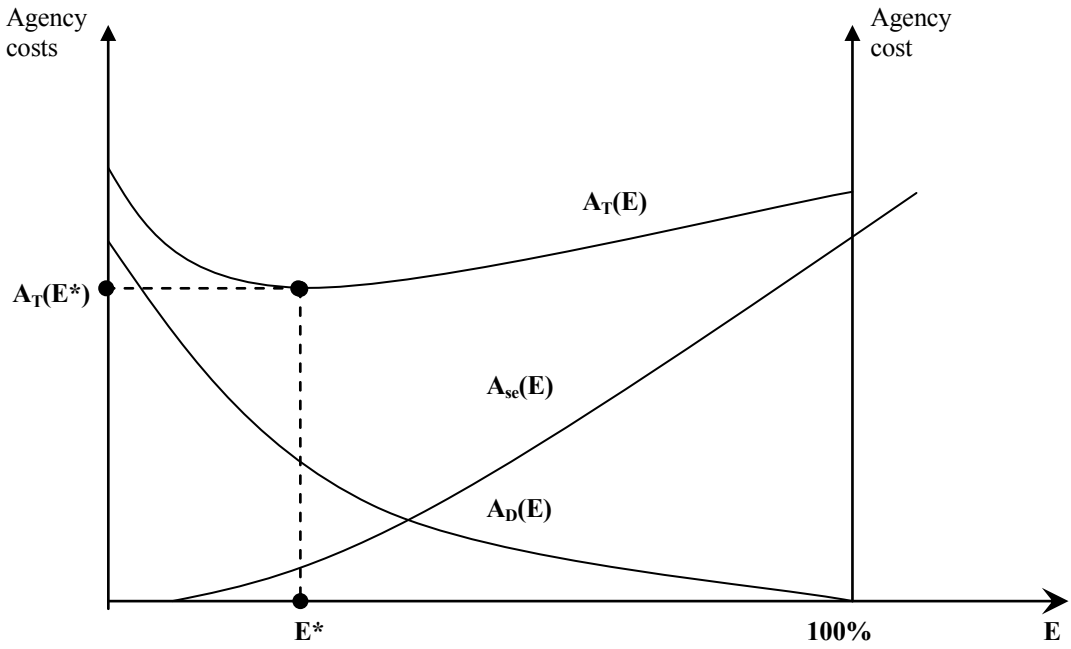
We will determine the optimal rate of external own funds reported to debts $\left(\frac{S_e}{D}\right)$, assuming that the size of the company and the amount of needed external funding (S_e +D) are constant.

Knowing that an amount of external funding is needed to be settled, the issue is to determine the optimal part (E*) of external own funds in the total external funding:

$$E^* = \frac{S_e}{S_e + D}$$

In the rational expectancy markets, the prices set to certain assets such as bonds (for debts) or shares (for own funds) issued by the company reflects correct estimations of control costs and wealth transfer costs determined by the agency relationship. Furthermore, in case of conflict of interests, the one that will pay for these agency costs is the managing shareholder. On his side of view, for a given level of internal own funds, the optimum amount of external own funds in the total external funding must correspond to an E* level for which the total agency costs, noted A_T (E*) are minimal. This situation is illustrated at figure no.1.

Fig. no. 1. Agency costs depending on funding sources



The agency costs graphically represented are:

- $A_{Se}(E)$ = agency cost depending on E, associated to own external funds;
- $A_D(E)$ = agency cost also depending on E, associated to debts. To be remarked that when maximum (100%) is reached for every of the two external funding sources, $A_D(E)$ is lower than $A_{Se}(E)$;
- $A_T(E)$ = total agency costs, equal to $A_{Se}(E) + A_D(E)$.

We will attempt to interpret these functions, on managerial behavior related to agency cost, presented in the previous section.

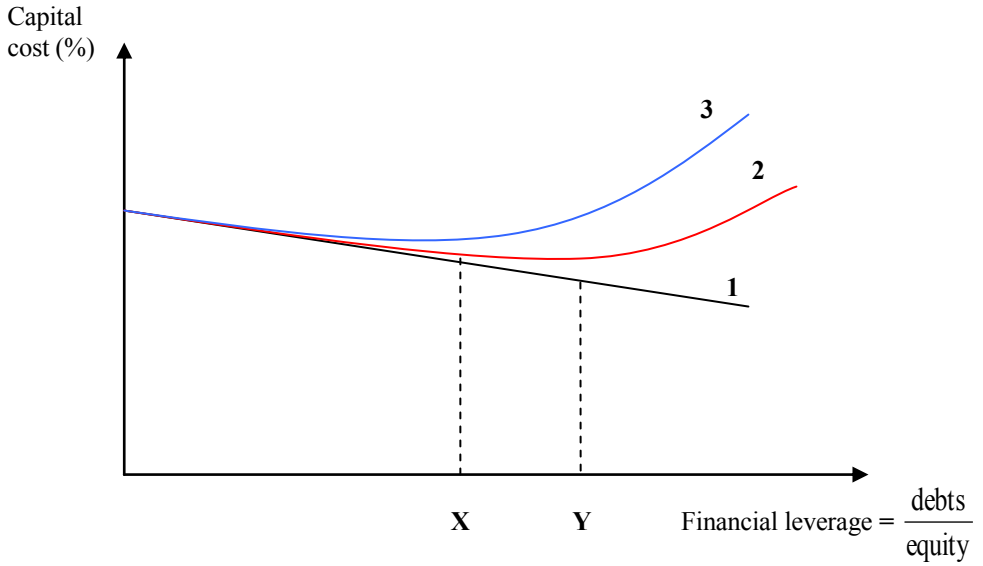
Thereby, for $A_{Se}(E)$, when E = 0 (meaning there are no external own funds), the manager isn't motivated to exploit external own funds. Besides, in this extreme case, any change in the value of the external own funds is equivalent to the change of value in the own funds owned by the manager; therefore the agency costs are null. Hence, any increase of E implies a manager's increase of motivation and for E=100%, the agency costs will be maximal.

For $A_D(E)$, representing the agency cost resulted from the indebtedness, it must be noted that this cost exist only because the manager is tempted to transfer a part of the profit from the benefit of the creditors to itself, given that this transfer increases the own fund value.

Starting from this, in order to explain the $A_D(E)$ function behavior we will apply the reverse reasoning used in the $A_{Se}(E)$ function analysis.

This allows the representation of a curve for total agency cost whose minimum indicate an optimal financial structure of the capital. If we take into consideration the fiscal effects of indebtedness (reducing the income tax amount owed to the deductibility of interest in the determination of taxable income), we got a new global representation of indebtedness limit (figure no.2).

Fig. no. 2. Capital cost



1 = capital cost considering fiscal effects;
2 = capital cost considering fiscal effects and bankruptcy costs;
3 = capital cost considering fiscal effects, bankruptcy costs and agency costs.

This graph allows understanding why the companies do not indebt to the maximum despite the fiscal advantages of indebtedness. If we take into consideration the fact that bankruptcy costs are as high as the financial leverage (rate of indebt) is higher, the optimal financial structure will be at Y level. If we also take into consideration the agency costs, which increase as the level of indebtedness increases, the weighted average cost of capital will increase and the optimal financial structure will be at a lower level (X).

Conclusions

In the financial domain the agency theory re-analyses the issue of optimal financial structure and stands as ground for new financial products development.

The agency theory starts with the hypothesis that stakeholders (managers, shareholders, creditors, employees, customers, suppliers, state etc.) have specific objectives and interests that are not necessarily spontaneous reconcilable; in consequence there are conflicts between them, especially in the large companies, based on the separation between ownership and management.

Accordingly to the agency theory, the optimal financial structure of the capital results from a compromise between various funding options (own funds or loans) that allow the reconciliation of conflicts of interests between the capital suppliers (shareholders and creditors) and managers.

The structure of the capital can affect the value of the company, by acting on the ways of managerial motivation and inciting the shareholders and creditors to supervise the managers and limit their abuses.

The agency relationships are mostly based on the theory of options. The junction between the two theories is proven useful for understanding the investment and funding behavior and for explaining the existence and role of some specific financial products such as bond convertible to shares or bonds with share subscription receipts, etc.

The agency theory has some limitations. It often gives partial models for identifying potential sources of conflicts and for finding appropriate solutions (sometimes idealistic). It is to be remarked that in order to formalize approached issues, some complex conditions have to be fulfilled. These conditions can refer, for example, to the sequences of events and decisions that are needed to be respected, in the simplified frame of single period, in order to highlight the sub-optimal investments issue.

The main limitation of the agency theory remains the insufficient studying or empirical verification of theoretical concepts. This methodological and scientific gap is firstly explained by the difficulty to measure the agency costs.

References

- Barnea A., Haugen R.A., Senbet L.W., *Agency Problems and Financial Contracting,* Englewood Cliffs (NJ), Prentice-Hall, 1985.
- Brennan M.J., Kraus A., "Efficient Financing under Asymmetric Information", *Journal of Finance,* vol. 42, n° 5 (1987).
- Fama E., "Agency problems and the theory of the firm"*, Journal of Political Economy* (1980): 88-2.
- Grossman S., Hart O., „Corporate financial structure and managerial incentives*". Economic Theory Discussion Paper* (1980), University of Cambridge.
- Hirigoyen G., Jobard J-P., *Financement de l'entreprise: évolution récente et perspectives nouvelles*, Encyclopédie de gestion. Paris: Economica, 1989.
- Israel R., "Capital Structure and the Market for Corporate Control: The Defensive Role of Debt Financing"*, Journal of Finance,* vol. 46, n° 4 (199l).
- Jensen M., "Agency Costs of Free Cash Flow, Corporate Finance and Takeovers", *American Economic Review,* vol. 76, nr. 2, (1986).
- Jensen M., Meckling W., "Theory of the firm: managerial behavior, Agency costs and ownership structure"*, Journal of Financial Economies* (1976): 3-4.
- Leland H., Pyle D., "Informational asymmetries, Financial Structure and Financial Intermediation", *Journal of Finance* (1977): 32-2.
- Rifki S., Sadq A. "La structure financière de la firme a-t-elle une influence sur sa valeur?", *Problèmes économiques,* nr. 2728 (2001).
- Ross S., The economic theory of agency: the principal problems*, American Economic Review* (1973): 63-2.
- Vernimmen P., "Réflexions sur la structure financière de l'entreprise"*, Analyse Financière*, 2e trimestre 1983.

INNOVATION, VECTOR OF THE KNOWLEDGE-BASED SOCIETY

VLADIMIR-CODRIN IONESCU[*]
VIOREL CORNESCU[**]

Abstract
The innovative potential of a nation is determined by its members' creative capacity, as well as by the design and implementation of strategies and policies that are meant to support the devise, experimentation and application of new ideas, respectively the transformation thereof both into tangible goods (products and services) and intangible ones (knowledge). The present paper approaches innovation as a vector of the new knowledge-based society, which consists of the main actions undertaken by the EU within the context of the "European Year of Creativity and Innovation", as well as of the actions promoted through the Initiative known as "A Union of Innovation", comprised by the Europe Strategy 2020. The final part of the paper illustrates the essential role of universities in developing knowledge-based and innovation-based society.

Keywords*: innovation, knowledge-based society, intelligent growth, community actions, university*

1. Introduction

Knowledge-based society implies putting to good account knowledge – which is a key component of national intellectual capital – at a higher level. In such a society, knowledge – the result of all knowledge processes – is the main competitive advantage at national, organizational and individual level. The increasing complexity of activities, the information-based society, as well as the accelerated rhythm with which technical and technological innovations are created require new competences, which result subsequent to the aggregation of the new knowledge that society members acquire through a continuous learning process. Consequently, in the knowledge-based society and economy, human resources are permanently included in the learning processes both at institutional level (in schools, high schools, colleges, universities, academies etc.) and at an organizational one (in private, non-profit and public organizations).

From this point of view, the European Union launched a long-term strategy which aims to promote a knowledge-based society that requires life-long learning in order to ensure the European citizens' sustainable prosperity and welfare.

Innovation plays a fundamental role in enhancing organizational competitiveness and, implicitly, the economic, social and cultural development of a nation. Within the context of the new society and, respectively, of a potentially new economy, the importance and significance of scientific and technological knowledge for economic activities has radically modified; the opinions according to which it is necessary for the innovation concept to be redefined theoretically are more and more insisting and convincing; according to these theories, the very concept of innovation must be included in a systemic model that is more complex than the traditional one, and that is also appropriate for contemporary realities; from a practical point of view, such a model would bring modifications in the innovation policy according to the new requirements [2].

The American Professor Peter F. Drucker considered that "knowledge-based society will inevitably become more competitive than any existing human society, simply because the more accessible information, the less excuses for lack of performance. There will be no "poor" countries, merely ignorant countries. The same principle will be applied to companies, industries and organizations of any kind. In fact this principle will be applied to human beings, too".

[*] Associate Professor, PhD, Faculty of Business and Administration, University of Bucharest (vladico12@yahoo.com).
[**] Professor, PhD, "Nicolae Titulescu" University of Bucharest (viorelcornescu@univnt.ro).

Knowledge-based society relies on innovation, the on-going training of its members, as well as on a large number of researchers, university teaching staff, and engineers, all of whom are part of a university and research centre network, as well as of innovating companies that provide high technological products and services which use information and put it to good account [8].

Knowledge-based society ensures – through its technological and functional vectors – human development while creating and maintaining balance between the economic, social and ecological dimensions. These vectors represent instruments that transform information into knowledge; thus, they transform informational society into a knowledge-based society. Knowledge-based society requires a converging action of these technological and functional vectors [1].

Innovation is a defining coordinate of the knowledge-based society. The innovative potential of a nation is determined by its members' capacity, as well as by the design and implementation of strategies and policies that support the creation, experimentation and application of new ideas, respectively the transformation thereof into tangible goods (products and services) and intangible ones (knowledge).

In a knowledge-based society, creative-innovative processes, respectively production of ideas and the transformation thereof into competitive products and services, are fundamental, whereas intangible resources become more important than the tangible ones.

2. Community-run actions within the innovation sphere

The EU developed states have adopted strategies and policies that stimulate innovation and that ensure transition from the new economic, social and institutional structures that are specific to knowledge-based society.

Since 2009 an eloquent proof of the concerns manifested by the EU in the sphere of innovation has been represented by the European Commission, which initiated the campaign: „Imagine. Create. Innovate". This Campaign mainly aimed at promoting creativity and innovation in different sectors of human activity, as well as at drawing attention at the importance of creativity and innovation for personal, social and economic development. A key-factor for the future economic growth is the full development of the EU citizens' innovation and creativity potential, which relies on European culture and scientific excellences [4].

Today's world relies on fast innovation. Creative thinking is the key of success in a global economy, a fact which was admitted by the EU a long time ago. Creativity can be considered the supreme innovation source that transforms creative ideas into products and services. Creativity and innovation cannot create sustainable economies outside the observance of cultural diversity, which is a source of creativity and innovation itself [7]. Innovation is an integrating part both of the European Commission as regards climate change, and also of the plan for re-boosting EU economy.

Danuta Hübner, former commissioner for regional policy, stated that "due to an ever increasing competition and to the serious global challenges, innovative practices and creative solutions represent an opportunity towards ensuring economic growth and welfare within our regions and countries. Abilities, ideas, and processes – all combine in order to help us gain a competitive advantage. Europe must not react to the present crisis while reducing investments in abilities and innovation. We must be trustful and rely on the quality of our ideas, as well as on our adaptation capacity."

The projects performed by the European Commission within the campaign run in 2009 basically aimed at [6]:

- Cooperation between member states in domains such as education, culture, enterprises and workforce occupation;
- Creation of closer links between art, business, schools and universities;
- Encouraging young people to be entrepreneurs;
- Developing innovative abilities within public and private organizations.

Results of the Campaign run by the European Commission in 2009 were summarized in "The Manifest for Creativity and Innovation in Europe", which comprises seven major directions of activity and represents a support community strategy for creativity and innovation for the period of 2010-2020.

Consequently, the European Union supports through active policies creative-innovative processes, a fact illustrated by the Programme of the Cohesion Policy for 2007-2013, in which creativity and innovation are appreciated as sources of sustainable development. Thus, over 86 billion of Euro, representing 25% of the total structural funds, have been allotted to the Agenda for Innovation, which includes research and innovation, ICT (Information and Communication Technologies) exploitation, measures for enhancing the entrepreneurial spirit, as well as innovation at the workplace.

3. A Union of Innovation

In 2010, the European Commission adopted the Europe 2020 Strategy, which is structured on three major coordinates [5]:

- Intelligent growth – the development of a knowledge and innovation-based economy;
- Sustainable growth – promotion of a more efficient economy ensured through an ecological and highly competitive resource usage;
- Favourable increase of inclusion – promoting an economy which has a higher rate of workforce occupation and can ensure economic, social and territorial cohesion.

These three important axes of development support each other and offer an overview of social market economy during the 21st century Europe.

Intelligent growth implies consolidation of knowledge and innovation, which are essential vectors for the knowledge-based society and economy. In order to achieve this goal, one must:

- Enhance the quality of learning systems;
- Enhance research performances;
- Promote innovation and knowledge transfer within the community by using informational and communication technologies;
- Cultivate the entrepreneurial spirit, which is market and consumers' needs-oriented.

One of the seven initiatives comprised in the Europe 2020 Strategy is the Initiative "A Union of Innovation". The objective of this initiative is the orientation of politics within the research-development and innovation sphere towards the challenges of a contemporary knowledge-based society: climate changes, energy and the efficient use of resources, health and demographic modifications. Each piece of the immense innovation chain should be reinforced as regards fundamental demand and commercialization. The European Commission will act in the following three directions:

- Accomplishing a European Space for Research, devising a strategic research agenda in compliance with a set of priorities, of which we mention: energy security, transports, climate changes, the efficient use of resources, health and aging, as well as ecological methods of production and land management;
- Improvement of the innovation-frame conditions for the business environment, creation of the Single European Patent, of a sole Court of law specialised in matters of patents, modernization of the design frame of copyright and trademarks, improvement of SMEs access in order to ensure intellectual property protection, enhanced creation of inter-operational standards, improvement of capital access and full use of secondary demand policies, e.g. through public acquisitions and intelligent regulations;
- Conclusion of European partnerships in the area of innovation between the European Union and member states in order to accelerate the development and usage of technologies that are necessary for answering potential challenges;

• Consolidation and further development of the community instruments that support innovation (e.g. structural funds, rural development funds, Research - Development Frame - Programme, Frame – Programme for Competitiveness and Innovation, SET Plan) and a closer collaboration with the European Bank for Investments through the simplification of administrative procedures in order to facilitate access to finances, particularly for SMEs;

• Promotion of partnership in matters of knowledge and consolidation of links between education, enterprises, research and innovation, including through the European Institute of Innovation and Technology (EIT), as well as the promotion of the entrepreneurial spirit by supporting young innovative enterprises.

4. University, a pillar of the knowledge & innovation-based society

Development of knowledge and innovation-based society fundamentally depends on universities, that is on the quality of processes and activities which are performed within them. Human resources are trained by universities and are going to be hired in private organizations, institutions and public authorities, NGOs, research centres, international organizations etc.

The activity performed within universities comprises:

• Acquisition of competences;

• Scientific research;

• Contribution to the development of the knowledge and innovation-based society.

Universities play an essential role in the new knowledge-based society:

➢ Scientific research processes produce, develop, store and disseminate knowledge;

➢ Didactical processes basically ensure knowledge transfer towards students, master's degree and PhD students;

➢ Knowledge that was assimilated and competences that were acquired during the three university study cycles (Bachelor's degree, Master's degree and PhD degree) will help potential students integrate into the labour market.

University, as a knowledge-based organization must produce three categories of intangible values:

• Concepts (ideas and technologies that result subsequent to the performed processes and activities);

• Competences (that help potential graduates adapt to the requirements on the labour market);

• Connections (creating partnerships with a view to extending the sphere of influence, and putting to good account opportunities).

The conclusion of partnerships between universities and research institutions, as well as private and public organizations, and NGOs, is essential for the knowledge and innovation-based society. If universities, innovative organizations and research institutions conclude partnerships, they have the chance to win grants and projects competitions, and also to obtain finance from national and international bodies.

Similarly, these partnerships facilitate the accomplishment of interdisciplinary studies and research projects through the participation of universities, institutes, technical, economic, and healthcare research centres. The involvement of private organization in these projects confers these studies and research projects an applicative dimension.

Dissemination of scientific research activities, which is in fact ensured through grants and projects, is accomplished through the organization of conferences, symposiums and workshops, through the publication of scientific studies and articles in journals with an outstanding indexation etc.

Another important aspect is, in our opinion, the development of the entrepreneurial spirit within the university and post-university system by creating competences that rely on the entrepreneurial, innovative spirit, respectively on the individual's capacity to identify and put to good

account potential business opportunities. The enhancement of the entrepreneurial spirit within the university curricula is a sine qua non condition at present especially because, on average, over two thirds of the active population performs its activity in SMEs.

In knowledge and innovation-based society it is important for university management to create and apply adequate development policies and strategies in order to improve performed activities and processes. We consider that the main goal of universities, as pillars of the new knowledge and innovation-based society, is to offer students, including master's degree and PhD students, who are potential actors on the labour market, relevant information and knowledge which, if understood and acquired, would later on become competences. In this context, we would like to include a comment. Academician Solomon Marcus underlined, in several conferences, the fact that knowledge is often received / memorised and repeated without being understood and, thus, knowledge is not transformed into competences for graduates. In our opinion, didactical academic activities should be reconsidered in order to ensure the acquisition of knowledge through modern and interactive methods, which rely on case studies, simulations, role plays, projects etc.

5. Conclusions

Knowledge-based society is based on innovation and the on-going training of its members, and it relies on a large number of researchers, academic teaching staff, engineers, all of whom are reunited in a network made up of universities, research centres and innovating firms that offer high technology products and services and that use information and put it to good account.

The EU supports through active policies creative and innovative processes, a fact which is illustrated by the Cohesion Policy Programme adopted for 2007-2013, in which creativity and innovation are seen as sources of sustainable development. Thus, a sum of over 86 billion Euros, representing 25% of the total structural funds, was allotted to the Agenda for Innovation, which comprises research and innovation, ICT (Information and Communication Technologies) exploitation, measures for the entrepreneurial spirit, as well as innovation at the workplace.

Intelligent growth, a coordinate of Europe Strategy 2020, implies the consolidation of knowledge and innovation, as essential vectors of the knowledge-based society and economy. In order to achieve this objective, the European Commission performs its activity in the following areas: improving the quality of the learning systems; increasing performance in research activity; promoting innovation and transfer of knowledge within the community space, by using informational and communication technologies; cultivating the entrepreneurial spirit, which is market and users' needs-oriented.

The development of the knowledge and innovation-based society basically depends on universities, respectively the quality of processes and activities performed by them. Universities train human resources that are going to work in private organizations, institutions and public authorities, non-profit organizations, research centres, international organizations etc. The university, as a pillar of the knowledge and innovation-based society, must produce three categories of intangible values: concepts (ideas and technologies resulted subsequent to the performed activities); competences (that will help prospective graduates adapt to the requirements imposed by the labour market) and connections (creation of partnerships with a view to extending the sphere of influence and putting to good account new opportunities).

References

- Drăgănescu, M., *Societatea informaţională şi a cunoaşterii. Vectorii societăţii cunoaşterii*, în Filip, F.,Gh.(coord.), *Societatea informaţională - Societatea cunoaşterii. Concepte, soluţii şi strategii pentru România*, Academia Română, Bucureşti, 2002.

- Iancu, A., *Cunoaştere şi Inovare. O abordare economică*, Editura Academiei Române, Bucureşti, 2006.
- Popescu, D.I., Meghea, A., Pincovschi, E., *De la Strategia Lisabona la Europa 2020*, Editura AGIR, Bucureşti, 2010.
- Council of the European Union, *Presidency Conclusions*, Brussels European Council, 13-14 March 2008.
- European Commission, Europe 2020, Brussels, 2010.
- European Commission, *Creativity and Innovation - Driving Competitiveness in the Regions*, Inforegio Panorama No. 29, , Brussels, 2009.
- European Commission, *Regions For Economic Change - Networking for Results*, Annual Conference, , Brussels, 16-17 February 2009.
- World Science Forum, *Knowledge and Future*, Budapest, 5-7 November 2009.
- www.europeancommission.com.
- www.infoeuropa.ro.

NEW TRENDS IN ECONOMIC FORECASTING

NICOLAE MARIUS JULA[*]
NICOLETA JULA[**]

Abstract
Economic forecasting is a dynamic domain. New methods are developed and tested and the methodology needs to be updated according to economic reality. Classical approach in methodology must be completed with latest trends in econometric analysis and the forecasting methods have to benefit from the increasing computational power of the modern software. One of the main causes of false prediction is using altered data. In this paper, we will present the new concepts for data testing, adjusted for the Romanian economy, based on Benford's law.

Keywords: *Economic forecasting, econometric analysis, data testing, econometric software, Benford's law*

1.Introduction

For creating reliable econometric model, one must rely on existing data. There are many situations when the models and the obtained results are not useful because of the initial data. The altered data sets may create false signals and the conclusions based on these signals are not in accordance with the economic reality.

For example, we have analyzed in the papers signals of political inferences in economy in order to manipulate the voters for increasing the chances of reelections. These models were based also on data provided by authorities, data related to final results in parliamentary or presidential elections. Now, we are testing the data form parliamentary elections in Romania from December, the 9th, 2012.

There are numerous useful methods that can be conducted in data analysis in order to check data correctness and authenticity. One of contemporary and efficient method is application of so-called Benford's Law.

Why using Bendfor's Law? In 1972, Hal Varian suggested that the law could be used to detect possible fraud in lists of socio-economic data submitted in support of public planning decisions. Based on the plausible assumption that people who make up figures tend to distribute their digits fairly uniformly, a simple comparison of first-digit frequency distribution from the data with the expected distribution according to Benford's law ought to show up any anomalous results. Benford's law is used extensively in United States in legal status issues, election data, macroeconomic reported data and other scientific fraud detection algorithms.

2.Benford's Law – from random numbers to political fraud

2.1. Benford's law

Benford's law has its origins in the study of American astronomer Simon Newcomb, who observed that in logarithm tables (used at that time to perform calculations) the earlier pages (which contained numbers that started with 1) were much more worn than the other pages. Newcomb's published result is the first known instance of this observation and includes a distribution on the

[*] Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (mariusjula@univnt.ro).
[**] Professor, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (nicoletajula@yahoo.com).

second digit, as well. Newcomb proposed a law that the probability of a single number N being the first digit of a number was equal to log(N + 1) − log(N).

The phenomenon was again noted in 1938 by the physicist Frank Benford[1], who tested it on data from 20 different domains and was credited for it. His data set included the surface areas of 335 rivers, the sizes of 3259 US populations, 104 physical constants, 1800 molecular weights, 5000 entries from a mathematical handbook, 308 numbers contained in an issue of Readers' Digest, the street addresses of the first 342 persons listed in American Men of Science and 418 death rates. The total number of observations used in the paper was 20,229.

The law stipulates that the distribution frequency of digits in data sources. A set of numbers would satisfy Benford's law if the leading digit d {1..9} occurs with probability:

$$P(d) = \log_{10}(d+1) - \log_{10}(d) = \log_{10}(1+\frac{1}{d})$$

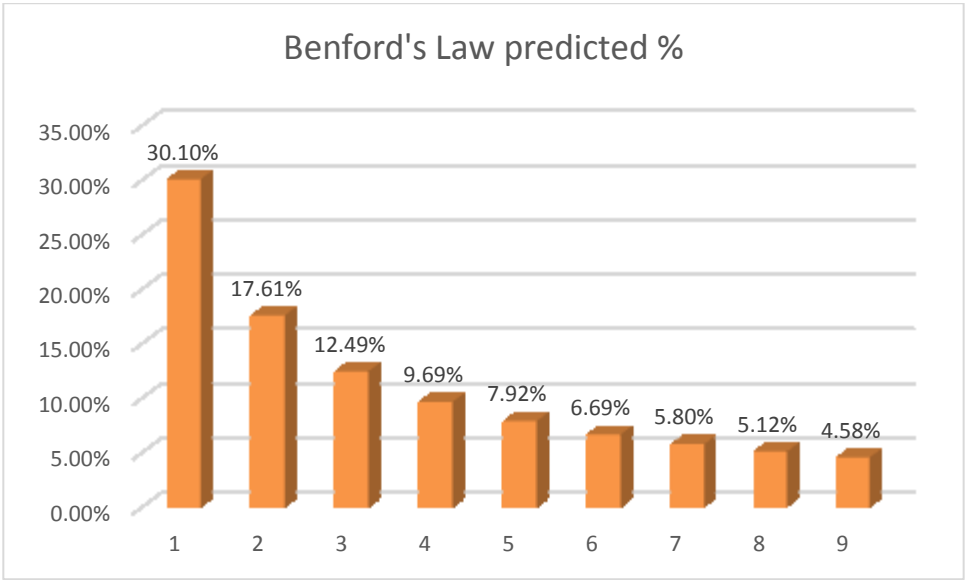


Figure 1 – Benford's distribution

The law is also valid for other bases besides decimal. Also, this law was extended to digits beyond the first. The general formula for probability that d {0..9} appears as the *n*-th (n>1) digit is:

$$\sum_{k=10^{n-2}}^{10^{n-1}-1} \log_{10}(1+\frac{1}{10k+d})$$

[1] Frank Benford, "The law of anomalous numbers", Proceedings of the American Philosophical Society 78 (4): 551–572, 1938.

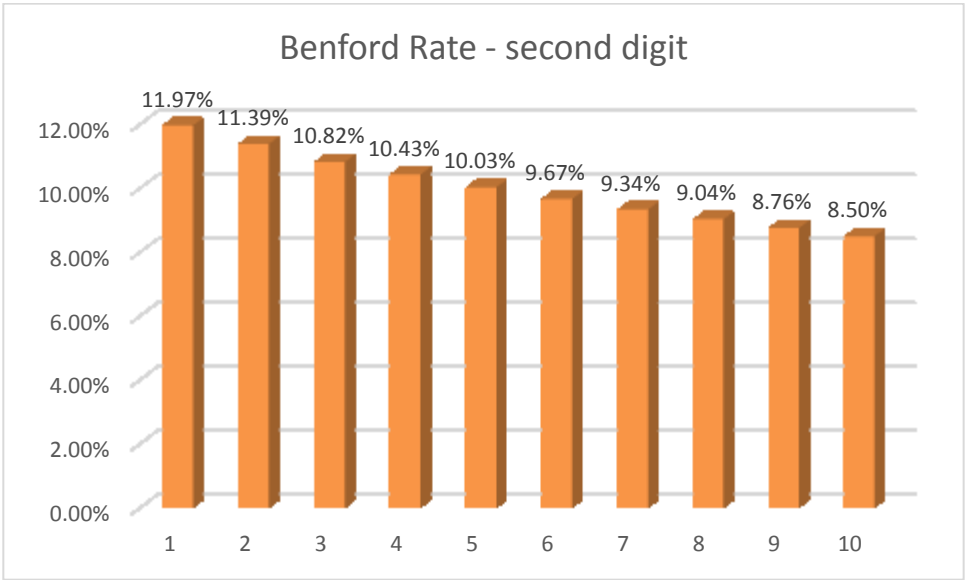


Figure 2 – Benford's law – second digit distribution

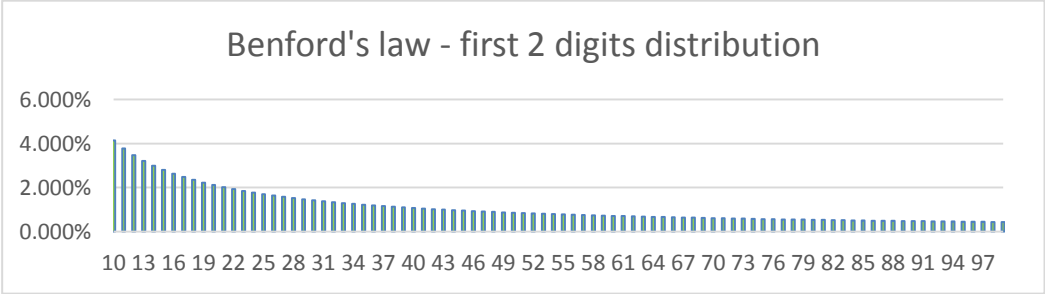


Figure 3 – Benford's law – first 2 digits distribution

2.2. Electoral data analysis

As Peter Klimeka et all[2] stated, free and fair elections are the cornerstone of every democratic society. A central characteristic of elections being free and fair is that each citizen's vote counts equal. However, Joseph Stalin believed that "it's not the people who vote that count; it's the people who count the votes." How can it be distinguished whether an election outcome represents the will of the people or the will of the counters?"

One can see elections as large-scale social experiments. A country is segmented into a usually large number of electoral units. This is also the case for Romania. Here we have electoral circumscriptions for each county, districts in Bucharest and electorate from abroad. The above-mentioned authors affirmed that "each unit may represent a standardized experiment, where each citizen articulates his/her political preference through a ballot. Although elections are one of the central pillars of a fully functioning democratic process, relatively little is known about how election fraud impacts and corrupts the results of these standardized experiments."

[2] Peter Klimeka, Yuri Yegorovb, Rudolf Hanela, Stefan Thurner (2012), Statistical detection of systematic election irregularities, Proceedings of the National Academy of Sciences of the United States of America, no. 41, vol 109, 16469–16473.

The specific literature acknowledge that there is an overabundance of ways of tampering with election outcomes (for instance, the redrawing of district boundaries known as gerrymandering or the barring of certain demographics from their right to vote, blocking access to voting locations). Some practices of manipulating voting results leave traces, which may be detected by statistical methods. Recently, Benford's law experienced a new start as a potential election fraud detection tool. In its original and naive formulation, Benford's law is the observation that, for many real world processes, the logarithm of the first significant digit is uniformly distributed. Deviations from this law may indicate that there are chances of data to be incorrect. For instance, suppose a significant number of reported vote counts in districts is completely made up and invented by someone preferring to pick numbers, which are multiples of 10. The digit 0 would then occur much more often as the last digit in the vote counts compared with uncorrupted numbers. Voting results from Russia[3], Germany[4], Argentina[5], and Nigeria[6] have been tested for the presence of election fraud using variations of this idea of digit-based analysis. There are also analysts who stipulate that the validity of Benford's law as a fraud detection method is subject to controversy. Peter Klimeka suggests that "the problem is that one needs to firmly establish a baseline of the expected distribution of digit occurrences for fair elections. Only then it can be asserted if actual numbers are over- or underrepresented and thus, suspicious. What is missing in this context is a theory that links specific fraud mechanisms to statistical anomalies[7]."

Walter Mebane[8] supports the idea of using Benford's law: "why should Benford's Law apply to vote count data?" He offers two mechanisms for why second digits of vote counts should follow a "Benford's Law-like distribution" which he refers to as the 2BL distribution. As stated above, Benford's Law does not apply to "simple random" data. Therefore, in order for Benford's Law to apply to vote count data vote count data cannot be generated simply randomly. Instead, due to the complexity inherent in the voting process, simple randomness should not be observed in voting outcomes. Thus, vote choice is not simply a "stochastic choice", but rather consists of a set of complex processes. Such processes are as follows. An individual voter first decides whether or not to vote and, secondly, who to vote for (or also which way to vote on a particular referendum). Finally, a voter must actually cast his or her ballot which can be done in a variety of ways: "election day voting in person, early voting, provisional ballots or mail-in ballots; on paper, with machine assistance or using some combination". In addition, there is always the potential for mistakes:

When all is said and done, most voters will look at each option on the ballot and have firm intentions either to select that option or not to select that option. Then for whatever reason—momentary confusion, bad eyesight, defective voting technology—a small proportion of those intended votes will not be cast or recorded correctly. A small proportion will be "mistakes" (Mebane).

The combination of the potential for mistakes and the set of complex processes produce vote counts that should "or will often" follow the 2BL distribution as laid out in Table 1. According to

---

[3] Mebane WR, Kalinin K (2009) Comparative Election Fraud Detection. (The American Political Science Association, Toronto, ON, Canada).

4 Breunig C, Goerres A (2011) Searching for electoral irregularities in an established democracy: Applying Benford's Law tests to Bundestag elections in unified Germany. Elect Stud 30:534–545.

5 Cantu F, Saiegh SM (2011) Fraudulent democracy? An analysis of Argentina's infamous decade using supervised machine learning. Polit Anal 19:409–433.

6 Beber B, Scacco A (2012) What the numbers say: A digit-based test for election fraud. Polit Anal 20:211–234.

7 Deckert JD, Myagkov M, Ordeshook PC (2011) Benford's Law and the detection of election fraud. Polit Anal 19:245–268.

8 Mebane, Walter R., Jr. 2006b. "Election Forensics: The Second-digit Benford's Law Test and Recent American Presidential Elections." Earlier version presented at the Election Fraud Conference, Salt Lake City, Utah, September 29-30, 2006.

Mebane, "the kind of complexity that can produce counts with digits that follow Benford's Law refers to processes that are statistical mixtures (e.g., Janvresse and de la Rue 2004), which means that random portions of the data come from different statistical distributions" (Mebane).

Mebane uses simulations to show that when manipulations occur to 2BL distributed vote counts, this "will produce a significantly large value" of the test statistics. He shows that the test statistic is sensitive to departures from the 2BL distribution under a variety of scenarios: (1) when electoral manipulation occurs in a precinct for an already strong candidate; (2) when vote counts are manipulated in a close election (tie is expected according to the vote-generating process); and (3) when votes are manipulated in a precinct for a weak candidate. In addition, he shows that even small manipulations will produce significance (i.e. test statistic is sensitive to small manipulations). In other words, a massive amount of fraud does not have to occur for this test to detect fraud. However, "if the amount of manipulation is sufficiently small, the 2BL test will not signal that manipulation has occurred"

We have analyzed the data from parliamentary elections from 9th December, 2012. The selected data was from the official results published by Central Electoral Bureau (Biroul Electoral Central – BEC) – Final results – Per candidate statistics[9].

First analysis was made using the whole set of data, counting 8120 records. The data was recorded per electoral circumscriptions (41 counties, Bucharest with 6 districts and voters from abroad). We were looking into the column of "Obtained votes per candidate" and we are searching for differences from the Benford's law.

The tests included 3 phases:

- First digit distribution
- Second digit distribution
- First 2 digits distribution

For all these distributions, we were using also the chi-square test, which is used to determine whether there is a significant difference between the expected frequencies and the observed frequencies in one or more categories. Here, we were testing if the observed distribution differs significantly from the Benford's law predicted distribution.

2.2.1. First digit distribution

Digit	Sample Frequency	Benford Rate	Sample Data Rate	Difference
1	2642	30.103%	32.585%	0.02482102
2	1498	17.609%	18.476%	0.00866454
3	1083	12.494%	13.357%	0.00863304
4	725	9.691%	8.942%	-0.00749215
5	583	7.918%	7.190%	-0.00727695
6	459	6.695%	5.661%	-0.01033603
7	420	5.799%	5.180%	-0.00619126
8	360	5.115%	4.440%	-0.00675193
9	338	4.576%	4.169%	-0.00407027

Table 1 – First digit test

[9] http://www.becparlamentare2012.ro/A-DOCUMENTE/Statistici/RezultateCandidati2012.xls

ChiTest: 99.99999999903%

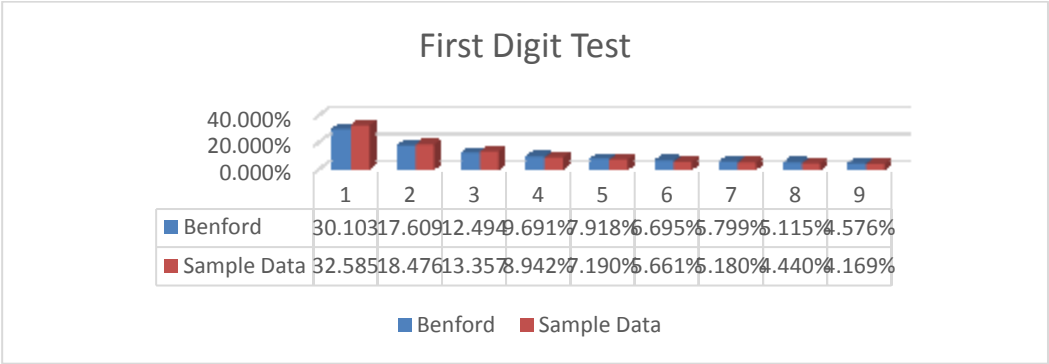


Figure 4 – First digit distribution

Conclusions: We observed a slight difference from the Benford's distribution, mainly the first 3 digits' frequency being above expected value and the others below. The Chi Square test indicates that the 2 distributions are almost identical, meaning that the test is not able to suggest a fraud in the data.

2.2.2. Second digit distribution

Digit	Sample Frequency	Benford Rate	Sample Data Rate	Difference
0	825	11.97%	11.84%	-0.0012986
1	846	11.39%	12.14%	0.0075047
2	782	10.82%	11.22%	0.0039912
3	728	10.43%	10.45%	0.0001326
4	702	10.03%	10.07%	0.0004218
5	686	9.67%	9.84%	0.0017559
6	625	9.34%	8.97%	-0.0036871
7	640	9.04%	9.18%	0.0014853
8	578	8.76%	8.29%	-0.0046313
9	557	8.50%	7.99%	-0.0050746

Table 2 – Second digit test

ChiTest: 100.00%

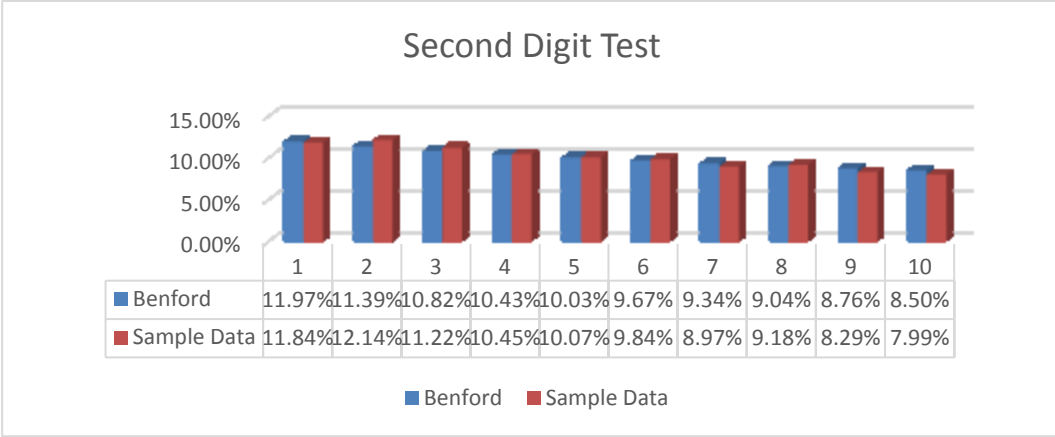


Figure 5 – Second digit distribution

Conclusions: The second digits 2 and 3 are above expected frequencies. The differences are insignificant according to Chi Square test.

2.2.3. First two digits distribution

Digits	Benford Rate	Sample Rate	Sample Frequency
10	4.139%	4.721%	329
11	3.779%	4.405%	307
12	3.476%	4.219%	294
13	3.218%	4.204%	293
14	2.996%	4.061%	283
15	2.803%	3.702%	258
16	2.633%	3.343%	233
17	2.482%	3.272%	228
18	2.348%	2.769%	193
19	2.228%	2.784%	194
20	2.119%	2.497%	174
…	…	…	…
96	0.450%	0.187%	13
97	0.445%	0.230%	16
98	0.441%	0.301%	21
99	0.436%	0.158%	11

Table 3 – First two digits test

ChiTest: 100.00%

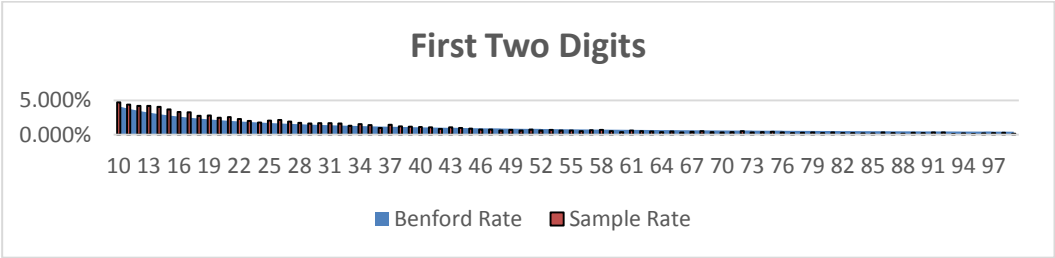


Figure 6 – First two digits distribution

Conclusions: The values starting with 1, 2 and 3 seem to have a slight value above expected distribution. All other starting digit pairs are under expected frequencies. This can suggest a possible data alteration (example: for a candidate with 24xx vote to 23xx or 25xx). The hypothesis is unstained by the Chi Square test.

3.Conclusions

Using Benford's law to discover data manipulation in the final results of the parliamentary elections from December, 2012, we can conclude that the data are validated. No important signs of abnormal distribution were detected.

As a further analysis, we recommend the analysis of the data using more fraud detection methods. This method is not exhaustive, as some economist suggest. This is not a perfect validation tool, is more like a test. If the data is in a category which supposed to obey Benford's law (like election data) and it fails, there is a signal of possible fraud. If the test is passed, doesn't mean the data is automatically validated, but more tests are always recommended to increase the confidence level.

References

- Battersby S.,"Statistics hint at fraud in Iranian election "(New Scientist: 24 June 2009).
- Beer TW, "Terminal digit preference: beware of Benford's law", J Clin Pathol 62 (2009): 192.
- Benford F., "The law of anomalous numbers". Proceedings of the American Philosophical Society 78 (1938): 551–572.
- Buttorff, G. Detecting fraud in America's gilded age. Working Paper No. 2, University of Iowa, (Cal Tech/MIT Voting Technology Project:2008).
- Cho WKT, Gaines BJ, " Breaking the (Benford) law: Statistical fraud detection in campaign finance." Amer Stat 61, (2007): 218–223.
- Deckert J., Mikhail Myagkov and Peter C. Ordeshook, "The Irrelevance of Benford's Law for Detecting Fraud in Elections", (Caltech/MIT Voting Technology Project: 2009) Working Paper No. 9.
- Diekmann A, "Not the First Digit! Using Benford's Law to detect fraudulent scientific data". J Appl Stat 34 (3) 2009:321-329, doi:10.1080/02664760601004940.
- Dümbgen L, Leuenberger C., "Explicit bounds for the approximation error in Benford's law." Elect. Comm. in Probab 13(2008): 99–112.
- Duncan R. L., "An Application of Uniform Distribution to the Fibonacci Numbers", The Fibonacci Quarterly, 5, (1967): 137–140.
- Durtschi C, Hillison W, Pacini C, "The effective use of Benford's Law to assist in detecting fraud in accounting data". J Forensic Accounting 5 (2004): 17–34.
- Fewster, R. M.,"A simple explanation of Benford's Law". The American Statistician 63 (2009): 26–32. doi:10.1198/tast.2009.0005.

- Hill T. P., "A Statistical Derivation of the Significant-Digit Law" (PDF). Statistical Science 10 (1995): 354–363.
- Hill T. P., "The first digit phenomenon" (PDF). American Scientist 86 (July–August 1998): 358.
- Hill T. P., "The Significant-Digit Phenomenon", The American Mathematical Monthly, Vol. 102, No. 4, (Apr., 1995): 322–327.
- Janvresse E. and Thierry de la Rue, "From Uniform Distributions to Benford's Law", Journal of Applied Probability, 41 (2004):1203-1210 doi:10.1239/jap/1101840566 MR2122815.
- Leemis LM, Schmeiser BW, Evans DL, " Survival distributions satisfying Benford's Law". Amer Stat 54, (2000):236–241.
- Mebane, Walter R., Jr., "Election Forensics: The Second-digit Benford's Law Test and Recent American Presidential Elections." Earlier version presented at the Election Fraud Conference, Salt Lake City, Utah, September (2006):29-30.
- Müller, Hans Christian." Greece Was Lying About Its Budget Numbers". (Forbes. September 12, 2011.).
- Newcomb S., "Note on the frequency of use of the different digits in natural numbers". American Journal of Mathematics (American Journal of Mathematics, Vol. 4, No. 1) 4 (1881): 39–40. doi:10.2307/2369148.
- Nigrini M , "A taxpayer compliance application of Benford's Law." Amer. Tax Assoc. 18, (1996): 72-91.
- Nigrini M.J., "I've Got Your Number". Journal of Accountancy, (May 1999).
- Raimi RA, "The first digit problem". American Mathematical Monthly, 83 (1976): 521–538.
- Sarkar P. B., "An Observation on the Significant Digits of Binomial Coefficients and Factorials", Sankhya B, 35, (1973): 363–364.
- Scott PD & Fasli, "Benford's Law: An empirical investigation and a novel explanation". CSM Technical Report 349 (2001).
- Smith S.W., "The Scientist and Engineer's Guide to Digital Signal Processing, chapter 34, Explaining Benford's Law". (2012).
- Stephens M.A, "Use of the Kolmogorov-Smirnov, Cramer-Von Mises and related statistics without extensive tables". Journal of the Royal Statistical Society, Series B (Methodological), 32, (1970):115–122.
- Suh I.S., Headrick T.C., "A comparative analysis of the bootstrap versus traditional statistical procedures applied to digital analysis based on Benford's Law", Journal of Forensic and Investigative Accounting 2(2) (2010):144-175.
- Suh IS, Headrick TC, Minaburo S, "An effective and efficient analytic technique: A bootstrap regression procedure and Benford's Law." J Forensic & Investigative Accounting 3 (3) (2011).
- Tolle C.R., Joanne L. Budzien, and Randall A. LaViolette "Do dynamical systems follow Benford?s law?", Chaos 10, 2, pp.331-336 (2000); doi:10.1063/1.166498.
- Varian, Hal. "Benford's law". The American Statistician 26: 65.
- Washington L. C., "Benford's Law for Fibonacci and Lucas Numbers", The Fibonacci Quarterly, 19.2, (1981): 175–177.

MARKET CONCENTRATION IN TURKISH JOURNALISM SECTOR

ADEM KALÇA[*]
YILMAZ ONUR ARI[**]

Abstract
Concentration is a situation in which market structure of a sector is controlled by a few firms. At the present time, many analyzing methods such as Herfindahl-Hirschman and N-Firm Concentration Indexes are used to determine market structure.According to market concentration indexes, higher concentration level means more monopolistic market structure, lower concentration level means more full competitive market structure.
In this study concentration levels of media groups in Turkish journalism sector within the scope of traditional journalism and internet journalism was analyzed via N-Firm Concentration and H-H Indexes. As a result of the study, it's seen that first four biggest media groups have monopolistic competition in internet journalism sector,and oligopol structure in traditional journalism sector. According to H-H index analyze, there is monopolistic competition in the sector.

Keywords: *maket concentration, Turkish journalism, internet journalism, Turkish media groups, concentration indexes*

1. Introductıon

In Turkey the basic function of journalism is to give information. Today there are many media groups which fulfill the function of giving information (Tokgöz 1981, 5). Primary objective of these media groups or firms is to get profit from this job. Highlighting the society is only an instrument, not a purpose; exactly like a baker's purpose is to return profit instead of providing people good and healthy food. Economically, a newsperson is like a firm who works for profit maximization and it's success level can be determined with it's profit level (Demir 1996, 79-84). Thus, the more journalism sector gets monopolistic, the more a newsmaker or a media group gets stronger, takes more ads and increases it's revenue.

Market concentration indexes provides beneficial and practical indicators to measure market power. Also these indexes become more beneficial when determining a firm's market power if they are used with other datas. Market concentration indexes are measured easily and give clues about how competitive a market is. If the number of firms in a sector increase, concentration diminishes and it augments the competition level. Firms' power of influencing the market variables decrease in direct proportion to competitiveness of the market structure. For this reason, it's important to know market concentration rates to determine how competitive a market is (Durukan et al. 2009, 76-77).

In the first part of this study the concept of concentration and concentration in media sector was discussed, followingly market structure of Turkish journalism sector was analyzed using N-Firm concentration and Herfindahl-Hirschman Index methods.

2. Conceptual framework of concentratıon

As its common definiton, concentration is the situation that production and pricing behaviours are controlled by a few firms. In a broad sense, concentration is the market structure-analyzing method used for measuring unfair competition among the firms in a sector or industry (Schmalensee 1988, 648). According to Varona et al. (2002, 8), concentration is the operation which makes the controls of two or more independent enterprise monopolise consistently. The situation which market behaviours are controlled by only one firm is called monopoly, the situation which market

[*] Professor, PhD, Black Sea Technical University, Trabzon (akalca@ktu.edu.tr).
[**] Research Assistant, Bayburt University (yoari@bayburt.edu.tr).

behaviours are controlled by two or more firms is defined as oligopoly (Güneş et al. 1997, 34). Taking over a firm by another firm involves the most important part of concentration. Also this concept includes changes in the structure and characteristics of control (Cook and Kerse 2000, 24). Market concentration differs according to market types and competition forms. In a monopolistic structure concentration is very high and competition is very low in a market, but vice versa in a full competitive market structure (Baş 2004, 111).

In media sector, concentration is generally divided into 3 groups as horizental, vertical and cross concentration (IRIS Special 2011, 2):

Horizental concentration happens when firms in the same sector merge. Generally these mergings are seen among radio and tv broadcasters, book, newspaper and magazine publishers and filmmakers in international communication. Rupert Murdoch's Sun, Times, News of the World ve Sunday Times and Doğan Media Group's ownership of five newspapers in Turkish journalism sector are the examples of horizental concentration (Özokçu 2011, 17). The reason why horizental concentration has been increasing in recent years is the possibility to operate all channels with same staff and remove marginal costs.Horizental mergings reduce the number of rival firms and remove the competition (Özdurdu 2011, 48).

Vertical concentration is defined as a firm dominates in every stage (from production to consumption) by ownership in an industry. For example, American film industry has a voice in filmmaking, distribution, studios and movie theatres, briefly in all phases (Sayılgan 2009, 82).

As a result of vertical concentration, market structure doesn't change directly because number of firms don't change at the sub-section and upper part of production chain. On the other hand, vertical concentration has negative effects for competition. **Foreclosure effect** is the leading effect. For example, if assignee firm is a customer of acquired firm, other firms no longer will sell goods to assignee firm. In addition to that, vertical concentration has many negative effects on competition such as making new entries to a market difficult and providing suitable environment for mergers (Waldman and Jensen 1998, 506).Especially if a one of the parties have power in its own market, new firm, which was formed as a result of vertical concentration, may push it's rival firms out of the market (Bishop and Walker 2002, 288).

Cross concentration emerges when big firms, which strenghten their controls over a significant means by the help of merger and acquisition, canalize different sectors and broaden their control area (Adaklı 2006, 37).In other words, ownership and integration of capital are the point in question among media components like television broadcasters, press and internet service providers, for example investments and ownerships are the point in question in sectors like automotive and finance (Avşar 2004, 90).

Cross concentration can be defined as the situation that a firm mergers in an industry which is more different than its own industry; but although the firm has the biggest share of resources and operations in its own industry, in other industries it is only a supplier or a user of products. As a result the firm doesn't make horizental or vertical merging. If cross concentration happens after a decline at operation costs, this situation may increase market efficiency (Demirgil 2008, 34).

Cross concentration developed in media sector especially by 2000s in Turkey. Thanks to cross concentration, media sector preserves its oligopol structure and eliminates the chance for new entries to the media sector (Özokçu 2011, 19-20).

3. Literature research

In the literature it's seen in the studies about market concentration that generally this subject was analyzed in many sectors, and concentration levels were analyzed according to production, income and cost and finally measured by N-Firm Concentration Rate and Herfindahl-Hirschman Index methods.

In the studies, it's stated that concentration is one of the most frequent situation in developed and developing countries's markets and this situation is a major obstacle for competition (Baş 2004,

110).Recently food security and quality control regularizations made mergers and acquisitions increase in the food sector in Turkey. Therefore number of giant companies in food sector increased and concentration rates of both food and retail sector augmented (Koç et al. 2008, 105-106).

In a study about cement sector in Turkey, N-Firm concentration analyze and Herfindahl-Hirschman analyze were applied. According to first analyze, market structure is a weak oligopolistic but it is more competitive, according to second analyze (Polat 2007, 97-116).But firms were assessed separately in this analyze..If they were analyzed as holding companies, concentration level could be higher.

Durukan and Hamurcu (2009, 84) made a study of market concentration in mobile communication and compared market structure in Turkey with Central Asian Turkish Republics' (Kazakhstan, Turkmenistan, Kyrgyzstan, Uzbekistan, Tajikistan) market structures.As a result of the analyze with the help of H-H index method, a non-competitive, over concentrated oligopolistic structure in Turkey, Kazakhstan, Kyrgyzstan and Turkmenistan; a mid-concentrated oligopolistic market structure was found out. Therefore some measures should be taken for easiness of new market entries in all six countries.

There are studies which argues its possible to get different results when concentration levels are analyzed according to production, income and cost. In a study on American advertising and marketing sectors, it's stated that these two sectors have the lowest share in total industry income but they have the biggest CR-4 concentration share in 2002 (Silk and King III 2008, 30).

Abdel-Raouf (2010, 398) stated in his study that international trade plays a crucial role in reducing CR-4 concentration rate to reflect the market structure better. As a matter of fact adjusting the published concentration ratio for international trade reduces the percentage of concentrated manufacturing industries (with $CR_4 > 60\%$) from 23 % to 11 % in 2002 and from 20 % to 11% in 1997 in USA.

In a study about media sector (Özdurdu 2011, 55-62) concentration analyzes were made according to Tv ratings, daily circulation and television advertising expenditures in Turkey. In the study both N-Firm concentration and Herfindahl-Hirschman methods were applied. As a result an oligopolistic market structure was confirmed in this sector. Also it was emphasized that advertising expenditures have been decreasing in journalism sector, but internet and television advertising expenditures have been increasing recently.

Bates (1993, 3-21) measured concentration levels of American local television market via H-H Index. As a result concentration is decreasing constantly in local television market because of the fact that broadcasting markets have been augmenting and artificial obstacles to the markets have been removed recently.

4. Application

On a standard measurement in order to determine the concentration level hasn't been agreed yet. Nevertheless, there is a wide range of selection among different concentration measurements. N-Firm Concentration Index, Herfindahl-Hirschman Index, Entrophy Index, Hall-Tideman Index, Linda Index and Gini Index are the most commonly used methods. But in empirical studies, the most widespread methods are N-Firm Concentration Index and Herfindahl-Hirschman Index (Yıldırım et al. 2009, 40-45).

Concentration level in Turkish Journalism Sector was determined via N-Firm Concentration Method Index and H-H Index.

N-Firm Concentration Rate (CR_N) shows aggregate market share of the biggest N number of firms in an industry.CR_4 states total shares of the biggest four firms and CR_8 states total shares of the biggest eight firms (Yolaç 2010, 1089).

By the help of formula (1), concentration rate index based on newspaper sales in Turkey was measured. In the study, concentration rates of first four and first eight firms in media sector were measured by the help of daily newspaper sales at Table 1 and shares of media groups at Table 2.

$CR_N = \frac{1}{x}\sum_{i=1}^{m} Xi$ (1)

N-Firm Concentration Rate (CR_N);

CR_N: Concentration rate for ''N''number of firms

X_i: Value of ''x'' for firm ''i'', when firms are ranged one under the other according to ''x''.

X: Total value of ''x'' for all firms in a market

In practice, according to CR_N concentration rate; it's accepted that there is low concentration if concentration level is between 0 and 30 (perfect competition), medium if it's between 31 and 50 (monopolistic competition), high if it's between 51 and 70 (oligopolistic structure) and very high if it's between 71 and 100 (Polat 2007, 100).

Similiarly, Herfindahl- Hirschman Index was measured based on newspaper sales in Turkey using Formula (2).

Herfindahl Hirschman Index is measured as the sum of squares of the market shares of firms.

$$H = \sum_{i=1}^{n} P_i^2 \quad (2)$$

P_i^2 ; sum of squares of firms' market shares

This index is accepted as a good measure because it not only includes all distribution but also is critical between the changes of firm sizes and number of firms in a market. H-H Index has been one of the most popular method of determining market structure since 1980s. In practice, H-H Index shows that there is perfect competition if it's smaller than 1000 (H-H < 1000), monopolistic competition if it's between 1000 and 1800 (H-H; 1000-1800) and finally there is oligopolistic market structure if it's higher than 1800 (H-H > 1800) (Parkin 2003, 203).

Average daily sales of newspapers between 26th of November 2012-2nd of December 2012 were shown[1] below at Table-1.

Table-1: Daily amount of newspapers sold

NEWSPAPER	**SALE**	**NEWSPAPER**	**SALE**
ZAMAN	1.046.273	TARAF	53.028
POSTA	456.196	ŞOK	52.899
HÜRRİYET	435.278	YENİ ASYA	51.448
SABAH	330.354	CUMHURİYET	50.827
SÖZCÜ	281.095	YENİ ÇAĞ	50.479
HABERTÜRK	210.988	YURT	49.866
P. FOTOMAÇ	197.095	YENİ AKİT	34.861
FANATİK	174.917	MİLLİ GAZETE	33.960
MİLLİYET	168.398	YENİ MESAJ	30.231
STAR	135.557	YENİ ASIR	25.453
TAKVİM	135.460	YENİ RADİKAL	24.421
TÜRKİYE	126.416	SOL GAZETESİ	16.129
VATAN	122.241	MİLAT	10.798
BUGÜN	108.514	TODAY'S ZAMAN	9.843
AKŞAM	101.397	BİRGÜN	7.356
YENİ ŞAFAK	100.775	ORTADOĞU	6.546
GÜNEŞ	89.086	EVRENSEL	5.967

[1] http://www.medyatava.com/tiraj.asp (06.12.2012).

AMK	72.823	H. DAILY NEWS	5.191
AYDINLIK	59.705	HURSES	2.118
TOTAL 4.873.989			

Aggregate sales of newspapers according to media groups and shares in this sector were shown at Table-2.

Table-2: Sector Shares of Newspapers of Media Groups

Media Groups and Newspapers	**Newspapers Sold**	**Sector share (%)**
Doğan (Hürriyet, Posta, Fanatik, Yeni Radikal, H.Daily News)	1.096.003	22,4
Feza (Zaman)	1.056.116	21,6
Çalık (Sabah, Takvim, Yeni Asır, P.Fotomaç)	688.362	14,1
Sözcü (Sözcü, AMK)	353.918	7,2
Demirören (Vatan, Milliyet)	290.639	5,9
Ciner (Habertürk)	210.988	4,3
Çukurova (Akşam, Güneş)	190.483	3,9
Star-Sancak (Star)	135.557	2,7
İhlas (Türkiye)	126.416	2,5
İpek (Bugün)	108.514	2,2
Albayrak (Yeni Şafak)	100.775	2,0

When H-H Index was analyzed according to sector shares of media groups' newspaper sales using Table 1 and Table 2;

$$H\text{-}H = \sum_{i=1}^{11} X_i^2 = 22{,}4^2 + 21{,}6^2 + 14{,}1^2 + 7{,}2^2 + 5{,}9^2 + 4{,}3^2 + 3{,}9^2 + 2{,}7^2 + 2{,}5^2 + 2{,}2^2 + 2{,}0^2$$

H-H= 501,76 + 466,56 + 213, 16 + 51,84 + 34,81 + 18,49 + 15,21 + 7,29 + 6,25 + 4,84 + 4,00

H-H= 1324, 21

According to average daily sales, H-H Index value is between 1000-1800. Thus it can be said that market structure for this sector is monopolistic competition.

When concentration was analyzed in Turkish journalism sector based on media groups' newspaper sales by the help of N-Firm Concentration Index;

When first four media groups namely Doğan, Feza, Çalık and Sözcü were analyzed in terms of their newspapers' selling rates, it's seen that concentration rate of the biggest four firms in the market (CR_4) is 65,3 %. According to CR_4 analysis, if total concentration rate of the biggest four firms is between 51-70 % ,it's accepted that market structure is oligopolistic. All in all, there is oligopolistic structure in Turkish journalism sector.

When first eight media groups namely Doğan, Feza, Çalık, Sözcü, Demirören, Ciner, Çukurova and Sancak were analyzed, it's seen that concentration rate of the biggest eight firms in the market (CR_8) is % 82.1. According to CR_8 analysis, it can be concluded that there is a very high concentration level in Turkish journalism sector.

COMSCORE measurement of news category sites on internet[2] shows the number of visitors to websites in Turkish Internet Journalism sector. At Table-3, number of visitors to internet sites in news category in March 2012 were shown.

Table-3: Number of Visitors in March 2012

March, 2012	**Number of Visitors(x1000)**	**March, 2012**	**Number of Visitors (x1000)**
Milliyet.com.tr	10.973	Yazete.com	678
Hürriyet.com.tr	9.711	Beyazgazete.com	668
Mynet News	8.703	Haberseninle.com	665
Haberler.com.tr	5.826	Yenisafak.com.tr	645
Sabah.com.tr	5.014	Stargundem.com	644
Haberturk.com	4.605	Kenthaber.com	610
Gazetevatan.com	3.812	Gazeteoku.com	601
Ensonhaber.com	2.970	Focushaber.com	571
Sondakika.com	2.939	Haberform.com	546
İnternethaber.com	2.837	Yahoo News Network	543
Haber365.com	2.537	Haber50.com	538
Posta.com.tr	2.491	Haber5.com	526
Ntvmsnbc.com	2.369	Nuveforum.net	502
Haber7.com	2.268	Anadoluhaber.net	493
Radikal.com.tr	1.750	Sonsayfa.com	472
Cnnturk.com	1.614	Ankarahaber.com	467
Dmi.gov.tr	1.604	Msnweather	446
Gazete5.com	1.593	Cumhuriyet.com.tr	446
Haber3.com	1.546	HPMG News	445
Haber365.net	1.403	Haber01.com	433
Medyafaresi.com	1.367	Porttakal.com	425
Zaman.com.tr	1.363	Haberaktuel.com	413
Gazetevan.com	1.313	Ahaber.com.tr	396
Stargazete.com	1.039	Taraf.com.tr	392
Takvim.com.tr	974	Vatan.tc	390
Bugün.com.tr	934	Habera.com	390
Haber.pro	924	Trthaber.com	389
Havadurumu15günlük.net	920	Yandex news	373
Habervitrini.com	874	Enerjigundem.com	373
Aksam.com.tr	835	BBC	364
Ok.net	831	Ozgunbakis.com	362
Songazetehaberleri.com	805	Haberbaz.com	361
Medya73.com	804	Netgazete.com	360

[2] http://www.medyafaresi.com/haber/80411/medya-iste-haber-sitelerinin-gercek-tiklanma-oranlari.html (08.12.2012)

Aktifhaber.com	784	Scroll.com.tr	358
Samanyoluhaber.com	762	Nethaberci.com	354
İhlassondakika.com	760	Havadurumu.com.tr	348
New York Times Digital	741		

Number of visitors of media groups' websites in Internet journalism sector, which has an increasing importance recently, were shown at the table below.

Table 4: Shares of Media Groups' Websites in News Category

Groups	Number of Visitors (x1000)	Sector Share (%)
Doğan	15566	14,2
Demirören	14785	13,4
Çalık	6384	5,8
Ciner	4605	4,2
Albayrak	2913	2,6
Doğuş	2369	2,1
Feza	2125	1,9
Sancak	1039	0,9
İpek	934	0,8
İhlas	760	0,6

According to Table-4, market shares of media groups' websites in news category, total concentration rate of first four media groups (Doğan, Demirören, Çalık and Ciner) is 37,6 %.Thus, there is a monopolistic competitive structure in Internet journalism sector and it's close to perfect competition.

When sector shares of media groups' websites which were shown in Table-4, were analyzed using H-H index;

H-H= $\sum_{i=1}^{10} X_i^2 = 14{,}2^2 + 13{,}4^2 + 5{,}8^2 + 4{,}2^2 + 2{,}6^2 + 2{,}1^2 + 1{,}9^2 + 0{,}9^2 + 0{,}8^2 + 0{,}6^2$

H-H= 201,64 + 179, 56 + 33,64 + 17,64 + 6,76 + 4,41 + 3,61 + 0,81 + 0,64 + 0,36

H-H= 449,07

H-H Index value of Internet web sites in news category in March 2012 is at perfect competition level. It's main reason is that only websites of media groups were included in H-H measurement, and independent internet websites weren't considered in that index.

Conclusions

Newspapers, which are the oldest mass communication tools, have been still keeping their importance. Main purpose of newspapers is to produce news. Accordingly, news carries value economically and media groups, which are the owners of newspapers, try to dominate the market in order to maximize their profits.

Using CR_4, CR_8 and Herfindahl-Hirschman Index, market shares of media groups' newspapers were analyzed by the help of newspapers sold in traditional journalism sector in Turkey. Similiarly, market concentration of news websites of media groups was measured by the help of number of visitors to those websites in Internet journalism sector.

According to daily newspaper sales, total concentration rate of four biggest media groups in the market is between 50-70 %, so this sector's market structure seems to be oligopolistic. In internet journalism sector, total concentration rate of first four media groups is 37,6 %. In other words a

monopolistic competition is dominant in this sector. The reason why internet journalism sector is more competitive than traditional journalism sector is that internet journalism sector is a newly developing sector in Turkey and also many websites on news category, which acts independently from media groups, have lots of visitors and show impressive performance in cyber world.

According to the results for H-H Index, H-H value occured between 1000 and 1800 for daily average newspaper sales. Therefore there is a medium-concentrated, monopolistic competitive structure in that sector.

References

- AbdelRaouf, Fatma.''Trade Adjusted Concentration Ratios in the US Manufacturing Sector''. *International Journal of the Economics of Business* 17(3) (2010): 385-403.
- Adaklı, Gülseren. *Yayıncılık Alanında Mülkiyet ve Kontrol, Medya Politikaları*. Ankara: İmge Yayınları, 2001.
- Avşar, Zakir. ''Medyada Yoğunlaşma ve Şeffaflaşma: Yasal Düzenlemeler, Beklentiler, Sorun Alanları''. *İletişim: Araştırmaları Dergisi* 2(2) (2004): 87-112.
- Baş, Mehmet ''Rekabeti Etkileyen Faktörlerden Pazar Yoğunlaşması ve Türkiye'deki Bazı Sektörlerin Yoğunlaşma Derecesi.'' *Gazi Üniversitesi Ticaret ve Turizm Eğitim Fakültesi Dergisi* 2(1) (2004):1-14.
- Bates, Benjamin J. ''Concentration in Local Television Markets.'' *Journal of Media Economics* 6(3) (1993): 3-21.
- Bishop, Simon and Walker, Mike. The *Economics Of EC Competition Law (2nd Publication)*.London: Sweet and Maxwell, 2002.
- Cook, C.John and Kerse, Christopher. S. *EC Merger Control (3rd Edition)*.London: Sweet and Maxwell, 2001.
- Demir, Ömer. ''İktisadi Bir Mal Olarak Haber Piyasası: Metodolojik Bir Yaklaşım.'' *Dokuz Eylül Üniversitesi İ.İ.B.F Dergisi* 11(2) (1996): 74-85.
- Demirgil, Hakan. ''Firmaların Hayatta Kalma ve Büyüme Performanslarını Belirleyen Faktörler: Göller Bölgesi Üzerine Bir Araştırma.''Phd diss., Süleyman Demirel Üniversitesi, 2008.
- Güneş, Merih; Köse, Ahmet and Yeldan, Erinç. ''Input Output Tablosu Sektör Tasnifine Göre Türkiye İmalat Sanayinde Yoğunlaşma Eğilimleri 1985-1993.'' *Ekonomik Yaklaşım* 8(26) (1997): 33-47.
- Hamurcu, Çağrı and Durukan, Tülin. ''Mobil İletişimde Pazar Yoğunlaşması.'' *Journal Of Black Sea Studies* 22 (2009): 75-86.
- IRIS Special. *Television and Media Concentration, Regulatory Models on the National and the European Level*. Strasbourg: European Audiovisual Observatory, 2001.
- Koç, A.Ali; Bölük, Gülden and Aşçı, Serhat. ''Gıda Güvenliği ve Kalite Standartlarının Gıda İmalat Sanayinde Yoğunlaşmaya Etkisi.'' *Akdeniz İ.İ.B.F. Dergisi* 16 (2008): 83-115.
- Özdurdu, Rahime. *Medyada Sahiplik ve Yoğunlaşma, Oluşturduğu Sorunlar ve Şeffaflığın Sağlanması*. Ankara: Radyo ve Televizyon Üst Kurulu Uzmanlık Tezi, 2011.
- Özokçu, E. Seda. *Görsel-İşitsel Medyada Sahiplik.* .Ankara: Radyo ve Televizyon Üst Kurulu Uzmanlık Tezi, 2011.
- Parkin, Michael. *Economics Sixth Edition*. New York: Addison-Wesley World Student Series, 2003.
- Polat, Çetin. ''Yoğunlaşma ve Piyasa Yapısı İlişkisi Çerçevesinde Türk Çimento Sektörünün Yapısal Analizi.'' *Anadolu Üniversitesi Sosyal Bilimler Dergisi* 7(2) (2007): 97-116.
- Sayılgan, Emine. Medya Sektöründe Rekabet Olgusu ve Medyaya Giriş Engelleri, *Marmara İletişim Dergisi* 15 (2009): 79-89.
- Schmalensee, Richard. Industrial Economics: An Overview *The Economic Journal* 98 (1988).
- Silk, Alvin J. and King, Charles. ''Concentration Levels In The U.S. Advertising And Marketing Services Industry: Myth vs. Reality.''*Harvard Business School* 9(44) (2008): 1-45.
- Tokgöz, Oya. *Temel Gazetecilik.* Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1981.
- Varona, E. Navarro, Galarza, Font, Crespo J. Folguera, Alonso, J. Briones. *Merger Control In The European Union*. London: Oxford University Press, 2002.
- Waldman, Don E. and Jensen, Elizabeth. J. *Industrial Organization: Theory And Practice*. Boston: Addison-Wesley,1998.

- Yıldırım, Kemal; Eşkinat, Rana; Kabasakal Ali and Erdoğan, M. Endüstriyel *Ekonomi*. Bursa: Ekin Yayınevi, 2009.
- Yolaç, Sema.''Türk İmalat Sanayinde Yoğunlaşma.''*Sosyal Siyaset Konferansları Dergisi* 50 (2005): 1088-1100.
- Yuping, Li. ''The Concentration Ratio of China Construction Industry Market.''*Management And Service Science (MASS) 2010 International Conference On* (2010):1-4.
- Medya Faresi.''Haber Sitelerinin Gerçek Tıklanma Oranları''. Accessed December 8, 2012. http://www.medyafaresi.com/haber/80411/medya-iste-haber-sitelerinin-gercek-tiklanma-oranlari.html (08.12.2012)
- Medya Tava. ''Gazetelerin Günlük Tirajları''.Accessed December 06, 2012. http://www.medyatava.com/tiraj.asp (06.12.2012)

FACTORS AND ASPECTS OF THE RELOCATION STRATEGIES OF COMPANIES

SERGHEI MĂRGULESCU[*]
ELENA MĂRGULESCU[**]

Abstract
In the last two decades there have been significant changes in the factors that determine the geographic location or relocation of R & D, production and marketing of all transnational companies. Supply chains have expanded to new areas of the globe and big traditional providers have also expanded their global presence by an increasing trend of co-localization with their main customers. Contract manufacturers have multiplied and strengthened, expanding their geographical distribution. A more obvious trend was that of the geographic dispersion of other global value chain functions such as business services and logistics support functions. Relocation to countries with cheap labor is not always a successful strategy. Therefore the decision to relocate in international geographical area, regardless of the structure formula, offshoring or outsourcing, must be based on a more diverse set of factors.

Keywords: *relocation, TNC, clustering, offshoring, outsourcing*

Introduction

In the last two decades there have been significant changes in the factors that determine the geographic location or relocation of R & D, production and marketing of all transnational companies. Production was internationally dispersed long ago, but the trend of integration on a so large geographic scale is relatively recent. Supply chains have expanded to new areas of the globe and have virtually integrated regional production areas that were previously separate structures.

Contract manufacturers have multiplied and strengthened, also expanding their geographical distribution.

Great traditional suppliers have also expanded their global presence by an increasing trend of co-location with their main customers. In connection with this, the so-called "postponement" trend appeared, meaning that components are manufactured or assembled as close as possible to the final sale locations to reduce transportation costs, which for some products are still high.

A more obvious trend was that of the geographic dispersion of other global value chain functions such as business services and logistics support functions.

Even innovation, which is supposed to be rooted in their own countries for strategic and skilled professionals reasons, is increasingly performed in overseas locations. Cutting-edge research is still mainly carried out in developed countries, but we can see that emerging countries allocate increasing and impressive amounts on research and development spending.

Factors of the relocation decision

To summarize, we can mention the following categories of factors acting simultaneously on relocation decisions of transnational companies:

a) **Differences in costs**. They remain an essential factor in choosing location, especially in respect of the production function, but to a greater extent also in what involves other activities such as research and development, accounting services, IT or marketing. In selecting the location, the

[*] Professor, PhD, Dean of the Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (margulescu@univnt.ro).
[**] Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (elena.margulescu@univnt.ro).

production costs are evaluated in the broader context of the efficiency and productivity of the location in question. This aspect is often neglected in discussions of comparative costs, but is essential for the transnational companies strategy of achieving a "systemic" efficiency throughout their entire productive system. Therefore, a location is analyzed according to how efficient performs a particular function in coordination with functions located elsewhere, and not in isolation.

b) **Search for valuable "assets"** such as the workforce qualification or the availability of talented people. The development of informatics and telecommunications has increased the ability of transnational companies to coordinate increasingly complex functions located at increasing distances. This stimulates them to outsource these functions in close relation with the mobilization of a broader range of skills and knowledge.

c) **Clustering**, which has turned into a global process of recognition by transnational companies of the benefits of co-location with suppliers, competitors, service providers, research and development centers. Although distances matter less in closing transactions, it is found that closeness and access to knowledge remains an important factor of competitiveness, and as such relocation to industrial parks or other areas of concentration of R & D activities will further remain a strategy of transnational companies.

d) **The growth potential of markets** is also an important factor. It is obvious when looking at the location of many activities in China, India and other emerging countries with large populations that, with the increasing standard of living, will also become important outlet markets.
e) **Other factors**, such as:

-Existence of a relatively developed infrastructure which creates an increased efficiency from start,
-Quality and cost of public utilities,
-Availability of building land,
-Institutional incentives offered by central and local authorities,
-Laws in the field of financial and economic activities and labor
-Aspects related to the quality of life.

In the field of services, offshoring reflects, in essence, the resulting revolution from the services' commercialization. Traditionally, most services were until recently non-marketable, in the sense that this required the buyers and sellers presence in the same place and at the same time. Unlike goods, they could not be traded between parties placed in different countries (medical services, fitness services, etc..). Other services do not require physical proximity of the parties, but instead they have to be delivered face-to-face due to technical or traditional constraints (sharing, storage, processing and transmission of information). These services were non-marketable because:

- certain types of information could not be stored
- others could be stored, but could not be transmitted quickly and economically across borders for processing,
- others were traditionally processed inside the company (accounting, data storage, design),
- others, traditionally presumed face-to-face presence (medical, financial, legal consultantions).

With the development and application of the new information and communication technologies (ICT), such barriers were more frequently demolished.

ICT enables the digitization, encoding and standardization of knowledge and, consequently, the production of a wide range of services which can be fragmented or modularized, the resulting components being relocatalbe, in order to obtain cost or quality advantages, economies of scale or another advantages. Thus, the arbitrage strategies of various factors on national and international level have become feasible in the sphere of services.

Requirements for these services to be relocatable are:

- to involve no face to face interaction

- to have a high information content
- the working process must be compatible with the distance transmission and the Internet
- to involve large wage differences
- installation barriers to be insignificant
- social protection requirements to be modest.

Factors that prevent compliance with these requirements and consequently prevent the offshoring of services are:

- technological limitations (such services can not be digitized or separated from other activities)
- need face to face interaction (marketing, delivery, etc.),
- the need to be closw to customers (fashion, creativity, innovation, medicine, privacy, etc.)
- occupational requirements, labor market restrictions, lack the necessary qualifications or knowledge of foreign languages,
- law and intellectual property rights protection
- risk aversion.

As time passes, more and more of these barriers are overcome, or seem to be overcome, both in terms of technological developments and government policies.

In many respects between the factors that determine the modularity and the globalization of production of goods and services there are many similarities, but some differences persist, such as:

- the offshoring of services is structurally simpler and faster in terms of resources, endowments and equipment necessary, than the offshoring of production,
-the offshoring of services mainly affects white-collar workers, not the blue-collar workers from the manufacturing sector,
- the offshoring of services potentially addresses to a larger number of companies in all areas,
- the offshoring of services require less investments and links with local suppliers.

Large transnational companies play the most important role in the phenomenon of services offshoring, both through captive offshoring, and through subcontracting to local suppliers. The captive offshoring can be implemented both for their own activities and / or to serve third parties. Offshoring is not limited however to transnational companies, but is implemented also by smaller companies.

The main **factors** that have influenced the decision of services offshoring are the following:

1**. The need to control those activities,** especially when involving intellectual property rights or sensitive information. As in other economic activities, the more strategic those services and closer to the core competencies of the companies are, the less willing are the companies to outsource them. In this situation there are, for example, the financial services or the research and development activities, preponderantly transferred to their own subsidiaries (transnational companies such as Oracle, Texas Instruments, General Electric, Cisco, Hewlett-Packard, IBM and Microsoft have established research and development centers in India).

2. **The internal interaction degree** involved in the respective activity. When the services can be split, but involve a closer connection with the other business activities (services, manufacturing, research and development) to ensure a greater efficiency, they will not be outsourced. By contrast, the back-office and front-office operations that can be easily standardized and separated from the other activities are more easily subject to outsourcing. The same thing happens when the software developments are outsoursed: the standard or routine activities are contracted with Indian corporations, for example, and the most sophisticated are kept in business.

3**. The existing of the service providers in the emerging countries.** The activity of such providers in the emerging countries is a relatively a recent phenomenon and has become an alternative to the strategies of the western companies, for about a decade. For example, when transnational companies began to transfer their back-office functions to India, they couldn't find there local companies to undertake the outsourcing. Therefore, in 1998, American Express had to set

up their own subsidiaries. Only after 2000, other airline companies that wanted to outsource similar services have found local Indian companies able to take over. For example, Delta Air Lines has outsourced some of the services booked by the call-center company Spectramind, a subsidiary of Wipro company. Also, Swiss International Airlines, Austrian Airlines and Sabena have outsourced the accounting services for the revenues resultinf from the cargo and people transport, ticket booking, flight schedules and administration support to air navigation to the company AFS, a subsidiary of Tata Consultancy Services, the largest Indian software company. There is also a range of services, which was developed more rapidly in the emerging countries, as the software services, for which local suppliers competitors can easily be found, while other services have evolved later, so that competition is lower (for example the financial analysis services). Availability of local suppliers in emerging countries is correlated with other factors such as intellectual property protection, cultural and linguistic differences, the information availability on local business.

4**. The volume of the activities that can be outsourced**. From the analysis of the corporate decisions can be seen that there is a greater temptation to keep in the company those activities with a bigger workload or added value, in order to benefit from the efficiency surplus resulting from the operations of the large yield series. Offshoring's version to subsidiaries is the most frequently used. At smaller sizes of activities, the offshoring to third parties enter into discussion with more power.

5. **The costs reducing** is one of the main motivations of offshoring, as confirmed by numerous studies. Cost reduction can be achieved either by searching for locations with lower costs, or by consolidating operations and reduce the costs with infrastructure, personnel training and management. Any international bank that has, for example, 50-60 data centers, each with infrastructure, specialists and maintenance costs, can strengthen them in 5-10 centers. This means costs reductions and allows the creation of centers of excellence, and if combined with lower labor costs, the savings can be considerable. It is estimated that the U.S. banking industry saved by offshoring to India about U.S. $ 8 billion in 1999-2002. In Europe, about 80% of the largest transnational companies with offshoring experience reported savings ranging between 20-39% and another 10% of them showed even greater savings. In call-centers, labor costs in developed countries represent 50-70% of total costs. In India, the salaries were at the beginning of this decade 80-90% lower than in England. However the savings derived from wages are diminished because of higher costs of infrastructure, personnel qualification and travel. Overall the savings are situated in the margin of 30-40% compared to the costs in England and something more compared to that ones from the U.S.A.

6**. A better quality of the services** is another important factor in the decision of services relocation. Many transnational companies have been surprised to find this, the factors in this respect being of two categories:

- when the "back-office" services of the services customer become “front-office” services of the services provider, the latter gives a higher attention to the quality of the services
- mostly, the low-cost locations use a more educated staff than the one used in developed countries. If in India they are university graduates in industrialized countries are school or college graduates.

Aspects of the relocation strategy

1. **Relocation to countries with cheap labor is not always a successful strategy.** Absolute labor costs are important in labor-intensive industries, but in the overall equation there are other factors that are even more important than we are tempted to believe at first, such as:

-Political risk,
-Risk related to intellectual property rights,
-Cost of raw materials,
-Energy and equipment,

-Transportation costs,
-Interest rates,
-Taxes
-Trade policies of states.

Maybe some items have to be adjusted in the meantime, but a study conducted in 2004 by McKinsey company, based on the experience of a number of companies in California, quantified that, when companies operate efficiently in the home country, the comparison with carrying out the same business in countries with cheaper labor, taking into consideration the above mentioned factors, leads to the following final price advantages in favor of these countries: in high technology field 0.6%, in the processing of plastics 6% and in the clothing industry 13%. These gains seem minor compared with those obtained by a faster satisfying of customers and a prompter respond to fashion trends and consumer preferences.

Also what matters ultimately is not absolute labor cost (dollars / hour), but the unit cost of labor, or labor incorporated into the product. This unit cost is often higher in countries in transition as a result of:

- Lower qualification of the labor force,
- Periods of training required to use certain technologies,
- Losses due to the need of more frequent repair of equipment and machinery,
- Loss of material,
- Increased labor migration,
- Stress caused by living conditions, transportation, and so on.

2. Relocation strategies generated by the cost benefits or by the benefits of processes **modularisation and** their outsourcing, show noticeable conceptual differences and approach. The best example results from the comparrison between the American and Japanese strategies, especially in the electronics industry.

In this respect, it is of interest the opinion of the president of the Japanese company Kenwood regarding the manufacturing outsourcing strategies, expressed in an interview: "I know that American companies are convinced that production without manufacturing plus EMS (electronics manufacturing services) is the best approach. But I have serious doubts in this respect ... especially on markets that are in rapid change. Managers of companies without manufacturing do not know anything about production anymore. If technologies or markets change, they simply can not adapt. Newly established companies require contract manufacturers, is the best approach for them because investments are minimal and development quick. But this is not for me. This is the U.S. power: new technology combined with production without manufacturing and EMS. In such a system, a flexible value chain is an advantage. In the long term, however, where the manufacturing process changes due to changing technologies and markets, you need manufacturing in-house. That's why companies in Japan have a longer life. It is another form of competition. We must specifically adapt to meet the challenges."

Japanese electronics companies have also pursued strategies that use the advantages of assemblying in China, but within a division of labor that keeps important percentages of production in the country, along with the phases of product defining, research and development, design and distribution. This trend is also manifested in industries with high potential of the value chain fragmentation. Japanese strategies focus on the complementarities between home integration and abroad networks.

Such an approach, even U.S. researchers say, is simply not possible to be put into practice in the U.S. anymore, in a wide range of fields.

Most likely to remain contracted in the country are activities with a strong nonmodular character. Also, due to American penchant for strategies built on modularity and contracting the modules (functions) of that business, modularity covers a wider range in U.S. than in Japan.

The two distinct forms of competition are based also on different thinking. A good example can be the following:

- Kenwood prefered organizing the production of mini-disk players within its factory in Japan, as a means of accelerating the renewal of the product range and their supply to consumers.
- Apple has registered remarkable achievements through another strategy, quickly designing new generations of iPods that are assembled outside the United States from components whose production was also outsourced. Apple has promoted the same strategy in the production of iPads, massivelly outsourcing it into China.

But what is more interesting is the fact that if an American manager in the electronics industry would like to apply the Japanese strategy to increase its market share of products with short production cycle, it would be hard for him to find within U.S. the ingredients for such a strategy. The widespread transfer of manufacturing functions and of other product design and technology functions to contract manufacturers in the U.S. and abroad have practically broken the production system in a way that seems irreversible.

Zara Company is maybe a "king" of speed on the route of concept-manufacturing-retail, but the U.S. has not left any company that could be like this. On a smaller scale there is still that possibility, and American Apparel and Knapps prove it. But electronics, automotive and auto parts, textiles and clothing, such companies are not the mainstream anymore.

3. There are a number of cases that make the manufacturing outsourcing counterproductive, and as such the relocation strategies are not operational. Such cases can be considered the following:

- High-tech areas where the new knowledge content has yet not been standardized
- Areas which require a continuous relationship between engineers, designers and workers on both manufacturing and product design or technology
- Situations in which major brand companies are reluctant to do outsourcing for fear of insufficient protection of intellectual property rights,
- Situations where the effect of "clustering" makes the leaving of the area counterproductive since in other locations proper factors are not to be found (qualified workforce, talents, research centers) or synergistic effects do not exist (large number of suppliers, manufacturing traditions, the type of relationships between firms, and so on).

Conclusions

The phenomena of the globalization of production have to be seen as a sum of **strategies of companies regarding the reorganization and relocation of their activities.**

The arbitrage of functions of the global value chain of a product is relatively new in corporate management, in the context of the “functional” specialization, and the analysis of the relocation strategies of companies on the basis of the “functions” arbitrage completes the entirely new list of opportunities that globally integrated companies have latelly at their disposal .

New opportunities arise also from the **reorganization and relocation of companies in the context of business services offshoring.** That is why companies have to analyze the premises for the services offshoring and the factors in the decision of outsourcing and offshoring of services. There are sufficient motives to assert that the modularization of services is vaster than the one in the sphere of production. At the same time, the new technologies often simplify the “production” of those services, facilitating even more their geographic relocation. However statistical data of the past decade show **differences in strategy among American companies, more likely to establish foreign affiliates, and European, more likely to contract service providers in other companies.**

One conclusion is that the **strategies of companies regarding the relocation of their activities**, driven by the cost advantages or by the benefits of processes modularization and

outsourcing, are hard to be standardized as far as companies and managers bear certain national incriptions. It is the case of American and Japanese company strategies.

Another conclusion is that **the relocation strategies are not operational anytime. There are cases that make the manufacturing outsourcing counterproductive and the business can be carried out more effectivelly and safe with most of the functions kept inside the company.**

References

- Baldwin R. (2006): "Managing the Noodle Bowl: The Fragility of East Asian Regionalism".
- Berger Suzanne and the MIT Industrial Performance Center, How We Compete: "What Companies Around the World Are Doing to Make It in Today's Global Economy", Currency Book, 2006.
- Dunning H. John: "The New Globalism and Developing Countries" – N.Y., 1997.
- Dunning H.John, Masataka Fujita, Nevena Yakova: "Some Macro-data on the Regionalisation / Globalisation Debate: A Comment on the Rugman/Verbeke Analysis", Journal of International Business Studies 38, no.1 (January 2007).
- "Globalisation Study" (2005), Industrial Performance Center at MIT
- Krugman P. & Venables A. (1995): "Globalisation and the Inequality of Nations".
- Inkpen A., Ramaswamy K.: "Global Strategy", Oxford University Press, 2006.
- Margulescu Serghei, Margulescu Elena**,** "Switching from the globalization of markets to the globalization of production and services in a semiglobalized world", in The 33-rd Annual Congress of the American Romanian Academy of Arts and Sciences (ARA) Proceedings, Volume I, Polytechnic International Press, Montreal, Quebec, 2009.
- Palmisano Sam ,"The Globally Integrated Enterprise" Foreign Affairs, USA (2006).
- Pankaj Ghemawat, "Redefining Global Strategy", Harward Business School Press, Boston, Massachusetts (2007): 10.
- Rugman Alan, Verbeke Alain: 'A Perspective of Regional and Global Strategies of Multinational Enterprises", Journal of International Business Studies 35, no. 1 (January 2004).
- Stiglitz J.: " Globalization and Its Discontents", 2002.
- Van Agtmael Antoine –"The Emerging Markets Century", Free Press, New York, 2007.
- Van Welsum D. & Reif X. (2005): "Potential Offshoring: Evidence from Selected OECD Countries".

INNOVATION – CREATIVE MANIFESTATION WITH ECONOMIC IMPLICATIONS

VALENTINA MUNTEANU[*]

Abstract

The present paper aims at a correct perception of innovation, regarded as a present phenomenon, for which it is necessary to resorts to a series of notions and definitions, as well as to multiple perspectives. Thus, the definition of this phenomenon - in all that it captures in it - suggests dynamism and ease of communication.

The complexity of the phenomenon of innovation is the creative capacity, around which there revolve all other matters concerning innovation.

The present paper also illustrates the relationship between technology and economy, meaning that technical progress makes the economic system that created it. This, in turn, provides a more consistent support for changing technology. Economic factors play a major role in the development of technology, because they are interested in reducing costs, increasing productivity, sales volume, as well as goals that can be achieved through innovation.

Successful entrepreneurs in an increasingly more competitive environment try to assert through value creation rewardingly new and different outputs, a fact which represents a change from what was known at the beginning of the business.

In general, innovation and to the same extent technical and technological innovation has always accompanied the development of human society. Innovation has manifesting itself throughout history with different levels of intensity. Technical-scientific revolution, present in all spheres of human activity through the accelerated mutations that produce them, fundamentally influence the way in which orientation and innovation evolve.

Keywords: *innovation, creative capacity, concerning innovations, value creation, economic factor.*

Introduction

Since the advent marked by the birth of a new idea until its merging with daily natural phenomena and becoming a common product for consumers at the organizational level there is an on-going metamorphosis, marked by an extremely complex process, called innovation.

Passing through a filter system, only a few ideas come to detain the attention of managers that may find those ideas worth being investigated. And fewer of these are to be implemented projects in the production system – often just a single one. In this instance, after substantial marketing costs, product/service reaches the market, supported by advertising, but also through a set of specific features (as defined in the phase of conception).

In the end, the consumer shall - depending on the degree of satisfaction of one's requirements - decide to buy it or not; the consumer is the one that decides the success of this very creative effort, which is both organizational, financial and also the result of media enterprise. The consumer compares all characteristics of the product – i.e. the perceptible and imperceptible ones – with those of similar products offered by competitors.

Definition of the concept

For a correct perception of this actual phenomenon that is believed to appeal to the notions and definitions that have tried to describe and to explain it, we have to consider a series of different points of view. Thus, the definition of phenomenon captures the fact that through it you suggest dynamism and ease of communication.

[*] Lecturer, PhD, "Andrei Saguna" University of Constanta (valentinamunteanu@yahoo.co.uk).

- Phenomenon: the outer manifestation of the essence of a thing, process, which is accessible and directly perceivable; what surprises by rarity and/or novelty.

The complexity of the phenomenon of innovation is the creative capacity, around which there revolve all other matters concerning innovation.

- Creativity: ability to identify new connections between seemingly unrelated items between them. A whole complex of ideas, ways of thinking, activities, processes (Tools, techniques, and approaches), results (solutions to problems, production systems, products).

From the historical point of view, the first item in terms of institutionalized innovation was the invention through the patent of invention. The definition suggests that a creation is permanently tied to the intellect, science or engineering and must involve the novelty, intention and purpose.

- Invention means an intellectual creation, scientific or technical, embodied in a product or process, in all fields of technology, provided that they are new, involve inventive step and are susceptible of industrial applicability.
- Invent yourself: is the science of making inventions.
- Innovation.

In terms of data definitions of the notion of innovation, one can notice a relatively large variety. According to our opinion, this diversity is a result of the manifestation of the phenomenon of innovation, which, over time, was revealed by researchers through new perspectives. One should remark the convergence of these definitions to the explanation of the application of the new innovation in response to the requests and demands of the market.

Starting from the definition of the concepts of this phenomenon, i.e. creativity, as well as invention, we appreciate that the most comprehensive definitions and objectives, in terms of coverage of innovation, appear to be the following:

- Innovation: the action to make a change, to enter a new domain, in a system that is upgraded, etc. The notion of innovation has become interesting to economists like Schumpeter, in whose work innovation is presented as an accomplishment which consists in applying ideas or inventions, products, technologies or systems in the economic activity. Thus, innovation can be considered to produce something else or to make something occur otherwise or in a way that may be a tool for entrepreneurs who might exploit change as an opportunity for the various different services or business.
- Industrial innovation: innovation in the industry that does get added value and competitive advantage for businesses, the main generator of new products/services.
- Open innovation: innovation based on the partnership between industry, universities and technology centres and research.

The concepts and definitions above may be supplemented with other forms of literature or through actual practice.

The definition most used at present is the one that presents innovation as a global technological process and a commercially creative act, one whereby new ideas or a new concept is transferred to the final stage of a new product, process or service accepted by the market.

Innovation – as a product: a new feature or improvement or expansion of the functionality of a product, process or service, in any of the domains and which could (or can be) responsible applications or market that could (or can be) generate a new market demand.

Innovation – as a process: the activity that allows the emergence of innovation-like product that is based on individual behaviour, as well as on social or corporate, creative and dynamic behaviour; innovation – the process includes research-development.

In these definitions, is the approach to innovation and its potential value, which in turn requires criteria of analysis, very difficult to establish? Criticism of these definitions, from the perspective of the author, mainly relates to the terms of individual, social or corporate, creative and dynamic behaviour in the definition of innovation – seen as a process, which must be extended to the

level of the product. The argument is that the two types of innovation do not differ in the assumptions or conditions, but only as to their based-on-reason application, which operationally and, possibly, from the point of view of the nature of the result, in the case of the second category of innovation, are more difficult to quantify.

- Innovation implies its own laws, such as:

➢ paradigms: innovation based on Science, this is the 'road' from idea, when the technology is in its infancy, up to standardizing the way of production, which requires a specific "technological trajectory";

➢ to innovate opportunities coming both from within the system (incongruity, need, changes in industry structure or market), and outside the system (of demographic changes and changes in education, openness, and understanding, the accumulation of new knowledge, etc.).

- Innovation stimulating role for the emergence of institutional forms, design offices, laboratories, centres of research and development (RD), public or private, in which human resources are trained; research is important both numerically and also as regards training, which organized on the topics of innovation. In addition, it outlines the trend of corporate networks for the exchange of information in the field of innovation.
- Innovation presents a high degree of dependency on the learning process of the acquiring of knowledge, whereas, during the process of innovation there is a dependency of the subsequent past-innovation processes (technological trajectory or natural trajectory).

Analysing the previous definitions, literature filters ideas and practical experiences generate long results in advising firms. Authors have outlined their own definition that summarizes the undertakings and the innovative effort. Thus, innovation is a continuous process of identifying and implementing new solutions (products, technologies, new production methods, new sources of supply, developing new markets, management systems, learning, etc.) in order to satisfy customers.

Socio-economic implications of the phenomenon of innovation

Innovation activity at all levels of aggregation overlaps the history of human society. This anthropology of human creativity is very well mirrored in literature, but the relevant points which are specific to the concept of innovation are very difficult to surprise especially with a profound clarity. As regards the evolution of the concept of innovation, once can find a few steps that have encumbered the phenomenon of innovation over time.

Innovation has been extended gradually, from the individual action of men of exceptional, collective actions, organized within the framework of institutions, research centres, enterprises, economic innovation by putting their thumbprint in all sectors of the economy, especially on the industry. Seen as evolving over time, innovation moves from the individual in the community, with significant social values, and will define itself as a change in the yield possibilities.

The most common sense and general innovation is attributed to the introduction of new products and technologies that affect the market. Schumpeter has addressed for the first time the mechanisms and factors of the innovative process, arguing that the spirit of enterprise and the possibility to obtain a temporary monopoly profit may stimulate the release of new products on the market and reducing the cost of production. Schumpeter called it creative destruction whereby the previous market structure is destroyed to make way for a successful invention[1].

Interference between technological development and economic development have resulted in the gradual shaping of the idea concerning the existence of a synchronization between the two phenomena, in the sense that major technological innovation intensifies during periods of strong economic growth[2].

[1] J. Schumpeter, 1934.
[2] J. Schumpeter, 1934.

The relationship between technology and economy is interdependence, meaning that technical progress makes the economic system that created it. This, in turn, provides a more consistent support for changing technology. Economic factors play a major role in the development of technology, because they are interested in reducing costs, increasing productivity, sales volume, goals that can be achieved through innovation.

Under the economic factors, in particular, the technological development (as the sum of innovation in a given period) tends to occur in waves, meaning that technological changes made in an industrial sector following the response triggers in other related sectors.

The concept of innovation, reflected in neoclassical growth theory leads to the observation that the ability to change the configuration of production becomes an essential factor of profit maximisation. In this case, technology is understood as summing the knowledge that firms can access on a fast and inexpensive way. K. Arrow identifies technology with knowledge; technology in its broadest sense is the know-how and the innovative process is interpreted as the process of production of knowledge. In this instance, it is considered that the process of innovation is, in particular, a process of discovery of new knowledge, transformed into new products under a given set of conventional stage.

In the modern theory of innovation, the technological infrastructure is different from one firm to another, depending on the organizational footprint of the firm, its features, and how the technological processes can be integrated with the knowledge, skills, use of equipment, training, management system, etc.[3]

According to endogenous growth theory, developed in the second half of the 80s[4], instead of total factor productivity, new inputs, as well as the knowledge of design and development, product quality, and quality of human capital are more realistic. The supporters of this theory believe that they may have an important contribution to the Elimination of jams induced by decreasing yields of production factors, to assure a continuous economic growth.

After 1994, the relationship between innovation and social issues has been highlighted by the study of the influence of technological innovation on the standard of living.

In the same context, in 1992, Lundwall, formulated for the first time in history, the phrase "national innovation system"; he stated that it is a principal instrument of government intervention in favour of technological innovation. Prerequisites for the success of the national system of innovation are considered economic liberalization, reforms of copyright, and multiculturalism[5].

In the recent statements of the theory of economic growth there has been a significant mutation in the treatment of the sources of growth, i.e. an acceptance of technical progress, which is regarded as a determining factor, has become widespread. The role of innovative activity in the process of growth has been reconsidered, air-dried to a finding that the abundance of goods which characterize the current era is the result of a sequence of following the confessions of design and methods development design, dissemination of information, dissemination of results, etc., both in terms of products and technological processes. Thus, the emergence of science is motivated by economic reasons, but also extra-economic resorts (social, environmental, etc.).

Successful entrepreneurs in an increasingly more competitive environment try to assert through value creation a rewardingly new and different production; thus, a change of what was known at the beginning of the business occurred. Innovation, in the opinion of a businessman, consists of an organized search and purposeful change; it also implies the systematic analysis of the opportunities that these changes could provide through the economic or social innovation analysis of the concept of innovation, which has lead to highlighting two approaches that have undergone multiple transformations.

---

[3] Peter F. Drucker, 1993.
[4] Peter F. Drucker, 1993.
[5] Lundwall B, 1992.

The first refers to the newness of the technology, which is considered a major source of essential changes.

The second approach, the latest, the innovation as a result of quality management, whereas the Manager is considered an essential vector of innovation within an enterprise, being responsible for its outcome. In this sense, different managerial tools have been developed with a view to creating efficient management for managers of all kinds within an organization.

Thus, when referring to innovation, the effects are: thinking in terms of efficiency or quality all activity or business, which sends it to the notion of quality assurance as a key part of the total quality management (TQM-Total Quality Management), as well as other similar systems that are developed (e.g. engineering). Currently, new approaches to quality in the enterprise have been expanded from the product up to the level of the organizational system of the firm, being developed as well, and for all phases of the life cycle of a product/service (from conception and design to after-sale services offered to customers)[6]. As a result, it has become natural for these systems to be applied, as well as for the innovative processes within organizations.

The Conference in Brussels in 2004, the cooperation in the fields of research and development (RD), on the one hand, and the transfer of knowledge, on the other hand, both stressed that they expect improvements in all aspects of innovation, because innovation depends on many factors, including the ability to create new relevant knowledge and to implement it through industry, as well as the value of human resources, and the ability to learn and innovate.

Collaboration with research organizations and firms from outside via a network and intake of this way of structuring the business innovation of enterprises is a feature of the phenomenon of innovation.

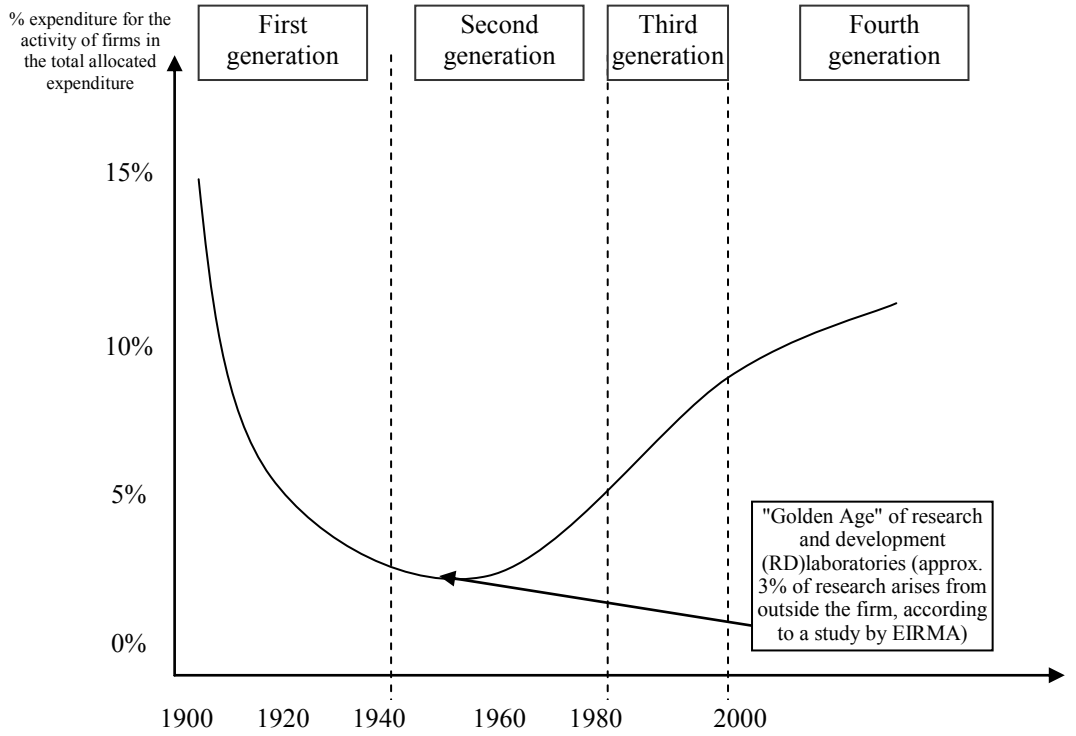
The innovation activity, link-time, research-development implied both the preservation of independent and specialized laboratories, as well as the internal organization of firms. In Figure 1 it is shown the work of research and development throughout the four phases (or generations) in the evolution of research-development-innovation, that is, the ratio of research and development organized outside the enterprise and company (first generation), research and development conducted within the enterprise (second generation), outsourcing research and development activity (third generation) and, finally, the globalization of research and development activity (the fourth, current generation).

As one can see, by the year 2000 (with the onset of the fourth generation), concurrently with the amplification of the phenomenon of globalization, businesses are looking to combine optimally the research and development work with the purchased from outside. The company, in this case, focuses attention on the evaluation, selection and exploitation of research results, as well as the development of purchased activities.

Thus, the fourth generation is characterised by the existence of cooperation between enterprises and research and development centres, and other businesses that carry out research and development, as well as in other newly created entities in the last period (centres of excellence, business incubators, technology transfer centres) etc. This new form of organisation of activity of enterprise is the concept of open innovation, as an important component of it.

[6] Utterback I., 1994.

Figure 1 Transforming evolutionary patterns of industrial research and development



Source: Druker, F. Peter – 1993.

Of the most fruitful collaboration, one should mention cooperation between businesses and universities, which has led to beneficial effects of stimulating innovation (research activities with predetermined goal, education for innovation, long-term research programmes and academic networks to promote the diffusion of knowledge and technology transfer, etc.), as well as the positive effects of social-economic nature (education for entrepreneurs increasing mobility of university-industry-market, business management courses for young scientists, etc.).

Currently, aspects such as the permanent relationship with the market (consumers) or construction of innovation culture have become equally important with the research and development component of the innovation.

Conclusions

Thus, it can be said that the phenomenon of industrial innovation, considering all its characteristics and determinants, as well as its restrictive dimension, is a difficult endeavour. Firstly, because of the immense literature and documentation developed on this topic so far (actually, this topic has an exciting, fascinating character and it illustrates the most outstanding attribute of the human spirit – creativity – that lies at the origin of one of the most explosive phenomena of the contemporary world-innovation), and secondly, due to the complexity of the phenomenon of innovation. In general, understanding innovation – to the same extent as the technical and technological – which has always accompanied the development of human society, implies that we also understand its manifestation throughout history with different levels of

intensity. Technical-scientific revolution, by affirming in all spheres of human activity, through the accelerated mutations that produce them, fundamentally influences the way in which orientation and innovation evolve.

References

- Băloiu, L.M.; Frăsineanu, I.; Frăsineanu, *C., Innovative Management,* ASE Publishing House, Bucharest, 2005.
- Drucker, Peter F., *Innovation and the entrepreneurial system*, Bucharest: Encyclopedic Publishing House,. 1993.
- Lundwall B., *National Systems of Innovation: Towards a Theory of Innovation and Interactive Learning,* London: Pinter 1992.
- Schumpeter , J., *The Theory of Economic Development*, Cambridge: Harvard University Press 1934.
- Utterback I. *Mastering the Dynamics of Innovation*, Boston: Harvard Business School Press, 1994.
- Utterback I. *Mastering the Dynamics of Innovation: How Companies can Seize Opportunities in the Face of Technological Chane"*, Boston: Harvard Business School Press, 1994.

THE INFLUENCE OF THE ECONOMIC CRISIS ON ROMANIA

VALENTINA MUNTEANU*

Abstract
Macroeconomic developments in Romania have submitted inadequate development amid the financial and economic crisis deepened. The objective of this research is highlighting the impact of the economic crisis, deepening its effects at the national level.
In Romania, the negative effects of the crisis begin to be more evident: lack of demand on the market, which the collapse of production and reduction of the amount of reports of police work. The economic crisis creates uncertainty. The uncertainty in the economy is, in fact, income insecurity – both for the company and for the employees. The unemployment rate is in a continuous growth and the population is increasingly affected.
Crises do not constitute exceptional circumstances, because they tend to repeat it; at the same time, it must be stressed that these changes its form, that require a periodic review of their claims, as understanding more and more refined methodologies and a smooth integration of empirical research in theoretical solid construction. If all economic mechanisms would work perfectly balanced real economy should not deal with situations of crisis.

Keywords: *crisis, economic, financial, unemployment, wages.*

Introduction

The effects of the financial crisis have spread and the Romanian economy. In terms of direct impact, the banking system has been relatively unscathed. He has not been exposed to toxic assets, prudential measures taken by the National Bank of Romania along the time. But the consequence of the global financial crisis had spread to the economy of Romania on multiple channels.

On the commercial channel, has been slowed and even reduced production, the latter being correlated with the evolution of the world economy.

The financial channel, has been limited access to external financing, such was the volume of lending, generating small difficulties in private foreign debt service. This phenomenon was demonstrated through: stop lending, increasing the "spread" CDS, the "trend" after agreement with the European Union and the International Monetary Fund, the "spread" between interest-NBR and ROBOR, moving the focus from market share to customer risk assessment[1].

The exchange rate channel, the depreciation of the national currency, reduced external financing reflected. Relative stability followed increased volatility.

In respect of the trust, there has been a withdrawal of investors from European countries, the effect of this phenomenon by highlighting them in the expression of the monetary-currency market has some moments of speculative attacks and panic.

On the effects of balance sheet and asset deterioration took place on net asset of companies and of the population, due to the high share of foreign currency loans (related to the depreciation of the ROL) and lowering prices for real estate assets and securities. This has contributed to the deepening of the crisis through the negative effects it has had on the expectations and the augmentation of caution from consumers and businesses.

National Bank of Romania has made estimates of the evolution: the confidence – very active, active trade channel – the channel of exchange rates – attenuated, alleviated the financial channel – (EU, IMF, EBRD, WB)[2].

---

* Lecturer, PhD, "Andrei Saguna" University of Constanta (valentinamunteanu@yahoo.co.uk).
[1] Berca, 2010, p.33.
[2] Ibidem, p.72.

The evolution of the crisis in Romania

Macroeconomic developments in Romania have submitted inadequate development amid the financial and economic crisis deepened.

The economic growth in Romania in the period 2005-2009 was generated by exports, as it would have been effective from the economic point of view, but also from domestic demand (consumption), investments in the most productive and Government consumption. This will be inadequate growth[3], macroeconomic imbalances created.

Reduction of exports led to a contraction of domestic demand and lower production.

Decline in production resulted in lower turnover in trade and services. This, in turn, has led to rising unemployment through limited size of enterprises.

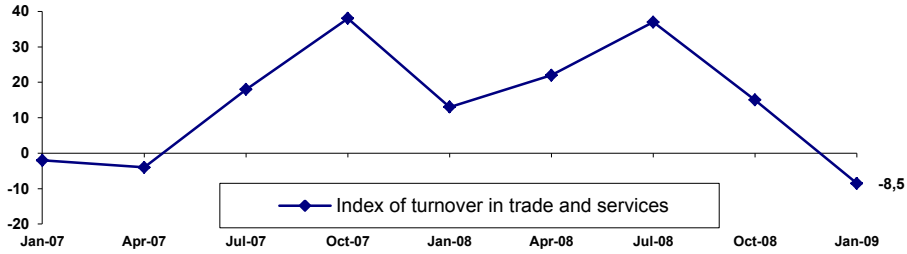


Fig.1 Index of turnover in trade and services

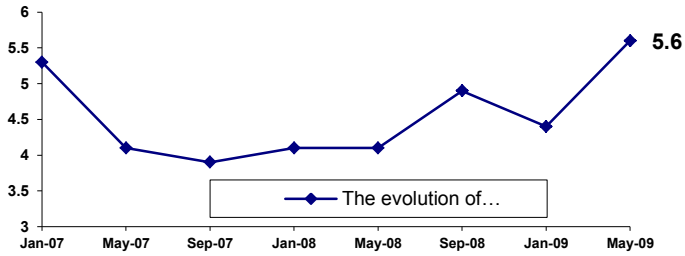


Fig. 2 The evolution of unemployement

In 2008, we achieved a growth of 7.9% to 6.3% inflation, a fiscal deficit of 4.8 percent of GDP (gross domestic product) and a current account deficit of 13.5 percent of GDP compared with 2004 when it achieved a growth of 8.5% to 9.3% inflation, a fiscal deficit of 1.5 percent of GDP and a current account deficit of 8.4 percent of GDP[4].

[3] Ibidem, p.83.
[4] Ibidem, p.84.

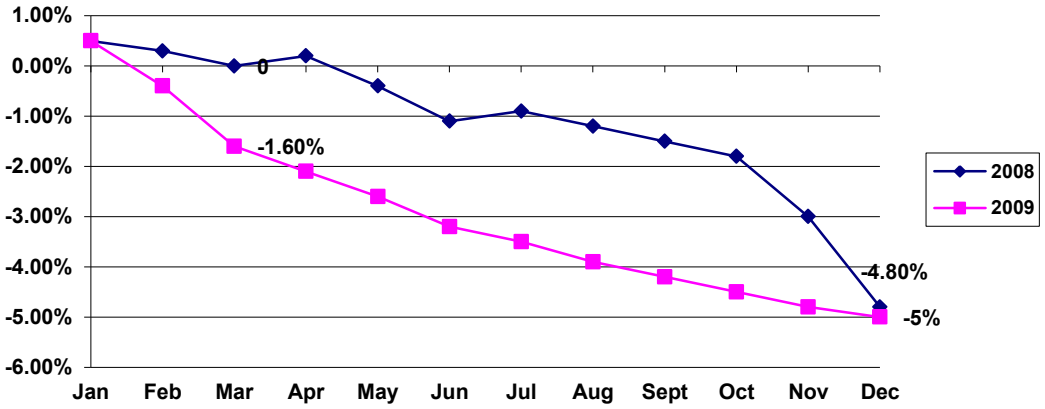


Fig. 3 Budget Deficit (% GDP)

Domestic savings are low, and economic growth and satisfy the domestic consumption and of higher investment was foreign capital. The total foreign debt has increased from 21.5 billion euros in 2004 to 74 billion euros in 2008. Unguaranteed public debt has risen to 11.4 billion euros in 2004, 63,3 billion euros in 2008[5].

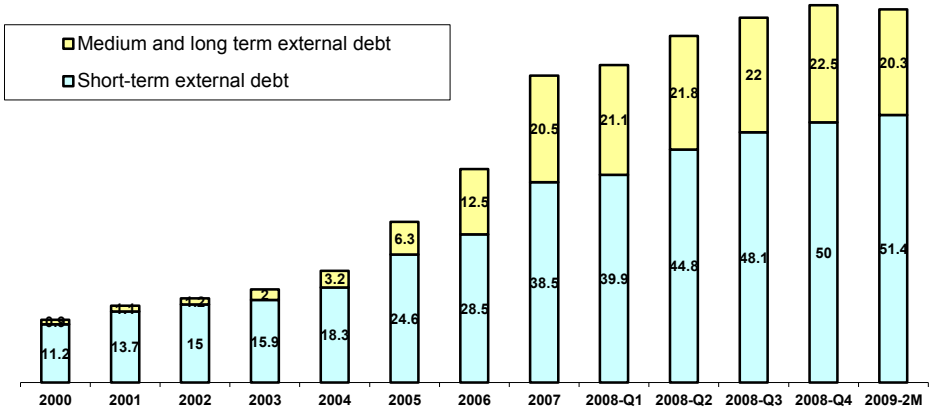


Fig. 4 Evolution of external debt

The Romanian banking system is owned in the proportion of 90% of banks with foreign capital. They have experienced financial losses due to the purchase of toxic products on the u.s. market and on the English, such as financial derivatives that are based on real estate and financial assets whose prices have collapsed.

By default, the low capacity of the parent banks with branches in Romania to grant further generous lines of credit with low cost to be reîmprumutate, with the American Bank Lehman

[5] Ibidem, p.87.

Brothers ' bankruptcy. Foreign debt in the short term, under one year, increased by 7,5 times. This creates a high degree of vulnerability in the external deficit financing[6].

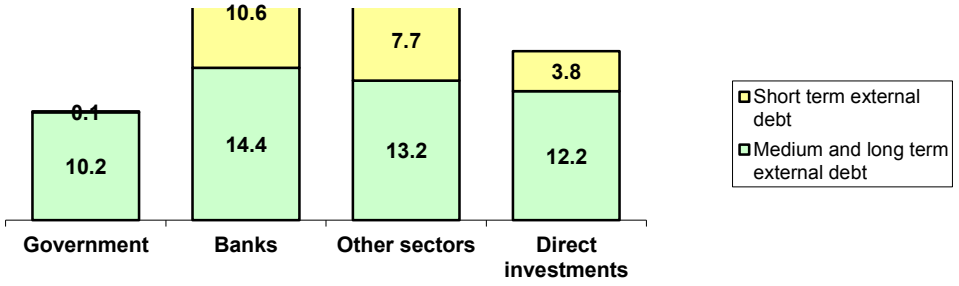


Fig.5 The structure of external debt-billions of euros

Romanian's exports are based on products, petro-chemical, metallurgical and construction of advanced equipment, including cars. The collapse of loans to banks decreased demand for such products. At the same time, domestic demand has fallen amid a sharp contraction in lending and thus GDP growth has been reduced by 3%.

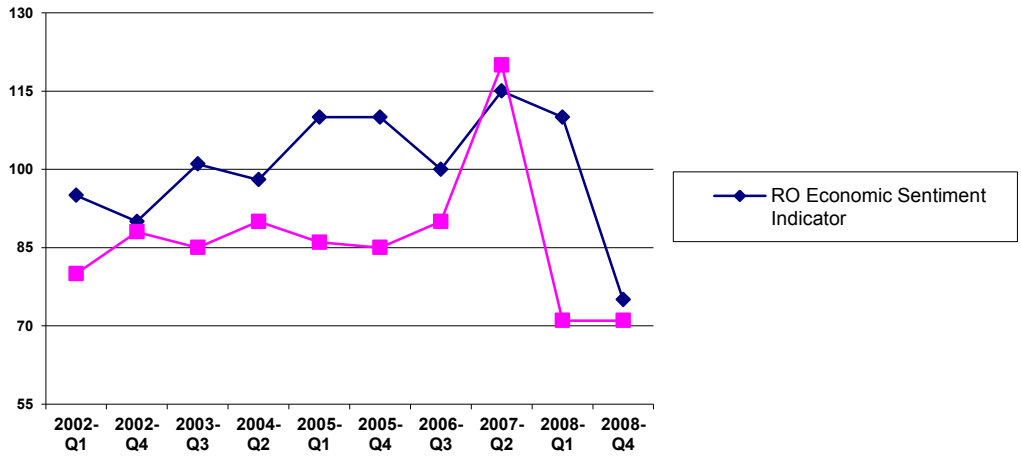


Fig. 6

Due to the uncertainty and cost of finance, foreign investment fell by around 10 billion euros in 2009.

The national currency, the ROL, was depreciated by 10.4% in 2008 and by 6.4 percent in 2009[7]. The inflation rate in 2010 was 7,96% to a level almost double that recorded in 2009. Increase in the value added tax (VAT) and the rise registered last year have caused this growth. Prices have climbed by 0.5 percent in December, further increases being registered in all foods.

The data appears in a report by the National Institute of statistics (NIS). National Bank of Romania (NBR) missed, so, for the fourth consecutive year inflation target set at 3.5% +/- one

[6] Ibidem, p.72 .
[7] Ibidem, p.72.

percentage point. The annual rate was 4.74% in 2009, when the range was being targeted all of 2.5-4.5 percent[8].

Average annual inflation in 2011 arrived at minimum-3,14% record, show the data of the National Institute of statistics (NIS).The graphs show that the official rate of inflation has not had a level in post-Decembrist so low, the last record of this kind being achieved only in March of 2007, when the media came down slightly under 3.7 percent.

CNP estimates an inflation of 3.5 percent by the end of 2013, as well as in the autumn forecast, while the annual average will be 4.3%.

No forecast for 2014 was not altered, so that it expects inflation of 3.0% at the end of next year.In 2015 and 2016, it will drop slightly, from 2.5% 2.3%, respectively.

In February 2009, the CDS have reached the peak of 777 bp, while the average for the year 2008 was of 260 bp[9].

The impact of the financial crisis and the confidence was felt in the real economy, which hit sectors of the economy, among the first reacting strongly to changes of cyclic: automotive and aviation industry, computer science etc. These are typically the industries where the negative effects of the change shall be reflected in the attitude of the people, i.e. the tendency to spend less and save more[10].

The consequences of the financial crisis in Romania

In spite of the interventions of the farms, the feeling of disbelief of investors has persisted, what he has done as many segments of the financial market in general and of the scuritizare and long-term financing in particular, remain vulnerable[11].

Increasing risk premiums and higher financing has affected directly and indirectly by a multitude of economic actors and had consequences in the real economies, which have been given clear signs of slowing economic growth or even recession.

Corrections to the value of assets had a wide and unpredictable. Although adjustments were concentrated in the residential mortgage market and the financial market segment it serves, their complex ties with parts of the financial sector and real have prompted tensions at the price level of other categories of financial assets, such as obligations issued by corporations or municipalities[12].

At the time of a shock in financial markets tend to overshooting. Afterwards, analyzes and digested the information and the prices of financial assets is adjusted according to the perceived risk. In the financial markets, asset values and corrections now, what is the evidence that the risks were not fully understood and the markets still face uncertainties[13].

Remain open and fair evaluation of the issue of financial instruments, the kind that have been based on the borrowers ' loans neperformanţi. As such, you may be able to assist you further to new revelations of losses from the financial institutions.

The areas affected by the crisis

Nationally, more than 150,000 employees have experienced a drastic decline in income due to the increasing demand of the market, reducing the activity of the place of work, or remained unemployed because of massive dismissals.The most affected are the trades that produce come in direct relation to the volume of sales (in commissions, for example, brokers.

[8] Ibidem, p.75.
[9] Ibidem, p.76.
[10] Ibidem, p.80.
[11] Puiu, 2010, p.15.
[12] Ibidem, p.83.
[13] Bal, 2009, nr.31.

As far as the sellers and brokers, the situation is somewhat better. They manage to get in the best case, revenue by 35% lower than those realized so far[14].

Due to the temporary closure of factories, workers in the iron and steel industry, receive wages by a quarter. They are in number of over 30,000 people.

In fifth place in the ranking of categories of employees poorer due to the crisis, there are those in the subassemblies.

Sixth place is budgeting, whose salaries were low by 25% and they have been changed to wage grids.

All of these are added to those who have lost their jobs, those who have not received meal vouchers and subsidy, there is no question of any of the 13th salary or holidays.

Banking sector

Despite the international financial crisis and reduce lending globally, the Romanian banking system can be described as solid, with levels of capitalisation, liquidity and solvency in accordance with the prudential requirements.

Following the requests made by NBR, the shareholders of the Bank have proceeded at an increase of share capital/endowment at the end of 2010 its level being higher in 2009 with 17.8% in nominal terms (+ 9,1% in real terms). In terms of foreign banks ' exposures are present in Romania, they rose from 81,1 billion in 2009 and EUR 84,7 billion during the year 2010.

In this context, the aggregate level of solvency shall be pointer to 31 December 2010 to 15%, its value in excess of 11% in the case of credit institutions. Furthermore, during the years 2009 and 2010 there were banks with a solvency ratio below 10 percent. The liquidity indicator system has been placed over the minimum regulated[15].

Rate of unemployement

Even if he will come back from Romania's recession, unemployment will head to 10%, and any wage hikes could be affected by inflation. The International Monetary Fund (IMF) has said the year 2010 that Romania could get out of the recession in 2011, i.e. a decrease of 8.5% to an increase of 0.5%. At the end of 2008, in Romania there were just over 400,000 people unemployed. After half a year, their number grew to nearly 550,000, the unemployment rate climbing from 4.4 percent in December and 6.3 percent in July. Also, at the conclusion of the 2009 unemployment rate has climbed to nearly 8% [16].

In 2010 unemployment rate was 6.8%, reduced by 0.9 percent from the previous year, the number of unemployed totaling 629.960 people, according to the NEA (National Employment Agency). Of these, 329.640 are unemployed make. The unemployment rate in Romania was less than the average of the European Union (EU) where it had fallen by over 9%[17].

According to data provided by the NEA, the unemployment rate in February 2012 fell to 6,58%, 1.75 percentage points below the level of February of 2010. Total number of registered unemployed was 600.308 people.

In April 2012, according to the international definition (BIM), seasonally adjusted, the unemployment rate in Romania was 7.1 percent, down 0.1 point in December 2012, and unemployment rate in seasonally adjusted was 6.5 percent, it said in a press release (NIS)[18]. Number of unemployed (persons shall be taken into account between 15 and 74 years) estimated for the last month of last year, is 661.000, towards 751.000, in December 2011.

[14] Ibidem, p.193.
[15] NBR, 2010, p.30-33.
[16] Ibidem.
[17] Ibidem, p.139.
[18] Ibidem, p.140.

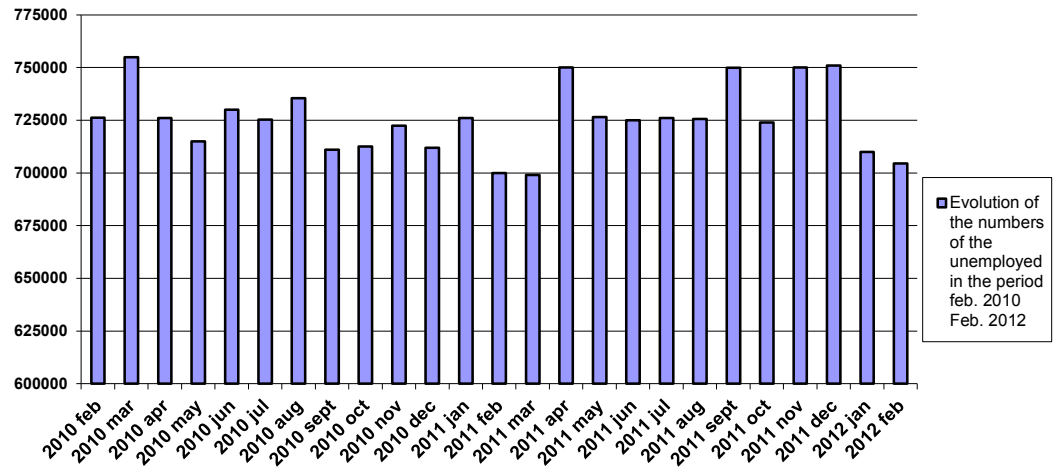


Fig. 7 Evolution of the numbers of the unemployed in the period Feb. 2010 Feb. 2012

In June of 2009, the average net salary per economy amounted to $ 1.379, up 8.3% compared to the same period in 2008. The average salary in real net, reduced inflation, increased by only 2.3% in the same period. From June 2007 to June 2008, the average net salary on economy rose by 24.4 percent, the real appreciating it with 14.5 percent. The highest average net salaries was retrieved in aviation, 3.282 ROL, and the lowest in hotels and restaurants, 769 ROL.

The average gross nominal earning was total at the beginning of 2010, with 1.1 percent higher compared with November 2009[19].

"Earning real Index" for February 2011, calculated as the ratio between the net nominal salary and consumer prices compared with the same month of 2010 has been set at 93.1% (6.9%)-reads in a press release (NIS).

At the same time, the average nominal wage net was in February of 1.414 ROL, 0.7% (10 ROL) lower than in January. The highest values of the nominal average wage net have been in the industry for tobacco products (3.790 ROL), and the lowest in hotels and restaurants (855 ROL)[20].

National Forecast Commission (NFC) claim that real wage grew by 0.8% in 2012 compared with 2011, according to the draft of the medium-term forecast for 2011-2015. For 2013, the NFC intends to increase real wages by 1,4%, 2014 with 1.6% and 1.8% for 2015.

The areas unaffected by the crisis

Although the economic crisis has swept most of the areas of activity, there are still a few areas that have not yet been affected: IT and communications, Retail and pharmaceutical. Due to the nature of these industries, employment will be made in the next period to meet demand of qualified personnel.

Despite the existence of these areas that are protected from the dangers of the economic crisis, the problem usually arises at the level of each company individually, depending on the liquidity of available and its capacity to make a long-term activity. It provides for an increase in salary in the next period, ranging between 3 and 5% thing declared and the Romanian Government.

[19] Gandul info.
[20] financiarul.com.

Maximizing profits is one of the main goals of all companies. Both companies in the public sector and the private sector have realised that this can be achieved by reducing the dramatic wage and looking for ways to reduce costs and depreciation risk for subsequent periods[21].

Conclusions

The direct effects of the economic crisis on Romania were increasing the risk premium and the cost of financing, high interest rates on CDS and the interbank market, depreciation and high volatility of the national currency ROL, reduction of imports and exports, the outflow of foreign capital, the decrease in industrial production due to dependence on international demand (70% of the exports of Romania being in the Euro area).

Indirect effects of the economic crisis on Romania were: increasing the uncertainty and cost of funding led to the cessation of crediting, increase of unemployment, reduction of the population, the decline in consumption; reduction of domestic and foreign demand coupled with the rising cost of funding have repositioned investment plans resulting in the postponement or reduction of investments in the economy, risks relating to financial activity by increasing bad loans, dwindling profits and a lack of financing companies, as well as exposure to currency risk; decrease in budgetary receipts resulting in a high budget deficit[22].

References

- Academy of Economic Sciences, *The current financial and economic crisis and its implications on emerging markets,* Bucharest, 2010.
- The Association of Economists from Romania, *The romanian crisis within the framework of the global crisis*, Polirom Publishing House, Iaşi, 2008.
- Bal, A., *The opinions about the causes of the current financial crisis*, The Romanian Economic Journal. No. 31, 2009.
- Berca, A., *Economic crises and their ciclicities* There Publishing House – online 2010.
- Cerna, A., *The economic and financial crisis and its effects on Romania*, Bucharest, All Publishing House, 2010
- Marinescu, Glavan, B., Staicu, G., *Capitalism and economic crisis* The Center for Economics and Freedom, Bucharest 2010.
- Puiu, A., *The effects of the economic crisis*, Polirom Publishing House, Bucharest 2010.
- http://www.financiarul.ro/
- https://twitter.com/ziarul_gandul
- http://www.money.ro/

[21] Cerna, 2010, p.15.
[22] Ibidem, p.190.

THE INFLUENCE OF CORPORATE REPUTATION AND MARKET COMPETITION ON COMPANY'S GROSS PROFIT

MIHAELA CORNELIA SANDU*

Abstract

To have a profitable business you have to make a big effort. There are two important things that can influence the profitability of a company: the rivalry among stakeholders or market competition and an important intangible asset, corporate reputation. In this paper I will develop a study about how reputation and competition influence the market position of an important cosmetics business from Romania.

Keywords: *corporate reputation, competition, gross profit, trend, time series.*

Introduction

Corporate reputation refers to the perception of a person on certain intentions or rules. It can explain the implication of stakeholders in repeatedly actions in conditions of uncertainty. Competition is the confrontation from different economical agents which wants to reach their interests. Competition has a significant growth at macroeconomic and microeconomic level, determines the development of the market and plays an important role in economical and social life as well. Reputation is an important element which determines the competitive position of a company. A good reputation determines the competitive advantage of a company.

In this paper I will speak about the influence of reputation and market competition on gross profit of a company and I will do a case study on Avon Company. At the beginning I will make a short review on corporate reputation and reputation. After this I will put in discussion a way to quantify corporate reputation. In the third part I will speak about Avon's history and her reputation. In the end I will make a study on Avon's gross profit.

A short review on corporate reputation and competition

Corporate reputation is an intangible asset defined as the firm value that exceeds the physical asset. A Latin Maximum says that a good reputation worth more than money. Reputation mirror expresses firm performance over the last customer confidence and business partners and also its promise for the future in an uncertain environment which is in continuously changing. This determines the stakeholder's credibility and determines their decision to continue or not working with the company in question. Reputation can be defined as a distribution of opinions about an entity[1] or as an interaction among and between business partners over which the company has no direct role or not investing[2]. Also, reputation is the result of past actions[3], the result of repeated actions and of the experience gained[4], and that element that will determine achievement expectations by comparing the company with competitors[5].

---

* Assistant Lecturer, Faculty of Business and Administration, University of Bucharest; PhD candidate at the Faculty of Economic Sciences, "Lucian Blaga" University of Sibiu, Romania (mihaela9sandu@yahoo.com).

[1] Bromley, D.B., "Psychological aspects of corporate identity, image and reputation", Corporate Reputation Review, vol 3, no 2, 2000.

[2] Mahon, J.F., "Corporate reputation: a research agenda using strategy and stakeholder literature", Business and Society, vol 41, no4, 2002.

[3] Herbig, P., Milewicz, J., The relationship of reputation and credibility to brand success, Journal of Consumer Marketing, vol 10, no 1.

[4] Flatt, S.J. and Kowalczyk, S.J., Do corporate reputations partly reflect external perceptions of organizational culture, Corporate Reputation Review, vol 3, no 4.

[5] Roberts, P.W. and Dowling, G.R., Corporate reputation and sustained superior financial performance, Strategically Management Journal, vol 23, no 1.

Reputation is seen as "an overall assessment of their impact on society stakeholders-time"[6] or on firm valuation by business partners. "Reputation is how people feel about the organization, taking into account the experience and networking with various information available from different people but also through the media"[7, 8]. Bromley[9] believes that reputation is a social impression, a consensus about what is considered a firm will behave in a given situation. Fombrun[10] says that reputation is based on a set of beliefs of a community about the company's ability and about her desire to meet the interests of different partners.

The public constructs his relation with a certain company based on perceptions results on his direct experiences with companies products, investments, clients services, employment; based on what the company says about herself by advertising, public relations, marketing and social responsibility; based on what other people like media, experts, leaders, family/ friends says about the company. This experience has different impact about respondent perception according the company.

Whether we are talking about economic or social life, competition plays an important role as an element providing a foothold situation of the individuals. Also, it ensures the functioning and development of different markets. We can say that the presence of competition is a positive factor if we see a significant increased performance at macroeconomic and microeconomic level.

In economics, firms that operate in the same market compete for both customers and suppliers seeking supremacy. We deal with direct business competition - they produce identical or similar goods that meet customer needs in the same way and in this case corporate reputation plays an important role in consumer choice; and indirect business competition - firms produce different goods but which satisfy similar customer's needs (for example road and rail or air)[11].

To gain competitive advantage, companies acting on the same market making significant efforts to build and maintain a reputation.

A way to quantify reputation

As we said before, reputation is the perception of a person according to a company. Reputation Institute survey (2012)[12] measure the way that respondents interact with the company and determine the way that different experiences determine the level of trust, admiration, respect and good feeling. Based on dates furnished by Forbes Global 200 list about companies revenue, big companies from USA are choose to participate at this study. All of these companies are activating in commercial field and are well known for the public. None of these companies was held by another one in the past. In January and February 2012, 10 198 clients answered about their perceptions about 5 different companies. Every company has at least 100 characteristics assigned by the respondents. The sample was a representative one and respected the criteria about age and gender. The USA respondents were 20.8% from West, 16.3% from Northwest, 24.4% from Midwest and 38.5% from South. The level of education is the following: 3.3% low, 21.2% medium and 75.5% high. The chart from figure 1 shows us the age dispersal of the group:

[6] Gotsi, M and Wilson, A.M, "Corporate reputation: seeking a definition", Corporate Communication: An International Journal, vol 6, no 1, 2001.

[7] Wartick, S.L., Measuring corporate reputation, Business and Society, vol 41, no 4, 2002.

[8] Fombrun, C., Gardberg, N.A., Barnett, M.L., Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational risk, Business and Society Review, vol 105, no 1, 2000.

[9] Bromley, D.B., "Psychological aspects of corporate identity, image and reputation", Corporate Reputation Review, vol 3, no 2, 2000.

[10] Fombrun, C, "Reputation: Realizing value from the corporate image", Boston: Harvard Business School Press, 1996.

[11] http://www.comunicatedepresa.ro/concurenta/definitie/.

[12] Forbes 2012, Reputation Institute U.S. RepTrak™ Pulse Study, Top-Line Findings Report Spring 2012.

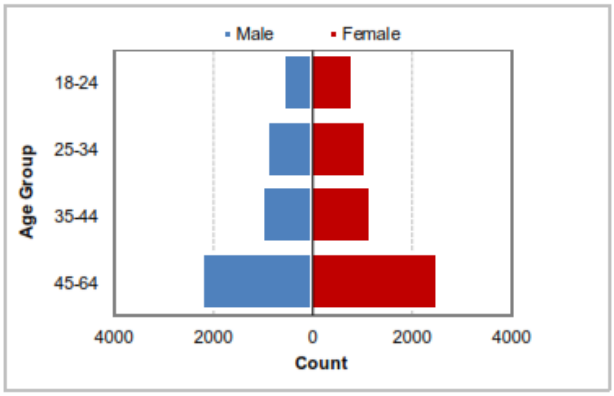


Figure 1. The age dispersal of the respondents[13]

For every company that participates to the study, based on respondents trust, admiration, steam and good feeling we determine the dependent variable – the Reputation Trak-Pulse. In the study, 150 companies were analyzed according to this score. To have a strong reputation, companies have to reach all of next seven dimensions: performance, products/ services, innovation, leadership, citizen, governance and working place. In 2012 the most important dimensions summed 47.3% from reputation components as it follows 17.5% for products/ services, 15.6% for governance and 14.2% for citizen. So, if consumers perceive a company as being very good in these dimensions, than the reputation is very strong. Contrary, perception and support will suffer.

A short review of Avon's history and company's reputation

According to 24/7 Wall St.[14], Insightful Analysis and Commentary for U.S. & Global Equity Investors, Avon is one of the ten brands in USA that will disappear in 2013. This conclusion is based on some major criteria like: a rapid fall-off in sales and steep losses; disclosures by the parent of the brand that it might go out of business; rapidly rising costs that are extremely unlikely to be recouped through higher prices; companies that are sold; companies that go into bankruptcy; companies that have lost the great majority of their customers; operations with rapidly withering market share.

On Avon's official site[15] it says "As the world's largest direct seller, Avon markets leading beauty, fashion and home products to women in more than 100 countries through more than 6 million active independent Avon Sales Representatives". The company[16] was founded in 1996 by book sales David H. McConnell which observed that women are more interested in his free samples of perfume than his books. More, he wanted to offer women an opportunity to earn their own money. At the beginning, the business was door-to-door selling. In 1970 when a big part of people have jobs and nobody was home all day long to answer the door, a brochure that included samples was left on a doorknob. Later, in 1986 were opened some workplace selling where the customers could access more easily the products. Until 1990 the only possibility to earn money within company was by selling the product to the customers. That thing changed with the launch of Avon's Sales Leadership Program. Representatives could earn money, not just by selling, but also recruiting and training other people. In our days when the technology had evolved so much, Avon developed the e-commerce. In 1996 Avon was the world's first beauty company to launch an e-commerce site.

[13] Forbes 2012, Reputation Institute U.S. RepTrak™ Pulse Study, Top-Line Findings Report Spring 2012.
[14] http://247wallst.com/2012/06/21/247-wall-st-10-brands-that-will-disappear-in-2013/2/.
[15] http://www.avoncompany.com/aboutavon/avonmarkets.html.
[16] http://investor.avoncompany.com/phoenix.zhtml?c=90402&p=irol-IRHome.

Avon started her activity in Romania[17] in September 1997. Company offered these years the possibility to buy products at an accessible price, delivered directly at home. In a very short period, Avon created a strong image in Romania. In 2002 the company was the leader on Romanian cosmetic market and it maintained the position until now.

Principal competitors[18] of Avon Company on Romanian market are Oriflame Cosmetics, Amway Romania and Zepter. In 2009, the year of economic crises when real estate market and auto market recorded important decreases in sales and profit, the advantage of Avon was on line market. To have a good on line reputation you have to focus on social engagement and outreach, to develop a social media policy, to coordinate social media management with other marketing efforts and to be prepared for crisis communication. It seems that Avon was very careful at all of these tips and in 2009, the year of economical crisis her sales have increased.

The study about Avon's gross profit

We will study Avon's gross profit[19] (table 1) registered between 2003 and 2011. Based on this data we will predict pre profit registered in 2012 and we will compare the results with the real one.

Year	Quarter	Gross Profit	Year	Quarter	Gross Profit	Year	Quarter	Gross Profit
2003	1	902,1	2006	13	1223,5	2009	25	1341,4
	2	1028,5		14	1303		26	1507
	3	1014,1		15	1243,8		27	1567,5
	4	1288,6		16	1559		28	1963,8
2004	5	1103,7	2007	17	1352,7	2010	29	1511,6
	6	1197,3		18	1407,8		30	1666,4
	7	1133,1		19	1460,1		31	1679,4
	8	1404,1		20	1776,9		32	1964,1
2005	9	1182,9	2008	21	1578	2011	33	1679,3
	10	1253,9		22	1742,7		34	1838,4
	11	1161,5		23	1669,7		35	1764,1
	12	1417,6		24	1750,6		36	1861,2

Table 1. Avon's Company Gross Profit

The graphic representation of observed values (blue points) and trend values (red points) shows us a linear growing tendency. We will work in multiplicative model hypothesis for a time series analysis: $y_t = T_t * S_t * \varepsilon_t$, where T_t is the trend, S_t is seasonality and ε_t is the noise.

[17] http://www.avon-reprezentant.ro/avon-reprezentant-istoria-avon.html.

[18] http://ycharts.com/.

[19] http://investor.avoncompany.com/phoenix.zhtml?c=90402&p=irol-IRHome.

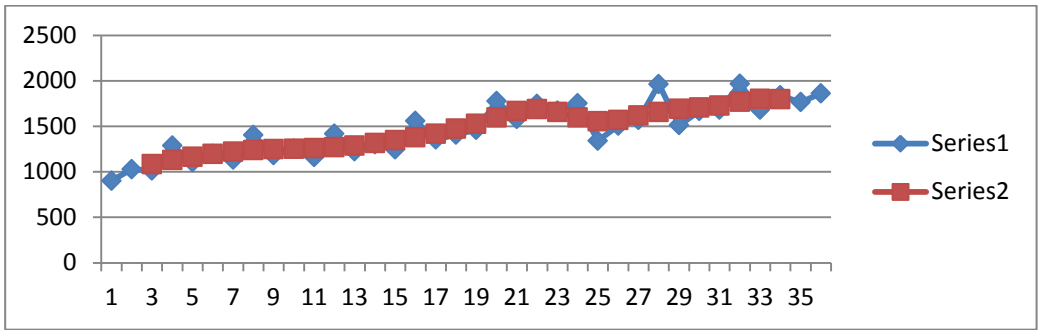


Figure 2. The graphic representation of the quarterly gross profit and of the trend

We will analyse quarter's values using time series analysis. Using specific calculations we determined the following seasonality factors: 0.93% for the first quarter, 0.99% for the second quarter, 0.95% for the third quarter and 1.13% for the fourth quarter. So, we can say that in the first quarter the gross profit is with 7% under the quarter media, in the second quarter the gross profit is with 1% under the quarter media, in the third quarter the gross profit is with 5% under the quarter media and in the fourth quarter the gross profit is with 13% over quarter media. This can be explained by buyer's appetite for shopping during holiday season and also by the offers made by the company.

Using least square method we intend to determine trend equation,

$$T_t = \widehat{\beta_0} + \widehat{\beta_1} \cdot t$$

So, with the help of a statistical soft called SPSS[20] we determine the following trend equation: $T_t = 1022{,}83 + 23{,}54 \cdot t$.

Using SPSS we determine that the coefficient of determination is 0,772 which means that 77,2% from the variation of the gross profit is influenced by the time (quarter of the year), the rest of 22,8% being influenced by others factors.

We want to test the significance of the relation between values. For this we will use the Fisher test. The critical value determined with the use of SPSS, which is calculated as the ratio between two sums of squares, F_c is equal with 114,936. If we want to test the significance for a 99% confidence, for a level of significance $\alpha = 0{,}01$, from Fisher table for 1 degree of freedom at numerator and 34 degrees of freedom at denominator we have F_α equals with 7,44. Comparing those two values, we see that F_c is bigger than F_α which means there is an significant relation between time and gross profit.

Based on this equation we can predict the trend value in every quarter of 2012 that means in quarter noted by 37, 38, 39 and 40. The predicted values are: $T_{37} = 1893{,}81$ millions dollars for the first quarter from 2012; $T_{38} = 1917{,}35$ millions dollars for the second quarter from 2012; $T_{39} = 1940{,}89$ millions dollars for the third quarter from 2012 and $T_{40} = 1964{,}43$ millions dollars in the fourth quarter of 2012.

Adjusting the forecast with seasonality factors we obtain the predicted values of gross profit from the fourth quarter from 2012: $y_{37} = 1761, 2433$ million dollars for the first quarter from 2012; $y_{38} = 1898, 1765$ million dollars for the second quarter from 2012; $y_{39} = 1843{,}8455$ millions dollars for the third quarter from 2012 and $y_{40} = 2219, 8059$ million dollars in the fourth quarter of 2012.

If we look at real data from Avon's official site we can see that the gross profits from the four quarters in 2012 were: 1566 million dollars in the first quarter, 1627 million dollars in the second quarter, 1560 million dollars in the third quarter and 1795 million dollars in the fourth quarter. It is

[20] http://www-01.ibm.com/software/ro/analytics/spss/products/statistics/.

truth that Avon's general manager Andreea Jung was changed with Sherilyn S. McCoy and this could cause a decreasing of the profit. Another important element is high competitiveness on beauty products market. The profit of the main competitors of Avon like Revlon, Inter Perfumes and Colgate-Palmolive Company grew from 888,8 million dollars, 386,77 millions dollars and respectively 959 million dollars in 2011 to 919,6 million dollars, 414,47 millions dollars and respectively 993,2 millions dollars in 2012. The estimation of gross profit made using time series is closer to the real one.

Conclusions

According to Reputation Institute survey (2012) Avon Company has the rank 32 in reputation ranking. In 2012 Reputation Trak was 73,13% lower with 0.53 than 2011 when Avon had the rank 37; the rank from 2010 was 50. Based on these data, we can see that even the Reputation Trak is lower in 2012, the company is better placed in reputation ranking. Even we can observe an improvement of reputation 24/7 Wall St. says that Avon Company is one of the brands that will disappear in 2013. Colgate Palmolive Company, one of Avon's competitors had rank 14 in Reputation Institute survey and her Reputational Trak grew from 74,40% in 2011 to 76,14% in 2012. The other two competitors, Revlon and Inter Perfumes are not in the ranking of Reputation Institute. In this case, according to Avon's trend of gross profit and to Reputation Institute ranking we can say that Avon is a strong company that will survive all problems.

In our days Avon is on socialization site like Facebook, Linked in or Tweeter. Also, Avon has an electronic catalogue so you can see and command products online. This development of electronic commerce determined important sales for many companies. Also, the development of on line communication determined important problems for corporate reputation. Not only good news like company offers and promotions but also bad ones are on the internet. In conclusion, company have to be always in alert to stop or to correct every problem that appears.

For on line market, reputation is an important element because you buy something that is intangible. Past experience with the company or with that product, but also the others consumers experience and beliefs is very important in decision to buy and remain loyal.

References

- Bromley, D.B., "Psychological aspects of corporate identity, image and reputation", Corporate Reputation Review, vol 3, no 2, 2000.
- Flatt, S.J. and Kowalczyk, S.J., Do corporate reputations partly reflect external perceptions of organizational culture, Corporate Reputation Review, vol 3, no 4.
- Gotsi, M and Wilson, A.M, *Corporate reputation: seeking a definition*, Corporate Communication: An International Journal, vol 6, no 1, 2001.
- Herbig, P., Milewicz, J., The relationship of reputation and credibility to brand success, Journal of Consumer Marketing, vol 10, no 1.
- Fombrun, C., Gardberg, N.A., Barnett, M.L., *Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational risk*, Business and Society Review, vol 105, no 1, 2000.
- Fombrun, C, *Reputation: Realizing value from the corporate image*, Boston: Harvard Business School Press, 1996.
- Mahon, J.F., *Corporate reputation: a research agenda using strategy and stakeholder literature*, Business and Society, vol 41, no4, 2002.
- Roberts, P.W. and Dowling, G.R., *Corporate reputation and sustained superior financial performance*, Strategically Management Journal, vol 23, no 1.
- Wartick, S.L., *Measuring corporate reputation*, Business and Society, vol 41, no 4, 2002.
- Galit Schmueli, *Practical Time series forecasting: A Hands-On Guide*, 2nd Edition, http://www.amazon.com/Practical-Time-Forecasting-Hands--Guide/dp/1468053450/ref=la_B001JSEHA6_1_2?ie=UTF8&qid=1361808658&sr=1-2.

- Forbes 2012, Reputation Institute U.S. RepTrak™ Pulse Study, Top-Line Findings Report Spring 2012.
- http://rankingthebrands.com/PDF/Global%20Reputation%20Pulse%20-%20U.S.%20Top%20100%202012,%20Reputation%20Institute.pdf.
- http://247wallst.com/2012/06/21/247-wall-st-10-brands-that-will-disappear-in-2013/2/.
- http://investor.avoncompany.com/phoenix.zhtml?c=90402&p=irol-IRHome.
- http://ycharts.com/.
- http://www.avon-reprezentant.ro/avon-reprezentant-istoria-avon.html.
- .http://www.wall-street.ro/slideshow/Companii/78806/New-York-ul-prin-ochii-Angelei-Cretu-cel-mai-tanar-vicepresedinte-din-istoria-Avon/3/Acum-10-ani-piata-de-cosmetice-era-cruda.html.
- http://www.comunicatedepresa.ro/concurenta/definitie/.
- http://www-01.ibm.com/software/ro/analytics/spss/products/statistics/.

ATTITUDES AND PERCEPTION IN CONSUMER'S INSURANCE DECISION

MIHAELA ANDREEA STROE[*]
MIHAELA ILIESCU[**]

Abstract

Consumers attitudes are both an obstacle and an advantage in the decision proccess. Choosing to discount or ignore consumers' attitudes of a particular product or service, while developing a marketing strategy,guarantees limited success of a campaign.Differences in attitudes dependes also by the gender of decidents. the different features between men and women in the perception of risk and decisional process of making an insurance. Women are more risk averse than men. Over an initial range, women require no further compensation for the introduction of ambiguity but men do. Differences appear also in which concerns risk taking, overconfidence and information processing. Perhaps the attitude s formed as the result of a positive or negative personal experience and by other psychological factors outside the common market manipulation.

Keywords: *risk aversion, insurance, decisional process, information processing, perception*

1. Introduction

This study aims to assess the degree in which formed attitudes and consumer perception influences the insurance decision and if women display a common trait of less risk-seeking behaviour than men in insurance decision-making.It is common known that the influence of society, of culture, of family and friends are not the only factors that drives a consumer in making a market decision.The subliminal factors like psychological ones and cognitive dissonance play a main role in what consumer perceive and decide in the insurance world.

Insurances are intangible products that have some special features apart from the material good. Insurances represent a service that cannot be touched, price standardization is not possible,there is no ownership transfer and production and consumption are inseparable.The consumer is a part of the production process so the delivery system must go to the market or the consumer must come to the delivery system.Because the insurance is linked also to the value of risk is very important to analyze if consumer of insurance is risk averse or not. The risk is evaluated before insuring to charge the amount of share of an insured, consideration or premium. There are several methods of evaluation of risks. If there is expectation of more loss, higher premium may be charged. So, the probability of loss is calculated at the time of insurance.

The insurance serves indirectly to increase the productivity of the community by eliminating worry and increasing initiative. The uncertainty is changed into certainty by insuring property and life because the insurer promises to pay a definite sum at damage or death.

From a family and business point of view all lives possess an economic value which may at any time be snuffed out by death, and it is as reasonable to ensure against the loss of this value as it is to protect oneself against the loss of property. In the absence of insurance, the property owners could at best practice only some form of self-insurance, which may not give him absolute certainty.

Having into consideration this aspects we can say that, the ultimate level beside the real utility of the insurance product in the decision process, is played by the perception of the insurance product.

[*] Assistant Lecturer, PhD Candidate at The National Institute of Economic Research; Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (andreea19_stroe@yahoo.com).

[**] Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (mihaelailiescu@univnt.ro).

Consumers can evaluate a product along several levels. Its basic characteristics are inherent to the generic version of the product and are defined as the fundamental advantages it can offer to a customer. Generic products can be made distinct by adding value through extra features, such as quality or performance enhancements. The final level of consumer perception involves augmented properties, which offer less tangible benefits, such as customer assistance, maintenance services, training, or appealing payment options. In terms of competition with other products and companies, consumers greatly value these added benefits when making a purchasing decision, making it important for manufacturers to understand the notion of a "total package" when marketing to their customers.For example when acquiring an insurance, the consumer do not acquire only the risk protection represented by the sum of money payed in case of a disaster but also the feeling of security and the psychological confort that can be offered by this exchange through the insurance policy.

Nevertheless, is obvious that some people are more risk averse and value more the insurance protection, others like to take risk and the insurance will not appear so appealing.

Also, gender differences relating to risk behavior, the perception of insurances, the information acquisition and reporting, information and moral hazard in financial decision-making is examined in Section 2, together with the importance of differing contextual instances in explaining such differences in building the stereotypes. If some behavioral factors as gut feeling and emotion effect desion making and how the persons react to those is the subject of our debate.

The insurance purchasing and marketing activities do not always produce results that are in the best interest of indivuals at risk.we will discuss such behavior with the intent of showing the difference for the insurance interest decision making and the factors that influence both men and women.

2. Knowledge stage

An attitude in marketing terms is defined as a general evaluation of a product or service formed over time (Solomon, 2008). An attitude satisfies a personal motive and at the same time, affects the shopping and buying habits of consumers. Dr. Lars Perner (2010) defines consumer attitude simply as a composite of a consumer's beliefs, feelings, and behavioral intentions toward some object within the context of marketing. A consumer can hold negative or positive beliefs or feelings toward a product or service. A behavioral intention is defined by the consumer's belief or feeling with respect to the product or service.

Perhaps the attitude formed as the result of a positive or negative personal experience. Maybe outside influences of other individuals persuaded the consumer's opinion of a product or service. Attitudes are relatively enduring (Oskamp & Schultz, 2005, p. 8). Attitudes are a learned predisposition to proceed in favor of or opposed to a given object. In the context of marketing, an attitude is the filter to which every product and service is scrutinized.

The functional theory of attitudes,developed by Daniel Katz,offers an explanation as to the functional motives of attitudes to consumers (Solomon, 2008). Katz theorizes four possible functions of attitudes. Each function attempts to explain the source and purpose a particular attitude might have to the consumer. Understanding the purpose of a consumer's attitude is an imperative step toward changing an attitude. Unlike Katz's explanation of attitude—as it relates to social psychology, specifically the ideological or subjective side of man—consumer attitudes exist to satisfy a function (Katz, 1937).

The utilitarian function is one of the most recognized of Katz's four defined functions. The utilitarian function is based on the ethical theory of utilitarianism, whereas an individual will make decisions based entirely on the producing the greatest amount of happiness as a whole (Sidgwick, 1907). A consumer's attitude is clearly based on a utility function when the decision revolves around the amount of pain or pleasure in brings.

In insurances case, we can assume that the consumer is thinking at and balance the chances that exists that a risk occur in his/her field of activity and the consequences it brings.

If the amount of pain and financial loses is bigger that the pain felt of loosing the premium amount of money that it is payed for the insurance policy, this is to say that the consumer accepts the insurance and has a positive attitude in which concerns the insurance.

Changing a consumer's attitude towards a product, service or brand it can be a challenge. Three attitude change strategies include: changing affect, changing behavior, and changing beliefs (Perner, 2010). Classical conditioning is a technique used to change affect. In this situation, a marketer will sometimes pair or associate their product with a liked stimulus. The positive association creates an opportunity to change affect without necessarily altering the consumer's beliefs. Altering the price or positioning of a product typically accomplishes changing behavior. In insurance, the deductibles and the marketing strategies in the domain have conditioned clients to be more opened to contract a policy of insurance that is less costly or is comprehensive and include more rosk in a single insurance and this lowers the price making the consumer more inclined to subscribe to such contract.

In this section, it can be discussed the problem of ambiguity which is close related with the risk and about risk aversion that manifest different in the case of women and men.

Studied have shown that women are more risk averse than men. Over an initial range, men reduce their

valuation of ambiguous urns more than women. After that, men and women equally value marginal changes in ambiguity.Since psychological measures are related to risk but not to ambiguity, risk aversion and ambiguity aversion are distinct traits since they depend on different variables. Schubert et al. (1999) find that women are more ambiguity averse than men in an investment context but not in an insurance context. Powell and Ansic (1997) report that women are more risk averse and ambiguity averse. Dohmen et al. (2008) find that lower cognitive ability and less openness to new experiences predict greater risk aversion.

In a review of the specific literature on gender differences in business decision-making, Johnson and Powell (1994) argue that the research findings before 1980 were instrumental in establishing a dominant view that substantial gender trait differences exist in the nature and outcomes of management de-cisions involving risk. These studies suggest that women are more cautious, less confident, less aggressive, easier to persuade, and have inferior leadership and problem solving abilities when making decisions under risk compared to men, reinforcing stereotypical views that women are less able managers. Johnson and Powell (1994) re-examine the early business decision-making literature and conclude that the evidence on gender differences is no longer clear cut.

Studies of insurance decision-making have also identified a lower degree of confidence amongst women in their ability to make decisions and in the out-come of these decisions (Estes and Hosseini, 1988; Stinerock et al., 1991; Zinkhan and Karande, 1991; Masters, 1989).

Women had a lower risk preference and a higher degree of anxiety in financial decisions

than men, plus a stronger desire to use financial advisers.

In which concerns moral hazard the difference between genders is not important,maybe because of the psychological factors like narcissism that make the person behave more irresponsibly.Suppose an insured individual behaves in a manner, which increase the probability of a loss from what it was before insurance was purchased. Furthermore suppose that the insurer cannot determine that the policyholder has changed his behavior in this way. When there is this type of asymmetric information between buyer and seller, then one has the condition known as moral hazard. There are good reasons for the presence of moral hazard. The insured individual has less incentive to take the same amount of care as when she was uninsured, knowing that if there is an accident or disaster, she has protection. Furthermore if a person has suffered an insured loss he may try and be able to collect more than the actual loss. The insurer may not be able to detect these types of behavior. It is costly and often extremely difficult to monitor and control a person's actions and determine whether she is behaving differently after purchasing insurance. Similarly it may not be

possible to determine if a person will decide to collect more on a policy than he or she deserves by making false claims without extensive auditing, which is also a costly proposition.

The risk aversion is related with risk perception and other psychological triggers that exists in the decisional process of the consumer.

Perception is another lead factor in the consumer insurance decision. A *perceptual set*, also called *perceptual expectancy* or just *set* is a predisposition to perceive things in a certain way. It is an example of how perception can be shaped by "top-down" processes such as drives and expectations. Perceptual sets occur in all the different senses. In insurance, perception is determined by culture, social development, education and informational background.That is why in poor country the perception of insurance is different by the one people have in devolped countries.

For example in Ghandia, majority of policyholders think that insurance companies are good at collecting premiums and once one get into trouble they bring you a lot of issues in order to avoid paying claims. 'insurance companies just collect your money.The perception is if one has an accident the company want to get a police report or inform that one's policy does not cover this amount.

In the developed countries, people have a financial education and they are opened to having more than one insurance policy.

But what happens about the young perception in insurance ? The perception and the attitudes of young people about the necessity of insurances it will be shown in the next survey.

3. Study case

Questionnaire about the perception of students about insurances.

The sample 100 students of the Foreign Languages Faculty, Italy.We can consider this sample as a pilot sample taken with the purpose of projecting a survey with much more variable which should insure a better reprezentativity of the sample and minimize the errors of the survey. The contact method and the collection of data was the direct questionnying of students applying a formular and also completying data on a internet platform

The first part of the questionnaire had the purpose to follow the registration of the classifying characteristics of the insurance agent or the consumer which had, has or will have an insurance and obtaining a representative sample. The sample structure after the classifying were:

1.At the question *"What is your age ? "* , the distribution of the answers was : **Table 2.**

The structure of students after age

Age	Structure (%)
>20 years	41,3
< 20 years	58.7

The majority of the students had above 20 years, some of them between 25-30 years old refering to the ones that completed the questionnaire on the online platform, the rest of the students had 20 or less (around 40 %). That is why at this segment of population the more important thing is to empahse the perception about insurances and the proclivity to make or not in the future a sort of insurance because at this age students don't have sufficient income in order to already subscribe to an insurance company.The main purpose of the questionnaire is to see the perception and the availability of the students regarding insurance market..

1. At the question *" You are male/female? "*,the distribution of answers was:

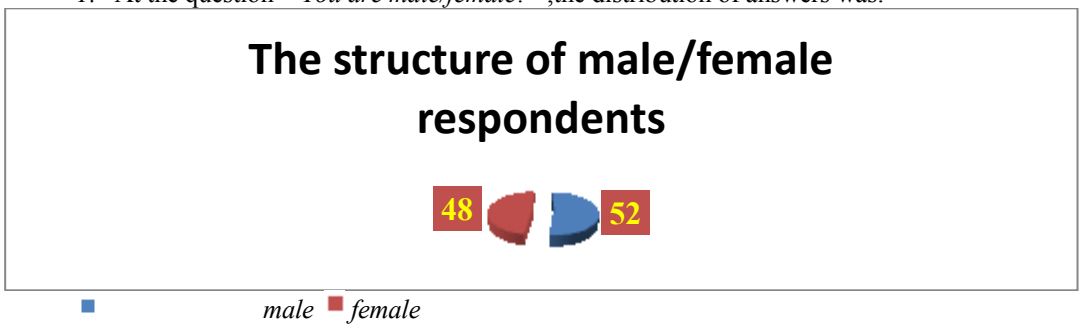


Figure 1 –The structure of male/female respondents

It can be seen that 52 % of the respondents were male that and the rest, 48% female.In fact, the type of the insurance held,as we will see in the second part of the survey, it is the insurance for social responsability car and the gender can create some differences in which concerns the consumer preferences and risk perception.

2. At the question «Are you risk averse ? », the distribution of answers was :

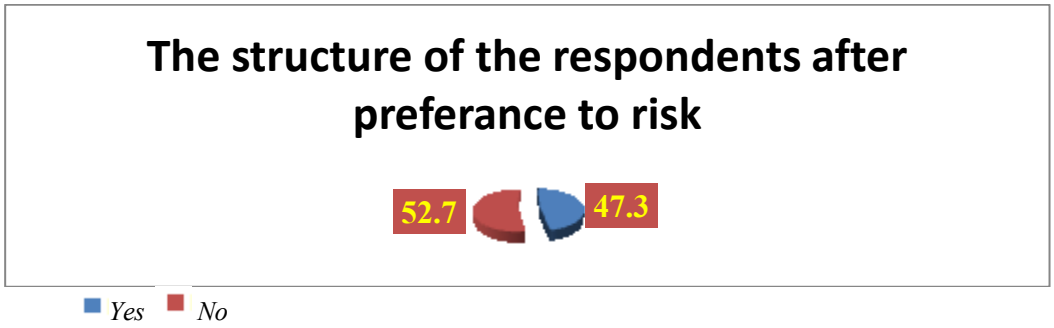


Figure 2 –The structure of the respondents after preferance to risk

It can be observed that 52.7% are risk averse, which is in according to Standard Economic Model (www.wikipedia.org/wiki/Economic_model) and 47,3% prefer risky situation.The reason that are behind this option should be analyzed in order to sustain the Prospect Theory(Prospect Theory: An Analysis of Decision under Risk, Daniel Kahneman and Amos Tversky, Econometrica, 1979) and prove that psichological factors and enviroment referential points can influence one person perception in which concerns risky situation.

3.At the question « Do you have an insurance policy ? If yes what kind of ? », the distribution of answers was :

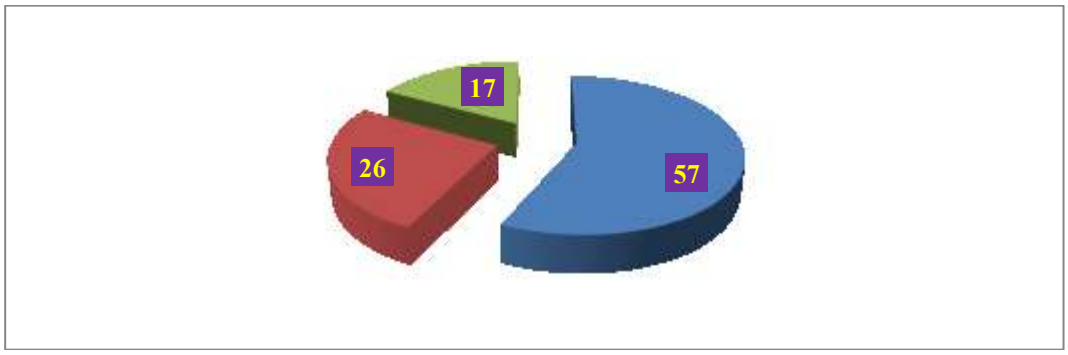


Figure 3 –Structure of the respondents after the insurance type held or future purchase

In the total of the responses, 57% of the students said that they did not have an insurance and of the ones they had an insurance they preferred RCA 26 %,insurance for car civil responsability because at this age the only good they have is the automobile and 17% had CASCO insurance or other types.It can be menstioned that in this procentage of 17%,are included the respondents that completed the online form and the age average was between 27-30 years. In this case the other types of insurance that they had, were included life insurance, family insurance,work insurance and accident or disaster insurance.

4. Referring to the question « Which is the current state of your insurance ? », the distribution of answers was :

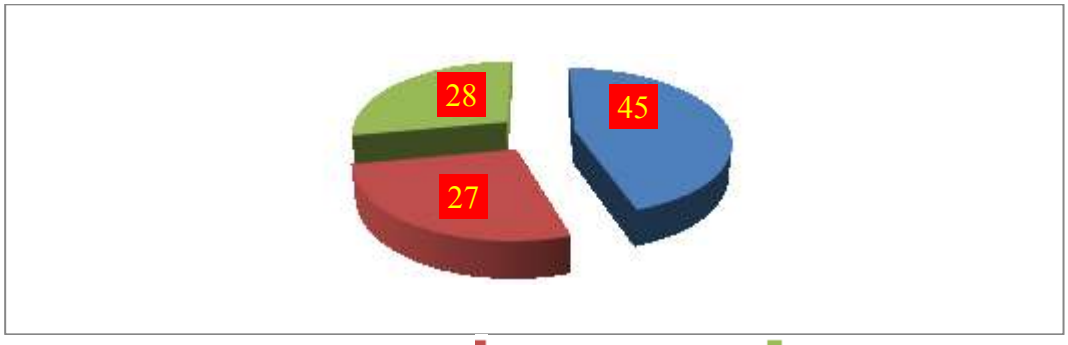


Figure 4 –The structure of the respondents in function of the current state of the policy

In figure 4 it can be seen that 45% of the ones that had insurance have a contract that is still running, 27% declare that the contract finished and 28% didn't answered motivating that for lack of money they did not subscribe to a contract.

4. At the question « Which are the main reasons for which you would buy an insurance ? », the distribution of answers was :

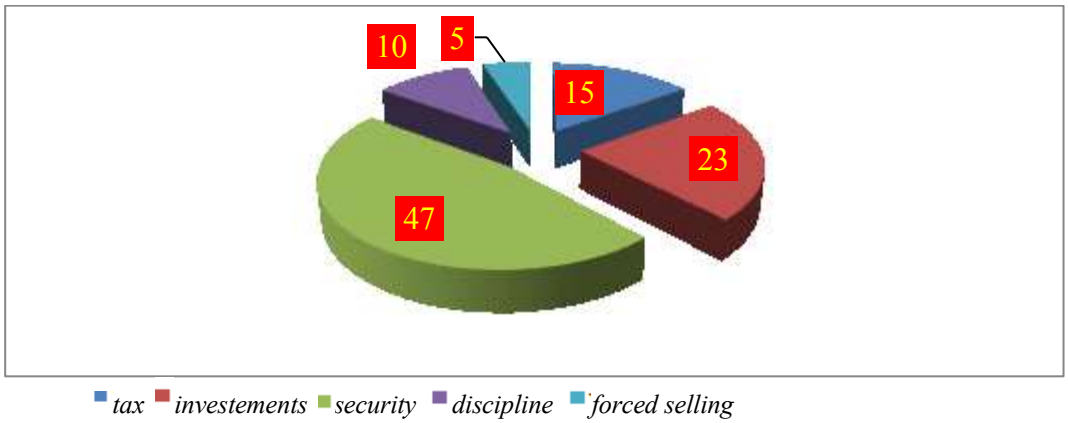


Figure 5 –The structure of answers after the main for buying an insurance

In figure 5 it can be observed that 47% of the respondents appreciate that they will buy an insurance for reasons of security, safety and trustv (emotional factors) 23% as investment in their future stability 15% for taxes, 10% for discipline,and 5% declare by forced selling because of contracting a bank credit.

5. At the question «What criterya you use for choosing the insurance company ?», the distribution of answers was:

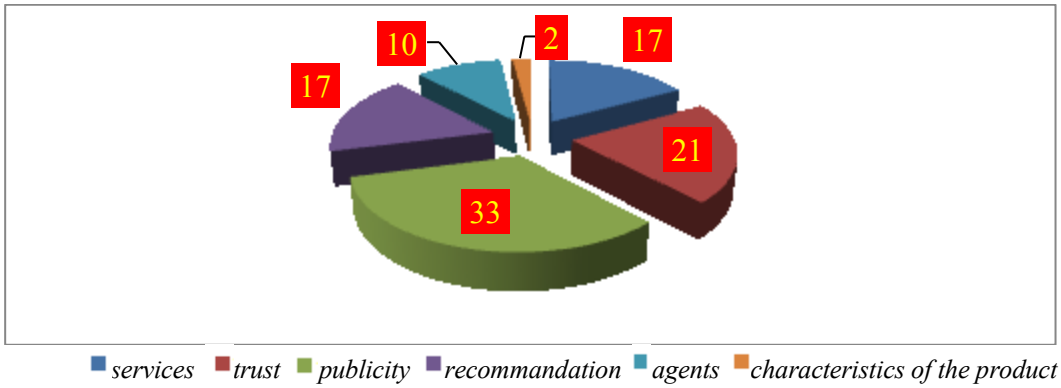


Figure 6 –The structure of the respondents after the criterya used in choosing an insurance company

In the figure 6, it can be observed that 17% of answers show that the society is choosen having into consideration the services offered and the historic of the security and trust of that society on the market, 33% by publicity, 21% due to trust and recommandations, 10% due to the selling agents, 17% due to the characteristics of the product, 2% other motifs.

7. At the question « If you have not an insurance, would you buy one ? Why ?. »

The majority answered that they would not buy an insurance (53%), because they do not need an insurance or they do not have money to subscribe to an insurance policy.This is easy to see

that the students does not perceive the importance of an insurance, they are not risk averse due to the lack of information or due to the age when they minimize the risk they are expose to.If they do not have the money to make an insurance is due to the fact that they do not have a fix income or the schoolarship or parents' allowance is very little and the structure of their income addresses to the fundamental needs like food, clothes, buying books for education, etc.

8. At the question « How do you prefer to buy an insurance ? », the distribution of answers was :

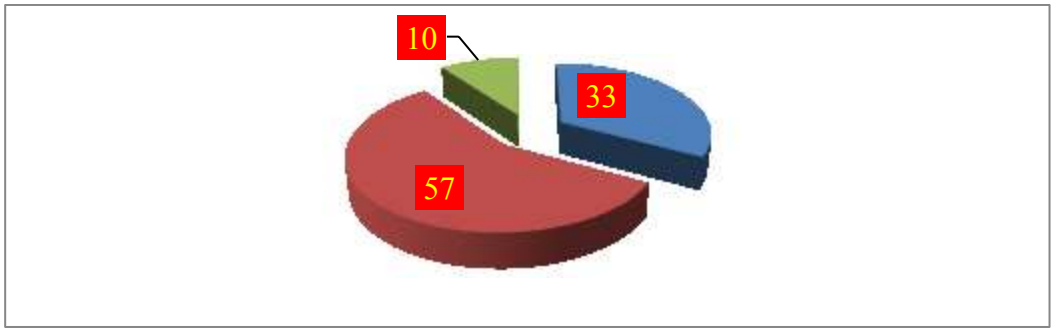


Figure 7 –The structure of respondents according to the channel of buying an insurance

The distribution of answers was : 57% declare that prefer to buy the insurance direct from the insurance society, 33 % prefer the selling agents and 10% prefer online buying.

9. At the question « Do you feel more protected having an insurance ? », the distribution of answers was:

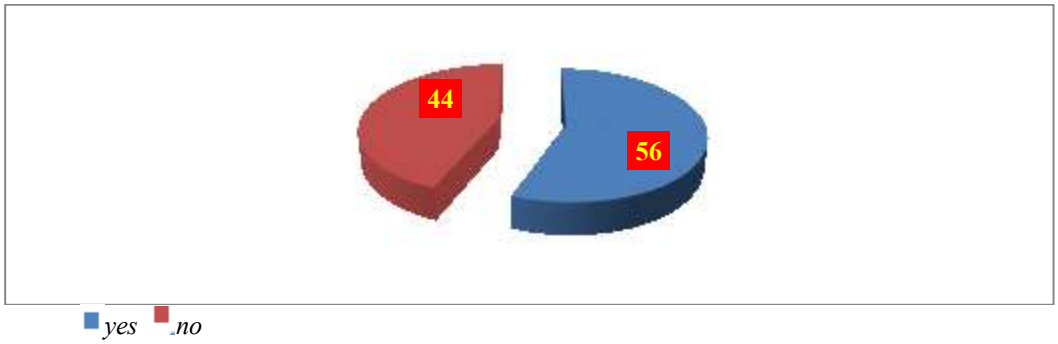


Figure 8 –The structure of respondents after the protection level perceived

In figure 8 we can see that 56% of students feel more protected having an insurance and 44% consider that this is not increasing their level of safety.This is due to the fact that in that 44% percentage the student do not have an insurance or do not have the financial education to understand why would be better to have an insurance.Due to the lack of experience, lack of money, lack of information and having in consideration that at this age they do not have many goods in their possesion, young people do not feel the need to be protected or to protect the welfare of their family.As the Maslow needs pyramide show, the need for security and safety is a superior need, it is

on the third level of the pyramide and this shows that people have primarly to fulfill their basic needs and accomplish a certain level of personal development in order to concentrate upon this sorts of need like security, protection.

Conclusions

The majority of students had no insurance or had an automobile insurance because of lack of money.It was observed that the male were more proned to subscribe to an compulsory car insurance or to a casco because they had automobiles.Other types of insurance,were registered to the ones that completed the questionnaire online and had between 25-33 years old, the principale insurances were house policies and life policies.In the crisis context, price has certainly become more important. It can be assumed that modern retail, which offers good prices, will be the consumers' first choice.Students perception about insurances in Italy revealed the fact that young people appreciate and find useful an insurance policy but due to the lack of money they do not have insurance policies. This is to say that majority of students would buy an insurance due to the trust and security feeling that an insurance held creates. Another reasons for making an insurance is to protect their family and future goods or if they will have the money for it. The principale insurance detain by students are the automobile insurances because this is the only welfare they have. It is to be noticed that financial reasons blend with emotional ones in order to sustain the idea that human beings are not so rational in their decision process and the affective component could play an important role in making an acquisition.

References

- "Consumer Psychology, Jansson-Boyd, Cathrine V., McGraw-Hill Professional Publishing.
- "Understanding consumer attitudes", Gregory Dean in Marketing Strategy,2010.
- "Insurance consumption in Italy: a sub-regional panel analysis",Giovanni Millo University of Trieste.
- "Consumer perception", Usc Marshall, University of Southern California site.
- www.ehow.com.

CHARACTERISTICS OF INVESTMENT PORTFOLIOS PASSIVE MANAGEMENT STRATEGY ON THE CAPITAL MARKET

MIHAELA SUDACEVSCHI*

Abstract

The strategies of investment portfolios management on the capital market involves a range of transactions with different financial securities, aimed at optimizing the results. On a developed and efficient capital market, with a high liquidity level, portfolio management primarly depends on investor's targeted level of return and the risk profile of the investor. Passive strategy of investment portfolios management is applied especially by risk aversion investors, who are taking into account all existing risks in the capital market and seeking to preserve the value of investments, rather than increasing its value. This strategy presume that the investor has no information about the prices and the return of securities that would make him to give to his investment portfolio a different structure from the structure of capital market portfolio. Therefore, he will seek a return level equal to the return on the market portfolio, minimizing the portfolio risk up to eliminating the specific risk.

Keywords: *investment portfolios, portfolio management, Random – walk theory, risk aversion, treasury bill.*

Introduction

One of the first proponents of passive portfolio management strategy was Eugene Fama (1), the author of the Efficient Market Hypothesis and Random Walk Theory. According to the Efficient Market Hypothesis is a useless searching undervalued securities or forecasting financial market movements, since the new information is already in the securities price, making impossible overcome the market performance. Also, the Random Walk Theory argues the lack of utility of shares historical price in forecasting of stock prices. That is happen because the information which runs on market is already incorporated in the price of securities.

Thus, using the two theories, E. Fama argues that there is no reason to determinate an investor to invest his capital in certain securities, as long as the market does not provide any signal that would justify such a decision.

Another convinced passive manager is Rex Sinquefield, President of *Dimensional Fund Advisors*[1]. He explained that the option for passive strategy portfolio management is based on understanding the function of the market mechanism. Virtually, no one has a too high volume of information that would allow the adoption of a specific investment decision under conditions of certainty. In fact, no matter how smart or how well informed are, the investors have a fraction of the information that are available to all market at any point in time. Markets are completely interdependent. Cannot be credible there is a person who has more information, in a systematic way, than a dispersed market of 6 billion people. However, Rex Sinquefield does not preclude someone chance to obtain a performance better than the market performance, but this case cannot be predicted with accuracy and, therefore, portfolio management active strategy is considered a waste of time. He believes that is more appropriate and efficient an investment in a market index than a portfolio management by an active strategy with a series of costs involved by selection of best securities. "Price is always correct, even if there are variations, which are determined by information that

* Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (msudacevschi@univnt.ro).

[1] Dimensional Fund Advisors, abbreviated as DFA or Dimensional, is an investment firm headquartered in Austin, Texas. The company benchmarks the performance of its large-cap equity portfolio against the S&P 500 Index, Consumer Price Index, MSCI EAFE Index and the Dow Jones Wilshire 5000 Index. (Accordingly Wikipedia, the Free Encyclopedia).

continuously appear on the market" is Rex Sinquefield's argument for a portfolio management passive strategy.

Finally, Merton Miller, Nobel Prize laureate (1990), also explains why passive management exceed that active one: "I favor passive investing for most investors, because markets are amazingly successful devices for incorporating information into stock prices. I believe, along with Friedrich Hayek [also a Nobel laureate, and a contemporary of John Maynard Keynes] and others, that information is not some big thing that's locked in a safe somewhere. It exists in bits and pieces scattered all over the world."[2] (interview for „Investment Gurus").

The portfolio selection and diversification

Investing in shares is a complex process. Even if the investment is short term (speculation) or a long term investment, a financial planning should be done and set the strategy to be followed. A rational management of investment capital involves keeping a liquid part of it. For a better risk management, financial assets should be placed as diversified (bank deposits, units, bonds, pension plans, life insurance or shares). The amount allocated for investment in shares should be in accordance with investor profile and its tolerance to risk (investor with risk appetite / individual risk aversion). Even if can be made equity investments with substantial reduction in risk, it is recommended that the amount of money that is aimed to be invested in shares be not planned for other investments.

Investment strategy

When forming a share portfolio, each investor sets a target of his return for the entire portfolio or sets a return target on each share of the portfolio. Thus, portfolio formation criterion is probability – risk / mean – variance. The mean – variance optimization used in standard asset allocation models is extremely sensitive to the expected return assumptions the investor must provide. Investor's return target is usually established long term of 1 year and therefore, the overall return on investment in shares may be compared to bank deposits interest rate for 1 year or term interest rate on government securities (money investments in zero risk conditions or risk free assets). It is also recommended that before making investment in shares, each investor establish the return objective and risk limit that he is prepared to assume.

The securities efficient portfolio selection, traded on the financial market requires three basic conditions:

1.Investors rational behavior, who target a level of the risk assumed in direct ratio to expected return of investments portfolio.

2.There is a positive correlation between the returns of portfolio's securities.

3.The price changes of securities are purely random. This means that changes in the price result only from the release of new information, which is completely unpredictable.

As financial instruments became more diverse and venture decision turns into a real risk, portfolio management becomes more and more difficult. Theoretically, there are only two portfolio management models: passive investment strategy and active investment strategy, both taking into account market performance. Nevertheless, it is obvious that today efficient management of portfolio is based on models created by complex informatics programs with massive quantity of information. Bringing together these elements can give, most of the time, surprisingly valuable solutions,

Portfolio's financial management aims to provide a superior return of financial investment than any other financial solutions. Thus, investments portfolio valuation and efficient management of portfolio will be made and will be anticipated by mean – variance criterion. It will be observed securities efficient combination that will lead to earn portfolios on the efficiency frontier.

[2] *Investment Gurus* by Peter J. Tanous, New York Institute of Finance, 1997.

The placement of available financial resources of individuals or companies can be done both on the money market and capital market, the option for the portfolio assets being justified by the risk – expected return ratio. Usually, the investment on the stock market is preferred as it provides an additional return from the investment on the money market. But investment on the capital market is more difficult than the other one and requires a detailed financial analysis of investment under certain conditions of income and costs, profitability and risk, respectively.

As a result of investments on the capital market, the investor expects to earn income, being ready to assume a certain level of transaction costs involved. Therefore, for investments in equities, investors expect to earn from dividends and capital gains as a result of the positive evolution of the shares price, which are investment subjects. In case of bond investments, the expected gain for the investor is permanent, for the entire bond life cycle and it consist in a bond coupon. The bond interest coupon means the annual interest amount, calculated as a percentage of the bond face value. In case of a discount bond issue, the earning per bond is generated by the difference between tha sale price of the financial tile and the face value repaid at maturity. If the investor chooses fund units for his investment, the income will consist in increasing in value of the net assets of the fund. The net asset value per unit of fund (NAVU) is the current market value of fund holdings, expressed as unitary value[3]. The NAVU is daily determined and it is calculated as:

$$NAVU = \frac{TotalAssets - TotalLiabilities}{TotalFundUnits}$$

A higher net asset value per unit of fund indicates a higher investment.

The basic rule of stock exchange is „buy cheap and sell high". This is the goal of all investors in the stock exchange, even if they are short-term investors (the stock exchange speculators), medium-term or long-term investors in the stock exchange (institutional investors).

One of the main concerns of the portfolio manager is the fact that the portfolio internal rate of return must be, in any case, higher than the other forms of investment return. Under this approach, it is aimed a certain return – risk ratio, as a goal of investment performance. Since the portfolio is a combination of securities, it has the same performance characteristics of the securities, the randomness of the profitability, the systematic and the specific component of risk.

Modern portfolio theory goes around of two fundamental concepts, which are: the efficient portfolio and optimizing portfolio structure. Financial fund managers will always try to find the efficient combinations of securities or, in other words, portfolios located on the efficiency frontier, which could satisfy investment's utility function for investors, or their attitude to risk. Optimal and efficient portfolios on the financial market are the result of various factors, such as: the rational behavior of investors, the positive correlation between securities return, or the random – walk of the return and the market price of the securities.

The optimal – risk portfolio can be found on the "Efficient frontier". That is the efficient portfolio, which offers the highest return for a given level of risk or the minimal level of risk for a certain return rate. In other words, it is possible for different portfolios to have varying levels of risk and return. Each investor must decide how much risk he can handle and then diversify his portfolio according to this decision. The optimal – risk portfolio has a minimal variance of return on investment and satisfy utility function for an investor with risk aversion. According to Modern Portfolio Theory, this portfolio is situated at the junction of "Efficient frontier" and highest utility curve. As a consequence, an optimal portfolio is the one that increases profitability and reduces risk level.

[3] A consumer's guide to MiFID (Markets in Financial Instruments Directive) – Investing in Financial products / The Committee of European Securities Regulations, Paris, France, March, 2008.

In the portfolio management, the main feature is to reduce and even eliminate the specific risk using the portfolio diversification and taking into account that the return – risk criteria is the evaluation and efficient management framework of a securities portfolio.

For stock market investments, it is necessary to predict market trends, because knowing its characteristics may lead of an efficient portfolio.

The set of portfolios that have the highest level of return for each level of risk or the lowest risk for each level of return forms the "Efficient Frontier".

To optimize the relation return – risk, must met a few aspects: making an investment with a minimum return, placing just a specified percentage of available fund in financial assets and maintaining a liquid part of available funds.

By the efficient portfolio selection, Harry Markowitz introduced the risk quantification theory, using the concept of average expected return and its variance, As a result, the optimal portfolio will be chosen as the maximum return portfolio with minimum risk conditions, achieved by applying the mean – variance criterion.

Based on this model, William Sharpe developed Capital Assets Pricing Model.

In finance, the **capital asset pricing model (CAPM)** is used to determine a theoretically appropriate required rate of return of an asset, if that asset is to be added to an already well-diversified portfolio, given that asset's non-diversifiable risk. The model takes into account the asset's sensitivity to non-diversifiable risk (also known as systematic risk or market risk), often represented by the quantity beta (β) in the financial industry, as well as the expected return of the market and the expected return of a theoretical risk-free asset. Since beta reflects asset-specific sensitivity to non-diversifiable, i.e. market risk, the market as a whole, by definition, has a beta of one. Stock market indices are frequently used as local proxies for the market—and in that case (by definition) have a beta of one. An investor in a large, diversified portfolio (such as a mutual fund), therefore, expects performance in line with the market.[4]

$$R_i = f(R_M),$$

Investment portfolio strategies

The decision of how to manage the portfolio (active or passive strategy) depends on whether the manager has access to superior analysts. A portfolio manager with superior analysts or an investor who believes that he has the time and expertise to be a superior investor can manage a portfolio actively by looking for undervalued or overvalued securities and trading accordingly. In contrast, without access to superior investor, the manager should manage passively and assume that all securities are properly priced based on their levels of risk.

A portfolio manager with access to superior analysts who have unique and analytical ability should fellow their recommendations. The superior analysts should make investment recommendations for a certain proportion of the portfolio, and the portfolio manager should ensure that the risk preferences of the client are maintained[5].

Passive investment portfolio strategy (or indexing strategy) starts from the premise that the investor has no information that would make him giving of his portfolio a different structure of the market portfolio, in which case, the portfolio risk is only the systematic risk. Passive investment management involves minimal trading, based on the belief that is impossible to beat averages on a risk – adjusted basis consistently.

[4] en.wikipedia.org – Capital Assets Pricing Model

[5] Reilly, Frank, Brown, C, Keith - Investments Analysis and Portfolio Management (10th Edition), South – Western Cengage Learning, Mason, Ohio, USA, 2012.

The equations underlying this theory are:

$$E(\overline{R}_{pf}) = E(\overline{R}_M) \text{ and } \sigma_{pf} = \sigma_M$$

Where: $E(\overline{R}_{pf})$ is the expected return for the portfolio, which depends on the expected return of all the assets returns in the portfolio

σ_M is the Variance of the portfolio's return, which depends on the variance of all the assets in the portfolio and the covariance of returns between al pairs of assets in the portfolio

$E(\overline{R}_M)$ is the market return, expressed by the official market index

σ_M variance of the market return

Indexing is a sensible strategy because the security market appears to be remarkably efficient in adjusting the new information. When information arises about individual stocks ar about the market as a whole, that information is generally reflected in market prices without delay. But passive management would sill be a winning strategy even if markets werw inefficient. This is so because winning performance must be a zero – sum. Clearly all stocks have to be held by some of certain investors achieve above – average returns, then it must be the case the other investors are achieving below – average performance. It is clear that all investors cannot be above average.[6]

If the market where portfolio securities are quoted is an efficient market, the only criterion considered for buying them is their relative capitalization. But it is not possible to know if the share's decreasing price is the effect of constitutive factors of securities. Investment passive strategy is considered the most appropriate method for managing a portfolio, in the stock exchange efficiency conditions. The result of choosing this strategy is the elimination of portfolio's specific risk.

Another great advantage of buy and hold strategy is also, the low cost, because broker's commission fees, spreads and other dealing costs become occasional rather than frequent. Passive strategy or buy- and-hold investment strategy means that rather than trading regularly securities are purchased and held for a long time (many years).

Another portfolio management strategy, opposite of the one, previously presented, is the active portfolio management. In an active portfolio strategy, a manager uses financial and economic indicators along with various other tools to forecast the market and achieve higher gains than a buy-and-hold (passive) portfolio.

Active portfolio management strategy is based on the selection of securities included in the portfolio. Manager will select securities according to their own performance and not according to their affiliation to an index or sector. Active management objective is to achieve higher performance as the benchmark (the stock market's official index).Accordingly, the return rate obtained by the investment's active management, which involves investing in securities with high return rate and risk is random, being the result of a normal distribution around the average return. (Gaussian function). Managers who adopt this strategy relies on a certain degree of market's inefficiency. They noticed that it could be achieved a higher return rate for very short term, as long as financial asset's price is not steady. Portfolio active management can be applied both on the individual securities, in which case we are talking about "stock selection" (picking) and on various financial assets (from the stock exchange market and from the banking sector), in which case active management is called "active asset allocation". The third form of active management is "market timing", the strategy which is based on expectations of market's return development.

Portfolio managed by an active strategy has fewer titles than the one which is managed by the passive strategy, because requires individual analysis of each title of the portfolio. The active strategy also involves higher costs than the passive one.

---

[6] Burton G. Malkiel – "Passive Investment Strategies and Efficient Markets" - European Financial Management, Vol. 9. No. 1, 2003, Blackwell Publishing Ltd., 2003.

Conclusions

Passive and active investment strategies properly impose to check if the results meet the objectives. Thus, investment passive manager has to check if portfolio return rate is at the same level as stock index performance. Instead, the manager who prefers to apply an active strategy of the investments and who has to manage the informational efficiency of the market, too, should check if the excess return level achieved is big enough to offset the risk supplement level.

Very few active portfolio strategy managers actually beat the market. That is why famous investors often recommend a simple index strategy, which allows everybody to profit from the overall growth of economy.

The aim of this paper was to prove that investors are likely to achieve far higher returns by employing a passive portfolio strategy, than they are likely to achieve from active portfolio management. Certainly, every goal set in a trading or management strategy has its advantages and disadvantages, which determines an investor to make some compromises.

References

- Reilly, Frank, Brown, C, Keith - Investments Analysis and Portfolio Management (10th Edition), South – Western Cengage Learning, Mason, Ohio, USA, 2012.
- Burton G. Malkiel – "Passive Investment Strategies and Efficient Markets" - European Financial Management, Vol. 9. No. 1, 2003, Blackwell Publishing Ltd., 2003.
- Famma, Eugen – "Market efficiency, long - term returns and behavioral finance", Journal of Financial Ecomics, Vol 49, 1998.
- Black, Fisher, Litterman, Robert – "Global Portfolio Optimization", Financial Analysts Journal, Sep/Oct, 1992.
- A consumer's guide to MiFID (Markets in Financial Instruments Directive) – Investing in Financial products / The Committee of European Securities Regulations, Paris, France, March, 2008 .
- *Investment Gurus* by Peter J. Tanous, New York Institute of Finance, 1997.

POTENTIAL DIRECTIONS FOR ENTREPRENEURIAL DEVELOPMENT THROUGH EDUCATION

CĂTĂLINA BONCIU*

Motto: **"Education, innovation and entrepreneurship are keywords today"**
(Silviu Hotaran, director of Microsoft Romania, 2012)[1]

Abstract
The European Union lives, for the past three years, a beginning of change. It was initially stated that it is a shift in the existential paradigm. Along with the financial crisis the United States exported in the whole world, primarily in Europe, a social, economic, spiritual, moral crisis is manifested... all these requiring a totally different approach to work, value, money, investment but not to man – as a social individual, with work, saving and consumption behaviors, with attitudes towards his own needs, as well as the possibilities to meet them... The sequence of crises was completed by a system crisis. In my opinion, it is totally true. A system tired, drained and depleted – according to my thinking - absolutely intentional. Of course, each system has its own life cycle, which implies that also the existing macroeconomic system shall reach in a point of inflection, only natural would have been to not cause its decline and death, but to prolong its existence as much as possible, by fundamental and structural modifications to support an innovative idea, of higher quality, viable for a medium period of time.

Keywords: *education, entrepreneurship, social/current entrepreneurial opportunities*

Introduction

Who can really know what it was planned for the economic and social future of the European Community? A hasty response could be given by developing and implementing the Europe 2020 Strategy. Sufficiently publicized, commented and interpreted, with pro and con approaches, the document provides targets on social inclusion (as a novelty, it is specified the extension of the green jobs), combating poverty and lack of education, rethinking the traditional forms of energy which can be replaced with alternative ones... A deeper approach should offer solutions to questions like "How could we achieve objective ...x?" And this is how the entrepreneurial solutions appear. In this presentation we shall develop a few valuable ideas that inspired entrepreneurs and professional investors may capitalize on today's market. We are going through a difficult period, even hostile for the small and medium business environment, but contrary to the general opinion, one can find enough entrepreneurial opportunities. To the question if entrepreneurship should be learnt, the answer is definitely yes. In this paper we shall illustrate this fact both theoretically, through studies in the traditional educational system or in the public/private organizations of continuous formation, and practically, by actual profession – either individually, in low level attempts or in groups, often facilitated through different projects.

Ever since mankind realized that a form of organization increases its chances of having a comfortable existence, it also understood that the role of learning is in continuous growth. Each may learn from the life experiences of their ancestors, from the close observation of others or of nature.

Nowadays there are many forms of training, for any level of education and formation. Also, there is a wide range of possibilities for each individual, provided that he is willing to learn. Of

* Professor, Ph.D., Faculty of Administration and Business, University of Bucharest (e-mail: catalina.bonciu@yahoo.com).

[1] http://www.euractiv.ro/uniunea-europeana/articles|displayArticle/articleID_13320/Educatia-inovatia-si-antreprenoriatul-cuvinte-cheie-in-lumea-de-azi.html.

course, the chances are not the same for everyone, the equal access to opportunities is not to be found in reality. What we can do, as trainers, is to provide them with as many information as possible, to instill them the courage to undertake, to encourage them in their actions and to consolidate in them the principles, norms and rules of entrepreneurial conduct. Of course, all in the spirit of respect for the ecosystem, the natural laws of the riches that the earth provides us so generously.

The education system introduces the pupils and students in the mysteries of entrepreneurship. It develops not only through education, exchange of experience with other universities with similar activities, but also by practice, or visits to successful companies entered in market niches. In recent decades, entrepreneurship has developed in its social form. The social entrepreneurship (HBS Social Enterprise Initiative) appeared and expanded from an idea, designed to meet a social need, which has been translated into reality and attracted followers, not only support funds, and transformed over time into a prosperous business.

Social entrepreneurship

Fundamentally different from the object of activity of NGOs, which support certain categories of disadvantaged people, social entrepreneurship stands aside from the charitable, voluntary and profitless actions conducted for the needy. The social entrepreneurs are ”problem-solvers” and do this for money. Namely, away from the altruist idealism directed towards others, the social entrepreneurs make business plans based on ideas that generate innovation, in order to prepare the society for change, to open the way for new entrepreneurial actions with profound social impact. Social entrepreneurs work to find means, tools, and ways of economic development that would lead to increases in profit. Of course, there are entrepreneurial courses in many universities of the world, people are competing for scholarships in different pilot organizations in the entrepreneurial environment, or there are research grants to address some pressing issues in society.

Social entrepreneurship, up to the present crisis, had only followers lacking of courage, who critically observed those who really have proven their entrepreneurship in real life. Nowadays, as funding has become more expensive and discretionary granted, entrepreneurship lost popularity. People think more before testing a new idea, which is a great loss for the practical dimension of the concept. In vain we have some well-prepared enthusiasts, with one or several potentially successful ideas, if they do not have the courage to borrow money from the banks to make them viable. It is really a pity because the present society offers many opportunities. Now the conditions to develop a successful social entrepreneurship are really met:[2]

1. *Entrepreneurship plus innate qualities* – the ability to identify and capitalize commercial opportunities in the economic and social environment we live in; the ability to think freely, to be a visionary, on the long term, unhindered by the restricting actions of ordinary people; determination, strong motivation to create and innovate; ability to take risks for the sake of goals.

2. *Behavior characteristics of a change agent, with "generator and destructive role in the same time"*- the ability to identify opportunities, creativity and determination. The idea of entrepreneurship success and serial entrepreneur is based on the perseverance of the entrepreneur to obtain and increase success, hence the profit, to "trigger a chain reaction", encouraging other entrepreneurs to restart the same process and, eventually, to promote the new, multiplying it up to the so called "point of creative destruction", when the innovative exhausts its innovative capacity, the products, services and the business itself ending its ability to generate profits (Joseph Schumpeter).

3. *Social mission* – the creation of value to determine social change, by speculating an opportunity, makes the entrepreneur a social missionary. Identifying the social problem entails the perception of the adequate opportunity for the respective community need. The prospect of financial gain is not as important as the community benefit, the impact with profound changes in attitude,

[2] http://master-supervizare.blogspot.ro/2009/11/antreprenoriat-social-nasterea-unei.html.

behavior, system of needs and possibility to satisfy them. The business turned into a social missions offers a special status to that particular business.

Current entrepreneurial opportunities

1.In the midst of uncertainty caused by the prolonged crisis, successful business ideas are those related to existence, working and living style of people. There will always be new directions for those in the food industry. The obvious trends of extension in current comsumption of genetically modified organisms are not examples to follow. But, shift towards organic farming, capitalize each plot of land with agriculture potential, expand agricultural land and irrigations are the imperative of the moment.

*2.*Permanent restrictions shall turn the future entrepreneurship towards unconventional energy systems. The depletion of fossil fuel reserves, estimated – at the present consumption – to maximum 25 years, as well as the continuous increase in prices for energy obtained in the traditional ways, require research and testing of primary energy resources, renewable and inexhaustible, but dependent on the sunlight, internal temperature of the earth, gravitation interactions of Sun and Moon with the globe's waters[3]. *Solar energy*, annually captured on Earth in quantity of 720x106TWh (dependent on the alternation day/night, on the latitude and longitude of captation, on the seasons and cloud interference) already offers many opportunities for captation and conversion. *Thermic solar energy* is already brought to experimental centers (with low capacity of 15%) through extractions by means of thermodynamic machines (with capacity of 2%, where differences between the surface and depth waters are of 25-30°C). These solutions are not cost-effective, but there is a field where research can be further done. *Photovoltaic solar energy* may be used to produce electricity using silicon cells. Photovoltaic panels are used to convert 10 – 15% of solar energy into electricity. These panels cover increasingly larger areas in Romania, even though its position does not allow capturing sunrays of strong intensity. *Wind energy* has a significant potential, because, at least in theory, the world availability of 60.000 TWh per year may cover the global demand of 40.000 TWh (including losses). *Kinetic and potential water energy* provides the cheapest energy. In terms of power installed, at world level, the hydroelectric power may be considered the first renewable source of electricity. Technically exploitable are 14.000 TWh of the theoretical potential of 36.000 TWh. *Tide energy* is not an opportunity, as projects already started in Canada, France and Britain transform the local ecosystem. *Waves energy* is an important source of energy, unfortunately cheap on the shores and expensive on territories far from them, because of the large areas occupied by the caption facilities. *Geothermal energy* can be transformed into electricity by pumping hot or warm water from the inside of the crust towards the surface. *Biomass*, supplier of biofuels (solid, liquid, gaseous), becomes renewable energy source on two conditions: expansion of forest areas and their rational exploitation. Here there can be identified many opportunities for entrepreneurship.

There are already more or less prosperous businesses[4]: electricity in the paving (through parquet, tiles, carpets); facilities to melt ice and snow outdoors, protection of roofs, gutters and downspouts, pipes, gates and exterior doors; foundations of freezer rooms and skating rinks; relays and mobile phone antennas; not to mention greenhouses in agriculture, livestock farms, public spaces destined to entertainment and recreations (malls, stadiums…)

3.More expensive are and will remain the futuristic initiatives. They have always supported bold ideas those beautiful dreamers who have brought the future in the hands of their fellows. Now it is the time of nanotechnology. Are not sufficiently promoted those researches on technologies and techniques of medical rehabilitation – for example, the efforts of Prof. Samuel Stupp team, with significant results in reversing and preventing the paralysis through regeneration of the spinal cord, the conservation of Parkinson and Alzheimer diseases, the universal repair of all fractures and

[3] http://www.armonianaturii.ro/Sursele-de-energie-neconventionala.html*articleID_1193-articol.
[4] http://energie-neconventionala.blogspot.ro/.

production of new cartilages[5]. And these are not the only achievements. As seems obvious, nanotechnology is most present in computers[6], varnish industry, colours and paints[7], constructions – automatic systems, automatic cranes, laser excavators, industrial robots[8]…

Unanswerably, entrepreneurship can be taught. The present offers wide entrepreneurial opportunities, in terms of types of business, scope, viability over time. Questionable is the capacity of financing the idea. As also the favorably legislative frame.

For several decades people are taught, through the educational system or via non formal and informal training, that in the battle with nature, the latter always wins until the end. Man must understand nature, identify the resources that it provides, the conditions under which it accepts his intervention, and most importantly respect it because if we were to state for the man to "cherish" or "love it" we might just overcome the economical-educational framework. Who teaches man how to find business opportunities without jeopardizing his present and future relationship with nature? The educational system did not always accomplish everything. At least lately, the involvement of various actors from the market has been more than welcome – they are training companies, economic agents, various projects which reunite non-governmental organizations, administrative structures with private partners, they are multinational companies with creative projects, they are organizations powerful research and development departments and pilot products in areas where ordinary human mind cannot imagine reaching.

The very premise is wrong, man cannot fight nature, man must not fight, especially nature. In a more formal way and quite commonly used, the rational man, "Homo tehnicus" or "Homo oeconomicus", as a product of nature, makes decisions based on ethics, environmental responsibility, respecting the rules of human coexistence with nature [Odum, 1971]: not to dissipate potential energy; to know exactly which elements our own survival system depend on; to act in such a manner so that all may benefit as efficient as possible from the energy circuits of the system; to outline in his own work systems those parts that place him on the good side of events; to value other life in the surroundings as one of his own, for only so can he survive; to judge any value through the energy spent to produce it and the energy that he is able to accumulate, and not to convert the energy current into insufficient money means whenever possible; not to use large amounts of energy because mistakes, destruction, noise and excessive surveillance lead to the increase in waste; not to take anything from man or nature without providing an equal value service in return; to enrich informational heritage, because using this unique and complex action, the system will justify new through what is immortal in it; to believe in the benefits of stability over growth, of organizing over competing, of diversification over uniformity, of the system over parties and of the process of overall survival of mankind over personal peace. But who to tell man how to act in order to meet the above standards? Examples to be presented in the paper come to reinforce the need for education in an entrepreneurial manner, innovative, responsible, economically and environmentally responsible, supporting the ecosystem.

Predictions about the future of mankind have always been more or less alarming. It seems that the present ones are based on the restrictive access to resources of an increasing number of consumers. Are we sufficiently educated to meet the needs of the planet that gives us existential support? Of course not. Do we really strive to teach our offspring how they can healthily live and work, economically and environmentally? Absolutely not. Do we manage to sufficiently develop everything that is provided to us by the environment? Certainly not.

It is difficult to understand how we should organize and administer our existence. The consumer society has destroyed almost all human common sense. The needs do not longer meet the

[5] http://www.prostemcell.ro/stiinta-cercetare/viitorul-nanotehnologiei-si-medicinei-regenerative.html.
[6] http://www.cs.cmu.edu/~mihaib/articles/nano/nano-html.html.
[7] http://www.bejeus.com/2010/06/viitorul-masinilor-coupe-cu-patru-usi.html.
[8] http://www.proiectulvenus.ro/tehnologia/constructiile.html.

level of existential comfort. There is an obvious and excessive polarization of the population – on the one hand an alarming majority survives at the minimum level of subsistence, and on the other hand, there is a small group, part of a "selective club, perpetuated in the family", the owner of wealth and numerous resources. What can we do? How could we overcome the current deadlock, in its double manifestation (economic and environmental)? Who is entitled to coordinate such actions? In any case, someone who is capable, someone literate and with vision, someone who is educated in the sense of respect, responsibility and duty towards fellow predecessors, contemporaries and successors. This means we need learning, experience, theoretical and practical knowledge, support and proper measures taken at high level, but also actions taken by smaller entrepreneurs.

From where we can start the entrepreneurial learning in resource exploitation

Entrepreneurship remains a process of identification, pursuit and capitalization of a business opportunity. The entrepreneur tries to make a business plan, which he must observe as closely as possible, in a structured manner, in order to achieve success on the market, i.e. to collect a satisfactory profit from the opportunity he discovered. A very important aspect is the time horizon, at least three-five years to develop the respective business, during which it is desirable that it becomes self-sustainable. If the entrepreneur succedes in repeating the process at least two times, with the same good results, watching different opportunities, he is a serial entrepreneur[9]. As everything is learnt, except native abilities, it is obvious the need to introduce as learning subjects (at any level) the entrepreneurial experiences, the good practices and the success in business, especially for low level businesses. The entrepreneurship and the business administration is learnt from the books, in a formal organized frame or from practice. But entrepreneurship is strongly related to the personal qualities and skills of a certain person, as well as to the managerial skills. An entrepreneur can develop by accumulating quantitative and qualitiative knowledge at theoretical level, he keeps himself permanently active, individually or within organizations, he operates in a extremely dynamic competitive environment, which is way too turbulent in recent years[10]. Regarding exploitation opportunities,there are many factors that influence the price and output trend in the mining industry, the most important being: fluctuations in profit rates, fluctuations in the cost of extraction, the introduction of taxes by the government. Some of these, such as taxation and the profit level, may by treated as variables of the pricing policy by the government in order to influence the extraction of non-renewable mineral resources.

A. Changes in the profit rate

Profit fluctuations may strongly influence production - price trends in the mining industry. For the beginning we shall assume that the profit market rate will increase. This means that the income rate obtained from a project of alternative investment, say term cash deposits, increases. If the owners do not undertake any amendments to the original plan, the stock reserves shall lead to suboptimal income rates in time. A way to avoid such losses is to transfer production into the present. Namely, the owners shall extract and sell more in the present, which will lead to lower market prices. Therefore, the less it is extracted, the higher shall be the net price of remaining reserves. This means that reserves would be exhausted in less time that the time needed to increase profits.

1. [9] http://www.finmentor.ro/business/educatie-financiara/antreprenoriat/antreprenoriat_ac.aspx.
[10] http://antreprenoriat.upm.ro/antreprenoriat-transilvan/antreprenoriat-si-administrarea-micilor-afaceri~6.html.

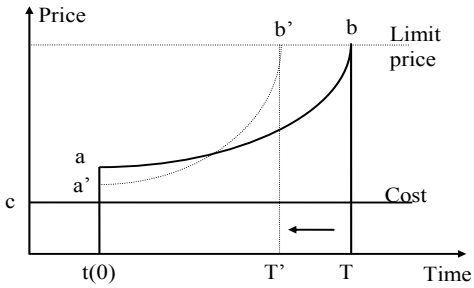


Fig.1. The effect of profit rate increase on the production – price trend and on the depletion time

Figure 1 illustrates this situation. The "ab" curve is the production – price trend before the increase in profit rate. Immediately after increase, the owners should make an adjustment by growing the production level, the price level shall drop to t(0) from a'. For the remaining time it shall be extracted less so as the appropriate rent of the remaining reserves to grow to a higher level. This shall shorten the depletion time from T la T'. The new price – production trend "a'b'" shall be more abrupt than the previous "ab".

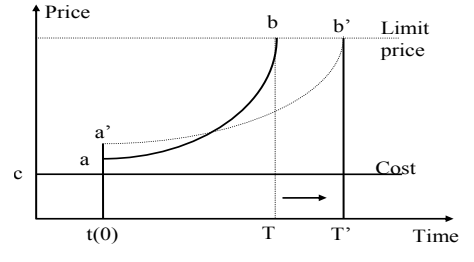


Fig.2. The effect of profit rate decrease on the production – price trend and on the depletion time

If the profit rate decreases, the reverse phenomenon shall take place. The initial price shall increase as the owners move the production into the future by reducing the current extraction. This is because lower profit rates make stocks more attractive than current production. This is also obvious because a lower profit rate would indicate a lower growth trend than in the previous case. This means that the depletion time increases, as shown in Figure 2.

For the start, let us think how the extraction cost increased. This can happen for various reasons, such as the lack of skilled labor, growth of salaries in the industry or the decline in base resources, because the owners start the extraction from ores with difficult access. A growth in costs shall reduce the current extraction level, thus shall increase the starting price, but reduce the subsequent prices. In exchange, this phenomenon shall reduce the amount required in the near future and increase the one in the future. The net effect shall be the increase of depletion time. The situation is described in Fig. 3. As the extraction cost increases, the rent shall be reduced. In response, the owner shall reduce the current production, which shall increase the initial price from t(0) to t(0)a', and the new price – production trend shall be "a'b". On the other hand, a decrease in the cost of extraction shall have the contrary effect, by increasing the initial rent. If no adjustment is made, the renunciation price shall be reached earlier than desired, and the owners shall remain with unsold stocks. To avoid such a situation the owners shall reduce the starting price. In this case, when the extraction cost decreases, the immediate level of production increases, which in turn shall reduce the initial price and the time of depletion (Fig.4.).

B. Taxation system

The taxation system may have powerful effects not only on entrepreneurial opportunities, but also on the policies used in the mining industry. In this respect we can mention several taxes. ***B.1. Excise.*** A tax on the value of production in the mining industry shall determine the increase in costs, with an effect similar to that described in Fig. 4. ***B.2. Ad-valorem tax.*** Set to the price of each production unit, usually as a percentage of the value of the extracted production. Its effects are the reduction of the depletion rate of reserves and an increase in their depletion time. ***B.3. Property tax.*** This type of tax shall shorten the time of depletion.

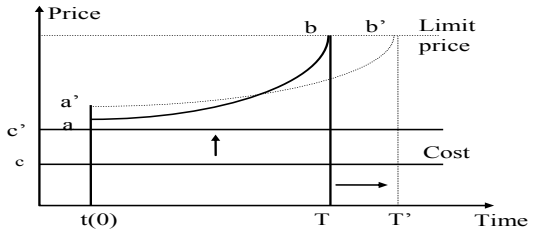


Fig.3. The effect of extraction cost increase on the price – production trend and on the depletion time

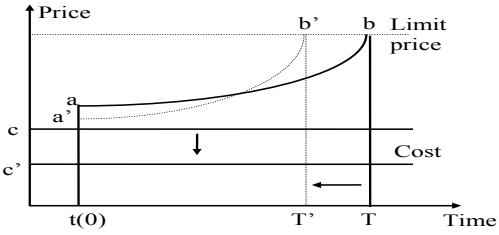


Fig.4. The effect of extraction cost decrease on the price – production trend and on the depletion time

Conclusions

The above example is just one among the many other opportunities which a potential entrepreneur may take, the majority of these being learnt. Of course the role of learning, individual or organized, is essential, not only because it facilitates the business organization and learning, but because it also offers ideas. The ideas of resource exploitation remain among the most profitable. Or, they continue to incite people with entrepreneurial spirit, precisely because mankind, until now, did not find or did not want to find, at large scale, alternative solutions to replace natural resources.

References

- AMIGUES, J.P., (1997), *Enjeux et limites de l'evolution des actifs naturells,* în *Economies et Societe*, Serie Developpment croissance et progres, F.nr.35,4.
- BĂDILEANU, M., (2002), *Economia protecţiei mediului înconjurător*, Editura SYLVI, Bucureşti.
- BULEARCĂ, M., (1995), *Teoria pieţelor şi utilizarea eficientă a resurselor naturale,* în *Fluxuri şi pieţe internaţionale de materii prime şi energie*, Studii şi cercetări economice nr.10-11, ERNE-IEI, CIDE, Bucureşti.
- MC KELVY, V.E., (1972), *Mineral Resource Estimates and Public Policy*, 'n American Scientist, vol.60 (ian-feb).
- MALENBAUM, W., (1975), *World Resources for the Year 2000*, 'n The Anaals of America Academy of Political and Social Sciences, july.
- MARTIN, R. L., OSBERG, S., (2007), "Social Entrepreneurship: The Case for Definition", în Stanford Social Innovation Review, Spring.
- POSTOLACHE T. (coord.), (1987) *Tratat de economie contemporană*, vol. 2, cartea 1, Editura Politică, Bucureşti.
- VINCENT A., NELINE R., (1968), *Etude methologigique du Capital natural*, Ed.Dunod, Paris.
- OLSEN, M., ZECKHAUSER, R., (1970), *The effîcient production of external economies*, în *American Economic Review* no.60.
- ROTTENBERG, L., (2009), *Speech presented at the 10th edition of the Annual Social Entrepreneurship Conference organized by Harvard University* on March 1st.

- SAMUELSON, P.A., NORDHAUS, W.D., (1989), *Economics*, 13-th Edition, McGraw Hill Book Co., New York.
- SAMUELSON, P.A., NORDHAUS, W.D., (1992), *Economics*, 14-th Edition, McGraw Hill Book Co., New York.
- http://antreprenoriat.upm.ro/antreprenoriat-transilvan/antreprenoriat-si-administrarea-micilor-afaceri~6.html.
- http://www.armonianaturii.ro/Sursele-de-energie-neconventionala.html*articleID_1193-articol.
- http://www.bejeus.com/2010/06/viitorul-masinilor-coupe-cu-patru-usi.html.
- http://www.cs.cmu.edu/~mihaib/articles/nano/nano-html.html.
- www.ecolife.ro.
- http://energie-neconventionala.blogspot.ro/.
- http://www.euractiv.ro/uniunea-europeana/articles|displayArticle/articleID_13320/Educatia-inovatia-si-antreprenoriatul-cuvinte-cheie-in-lumea-de-azi.html.
- http://www.finmentor.ro/business/educatie-financiara/antreprenoriat/antreprenoriat_ac.aspx.
- http://master-supervizare.blogspot.ro/2009/11/antreprenoriat-social-nasterea-unei.html.
- http://www.proiectulvenus.ro/tehnologia/constructiile.html.
- http://www.prostemcell.ro/stiinta-cercetare/viitorul-nanotehnologiei-si-medicinei-regenerative.html.
- http://www.responsiblemanagement.ro.
- http://ro.wikipedia.org/wiki/Discu%C8%9Bie:Energie_regenerabil%C4%83.

NATURAL RESOURCES AVAILABILITY IN A SUSTAINABLE ECONOMY

CĂTĂLINA BONCIU[*]
CRISTIAN SIMA[**]
GEORGE MARINESCU[***]

Abstract
In the theoretical and practical approach of the economic life, appears more often the idea of sustainable economic development, of reconciliation between man and nature in attracting and using its resources without interfering in its natural movement and evolution.
In this paper we are trying to bring to light the relation between the economic development and the mineral resources, in terms of achieving sustainable development. The place and role of natural factors in the market economy is revealed by bringing to the forefront a number of arguments that demonstrate their vital position in the sustainable growth and development.

Keywords: *mineral resources, natural environment, economic growth, environmental protection, eco-development*

Introduction

When the relations "natural resources – raw materials" and "energy – final products" are considered, we must also take into account the possibility of replacing certain raw materials, because some natural resources become deficient or depleting at some point. Technically speaking, raw materials are interchangeable but, from the economic point of view, the substitution is limited at the level of unitary production costs. Thus, as long as these expenses are under the marginal cost of extraction, preparation and processing of a particular material, its substitution with a new raw material is considered profitable. For these reasons, we consider that in approaching the economic management system of natural resources we have to take into account some peculiarities determined by: the type of resource, the type of ownership on the soil and subsoil, the pricing methods, as well as of the relation between the development of industries consumers of natural resources and the environmental protection policies.

In terms of the degree of depletion of deposits, natural resources can be divided into three categories: renewable, permanent and nonrenewable. Therefore, vegetables, livestock and the biomass resources (generally, riches of the soil) are included in the renewable natural resources category, as they continuously reproduce, so a balance between production and consumption is established. Man can intervene in the processes of production and consumption of renewable resources in order to change their status. In the permanent resources category (solar energy, rain and running waters) are included those whose conversion cycle is the same, man not being able to fundamentally change it. In the specialized literature, permanent resources are mostly included in the renewable category.

Nonrenewable resources are, generally, the minerals, whose formation lasted millions of years. Therefore, geological reserves of natural resources appear as finite, and their exploitation and consumption lead to the depletion of deposits.

[*] Professor, Ph.D., Faculty of Administration and Business, University of Bucharest (e-mail: catalina.bonciu@yahoo.com).
[**] CS III, Ph.D., The Center for Industry and Services Economy, Romanian Academy, Bucharest (e-mail: sima_cristian@hotmail.com).
[***] Lecturer, Ph.D., "Dimitrie Cantemir" University, Bucharest.

This delimitation of natural resources brings a distinct policy of economic management and financing of the exploitation activities by type of resource. For example, in the case of mineral resources, which are exhaustible, it is implemented an efficiency directed exploitation and usage policy. In fact, exploitation of mineral deposits must be made within certain economic and technical limits, so as to ensure the necessary mineral resources for future generations. In the same time, there are certain renewable resources whose regeneration stretches over 2-3 generations, such as the forest resources. Replanting forests and growing trees up to the economic limit of exploitation lasts between 50 and 100 years, which also requires a rational economic management policy on these resources.

Implementing a system of economic management also depends on the type of ownership on the soil and subsoil richness. In Romania, both mineral deposits (subsoil richness) as well as most of the forests are State's property, which imply appropriate organizational systems and international circuits for the management of these resources in the market economy conditions.

A special element in the economic management system of natural resources is the costs-prices relation, as well as the pricing methods for the products in mining, oil, gas, forest resources etc. In mining, as in forestry, there are major differences between the costs of production of the respective companies, because of the exploited deposits or the existing species of trees, as well as because of the conditions for obtaining the respective raw materials or energy resources. Depending on the market prices of raw materials or energy resources, companies may register profits or losses in relation to the costs incurred. In case of profit, companies may use a part of it for development, using, in this respect, a series of short, medium and long term strategies. In case of loss, according to their volume and the social utility of the respective natural resources, they may decide to close the company or to receive subsidies from the state up to a certain economic limit. The state intervention in the field of mineral resources exploitation is mandatory. The state, through its policies, may control both the mineral resources exploitation and the pollution arising from the exploitation activities.

The analysis of natural resources availability

By closely analyzing the results of specialized research we can assess that the earth curst encompasses, in absolute terms, practically inexhaustible resources of all metals and minerals necessary to human beings, although many of them are distributed evenly in the crust and are to be found in low concentrations. The necessary costs for mining the inferior deposits are surpassing their economic and social value and, therefore, under the current technology, these are not considered exploitable.

Anticipating future conditions is clearly arbitrary and subjective and therefore, the mineral richness of a certain region may vary widely from one evaluator to another. Therefore, it can be said that the mineral richness of an area or region cannot be expressed in absolute terms, but only in connection with a certain economic and technological situation, but it may be that in these circumstances there is plenty of room for error.

A country's mineral reserves include both the reserves known and declared by the companies and the estimates based on the best information available. The information obtained is related to the ore regions that, if not already exploited, at least have been prospected.

The concept of reserves is dynamic in essence. Therefore, the terms used to define mineral reserves, namely the quantity, type, concentration etc., must be regarded as variables that can change in time, together with technology and economic conditions.

There are few materials found in nature in a form man can use as such. In order to become materials, in most cases, natural resources have to undergo a certain physical or chemical processing, which requires an increase in prices.

This price rise shall be particularly due to the additional energy necessary for extraction and treatment of poor ores, as well as to the efforts to maintain satisfying ecological and geographic levels (envinronmental changes). These rises shall be partially balanced by a decrease in exploration expenditures, the practice of economies of scale, the technological improvement and the development of procedures for the recovery of all elements of real value from a certain resource. An important problem is the market imbalance which may come from the complex recovery of useful substances (POSTOLACHE T.,1987).

As national economies develop, their profile and structure does not longer depend exclusively on the endowment with natural production factors. The economy structure remains closely linked to its own energy basis and raw materials only as far as the national economy is at a relatively low level of development. The influence of technical progress on the economic structure, in particular on the industry, had led to weakening its ties with the energy basis and raw materials because:

a) the creation of new industries and diversification of production which encourages an increasing demand for high skilled labor and research had resulted in the reduction of natural resources consumption per unit of national income;

b) the development of foreign trade relations has triggered the payment in different currencies for the import of natural resources and the expansion of international cooperation through direct investments in production, as well as in energy and raw material research;

c) some raw materials and energy resources have been replaced by new ones (synthetic and artificial) or alternative resources have been used.

In the economic literature it was said that natural resources depletion is caused by the economic and demographic development. But the technical, economic and social progress leads to a wider nomenclature with new natural and artificial resources which may substitute the weak and exhausted ones. In fact, the technical progress simultaneously acts on the economic structure and on the specific consumption of resources, especially on those which are poor and expensive, making it possible to obtain increasing amounts of goods and services by improving the product performance and reducing the consumption per product unit or performance (W. Malenbaum, 1975).

In theory, the evaluation of natural assets is based on the development of an integrated model, essentially focused on extending the capital theory, and a social welfare theory in dynamic and uncertain conditions. From this perspective, *natural assets are known as capital goods, not produced by the economic system, but directly and indirectly influenced by the production and consumption conditions of economic goods within this system* (Amigues J.P., 1997). We are, therefore, talking about an explicit temporal approach and the introduction of uncertainty in the system, which gives it a double nature. On the one hand, uncertainty comes from not knowing if the potential ecosystems could maintain a certain amount of services to society, as well as their impact on the human activities. On the other hand, uncertainty depends on the dynamics of economy and society, the role of technological progress, the demographic evolution, the dynamics of production and consumption patterns, as well as on the special distribution of agricultural, industrial and population assets.

In purely economic language, the uncertainty is caused, primarily, by the "efficiency" and "dynamic" of accumulation and dispersion of natural assets, which revives the problem of "sustainability" of the economic development trajectories in interaction with the environment dynamics. Secondly, uncertainty also ponders on the criteria which have to be adapted in order to make sure the optimal decisions are taken when talking about the evolution of the relation economy-environment, which have to take into account the future generations.

In terms of applicability, the evaluation of natural assets encounters difficulties because of the studies regarding the physical impacts, certifications or social and political analysis, as well as the social perceptions and implications on the environment when talking about the behavior (actual or

simulated) of the economic agents. The physical impact tends to be confused with individual welfare, in general, measured in biological or physical constants in relation to the environment quality characteristics and with welfare in economic terms, which reflects the characteristics, life options and social situations of individuals, as well as the technical and economic rationales of industrial or agricultural production. As a matter of fact, it is again discussed the performance of surveys to guide the public choice in terms of environment. If the need for a scientific expertise is unquestionable, a minimum democratic requirement must take into account the public option with regard to the financial efforts to be made in order to improve environmental quality. Otherwise, countries will only measure social perception without acknowledging neither the actual behavior of individuals nor their attitude when making a choice, in sacrificing money or improving environmental quality.

Productive assets (mineral resources, forestry, arable land) are evaluated by rules similar to those of productive physical capitals, which allow the conversion of the service flow value generated by the value of available inventories. These flows may be spread over finite periods (the case of a mine, or all exhaustible resources) or infinite periods (for example, a forest continuously replanted, a cultivated and maintained soil etc.). When adopting general rules of evaluation the specific characteristics of each type of natural asset are taken into account. But, sometimes, these rules are not applicable if not verified the following hypothesis: the existence of a balanced capital market rationally anticipated by the economic agents. However, the evaluation of these assets is a very delicate operation, depending on the period of time considered, therefore also on the uncertainties affecting their use and value (for example, the long-term evolution of demand for raw materials, the exploration and discovery of new reserves, the evolution of production technologies and use) (Răducanu V., 2000).

The evaluation of the subsoil mineral assets was subject to many theoretical arguments for extending or restricting the introduction of mineral resources in the national wealth. Taking into account that the availability of mineral resources is dynamic (on the one hand, following the extension of geological research activities and the influence of technical progress on the level of demand for raw materials and energy and, on the other hand, due to the size of the exploitable reserves due to consumption) the problem regarding their introduction in the national wealth became more complicated. In general, economists interested in this area, converge towards two interpretations:

The first group considers it is necessary to make a distinction between the quantifiable elements, well known, of the national wealth and those that cannot be evaluated in a satisfying manner. This idea was promoted by A. Vincent and R. Neline (1965), who believed that national wealth is a theoretical concept and as such, it is necessary to distinguish between its quantifiable elements (such as the industrial exploitable reserves) and those that cannot be rigorously quantified (such as potential reserves).

The second group, supported by N. N. Constantinescu (1976), gives to the term national wealth both a theoretical and a practical meaning. Thus, are included in the national wealth, in addition to the exploitable reserves (which can be determined with certainty), also those reserves which have a low level of useful elements but which can be drawn in the economic circuit in the future. Therefore, it is considered that in the national wealth should be included both the exploitable reserves of mineral resources (known and rigorously determined) and the potential reserves which cannot be drawn into use and efficiently exploited with the existing technologies. The authors also emphasize the necessity of a periodical evaluation of national mineral resource potential because there are indissoluble links between the evolution of the production process and the volume of goods offered by nature.

The problem of introducing the mineral resources in the national wealth was subject to many studies in our country. Most authors have considered that the evaluation of mineral heritage has a practical importance for the measurement of the potential exploitable subsoil, in order to avoid waste in production and consumption, for their efficient exploitation etc. In order to introduce the mineral resources in the national wealth it was required to group the mineral resources, according to the possibility to attract them in the economic cycle, in three categories (Răducanu V., 2000):

1. useful mineral substances found in deposits;
2. useful mineral substances recoverable from deposits;
3. useful mineral substances capitalized as raw materials.

Such a classification of raw materials is particularly useful as it can highlight the share of national exploitable potential from the total mineral asset of the subsoil. In fact, knowing and evaluating the mineral potential offers the possibility to quantify the share of internal production to cover the necessary of energy and mineral resources.

Developing a methodology and a unitary statistical system of classification and quantitative and qualitative assessment of the mineral resources potential represented a complex issue that has been examined repeatedly by the UN Economic and Social Council. In developing this methodology, the recommendations made by F. Blondell and S. C. Lascky were taken into account (they were valued and supported even since 1956 by the International Committee of the Society of Economic Geologists). These recommendations underline the need to distinguish between the term "reserves" and the term "resources"[1], as well as the classifications made by other specialized bodies. Therefore, in terms of opportunities for exploitation, the European Commission classifies the resources in: exploitable, marginal, submarginal and latent (qualitative aspects). From the point of view of the degree of knowledge (quantitative aspects) there are: not estimated (unknown), presupposed, identified and measured. This classification takes into account that, when evaluating and defining reserves and resources, two factors have to be considered: the degree of geological safety regarding the industry's existence and extent (discovered and potential reserves) and the possibilities to recover the useful substances with the economic and technological conditions existing at a certain moment. These two factors are directly influenced by the technological level existent at a certain moment in the mining industry.

Mc. Kelvey made another distinction between reserves and resources, applied to fossil fuels (Mc. Kelvey V.F., 1978). Thus, the reserves are economically identified deposits and resources include other than reserves also the sub-economic or undiscovered deposits. According to Mc. Kelvey, a high degree of geological certainty leads to the identification of new geological reserves and a known economic feasibility degree leads to the growth of industrial exploitable reserves.

It should be noted that in the picture made by Mc. Kelvey resources are listed in columns according to the degree of knowledge, and in rows according to costs. Even though this classification differs according to the geological and mining peculiarities of minerals, we could make a simplified diagram in order to notice the distinction between the different types of resources (Fig. 1), whose evolution is determined by:

[1] The term "reserves" is limited to the mineral substances estimated and considered exploitable from the teorethical and economic point of view and the term "resources" are the "reserves" plus all the substances that may become exploitable (See: F. Blondell, S. C. Lasky, Mineral reserves and Mineral Resources, Economic Geology 51 (7), 1956; D. Gabor, V. Colombo, A. King, R. Galli. "Sa iesim din epoca risipei, Ed. Politica, 1983).

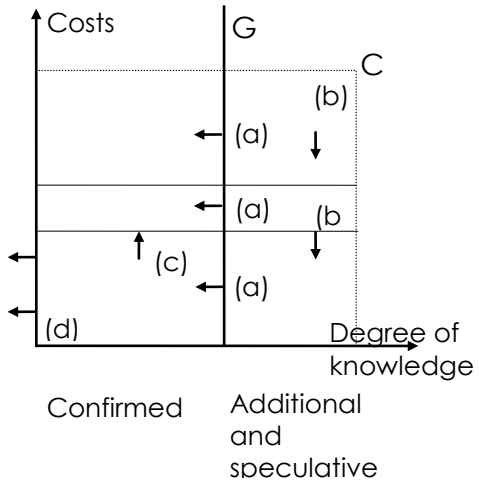


Fig.1: The simplified diagram for the classification of mineral resources according to Mc. Kelvey.

- the growth in volume of confirmed resources following activities of attraction in the economic circuit (arrow "a") of certain deposits;

- shift of some resources from the "high cost" category to "low cost" category following the introduction of new methods of extraction (arrow "b");

- the shift of some deposits from the "reserve" category in the "resources" category due to lower efficiency and higher costs of extraction (arrow "c");

- increase in resource consumption (arrow "d").

It should be noted that the dynamics marked by arrows a, b and c modify only the distribution of resources among the different categories, their total volume remains constant, while those marked by arrow d reduce their volume.

Theoretically, the horizontal lines according to cost may be succeeded infinitely. Practically, these stop at a certain level (line of points c) from where exploitation, even in a distant future, is not profitable. Therefore, the vertical line "G", which marks the evolution according to the degree of knowledge, may have the "O" value, but practically, the process of mineral resources evaluation does not reach this point.

The distinction between "reserves" and "resources" according to the level of production depend also on the mineral resources market, which determines the limit fixing the boundary between these two concepts. As rich deposits deplete, this limit will rise due to increasing level of marginal costs influencing the resources trading prices. Such a movement of the cost limit is stopped by the appearance of certain factors that reduce marginal costs (especially those related to technical progress) (Răducanu V., Bulearca M, and others, 1997).

This methodology was implemented also by the US Bureau of Mines which sorted the mineral resources both in terms of knowledge development (identified and undiscovered) and that of development of profitability level (economic and sub-economic).

Regarding the classification of geological reserves into deposit groups and categories, the specialized literature considers that certain criteria of classification have to be taken into account, among the most important are: knowledge of reserves from the quantitative, qualitative and deposits conditions point of view; the technical and economic exploitation possibilities of the respective deposits; the medium or minimum content of useful substances in the extractible mining gross mass; the existence of natural energy in the case of hydrocarbon deposits etc.

The adoption of these principles led to the development in various countries, including Romania, of similar classifications, which facilitated data comparisons. However, in terms of terminology and parameters used in setting up the categories or classes of reserves these classifications still differ.

Taking into account all recommendations and classifications used, since with the sixth session of the Committee on Natural Resources, held in Ankara in 1979 under the aegis of ECOSOC, was adopted an international classification of mineral resources which attempted to unify all methods of quantitative evaluation of potential mineral resources (in compliance with the essential condition that these principles are compatible with those of the national classifications).

Recently, it has been tried to develop a new methodology to allow the equalization in exploitable reserves of those resources belonging to different categories and groups in order to obtain a full picture of the entire national heritage. Such an activity is extremely important because the evaluation of mineral resources in natural-conventional units (equivalent) allows a better understanding of the potential of different mineral substances by using an equivalent unit (for example: tcc, Kcal or joule for energy).

Problems concerning the environment and the mineral resources

In the context of economic growth, sustainable development, economic and environmental progress, natural resources and environmental protection are having a strong impact on redefining and determining their real content. In the economic literature there are new terms like: ecotechnics, eco-development, ecological progress, ecological growth etc., which express the evolution of economic phenomena and processes due to the human impact on the environment and the restrictions in the natural resources field (FROGER G.1997).

Intense exploitations of natural resources of raw materials and energy have maintained an unsustainable economic growth, leading to an increasing economic gap between the developed and the developing economies. The human impact on nature increased, nature being the main source of natural resources (mineral and organic) and in the same time the main industrial and household waste receptor. The limited absorption capacity of these residues and the low capacity of the natural factors to self-healing were shaken for long periods of time.

In the relations between man and nature the social-economic system proved to be very important. Thus, the desire for profit and the tendency to avoid external costs by not considering the total effect of the economic activity gave the impression of movement in an infinite space, with "free and unlimited" natural assets. The market mechanisms had proved to be unable to prevent this exploitation and degradation of natural environment, causing serious ecological imbalances. This type of economic growth, especially in the developed countries does no longer meet the current conditions, a new vision on the growth model is required, which must take into account a series of restrictions regarding the natural resources and the environmental quality.

Today, the problems on natural environment and natural resources have become increasingly complex. It is therefore necessary: (a) a thorough knowledge of the natural environment and the interactions between the social-economic system and the natural systems; (b) a rational and economical use of natural resources, avoiding waste and disorder in their management; (c) preventing and combating serious environmental degradation caused both my man and nature; (d) harmonize the immediate interests with the long term and permanent interests of the human society in the use of natural environmental factors: air, water, soil, subsoil, flora, fauna, nature reserves, monuments of nature, landscapes. By discussing these issues we can discover a series of consequences regarding the efficiency criteria of modern economic growth and sustainable development.

Modern concepts, that support sustainable development, start reconsidering the human role not only in the economic system of market economy, but also in the social, spiritual, moral space. It can be noted the international and national institutions concern for maintaining a natural environment capable of efficiently capitalize the human physical and intellectual capacity. For Romania, which goes through profound changes towards a market economy, a problem of vital importance is the protection of natural environment. It is also important to learn and promote new conceptions on the relation man-nature, meaning that man is part of nature and cannot live but in harmony with it, for his own good and for the whole community.

The rational and economical use of natural resources leads to obtaining from the same amount of raw material and energy a larger amount of utilities or added value due to the amplification of work in their processing. The process of rationalizing and saving resources is complex and requires knowledge of all factors influencing it. This leads to less pressure on the natural environment, the

rational conservation and use of nature. In this respect, it is necessary to reduce the energy intensity of certain products, to attract and seize all relevant components of deposits, to set aside the way too selective character of processing technologies (by creating integrative technologies), to recover and recycle materials after they are no longer used, to recycle waste and industrial waste.

The problem of economic growth under the environmental protection conditions has at least two aspects. First is the incompatibility of economic growth with natural environment disorder and second the efficiency criteria of economic growth in contemporary conditions.

1. The increase of national income and gross domestic product per capita implies attracting in the economic circuit both the natural resources of raw materials and energy and their superior capitalization. Their selective use requires more energy and causes waste of raw materials. Basically, the relation between the mass of natural resource extracted and the finite product decreases in direct proportion with the increase in processing steps. Contrary to this trend, recovery and recycling reduces this waste, but differently from one economy to another, depending on the existing industrial structure, their degree of technicality and economy.

The economic growth was realized so far as a "polluting" growth based on the idea of obtaining maximum profit and ignoring the external costs of development. Some economists consider that the economic growth cannot avoid pollution, their removal meaning an arrest in the economic growth, solution mirrored in "Limits of Growth" with the famous theory "zero growth." Economic growth and sustainable development should not be opposed to environment, but adapted to the laws of nature, of natural ecosystems. Therefore, ensuring an ecological balance requires particular attention from society, effective actions to protect the environment, to prevent and combat environmental degradations, of rationally using natural resources.

2. The economic growth in the modern market economy is efficient when the optimum economic-social-ecological relation is fulfilled. This includes: maximizing the efficient use of key resources for the society; allocating these resources based on the market mechanisms; maximizing material and spiritual welfare by making consumption more diversified and efficient; maintaining ecological balance. These criteria of the optimum economic-social-ecologic must be completed by new criteria which come from the necessity for economic growth in the context of environmental protection. Such criteria may be: a) minimizing the natural resources incorporated into products or per unit of national product and national income; b) appropriate conservation of natural resources; c) full capitalization of material substance and energy by designing and introducing technologies in steps; d) production and products energy intensity criterion (energy intensity – essential condition of economic efficiency); e) recycling and recovering after consumption; f) the biodegradation and integration in the natural circuits of goods entered in the natural environment; g) minimizing costs imposed by using non-polluting technologies; h) rational consumption of goods and services per inhabitant; i) environmental responsibility in all productive and non-productive areas.

a) *The criterion of minimizing the amount of natural resources per product* favors growth by maintaining the average annual growth rate, in terms of restructuring, modernization and improvement of technology by stimulating activities which bring about technical progress. The difficulties in accessing the raw materials and energy make this criterion a very important one. Along with this criterion we can find the qualitative and quantitative restrictions, the economic efficiency of attracting and using natural resources. Generally, attracting resources occurs in the decreasing order of their effectiveness and therefore the same amount of utilities is obtained by using a bigger volume of production factors.

b) *The criterion of appropriate conservation of natural resources* starts from the fact that social production takes place in a finite environment with renewable and non-renewable resources, which must satisfy not only the immediate requirements of the present generation, but also the needs of future generations. From this point of view, it is necessary to reduce material consumption and reallocation of natural resources used for military purposes by orientating them towards peaceful activities. Maintaining economic growth, without worsening working conditions, involves

rebalancing the relation between the amount extracted from nature and the amount included in the goods produced at various stages of processing.

c) *The criterion on the full capitalization of material substance and energy* starts from the principle of conservation of matter and energy. Based on this criterion it is made the transition from linear production processes to active loop system production processes.

d) *The criterion on the energy efficiency national production* expressed by the indicator "energy consumption/social product or national income" which measures how many energy units are used to obtain a unit of national product or national income. For physical products it is necessary to specify the energy efficiency by degrees of intensity. In the economic literature in our country, it was expressed the need to determine the cumulative energy consumption in value and physical units (t.c.c.).

e) *The criterion of post consumption recycling and recovering* aims to anticipate the recovery of useful material from the physical body of material goods after their removal from production, both as inputs and consumer goods. This involves maintaining the quality of economic goods with low and very low value – likely to be attracted in a given time horizon – and after expressing the duration of use to be considered as "stocks of raw materials in the recycling process."

f) In order to maintain the quality of the natural environment, by avoiding the risk of pollution, *the biodegradation criterion* takes into account the decomposition of materials without any harmful effects to nature. "Biodegradation is the decomposition process of certain elements, objects or organic bodies in nature under the action of living organisms and especially of "microorganisms." By the action of biodegradation the decomposing microorganisms help reintegrate into nature all organic compounds. Therefore, the capitalization in steps of natural resources, ensuring the return and reintegration of waste in nature, justifies the promotion of eco-technics and economic eco-growth.

g) *The criterion of minimizing the anti-pollution costs* is verified by the curve of total savings resulting from the anti-pollution activity. This curve has a rapid growth up to a certain point where growth is slowed (Fig.2.).

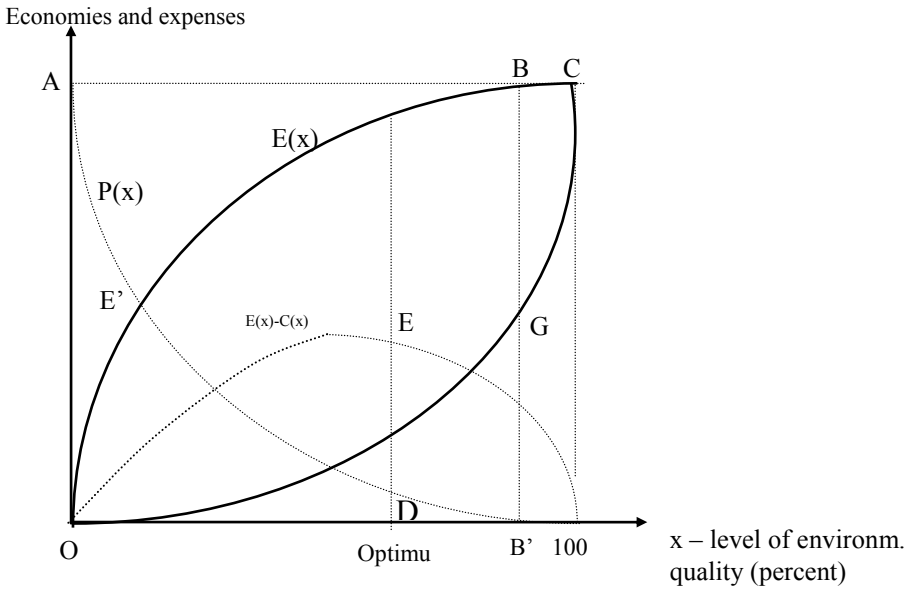


Fig. 2. The evolution of costs for anti-pollution actions C(x), the total savings resulting from the anti-pollution activity E(x) and the damage produced by pollution P(x) according to the level of environment quality (x)

The inside region bounded by curves C(x) and E(x) represents an area of environmental quality where saving are greater than anti-pollution costs. In practice, removing pollutants and waste should be made up to the point B, because this marks the disappearance of economic and social damage caused by pollution. The optimal level, minimal level, where these expenses have maximum effects is achieved on top of the graph representing the differences between E(x)-C(x). In other words, in point D on the Ox axis it is achieved the optimal level of environmental quality; in point E the minimum level, optimal level, of anti-pollution costs; and in point F the maximum level of savings and benefits as a result of the implementation of anti-pollution measures.

The problem of optimizing the anti-pollution costs arises especially since they appear as production costs, included in the company's costs.

Starting from the fact that these expenses are necessary, the company must determine their optimal level compared with the saving and benefits achieved by each pollutant unit.

From the figure result the main functions that define the actions taken in combating environmental damage and the effects obtained. Here is their meaning:

C(x) - expenses for anti-pollution actions, depending on parameter X, which represents the level of environmental quality;

E(x) - total savings resulting from the anti-pollution actions, according to the same parameter x;

P(x)- economic and social damages caused by pollution, according to the same parameter x.

In determining the optimal level we have to start from the increasing values of x, which express a growing level of environmental quality. The anti-pollution expenses curve increases slowly at the beginning. These expenses shall influence the gross income (benefit) and hence the national income and price level. On the other hand their optimal determination is necessary because without any of these expenses the absolute growth of the national product and income cannot take place, because of the worsening environmental conditions.

h) *The criterion of material and social wealth*, under the modern economic growth conditions, means increasing the national income per capital and the amount of goods and services to satisfy their needs. However, under the environmental protection conditions, the need to preserve and improve environmental factors has to start with determining the consumption needs, their harmonization with the biological requirements of each individual. Material wealth is achieved in relation to the natural and human resources level and efficiency. When talking about rational consumption of goods and services per capita, economic growth efficiency may be achieved by switching from mono-energetic production to multi-energetic production, from the "dirty" (but still useful) fossil resources, to the clean ones. How do we exploit or preserve the resources available today, how energetic we develop our new technologies, how carefully we reduce their capacity to damage the environment, all these represent opportunities we leave to future generations. To make sure that the current aspirations will be met in the future, we have to limit the range of actions allowed today. Giving up on the tendency to shorten a product's life and to acquire personal goods, over the real needs, are basic requirements for the conservation of natural resources. Economic growth, under the conditions of environmental protection, is marked by the society's efforts to avoid the degradation of nature. Together with the economic growth there is a tendency of increasing external costs to be born, primarily, by those who caused the environment degradation. It is clear that money have to be spent in order to maintain the environment unaltered.

i) The social and economic implications of the exploitation of nature are not sufficiently understood by all participants in the economic life. One or another criteria mentioned above is being generalized, or any change is judged by the immediate pecuniary effects. "Taking into account this insufficient knowledge, anyone taking any action which represents an investment in nature, no matter how minor it would seem at first sight, is bound to make a scientific analysis of all implications that might result from it."

Conclusions

Any decision should be based on ethics, environmental responsibility, which involves compliance with the rules of human coexistence with nature. These rules were formulated by Odum in 1971 and state that man is part of nature and any economic activity bears the seal of this relationship sine-qua-non. "Homo tehnicus" or "Homo economicus" should respect and implement the following rules, a true human-nature Decalogue:

- do not waste potential energy;
- know the exact elements on which our own system's survival depends;
- act so that everyone benefits as efficiently as possible from the energetic circuits of the system;
- highlight in your own work systems those parts to place you on the goods side of events;
- value the other forms of life in the environment, as it were your own life, because that is the only way to survive;
- judge any value by the energy needed to obtain and by the energy capable of accumulate, and the flow of energy do not turn it, any time it is possible, into money;
- do not use large amounts of energy because mistake, destruction, noise and excessive surveillance lead to waste;
- do not take anything from man and nature without offering them back a service of equal value;
- enrich your legacy of information, because by this unique and complex action the system shall justify what is immortal in it;
- have trust in the advantages of stability over growth, of organization over competition, of diversification over uniformity, or system over parts and of general survival process of humankind over personal peace.

We believe that in terms of a sustainable development the criteria of measuring the efficiency of economic growth could be more, but in this paper we referred only to the most important ones.

It should be noted that these criteria converge towards a common goal: the satisfaction of human welfare. This gives a human meaning to growth which cannot take place, whatever the system, without a rational use of natural and human resources, without maintaining a natural environment proper for life on earth.

We consider necessary to mention that, under the economic development conditions, the natural environment becomes environment prepared for the economic activities of protection, defense, preservation and improvement. Environment appears both as premise for development and the materialized effect of our efforts to attract it and transform it in a man-made environment. From this point of view, we consider complete and full of meaning the definition given by academician N. N. Constantinescu to the environment "the environment itself is defined by understanding man as part of nature and purpose for the general development; he represents all natural factors and those created at a certain time and in a certain place, influencing the ecological balance, determining the life and work conditions of man and the social development prospects." From here results a new concept regarding the position of man towards nature, towards its wealth. The demiurgic, almighty, victorious in the "fight" with nature position is excluded. Environment is an economic factor of utmost importance, traditionally considered production factor, along with capital and labor. It is also interesting the definition of environment given by prof. Gonzague Pillet, from the University of Freibourg, Switzerland, who considers that "the environment or environmental resource is any function assigned or obtained from an ecosystem or produced by it." We note, in particular, the point of view according to which the environment becomes economic resource of the ecosystem as it attains certain functions in the benefit of man. But the environment cannot be limited only to the function of provider of resources and recreational services; it provides, first of all, the greatest service to humanity: the maintenance of life on earth, basis for life and economic activities.

References

- AMIGUES, J.P.,(1997), *Enjeux et limites de l'evolution des actifs naturells, în Economies et Societe*, Serie Developpment croissance et progres, F.nr.35,4.
- BADILEANU, M.,(2002), *Economia protectiei mediului inconjurator*, Editura SYLVI, Bucureşti.
- BULEARCA, M.,(1995), *Teoria pieţelor şi utilizarea eficientă a resurselor naturale, în Fluxuri şi pieţe internaţionale de materii prime şi energie*, Studii şi cercetări economice nr.10-11, ERNE-IEI, CIDE, Bucureşti.
- CONSTANTINESCU, N.N.,(1976), *Economia protectiei mediului inconjurator*, Editura Politica, Bucureşti.
- FROGER, G.,(1997), *Elements pour une theorie institutionnaliste des resources naturelles revisites*, în Economies et Societe, Serie Developpment croissance et progres, F.nr.35,4/1997.
- MC KELVY, V.E.,(1972), *Mineral Resource Estimates and Public Policy*, 'n American Scientist, vol.60 (ian-feb).
- MALENBAUM, W., *World Resources for the Year 2000*, 'n The Anaals of America Academy of Political and Social Sciences, iulie 1975.
- PLATON, V.,(1997), *Protectia mediului si dezvoltarea economica. Institutii si mecanisme in perioada de tranzitie*, Editura Didactica si Pedagogica, Bucureşti.
- POSTOLACHE, T., (coord.)(1987) *Tratat de economie contemporana*, vol. 2, cartea 1, Editura Politica, Bucureşti.
- RADUCANU, V.,(2000), *Economia resurselor naturale*, Editura ALL BECK, Bucureşti.
- VINCENT, A., NELINE, R.(1968), *Etude methologigique du Capital natural*, Ed.Dunod, Paris.

NON-QUALITY COSTS AND THEIR CONSEQUENCES IN THE ORGANIZATION

ANDREI DIAMANDESCU*

Abstract
The purpose of this paper is to evaluate and analyze non-quality costs. This approach can be best based on the definition and understanding of the quality costs and then passing to the study of the effects of failures on the quality and the costs of these failures. Finally the paper will suggest several ways to improve the control costs of non-quality.

Keywords: *quality system, quality costs, non-quality, evaluation of non-quality, total quality management.*

Introduction

The problem of quality costs can be treated in terms of highlighting the costs, the time evolution of the concept and their classification (types of quality costs). Quality costs contribute to a high proportion of the total costs of an organization. Their importance is as important as they can not be fully reflected in the accounting documents, many of them can not be measured in practice. Thus, some costs can be calculated, such as for example the costs involved during the warranty period, others, due to wastage or subsequent processing can be found in the documents, others can not be practically measured.

If it were be possible making comparisons between quality costs, they can be regarded as a qualitative benchmark of an organization. However, to perform such analyzes should be considered different cost categories and among these must be the most carefully studied non-quality costs. About these costs it is said that they are most important in the organizations.

About the costs of quality there are opinions that the correct wording would be "cost of poor quality" or "non-quality costs." Although the arguments using the phrase, non-quality costs "were quite strong, yet most authors use the term" quality costs ", considered to be more comprehensive and fairer because, logically, quality costs include non-quality costs.

Quality costs are in fact a generic formulation of an activity for all costs involved in getting a quality product or service, they can be defined as "costs of insurance and quality assurance as well as losses incurred if the quality is not reached ". This definition completes an earlier definition given all of J.M. Juran, but the definition which better capture the idea of non-quality costs, "costs will disappear if there will be no defects"[1]

Quality costs include three categories of costs that voluntary cost to achieve a desired level of quality, cost involuntary failures in reaching this level (these cost categories were called "quality costs" - costs of compliance and the "cost of non-quality" - costs of non-compliance), plus the cost of the lost opportunity.

This classification was made to distinguish clearly between "useful cost, good, necessary" that will produce the desired quality and "bad costs, unnecessary", which are cost penalty for failures to achieve the desired quality.

Methodology for assessing non-quality

Evaluation of non-quality is first considering the cost of the investment in quality systems. These investments are designed to bring the organization to a level of quality according to the

* Assistant Lecturer, Faculty of Economic Studies, "Nicolae Titulescu" University of Bucharest; PhD Candidate at The Bucharest University of Economic Studies (email: dandrei@univnt.ro).

[1] Joseph M. Juran – *Quality Control Handbook*, McGraw-Hill, New York, 6th Edition, 2010.

requirements. The second issue concerns the costs incurred by the organization for quality failures. These costs are most important to the organization and should be as carefully controlled and managed.

Working on quality management organizations generates some costs that are not included in the traditional accounting systems. However the biggest challenge in testing, evaluating and reducing quality costs represent precisely these hidden costs. The cost of non-quality can be calculated as the difference between the costs actually incurred by the organization in the current and costs reduced if there was no error and no defect during the design, manufacture, marketing and use of products.

Information necessary to compute non-quality costs are sometimes difficult to obtain. The data source for the analysis of these costs may be technical and commercial product documentation, and accounting organization since it records the data. Another source of data could be estimates based on surveys and organizations interested in knowing the costs of non-quality.

Total Quality Costing

Traditionally, so-called quality costs have been divided into the following four main groups[2]:

1. Preventive costs;
2. Inspection / appraisal costs;
3. Internal failure costs;
4. External failure costs.

In the quality literature, it is often claimed that total quality costs are very considerable, typically between 10–40% of turnover. This is why these costs are also called 'the hidden factory' or 'the gold in the mine'. We believe these figures can be much higher, especially if invisible costs are taken into account.

Invisible costs are everywhere. This can easily be seen by looking at developments in quality cost theory from before 'the TQM age' to the present.

Before TQM. Quality costs consisted of the costs of the quality department (including the inspection department), costs of scrapping, repairs and rework and cost of complaints. The companies were aware of the above division of quality costs and understood that prevention was better than inspection and that an increase in preventive costs was the means of reducing total quality costs. Most companies, however, did not deal either systematically or totally (i.e. in all the processes in the firm) with these costs.

The TQM age. Total quality costs are defined as the difference between the firm's costs of development, production, marketing and supply of products and services and what the (reduced) costs would be in the absence of defects or inefficiencies in these activities. Put another way, total costs can be found by comparing the firm with 'the perfect firm' or 'the perfect processes'. In this sense, there is a close connection between the concept of quality cost and benchmarking.

There is also a close connection between quality control points and quality costs. A quality control point is defined as a result (output) of a process which management has decided to control and therefore measure. The result of any process is thus a potential quality control point. Since all firms consist of a large number of processes, there will be a similarly large number of potential control points. Each of the firm's processes can be compared with the perfect process and all the potential control points can therefore be compared with the result of 'the perfect process'. If the difference between the result of the perfect process and the firm's present process result is valued in money, we get the process's contribution to the total quality costs. We can also call this the process's Opportunity For Improvement measured in money. This process can best be determined either at the time of the annual quality audit or during the year when the quality improvement teams choose new quality problems to solve.

[2] Dahlgaard J.J., Kristensen K., Kanji G.K – Fundamentals of Total Quality Management – Process analysis and improvement; Taylor & Francis Group, e-Library 2007.

Approach of non-quality

We can not talk about quality without managing non-quality, if we get the additional costs, which reduce the competitiveness of products.

Concept of quality means the assessment of the cost of non-quality improve previously attempted definition of quality is "the totality of characteristics of an entity that bear on its ability to satisfy stated and implied needs" (ISO 8402). Quality is "the totality of characteristics of an entity that bear on its ability to satisfy stated and implied needs" (ISO 8402).

The best definition in the opinion of many specialists can only come from those who are considered as the pioneers of quality management. Thus, for K. Ishikawa "Quality can only be defined in terms of one who does it."

For the worker quality means "to be proud of his work".

For enterprise manager quality means the realization of the required production.

For the engineering director quality is the compliance with the specifications

For the marketing manager quality is the best fit of the product to public expectations.

However, obtaining this quality implies a cost that denominates the cost of obtaining quality"

Evaluation of the non-quality methodology

We can distinguish two aspects:

• The first aspect is related to the investments we made to achieve the level of quality that meets the requirements. This is the price to pay to ensure an acceptable level of quality.

• The second aspect is the cost of doing things wrong, or not doing them well since the first time. The cost incurred is twice the price it would be enough to invest to make a conform quality product.

Financial implications

The production activity generates energy losses, human and physical resources that do not appear in conventional systems where only conventional accounting costs of material, labor and workshop are taken into account. Research quality should reduce these hidden costs.

The cost of non-quality can be defined as the difference between the current cost and reduced cost if there were no errors and defects in the design, production, marketing and use.

It is possible to calculate the cost of non-quality in % of turnover of a company or a nation's GDP.

The information needed to calculate the costs of non-quality are sometimes difficult to obtain (often confidential). They can be obtained from the accounting documents (analytical and general), technical documents, administrative or commercial. It is always possible to make an estimate from surveys of persons concerned.

Elements of costs of non-quality that involves in the evaluation

Most experts say that non-quality costs can be measured from:

- Excess of financial expenses
- Delays billing
- Loss of prestige
- Delayed start or premature introduction of new products
- Absence, insufficient or inadequate presence of the product in retail outlets
- Repeated requests for changes in design
- Purchase price wrongly established or calculate
- Out of stock or excessive stock
- Stop production

- Investments not utilized at their entire capacity
- Over-consumption of raw materials and supplies
- Failures of production tools
- No recovery or inadequate utilization of by-products.

After the evaluation, the following ratios are calculated and integrated dashboard management company. They constitute the reference indicators to monitor progress in the improvement process:

$$I_1 = \frac{NQC}{T} \times 100$$

$$I_2 = \frac{NQC}{AV} \times 100$$

$$I_3 = \frac{NQC}{NE} \times 100$$

NQC = Non quality costs
T = Turnover
AV = Added value
NE = number of employees

Analysis of the different costs of non-quality

The calculation of the cost of non-quality is an accounting method that locates in the business all unnecessary expenses caused by the failure of products and services. The cost of quality has the same elements with the addition, the cost of failure prevention.

The result of the calculation of the cost of non-quality allows the company management to prioritize the improvement of the quality programs.

It is important to observe that the data at the origin of this information are not always reliable, and these expenses are only part of the shortfall.

For example the fact of losing dissatisfied customers services business is generally much more serious than replacing defective products.

The design means manufacturing and distribution is not perfect and it causes defects in the product that will result in losses automatically.

These losses can be quantified directly:

1. Internal anomalies: scrap, rework, repairs - repairs, decommissioning of finished product or ongoing losses unemployable purchases other internal costs, pollution, accidents, absenteeism, etc.

2. External anomalies: Customer complaints, cost of warranty, other external costs, late fees, interest charges for missed deadlines, loss of customers, reimbursement for damage caused to others, insurance premium to cover the liability products etc..

We must add to this the indirect losses in credibility as the loss of brand image (and often most difficult to quantify)

Detection

- Salary and expenses related to audits
- Cost control outsourced
- Supplies and products for various tests used to evaluate the product
- Costs calibration

Prevention

- Establishment of quality documents (manual quality assurance, quality plan, control plan, procedures)
- Evaluation of suppliers
- Awareness, motivation and training to quality and quality management.
- Conducting quality audits.

Methodology to reduce the cost of non-quality

- Understanding the situation, identifying all the costs of non-quality (state of places)
- Set realistic and achievable goals of decreasing costs.
- Prioritize problems with the cost Pareto chart:
- Ranking the costs.
- Identifying the priorities
- Determine the true causes the diagram cause - effect (Ishikawa) that classifies a structured way the views of various experts
- Define corrective actions, monitor their implementation and measure the effectiveness with dashboards
- Conclude preventive actions
- An inappropriate choice of suppliers may result in the following consequences:
- Reinforced entrance inspection
- Returns to suppliers
- Delays
- Incidents manufacturing.

Action process for the treatment of non-quality

Cost improvement

Lowering costs is given by:

- Improving process operations
- The removal of non-rewarding operations
- The improved results following improvements oriented process.

To improve the results, it must be directed to the process and not move towards results. The process must be understood in its broadest sense and includes the development. The largest gains are achieved in the design and industrialization.

Reduction of losses

In an attempt to reduce losses, investments are needed.

Investment in hardware detection

It is investing in equipment, methods and techniques of control:

- Receiving inspection
- Controlling the products
- Verification of the measuring instruments
- Controlling the lines
- Inventory control
- Monitoring time
- Control orders and invoices

But this investment is limited. This is strictly a consequence andit does not address the causes of evil.

Investment in prevention equipment

We can talk about the reason to investing in equipment, methods and techniques of prevention.

- Check specifications (contract)
- Review design and production
- Improvement plans and records of planning and control
- Creating quality indicators
- Training of staff
- Implementation of a quality approach from model

An investment in prevention is made only if the losses will be reduced. The optimization is made knowing that there is a correlation between losses and investment.

Conclusion

Non-quality costs money. The cost of non-quality proves to be an indicator that can help the company management to understand the problem of quality, highlight opportunities for improvement and to measure the progress of the improvement actions.

It thus makes it possible to summarize the overall situation of the quality in the company and speak in common terms, which allows us to measure progress and set priorities in corrective actions.

It is therefore necessary to manage quality by implementing a gradual process of continuous improvement that will bring the industrial enterprise of a state of "detection - defection" to a state of "prevention - action."

The most productive investment would ultimately be for many businesses prevention. This will be a key element of quality management.

References

- Ph.B. Crosby – *Completeness: quality for the 21st century*. Dutton, New York, 1992.
- Campanella, J. – *Principles of Quality Costs,* ASQC, Milwaukee, Wisconsin, USA 1990.
- Dahlgaard J.J., Kristensen K., Kanji G.K. – *Fundamentals of Total Quality Management*. Taylor & Francis Group, e-Library 2007.
- Kèlada, J. – *La gestion intégrale de la qualité. Pour une qualité totale*, Edition Quafec, Québec, 1990.
- Duret D., Pillet M. – *Qualité et production*, Editions d'organisation Paris, 2002.
- Joseph M. Juran – Quality Control Handbook, McGraw-Hill, New York, 6th Edition, 2010.
- Joseph M. Juran – Upper Management and Quality, New York, 1980.
- Joseph M. Juran – Management of Quality Control, New York, 1967.
- Graham W. Parker – *Costurile calităţii* Editura Codecs, Bucureşti, 1998.

AN OFF-LINE DUAL MAXIMUM RESOURCE BIN PACKING MODEL FOR SOLVING THE MAINTENANCE PROBLEM IN THE AVIATION INDUSTRY

GEORGE CRISTIAN GRUIA[*]
MICHAL KAVAN[**]

Abstract
In the aviation industry, propeller motor engines have a lifecycle of several thousand hours of flight and the maintenance is an important part of their lifecycle. The present article considers a multi-resource, priority-based case scheduling problem, which is applied in a Romanian manufacturing company, that repairs and maintains helicopter and airplane engines at a certain quality level imposed by the aviation standards. Given a reduced budget constraint, the management's goal is to maximize the utilization of their resources (financial, material, space, workers), by maintaining a prior known priority rule. An Off-Line Dual Maximum Resource Bin Packing model, based on a Mixed Integer Programing model is thus presented. The obtained results show an increase with approx. 25% of the Just in Time shipping of the engines to the customers and approx. 12,5% increase in the utilization of the working area.

Keywords: *bin packing, maximization, resources, scheduling*

1. Introduction

Scheduling in the field of Maintenance is any variety of scheduled maintenance to an object or item of equipment. Specifically, Planned Maintenance is a scheduled service visit carried out by a competent and suitable agent, to ensure that an item of equipment is operating correctly and to therefore avoid any unscheduled breakdown and downtime.[1]

Aircraft maintenance checks are periodic inspections that have to be done on all commercial/civil aircraft after a certain amount of time or usage, according to Federal Aviation Administration (FAA) in the United States,[2] Transport Canada, for Canadian carriers, or the European Aviation Safety Agency (EASA) for EU carriers. Taking into account that an airplane (or helicopter) engine must be checked and repaired in such a way that the quality of the repair should be nearly perfect and the operational scheduling involved in this field, we've decided to investigate a scheduling problem within a maintenance facility, where the engines must be priority-based scheduled function of the availability of multiple resources.

The present article aims to present a way for solving the problem of maximizing the utilization of the available resources for the maintenance and repairing operations of the propeller motor engine (for helicopters and small commercial and recreational airplanes) based on a priority rule when entering the company. In order to solve it, a Mixed Integer Programing model is created, but due to the complexity of the problem we try to solve it by an analogy to the Off-line Dual Maximum Resource Bin Packing problem where three novel approaches are used. Then, the model is tested in a Romanian company and results are presented accordingly.

The Bin Packing Problem has been extensively studied in combinatorial optimization. We can state it as follows:

---

[*] Graduate Teaching Assistant, Ph.D. Candidate, Czech Technical University in Prague, (georgecristian.gruia@fs.cvut.cz).
[**] Associate Professor, Ph.D., Czech Technical University in Prague, (michal.kavan@fs.cvut.cz).
[1] Wood, Brian, *Building care*. Wiley-Blackwell, 2003.
[2] AFS-600. "Chapter 8. Inspection Fundamentals". In *Aviation Maintenance Technician Handbook,* ed. Federal Aviation Administration. 2008, 129.

-for a given set of n items with a weight w_1, w_2, … , w_n and an unlimited number of identical bins of maximum capacity c, find a way of packing all the items into the minimum number of bins so that no item is left aside and the capacity of the bin c is not exceeded.

This problem has several applications in different areas like production scheduling, manufacturing, hospitals, logistics, but however is a NP-hard problem[3] as Karp[4] showed.

In our case, the above stated problem was modelled as a Dual Bin Packing Problem (DBPP). If classical bin packing problem is about minimizing the total number of bins required to assign a given set of items, the dual one is about maximizing the number of items that can be packed in the available bins, i.e. maximizing the resources utilization for our maintenance operations.

The DBPP has been referred to in the scientific literature[5], as a problem of maximization the number of items packed in a fixed number of bins[6], but also as a problem of unlimited number of bins[7], where we should pack items in as many bins as possible so that the total weight of each bin is at least equal to its capacity. Assmann[8] studied this problem from a discrete point of view. We will however consider the first type of the DBPP in our study case.

There are a lot of applications of the DBPP but until this article was written, the authors didn't find an application in the manufacturing aviation industry where products are scheduled according to their priorities and the workers' performance on their jobs, which in the worst case scenario may increase their time working on a specific assigned product, thus the schedule would be affected.

2. Problem definition

The Romanian company involved in our research, further "the Company", was as many other manufacturing and maintenance companies, hit by the financial crisis. Due to this unfortunate situation, the management had to let go some of the employees and the working floor was redesigned in order to better comply with customers' requirements and due-dates. A problem with the process line occurred when the delayed orders hit a record number of 300 per week (because workers were laid off and human resources together with the financial resources had to be drastically reduced). Also due to the Company's working profile, the maintenance has to be done according to the airspace regulations and ISO 9000 Quality Standards, so a middle way had to be found when scheduling the incoming orders for different types of engines with different problems.

The Company's facilities are equipped with a tear-down area, a dismantling dedicated area and several types of equipment for measurement and NDT capabilities. Engines repairs and overhauls are performed using state-of-the art technology. All phases of the repairs are applied according to the requirements: dismantling, stripping and cleaning, visual inspection of components, measurement and/or non-destructive inspection tests. After the preliminary analysis, technical reports are filled in and the replacement of non-reparable parts is made accordingly. The engine is then reassembled and tested in another testing facility for ensuring the required performance as part of the quality assurance process. The Company's testing facilities cover a wide range of tests: test rigs for fuel/oil/hydraulic accessories of the engine, balancing and over-speed equipment, test beds for

---

[3] Garey R. Michael and Johnson S. David, *Computers and Intractability. A Guide to the Theory of NP-Completeness,* Freeman, (New York, 1979), 340.

[4] R.M. Karp, "Reducibility among combinatorial problems" In *Complexity of Computer Computations*, ed. Miller, R. et.al. (Plenum Press, 1972), 19.

[5] Dean P. Foster, Rakesh V. Vohra, "Probabilistic analysis of a heuristics for the dual bin packing problem" *Information Processing Letters* 31 (1989):287-290.

[6] J.L. Bruno and P.J. Downey, "Probabilistic bounds for dual bin packing," *Acta Informatica* 22 (1985):333-345.

[7] Labbe, Laporte and Martello Silvano, "An exact algorithm for the dual bin packing problem" *Operations Research Letters* 17(1995):9-18, accessed December 20, 2012, doi: 10.1016/0167-6377(94)00060-J.

[8] S.F. Assmann, "Problems in discrete applied mathematics" (PhD diss., Mathematics Department, Massachusetts Institute of Technology, 1983).

turbojets and turbo shafts. Similar procedures are applied on specific equipment for Dynamic Components for helicopters.

Assembling of components, subassemblies and final assembling are performed in a dedicated shop area, divided in several working areas (WA), using complex assembling precision specific equipment, where specific personnel works in teams, each team being run by a Team Leader (TL) and each team having assigned one engine at a time. There is also available and used equipment for balancing (shafts, rotors, rotating assemblies) and over-speed tests.

Due to the large number of airplanes and helicopter engines which have been waiting for the maintenance operation to be performed on and also due to a new lucrative contract for the next 5 years with important clients, the management decided to redesign the production and overhaul shop space in parallel with an optimization of the available resources, according to a priority-based rule.

For the production 2,000 sqm were dedicated and for overhaul 4,000 sqm shop space. The assembly shop of the new facility allows for other engines from the same family-types and sizes similar to the engines in current maintenance to be repaired. But in order to do so, the current orders had to be scheduled for maintenance and the delayed orders had to be reduced to zero.

The old and new orders had to be scheduled according to: the priority of each case (late orders had the highest priority, because of every additional day of the one week, i.e.5 working days, guaranteed maintenance time, the Company had to pay 0.01% penalties; and also new orders had high priority, i.e., the customers had the opportunity of paying an extra fee for getting their engines fixed faster than usual), the resource availability (available shop space, equipment, each TL was responsible for his/her engine and each TL had a certain affinity and thus was specialized in a certain engine type) and working time of each team. Due to the constraint imposed by the limited resources compared to the high number of engines which had to be repaired in the same time, a working schedule was implemented for the 8 hours, 5 days a week, working time. Sequencing the maintenance operations on engines and placing them at the right time slots, according to the available resources plays an important role in maximizing their utilization.

In this schedule case it was considered the case of maximizing the resource utilization – for the fixed costs to be as lower as possible, when assigned to final products. In other words, the fixed costs with the resources and the new production and overhaul shop space, are known in advance and taking in consideration that the working overtime would make the management to pay workers their overtime, the goal is to maximize the number of engines that are repaired using fixed working hours through a given set of available resources.

Some of the engines which arrived for their annual maintenance procedure had complaints from their owners and had to be subjected to additional tests before the typical maintenance procedure, and so required a delayed start of the maintenance, i.e. delayed start.

The engines when entering the Company's facility are registered in the internal informational system (database) from where are scheduled on a first-come, first-served basis.

The Service department, based on this FCFS policy but also according to the priority of each engine in combination with some engines which had to be subjected to different tests (had a delayed start) had to choose the optimal solution of the sequence of the engines which entered the shop floor. Accordingly, a tool was needed in order to comply with these constraints but also to maximize the resources utilization, as part of the top management's priority.

Our problem is a complex one because it takes in consideration a long term period of time, where the resources can have distinct availabilities, function of different parameters like: delayed materials needed for the repairs, different tools and/ or machines are not in handy for one team because are used by another team, one team cannot work on more than one engine at a time and so the assigned floor space is occupied until the engine is ready to go.

Another constraint is added to the actual problem, i.e., new people are needed to be specialized for the new orders (also because of the lay-offs, it was cheaper to employ and train new workers than to increase the salary of the old ones, which accordingly were laid off) and so they

should be able to be trained on the spot within different maintenance operations and the maintenance could have been prolonged.

The article is further organized as follows. A MIP model is presented in the 3rd part, while in the 4th part a simplified example of the DBPP is solved using three heuristic approaches for finding the best possible solution: First Fit Decreasing-based (FFD), First Fit Increasing (FFI) and a new First Fit Best Randomized (FFBR) approach. In the last part of the article conclusions are drawn based on the obtained results and we show that the FFBR is the best possible solution for our example, taking in consideration that DBPP is NP-hard.

3. A Mixed Integer Programing (MIP) model

We've started from our goal of maximizing the utilization of available resources (people, space, fixed working hours) according to the cases' priority and availability. In order to do so we should maximize the number of repaired engines in a given working time-slot according to the resources' availability. Due to the priority constraint, we should maximize the sum of priorities of the scheduled engines as an objective. In this way, weights are given to each engine when entering the facility in order for a priority scale to be made, and use these weights for the model to solve first the highest priority cases and then the lower priority cases.

In order to maximize the utilization of the working area and the shipment of the repaired engines, two coefficients are introduced:

$$k_1 = \frac{total\ time\ the\ WAs\ are\ occupied}{total\ available\ time\ across\ all\ WAs} \text{ and } k_2 = \frac{scheduled\ engines}{total\ number\ of\ engines\ to\ be\ scheduled}$$

and will be used is assessing the improvement of the maintenance process after implementation of the three approaches for our DBPP.

Before trying to state the MIP model, several initial conditions should be stated:

- A team can only work on one engine at a time in only one designated shop area.
- A team can repair an engine only if all the members, including the TL is present at work in that day, at that time interval (time-slot).
- Each team is specialized in one engine and when prioritizing this aspect is considered, but every team can also switch the type of engine which will repair in case of increased number of a certain engine type.
- Engines, when entering the facility are prioritized according to the customers' requirements and they are sent to testing facility or to the deposit (where will wait to be processed at a later time) or directly to the WA. Accordingly, we can give 3 levels of priority to these engines: 1 star to the engines which are not an urgency and can still wait a little time in the deposit, 2 stars for those which should be tested and 3 stars to those, which customers need as soon as possible and for which they paid an extra fee to "be first in the row".
- Each TL has assigned the type on engine at which his/her team is the best and we can predict that the duration of each repair is known in advance.
- In order for the time to be better managed, the working day (8 hours) is divided in 30 minutes time slots obtaining a 16 time-slots for one working day. We have chosen 30 minutes, because this is the average time for checking the parameters of an engine (visual and computer aided process) by performing a basic diagnostic analysis.
- The Company works on a 1 shift, 8 hours a day, 5 day per week, working program.
- An engine can be automatically scheduled for maintenance by the Service department, but also by each of the Team Leaders according to their time availability. As part of the management's motivation scheme, a Team Leader and his/her team can enter the internal competition of "the Best Team" Award, with extra financial benefits, according to the highest number of engines repaired

according to their priority. But also the number of engines assigned by the TLs cannot surpass the number of the assigned engines by the Service department.

For a clearer description of the problem, we give a mathematical formulation for the problem. We first give notation used in the formulation (and throughout the paper).

The parameters, indices and variables of the proposed model can be seen from table 1 below:

Variable	Equals to:
$x_{ewatltsd}$	1, if the engine e is scheduled for maintenance in the WA with a team, run by team leader TL, at time-slot ts on day of the week d, 0, otherwise
y_{ewad}	1, if the engine e is assigned to the WA on day of the week d, 0, otherwise
z_{etl}	1, if the engine e is scheduled for maintenance by their TL, 0, if it is not scheduled at all
w_{eS}	1, if the engine e is scheduled for maintenance by the Service department, 0, if it is not scheduled at all

Table 1 – Variables of the MIP model

A start time (St) and an end time (Et) can also be considered for the maintenance process of a given engine.

Indices and parameters:

EIndex for engines requiring maintenance e = 1, 2, … , E

WAIndex for working areas: wa = 1, 2, … , WA

TLIndex for team leaders: tl = 1, 2, … , TL

TIndex for teams: t=1, 2, …, T

DIndex for days, used for scheduling the maintenance operations: d = 1, 2, …, D

TSIndex for time-slots during a working day: ts = 1, 2, … , TS. In our case TS=16, for one shift working day, but we consider a general approach.

IIndex for repairing operation: i = 1, 2, … , I

JIndex for engine type which will be repaired: j = 1, 2, … , J

SSet of all engines which must be repaired / pass maintenance operation

S^TSet of engines which require additional tests

S_iSet of engines requiring the repairing operation i

S_jSet of engines of type j

S_{tlj}Set of TLs specialized in repairing the engine type j

P_{ed}Priority of engine e in the day d: $P_{ed} \in \{1, 2, \dots, k\}$ $stars$ as a priority scale

T_eTotal time for maintenance / repair for engine e, required by the best TL and his / her team (we assume that T_e = 1 time slot = 30min)

T_{tl}Time needed by the TL for fixing an engine according to his/ her abilities (skills)

T_TTime for the transportation of the materials, people, engine to and from the WA, before and after the maintenance

A_{tltsd} 1, for the availability of the TL (with his / her team) at time slot ts on day d; 0, otherwise.

E_{tsd}Total equipment (tools, machines, parts, consumables) available for time slot ts on day d

N_{ee}Number of equipment e required for fixing an engine e

Although each TL has his / her own team, on some engines which are in better conditions than others, there is no need for all of the team members to participate in the repairing process, thus we consider that the number of team members is variable and we introduce:

M_{tsd}Total number of team members available at time slot ts on day d

N_{me}Number of team members required for fixing an engine e

Our goal is to maximize the number of engines scheduled in all the WAs during all given working days. This can be noted as follows:

$\sum y_{ewad} P_{ed} = maximum$ subject to:

$\sum_{watld} x_{ewatltsd} \leq 1, \forall\, e, ts(1)$

This states that an engine can be assigned at any time slot to at most one TL and WA on a certain day.

$\sum_{etl} x_{ewatltsd} \leq 1, \forall\, wa, ts, d(2)$

That is, at most one maintenance operation can be performed in a WA in a given day and time slot.

$\sum_{ewa} x_{ewatltsd} \leq 1, \forall\, tl, ts, d(3)$

Any TL can work on at most one engine at a given time slot and day.

$\sum_{wad} y_{ewad} \leq 1, \forall\, e(4)$

An engine will be scheduled to at most one WA across all days.

$\sum_{tlts} x_{ewatltsd} \leq TS\ y_{ewad} \forall\, e, wa, d(5)$

A TL works on an engine in a given WA at a time slot on a day no more than the assigned TS for engine e to be repaired in the WA on day d.

$\sum_{wad} y_{ewad} = \sum_{tl}(z_{etl} + w_{eS})\ \forall\, e(6)$

The scheduled engine will be assigned with its TL to a specific WA on a day d.

$\sum_{watsd} x_{ewatltsd} = (T_e + T_{tl})(z_{etl} + w_{eS}) + T_T\ \forall\ e, tl(7)$

The total time slots an engine is worked on, equals to the sum of total time for maintenance required by the best TL and the time of the actual TL according to his/ her skills, where the T_e is considered a reserve time slot for additional complications which may appear during the repair.

$\sum_{wa} x_{ewatltsd} \leq A_{tltsd} z_{etl} + A_{tltsd} w_{eS} \forall\, e, ts, d, tl(8)$

The scheduled engines by their TL and the Service department should be repaired only by the Team Leaders who are available.

$S_t \leq ts \sum_{watld} x_{ewatltsd} + TS\ (1 - \sum_{watld} x_{ewatltsd}) \forall\, e, ts(9)$

The start of the maintenance operation should not exceed the time slot allowed for the start of its repair.

$E_t \geq (ts + 1) \sum_{watld} x_{ewatltsd}\ \forall\, e, ts(10)$

The maintenance of an engine with eventual repair should not exceed the maximum time slot allowed by the timetable and should be longer than the calculated start of the operation, with at least one time slot.

$\sum_{watltsd} x_{ewatltsd} = E_t - S_t \forall\, e(11)$

The time slot allowed for the engine e should be equal to the difference from the end and the start of the maintenance and repair.

$\sum_{ewatl} N_{me} x_{ewatltsd} \leq M_{tsd} \forall\, ts, d(12)$

A certain number of team members are necessary to be present at the time slot ts in the day d, for the maintenance of the engine e.

$\sum_{ewatl} N_{ee} x_{ewatltsd} \leq E_{tsd} \forall\, ts, d(13)$

A certain number of equipment should be available for the maintenance of the engine e to be performed in the allowed time slot ts on the day d.

Due to the conditions of the bin packing problem, we must state that the variables can have only two values according to their specific conditions, i.e., 0 and 1.

We cannot solve the problem due to the NP-hard situation, but we can solve a simplified example where we show our three approaches.

We consider a number of 8 engines with different priorities (as given by the customers), but note that the same engines have priorities given by the available time and resources' constraints within the company.

Our methodology for solving this problem can be stated as follows:

1.Assign priorities to the set of engines according to the outside constraints (from the customers who paid an extra fee).

2.Assign priorities according to the estimated repair time, the availability of the TLs and their teams in the certain days and time-slots (inside constraints).

3.Search the local optimum for both of the cases.

4.Compare and combine the local optimums in order to satisfy the constraint of maximizing the resources' utilization, i.e., to find a global optimum.

5.Send the engine e to maintenance to the assigned WA with the available TL in the day d on the time slot ts.

6.Repeat the 1st to 5th step until all the engines are repaired and shipped to the end users.

The constraints for the 8 engines' example for the day d are as follows:

Engine no.	1	2	3	4	5	6	7	8
Customers' priority	3	1	3	2	2	2	3	1
Expected maintenance time in time slots	1	1	1	3	3	3	2	2
Available Team Leaders specialized in these engines*	YES =TL1	YES =TL2	YES =TL3	NO =TL1	NO =TL2	NO =TL3	YES =TL4	NO =TL4
Special equipment available for each specific engine	NO	YES	NO	YES	NO	YES	NO	YES
Available WA in ts	YES	YES	YES	YES	NO	NO	NO	NO
Company's priority**	2	3	2	2	1	1	1	1

Table 2 – An example for 8 engines with their constraints

*) If the TLs specialized in engines 4, 5, 6, 8 are not available; other TLs available will repair these engines.

**) Take in consideration that the company's priority is solved in a very simplistic way, which doesn't correspond to the reality! However in practice we cannot find the priority according to the company's resources and time constraint so easily!

If we try to solve this MIP model we won't be able to get feasible solutions due to the complexity of the model. Also we can make an analogy with the dual bin packing problem. We are able to solve it only for a restricted number of engines which are to be scheduled for maintenance, because this relates to a NP-hard problem.

4.A new approach for solving the DBPP

The DBPP can be solved with different algorithms, but due to the fact that we must choose a way of prioritizing the incoming engines, we've decided to use the First Fit Decreasing, First Fit Increasing and a new First Fit Best Randomized approach. Our solution tries to find a way for repairing the incoming engines and according to our constraints x, y, z, w, which can take only 2 values {0,1}, our DBP problem transforms into an Off-Line Dual Maximum Resource Bin Packing (ODMRBP).

In this off-line variant, we have a limited number of unit sized bins, the working areas, and a sequence of items with sizes in [0; 1], and the goal is to maximize the number of bins used to pack all the items subject to our constraints. A set of items fits in a bin if the sum of the sizes of the items is at most one, where number one can be associated with a fixed engine. In the off-line variant, there must be an ordering of the bins such that no item in a later bin fits in an earlier bin.

Thus we must first sort the items, and in our case this is done with the help of the "stars" scale, where for the engine with the highest priority the engine receives 3 stars and the one with lowest 1 star. Then the first engine e_1 should be sent to the first WA where "fits best" and the maintenance will start according to the available resources and time slot.

We consider and further solve the problem for 4 Team Leaders and 8 engines which must be scheduled on 2 Working Areas in 8 time slots from Monday, i.e, 4 hours.

Team Leader	Availability
TL 1	1-8
TL 2	3-7
TL 3	1-8
TL 4	4-8

Table 3 - Team Leaders availability on Monday

We use the following approaches:

• *First-Fit-Increasing* (*FFI*) allocates engines to WA (bins) in non-decreasing order with respect to their "sizes" (priority and resource availability).

In this case, we must first sort the engines according to the increasing priority as can be seen from Tab.4. With the time availability of the Team Leaders and their teams we find the best way for utilizing the available resources for scheduling the engines on Monday morning.

Engine no.	2	8	4	5	6	1	3	7
Customers' priority	1	1	2	2	2	3	3	3
Expected maintenance time in time slots	1	2	3	3	3	1	1	2

Table 4 – Engines sorted according to increasing priority

The results can be seen from the table below, where "?" signifies an empty time slot, an extra cost the company had to pay if this approach was chosen:

30 minutes time slots	TLs working on e_x engine in WA1	TLs working on e_x engine in WA2
1st	?	?
2nd	?	?
3rd	TL2 on e_2	TL2 on e_5
4th	TL4 on e_8	TL2 on e_5
5th	TL4 on e_8	TL2 on e_5
6th	TL1 on e_4	TL3 on e_6
7th	TL1 on e_4	TL3 on e_6
8th	TL1 on e_4	TL3 on e_6

Table 5 – Results for the FFI approach

• *First-Fit-Decreasing* (*FFD)* allocates engines to WA (bins) in non-increasing order with respect to their "sizes" (priority and resource availability).

For this approach the engines are sorted in a decreasing priority manner, according to Tab.6 and results are in Tab.7.

Engine no.	1	3	7	4	5	6	8	2
Customers' priority	3	3	3	2	2	2	1	1
Expected maintenance time in time slots	1	1	2	3	3	3	2	1

Table 6 – Engines sorted according to decreasing priority

30 minutes time slots	TLs working on e_x engine in WA1	TLs working on e_x engine in WA2
1st	TL1 on e_1	?
2nd	TL3 on e_3	?
3rd	?	TL2 on e_5
4th	TL4 on e_7	TL2 on e_5
5th	TL4 on e_7	TL2 on e_5
6th	TL1 on e_4	TL3 on e_6
7th	TL1 on e_4	TL3 on e_6
8th	TL1 on e_4	TL3 on e_6

Table 7 – Results for the FFD approach

• *First-Fit-Best-Randomized (FFBR)* allocates engines to WA (bins) in a purely randomized, corresponding to the optimistic scenario, where each TL wants to work on a specified engine and they make their schedule accordingly.

We will sort the engines first according to the willingness of the TLs and second according to the customers' priority as can be seen from Table 8. The results one can see from the Table 9 below:

Engine no.	1	3	2	4	5	6	7	8
Customers' priority	3	3	1	2	2	2	3	1
Expected maintenance time in time slots	1	1	1	3	3	3	2	2

Table 8 – Engines sorted according to the optimistic scenario

30 minutes time slots	TLs working on e_x engine in WA1	TLs working on e_x engine in WA2
1st	TL1 on e_1	?
2nd	TL3 on e_3	?
3rd	TL2 on e_2	TL2 on e_5
4th	TL1 on e_4	TL2 on e_5
5th	TL1 on e_4	TL2 on e_5
6th	TL1 on e_4	TL3 on e_6
7th	TL4 on e_8	TL3 on e_6
8th	TL4 on e_8	TL3 on e_6

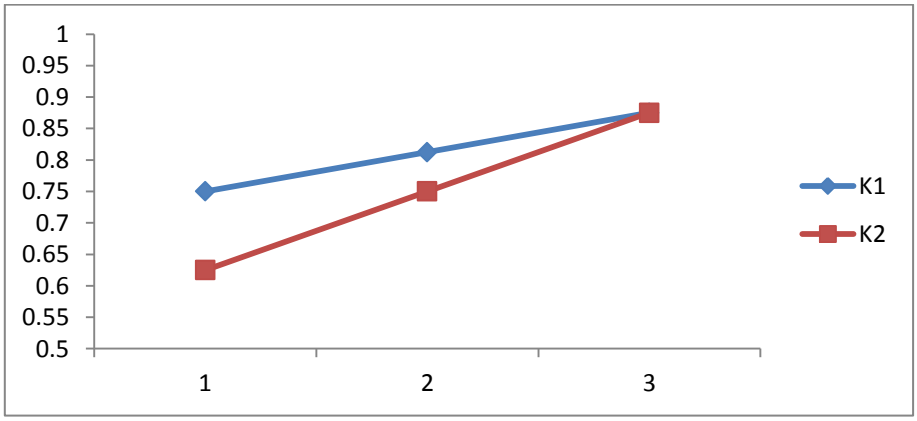
Table 9 – Results for the FFBR approach

Another way of measuring the success rate of our approaches for solving the ODMRBP problem was by computing the two coefficients presented at the beginning of the paper. Also due to the solutions presented above the best values of these 2 coefficients are for the FFBR approach,

where workers together with their TLs and Service department schedule their own tasks and try to optimize every day the WA and time slots' utilization.

The obtained results show an increase with approx. 25% of the Just in Time shipping of the engines to the customers and a decrease of the penalties the company had to pay for sending engines with delays and an approximate 12,5% increase in the utilization of the working area, which also increase the resources' utilization and minimizes the fixed costs of the working area when assigned to the total costs of the engines' repair.

The coefficients can be seen from the Graph below:



Graph 1 – Values of the coefficients K_1 and K_2 for FFI, FFD and FFBR approach

5.Conclusions

In this paper we have offered a possible solution to a multi-resource, priority-based case scheduling problem, which the authors have encountered in a Romanian manufacturing company, where helicopter and airplane engines were repaired. A Mixed Integer Programing model was developed, but due to the complexity of the problem, which is NP-hard, a solution was described only on a small batch of engines which had to be scheduled on the Monday morning. An analogy with the Dual Bin Packing problem was noticed, more exactly with the Off-Line Dual Maximum Resource Bin Packing problem and three new approaches were used in order to find the best possible solution. As one can observe the best results are when we use the new FFBR approach, as a number of 7 out of 8 engines are scheduled according to the priority imposed by the customers, the working space availability and Team Leaders' working hours. For the previous approaches a number of 5 out of 8 engines are scheduled for FFI and 6 out of 8 for FFD. Even if 7 out of 8 still misses one engine to be scheduled, the authors consider that FFBR approach can be successfully used for finding the optimum solution (with all the engines scheduled), because on a longer time interval, the complexity of the problem increases, but with the help of computational software a good solution can be found.

Due to the intellectual property rights the data presented in this paper were altered and the company's name cannot be stated, but the authors tried to present the ratios, coefficients and results as close to reality as possible.

Future studies are aimed at improving the upper presented approaches, with the goal of developing new software for solving this exact type of problem, where other constraints can be added or removed according to the specific profile of the company where the optimization of the resources is needed on a priority-based rule.

Acknowledgement

The paper was elaborated in the framework of solving projects of GAČR P403/12/1950.

References

- AFS-600. "Chapter 8. Inspection Fundamentals". In *Aviation Maintenance Technician Handbook*, ed. Federal Aviation Administration, 59.
- Brian Wood, *Building care*, (Wiley-Blackwell, 2003), 150-178.
- Dean P. Foster, Rakesh V. Vohra, "Probabilistic analysis of a heuristics for the dual bin packing problem" *Information Processing Letters* 31 (1989):287-290.
- J.L. Bruno and P.J. Downey, "Probabilistic bounds for dual bin packing," *Acta Informatica* 22 (1985):333-345.
- Garey R. Michael and Johnson S. David, *Computers and Intractability. A Guide to the Theory of NP-Completeness*. Freeman, (New York,1979), 340.
- Labbe, Laporte and Martello Silvano, "An exact algorithm for the dual bin packing problem" *Operations Research Letters* 17(1995):9-18, accessed December 20, 2012, doi: 10.1016/0167-6377(94)00060-J.
- R.M. Karp, "Reducibility among combinatorial problems" In *Complexity of Computer Computations*, ed. Miller, R. et.al. (Plenum Press, 1972), 19.
- S.F. Assmann, "Problems in discrete applied mathematics" (PhD diss., Mathematics Department, Massachusetts Institute of Technology, 1983).

SERVICES EXPORT PROMOTION, A PRIORITY WITHIN THE GLOBAL WORLD ECONOMY

OCTAVIAN-LIVIU OLARU*

Abstract
The basic challenge in exporting a service is to convince a foreigner to try a service that does not exist yet. The foreigners have to believe that the service will be of good quality and will meet their needs. Usually the foreigner forms that belief based on recommendations, referrals, or somehow seeing the service provider in action. There are also several roles that trade promotion activities can play in building that belief or credibility. A national TPO needs to find or reinforce some special quality that its country has so that when potential customers hear about a service supplier from this country, their first response is, "Oh yes, I've heard good things about services from your country."

Keywords: *foreign trade promotion, services, TPO, efficency, export*

1. Introduction

The importance of international trade is widely recognized not only by the business sector, but also by governments. Governments all over the world have reviewed and streamlined their trade policies during the last decade. Economic reform programmes have improved the overall policy framework and created a more favorable environment in many countries.

In spite of this considerable resource endowment of trade promotion programmes, these programmes need to be selective in terms of products, functions and/or markets. An equal distribution of trade promotion resources over all products, functions and markets would obviously not make sense, as resources would be spread to thinly to reach anywhere a critical mass.

In spite of this considerable resource endowment of trade promotion programmes, these programmes need to be selective in terms of products, functions and/or markets. An equal distribution of trade promotion resources over all products, functions and markets would obviously not make sense, as resources would be spread to thinly to reach anywhere a critical mass.

In the context of globalization and increased competitiveness in the world market in general, and in Central and Eastern European countries, in particular, structural adjustment programmes and trade policy reforms are preconditions for economic growth and healthy trade performance. However, macroeconomic initiatives need to be complemented and supported at the microeconomic and operational level, in order to ensure a dynamic, outward-oriented and competitive business sector. Firstly, there is a need to improve the export supply response through institutional strengthening and enterprise-oriented assistance in areas such as product development and adaptation, trade finance, export quality management, export packaging, and better management of imported inputs. Secondly, efforts towards market expansion and diversification must be intensified, for example through the strengthening of business information networks.

Trade Promotion Organizations (TPOs) have a broad mandate to provide or coordinate trade support services in these areas.

A Trade Promotion Organization (TPO) is defined by the International Trade Centre UNCTAD/WTO from Geneva like a private or public institution with the main task to facilitate entry into foreign markets for a collective group of exporters and manufacturers of the home country.

* Professor, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: livolaru@yahoo.com).

Governmental TPOs are those bodies set up by government as part of its infra-structure in order to facilitate foreign trade in general, but exports more in particular.

2. Recent Trends of the International Trade with Commercial Services

The total dollar value of world merchandise exports (nominal terms) jumped 19 per cent to US$ 18.2 trillion in 2011. This increase was nearly as large as the 22 per cent rise in 2010 and was driven in large part by higher primary commodity prices.

Commercial services exports also grew 11 per cent in 2011 to US$ 4.1 trillion. The share of commercial services in total goods plus commercial services trade (on a balance of payments basis) was 18.6 per cent, the smallest such share since 1990.

Transport services recorded the slowest growth of any sub-category of services (8 per cent), followed by other commercial services (11 per cent) and travel (12 per cent). The slow growth of transport services is perhaps not surprising considering the close relationship between this category of services and trade in goods, which stagnated in the second half of 2011. An oversupply of new container ships may have also depressed revenues in the shipping sector.

The top five exporters of commercial services in 2011 were the United States (US$ 578 billion, or 14 per cent of the world total), the United Kingdom (US$ 274 billion, 7 per cent), Germany (US$ 253 billion, 6 per cent), China (US$ 182 billion, 4 per cent) and France (US$ 161 billion, 4 per cent). The United Kingdom replaced Germany as the world's second-largest exporter of services compared with last year's tables, but this was mainly due to a large upward revision in official statistics on UK exports of other business services and financial services, which together make up roughly half of all UK commercial services exports.

The top five importers of commercial services were the United States (US$ 391 billion, or 10 per cent of the world total), Germany (US$ 284 billion, 7 per cent), China (US$ 236 billion, 6.1 per cent), the United Kingdom (US$ 171 billion, 4 per cent) and Japan (US$ 165 billion, 4.3 per cent). There were no changes in the ranking of the top importers.

3. Service Innovation Management

Innovation in any industry requires a conscious allocation of resources and careful management of the concept development and implementation process. The firm is at risk if the innovation fails; however, there is also the potential for major market rewards if the firm is able to sustain intentional, repeatable change. Services firms face some additional challenges related to innovation that are not shared by goods-producing companies:

- Need the most skilled staff in direct contact with customers, but promotion means moving away from direct contact.
- Need staff to be highly motivated, but staff have flat career paths.
- Need staff to take initiative in solving customers' problems, but staff need to conform to standard service procedures.
- Need staff to use information technology, but there is no time available for training.
- Need staff to "recover" well with customers, but often they do not have the authority to act.
- Need customers to cooperate, but customers do not know or accept their role in co-production.
- Need customers to recommend the service, but customers' perceptions are shaped after they receive the service.

To manage these additional challenges, managers of services firms need to be able to address the issues discussed below: reducing the risk, managing the customer interface, "training" customers, managing staff performance, engaging front-line staff, linking innovation options to the type of service, and using information technology.

Reducing the risk. One of the main barriers to innovation adoption is the customers' fear of the risk involved. For services firms, risk is already a factor in that customers never know ahead of time how well the service will be provided. While customers may find a service innovation intriguing, they may also be concerned that the service firm is less likely to be able to control quality in providing a service with which they are less experienced.

The issue of risk is particularly critical in regard to business services (i.e. those provided to businesses rather than to households) as the consequences of service failure are often more serious. Business services typically comprise half of all the output of the services sector, or as much as 40% of overall economic activity, and are the most likely candidates for export.

Managing the customer interface. Manufacturers produce their goods away from the customer and so can separate the operational and marketing functions. This is not the case for services firms. In most cases, customers have too levels of direct interaction with the service production process, whether virtually or in person (so called line of interaction and line of visibility) and one level of indirect interaction (so called "line of internal interaction").

While the technical aspects of the service may be provided by professional staff, the customer's experience of the service process is shaped in large part by the front-line contact staff, which performs both as administrative and marketing staff. The "line of interaction" represents the potential moments of truth when the customer is in direct contact with the company's employees, and so he is gaining a positive or negative impression of the company service capabilities.

The "line of visibility" indicates the point at which the customer is aware of being in direct contact with the firm. Poor service at this interaction point often reflects a staff attitude that views customer contact as disruptive. Alternatively, poor service may result from not having analyzed all aspects of the service delivery process from the customer's perspective.

The "line of internal interaction" refers to interactions between those responsible for services to customers and those who provide the support functions within the firm (e.g. accounting, computer network administration) which affect how well the service can be delivered to the customer. This is the place within a service firm where organizational innovations are most promising but most often overlooked. The ease with which this interaction is handled is often referred to as "internal service quality".

Training customers. Often customers must themselves play a role as "co-producers" or "unpaid staff" for the service to be delivered. This requires them to learn their role and execute it properly. In this respect it has to be mentioned the conclusion of the United States Technical Assistance Research Program (TARP) that 30% of customer dissatisfaction results unwittingly from their own inadequate performance.

When considering service delivery innovations, firms often overlook the customer's role, which overlaps significantly with that of staff at all three stages of the service (service design, service delivery, service evaluation). At the service design stage, an increasing number of services firms solicit customer input on what would make a new service or service delivery process most attractive to them. Once the service is being delivered, both customer and staff roles may vary. If the design is for self-service, then customers will be taking the lead "production" role.

Alternatively, staff may provide the service to customers without requiring customer participation, or both customers and staff may collaborate in creating the service experience. Once the service experience has been completed, staff will want to review and evaluate it, but customers play the dominant role.

When services firms introduce an innovation, the customer's role may need to change. This raises issues about whether or not customers want to take on the effort of learning a new role. Services firms also need to think through how they will communicate those changed role expectations and what additional benefits customers could expect to receive if they are willing to adopt a new role.

Managing staff performance. When customers assess service quality, what they are typically assessing is staff performance (i.e. how the service was delivered) rather than the service offering *per se*. This means that successful innovation needs to focus on execution in the interaction in the web of relationships. One of the challenges for managers is that, while customer satisfaction increases with consistent task execution, staff motivation may decrease if they feel that their work has become routine. Generally staff is motivated by increased task complexity and increased discretion in task execution.

Because research for innovation begins with assessing customer needs, it is usually counterproductive for services firms to segregate research and development into a separate department. In fact, the most knowledgeable staff is often those who interact directly with customers.

Traditionally, "research" has been viewed as a technical skill that is not part of front-line responsibilities. Services firms which overlook the potential for input from front-line staff are severely limiting their chances of success.

Linking innovations options to the type of service. While in general service operations differ from goods production in the tangibility of their output, they also differ amongst themselves in critical ways. One of the dimensions most relevant to innovation is the perceived degree of risk. Experience shows that customers will expend much more energy seeking out specific services firms if the potential for nonperformance is high and the consequences are highly negative. Customers select some services primarily on the basis of convenience of location and are unlikely to travel to a distant location no matter how innovative the service offerings are. More risky services purchases (e.g. medical care, security services) usually result in customers researching options carefully and selecting a service provider largely because of its ability to deliver rather than for reasons of convenience.

Using information technology to innovate. Both domestic and export service operations have been revolutionized by the links between information technology and telecommunications. The Internet is being utilized for marketing, partner search, service delivery, inter-staff coordination, and interactive customer research, among other uses. The successful launch several years ago of amazon.com, the first bookstore to exist only in cyberspace, is one example. Medical specialists provide real-time consultations to remote communities that they may never visit in person. Customer service telephone numbers may be answered from anywhere in the world.

4. Main Approaches in Trade Promotion of Services Exports

At micro - economic level, the main approach for a services exporter is represented by his ability in promoting his new product on the international market. In this respect, the basic challenge in exporting a service is to convince a foreigner to try a service that does not exist yet. The foreigner has to believe that the service will be of good quality and will meet their needs. Usually the foreigner forms that belief based on recommendations, referrals, or somehow seeing the service provider in action. There are also several roles that trade promotion activities can play in building that belief or credibility.

At macro – economic level, the main task in promoting the national business oportunities in the field of services on the international market is in charge of the national TPO, which, in cooperation with the non – governmental organizations and the economic operators has to create a general favorable image of a certain branch on a well defined segment of the world market. In this respect, the national TPO needs to find or reinforce some special quality that the national providers of a specific service have, so that when potential customers hear about a service supplier from this country, their first response is, "Oh yes, I've heard good things about services from your country". An example in this respect is the following: when people think of computer software and IT services, they think of India which now has 12% of the global market. Any Indian IT firm benefits from that reputation, which was built up over a period of ten years.

Here are some questions to ask yourself to help a national TPO to identify the competitive advantage of the national providers of service:

- *Does the country have a geographic advantage?* For example, Panama is already known for being a transportation and distribution hub due to the Panama Canal and its strategic position between Central and South America. Based on its infrastructure and links to four submarine fibre optic cable systems, Panama can now market itself as the regional hub for e-services.
- *Does the country have a language or cultural advantage?* For example, Peru has large Japanese and Chinese immigrant communities.
- *Does the country have a human resources advantage?* For example, Jordan has a number of well- trained professionals who were trained in the U.K., U.S., or France and have extensive work experience in the Arab Gulf countries.
- *Does the country have a reputation for being particularly business friendly or familiar with other ways of doing business?* For example, Barbados has a reputation as a politically stable, open economy with over 8,000 offshore businesses.
- *Does the country have a reputation in a particular sector that can be leveraged as a country image?* For example, Jamaica has a global reputation of reggae music, which is being leveraged as a lead sector.
- *Can the country provide the foreign customer access to a range of other markets?* For example, a CARICOM country like Trinidad & Tobago can position itself as the gateway to the Caribbean (and South America through links with Venezuela) for services like market research.

5. Selecting Priority Sectors and Target Export Markets

Usually, a country is offering over 60 categories of services being exported. For successful trade promotion, the national TPO will need to pick priority sectors for the focus of its promoting resources – i.e., sectors where the local companies have:

- Some competitive edge to exploit.
- Sufficient domestic capacity to support rapid export growth.
- Some potential for synergies among services.
- A service industry association to work with government on trade promotion strategies.

In general, services are exported to a wider range of markets, at least 30 different export markets, than are goods. For effective use of resources, the national TPO will need to select geographic markets that hold the greatest growth potential. For this reason, the national TPO has to take into account the following:

- The number of firms already exporting to, or interested in, that market.
- Economic growth patterns in that market.
- Attitudes in that market towards importing services.
- Historical links with that market, including investment and tourism.
- Ease of access for exporters (direct flights, visa requirements).
- Ability to pay, including exchange restrictions, inflation rate, currency stability.

6. Services Trade Promotion Activities

While goods promotion typically focuses on the tangible product (making use of virtual trade shows and online catalogues), services promotion needs to focus on the solutions that can be provided by the service companies. Customers are particularly interested in onestop solutions. For example, a consortium that includes architecture and design, engineering, construction, and project financing is more competitive than any of those services on their own.

While there is a wide range of services being exported, from a trade promotion perspective there are five general categories of services that benefit from slightly different promotional approaches:

• *Infrastructure services*. These include architecture, engineering, construction, transportation, distribution, and financial services.

• *IT-related services*. These include computer consultancy, software development, data processing, database management, and call centres.

• *Business services* (non-IT-specific). These include a wide range of business support activities such as research & development, equipment leasing or maintenance, market research, management consulting, translation, investigation & security, etc.

• *Professional services*. These include the licensed professions (other than architecture and engineering) like accounting, legal services, medical & dental services, nurses and veterinarians.

• *Quality of life services*. These include education & training, health-related services, entertainment services, cultural services, recreational services, and sporting services.

There are eight general types of activities that have proven useful in promoting the above mentioned five categories of services.

• *Participation in global or regional trade events*. For some services, there are annual or biannual trade events that provide excellent profile building and networking opportunities. Examples include CeBIT, Medtrade, and WTA. In some instances, it is possible to find that a regional trade event that is held in an export market of priority is even more useful. To maximise effectiveness, it is useful to have some kind of export country presence – a booth with information about service capabilities, a sponsored reception for participants from targeted export markets, speakers on the program, etc.

• *Sector-specific trade missions.* These trade missions would be comprised of service firms that are already exporting or wishing to export. To maximise effectiveness, the TPO which is in charge with the mission has to think to have some kind of theme to the mission and organise opportunities for mission participants to meet not only with potential customers but also with potential partners. A component of the mission would be educational presentations by mission participants. An example of this type of mission is the health services missions Malaysia has led to Cambodia and Brunei in order to convince local health practitioners to refer patients to Malaysian hospitals for specialised care.

• *Cross-sector trade missions.* These trade missions would be comprised of service firms from several industries willing to work together to provide "bundled' services.

• *Partnering events.* The purpose of such an event is to encourage collaboration between organisations, either across national boundaries or across sectoral boundaries. Such events can be held for service firms and/or for service industry associations.

• *Media tours.* The purpose of this type of event is to promote the profile of service firms' capabilities in the media of developed markets where media coverage confers credibility. The structure would be to identify a small group of service firms with unusual capabilities and successes, and then to hire a public relations firm in the target market to arrange a series of media interviews with those firms.

• *Incoming missions.* Incoming missions from target export markets provide a low-cost opportunity to acquaint potential foreign customers with the capabilities of service suppliers. The structure would be to have an business event at which service suppliers could provide useful information, followed by a networking reception.

• *Networking with investors*. Sometimes foreign investors import services (especially professional and business support services) because they are unaware of local capabilities. Providing a structured opportunity to highlight national expertise gives the local firms the chance to engage in exporting.

• *Missions to international finance institutions*. These missions would be comprised of service firms that provide the types of services currently being funded by international financial institutions such as the World Bank, the regional development banks, or bilateral aid agencies. The

purpose would be to apprise the officers of the capabilities of country's service firms both to deliver IFI-funded projects in their country and also to deliver quality services in other donor-funded markets.

7. Conclusions

Export readiness is the capability to succeed in export markets. Innovation links to export readiness in several ways. First, in order to resource a company export initiative effectively, it may need to introduce internal organizational innovations to handle different customer demands. Second, the manager will find that his company will profit the most in an export market if it is offering a service or service delivery process that is new to that target market. Third, in order to adapt to the cultural norms of the target market, it is very likely that the company will need to change features of its service or the manner in which its service is delivered (again an innovative activity).

Exporting can strengthen overall competitiveness if the company is able to select target markets where the services it can offer are a good match with local needs and cultural values. Foreign customers can offset low demand in a home market and may provide hard currency earnings. However, because of cultural variables, it is all too easy to misread customer needs, motivations and priorities. The same is true with local partners and staff.

To improve a service company's chances of export success through innovation, there are several strategies to put into practice:

- It has to target ethnic subgroups with cultures similar to the services provider.
- It has to target expatriates from the services provider's home country who are living in the target market.
- It's very useful to find a local partner and let them lead on issues of services design and delivery that are culturally specific.
- It's considered to be efficient to hire local staff for the lead front-office, high-contact positions.

Entry into new export markets can be speeded up through strategic alliances with local service providers. A local partner can vouch for the service exporter capabilities and can provide it with ready-made networks. Strategic allies can also help exporter to succeed in third markets due to their reputation and profile.

References

- Hofstede, G.: "Culture 's Consequences", Beverly Hills, Sage, 1984.
- International Trade Centre UNCTAD/WTO - Priorities on Export Trade Promotion and Competitive Advantage, 2005.
- International Trade Centre UNCTAD/WTO - Trade Promotion Approaches for Services Exports, December 2010.
- International Trade Centre UNCTAD/WTO - Using The Internet For Service Exporting, November 2010.
- International Trade Centre UNCTAD/WTO, Geneva, "Choosing Your Service Export Market", 2008.
- International Trade Centre UNCTAD/WTO, Geneva, "Innovating for Success in the Export of Services", 1999.
- Olaru, Octavian Liviu - Promovarea exportului, componentă esenţială a strategiei naţionale de comerţ exterior, Editura Cavallioti, Bucureşt, 2002.

ROLE OF DIVERSITY IN TEACHING MARKETING

MAGDALENA PLATIS[*]
ELEONORA GABRIELA BABAN[**]

Abstract
In a contemporary context, education is regarded as an innovative concept that has a powerful impact on educating the young generation. Selectively passing over knowledge in an adequate framework allows an optimum development of educational actions that have a specific goal. The role of education in the society's development and in the development of each individual increases significantly as the impact of technological progress on the educational process requires an organization of the educative activity in accordance with these significant changes in society. From the past and up to now, the education system has undergone important stages in the transformation and improvement of the educational activity. The modernization of the education system aims to achieve an optimal balance between the contemporary society's demands and the quality of the educational activity. The objectives of this study are the following: highlighting the context of higher education in Romania, presenting the importance of teaching marketing in an applied way, the analysis of the effectiveness of implementing modern teaching techniques, the analysis of the impact of diversity in teaching marketing discipline, highlighting the role of the teacher in teaching and learning activities. Teaching strategies and interactive teaching methods are direct ways of action that stimulate the activity of teaching-learning. By using modern strategies and means of education, the teacher makes task achievement more efficient, thus facilitating the transmission of knowledge taught.

Keywords: *innovation, interactive teaching strategies, diversity, marketing, higher education*

1. Introduction

Education contributes to the development of each individual having a purpose oriented towards training and educating individuals to adequately adapt to the demands of the labor process but also to everyday reality. For a proper functioning of the education system a connection of all education and training activities to a social, economic, political, geographic, demographic and cultural level is required in each country. In a knowledge-based society, the continuous improvement of the education process represents a priority axis in the current European context.

This study aims to emphasize the importance of practicing a modern teaching style practiced by teachers by using various techniques and modern methods of teaching. The objectives of this study are: emphasizing the main changes that occurred in time in the Romanian system of higher education, the analysis of the implementation of modern teaching techniques in the educational-training process, the analysis of the role that the diversity of techniques and modern teaching methods contribute to teaching marketing in an applied way, highlighting the role that the teacher has in using interactive and modern methods of teaching in the educational-training process.

This study presents the main modern teaching methods and techniques used by teachers in teaching marketing in an applied way. These are the following: 1. case study; 2. writing essays; 3. personal reflection; 4.Brainstorming method; 5. Jigsaw puzzle. A brief description of these elements is made, emphasizing the role that diversity plays in teaching marketing and the positive effects generated by applying modern techniques on students who in this way succeeded in developing their creativity, practical skills and competitive spirit.

[*] Professor Ph.D., Faculty of Business and Administration, University of Bucharest (e-mail: magdalena.iordache-platis@drept.unibuc.ro).

[**] Graduate Teaching Assistant, Ph.D. Candidate, Faculty of Business and Administration, University of Bucharest (e-mail: baban.eleonora@yahoo.com).

A review of literature is made in order to highlight the importance of using modern, effective and interactive teaching techniques by teachers in the educational-training process.

In Romania, the implementation of effective learning strategies and setting up a radical reform in education could be the key of an efficient education process. In knowledge society the teacher's role is to encourage and stimulate students' creativity, to develop their skills by using modern teaching strategies. A good teacher, in order to obtain the results expected and in order to maintain an interactive teaching environment, needs to harmoniously combine all forms of learning, i.e. formal, non-formal and informal learning. Traditional pedagogy was dominated by formal learning; while modern pedagogy harmoniously entwined formal, non-formal and informal learning (learning is also accomplished outside universities through the students' participation in specialized trainings held in companies which operate in fields that are in accordance with the students' specialization). Nowadays, students participate in interactive classes, gliding from the process of memorizing to that of developing critical thinking and personal expression. By using interactive teaching strategies, an effective teacher prepares his/her students for the dynamic challenges in society.

2. The context of higher education

From the past and up to present the higher education system has continued to grow and attract more and more students. After 1989, there was a steady effort regarding the development of higher education in Romania, the following steps being taken: "the development of the institutional network and the number of students; the appearance of private higher education, the efforts to achieve decentralization (…)"[1].

In the '90s, aside from full-time higher education institutions that held courses for 4, 5, 6 years there were also colleges (short-term higher education institutions), and also distance learning[2].

In its attempt to reach the standards of Western Europe, Romania went through important stages in the development of Romanian higher education. Therefore, on June19th, 1999, 29 countries (both from Europe and outside it), including Romania, attended the meeting in Bologna, that ended with the signature of the "Bologna Declaration". The general objectives set out in the "Declaration of Bologna" are the following: "the accreditation of diplomas (...), adopting a system for organizing studies based on two cycles; implementing a credit system (ECTS), promoting the mobility of students and that of academic administrative personnel; promoting the European cooperation in terms of quality development, promoting the European dimension of higher education, especially in terms of curricula development, cooperation between institutions, mobility programs"[3].

In the present context, Romanian higher education system follows these objectives that contribute to the achievement of the expected performance. In Romania, higher education is organized on three levels, namely: Bachelor's degree programme, Master's degree programme and doctoral programme, the European Credit Transfer and Accumulation System (ECTS) being mandatory, and "starting with the academic year 2005-2006, universities issue to each graduate, free of charge, the Diploma Supplement, both in Romanian and in a foreign language, whose content is in accordance with European standards"[4]. Also, the implementation of National law no. 1/2011 has resulted in significant changes in the Romanian higher education system. Universities participated in an evaluation process that had the fundamental purpose of improving the educative process and identifying the position held by each university in the system of higher education.

[1] Pachef, R.C. (2008), Evaluarea în învăţământul superior, Editura Didactică şi Pedagogică, R.A., Bucureşti, pp. 78.

[2] Ibidem, pp.79.

[3] Ibidem, pp. 73-74.

[4] Ibidem, pp.80-81.

Universities are classified into three categories: "universities focused on education, universities of training and scientific research and universities of education and artistic creation, and universities of advanced research and education"[5].

According to the National law of education no. 1/2011, 2011 universities must provide students with necessary practice sites, both within and outside universities. Also, higher education institutions accredited according to legislation can organize the graduation exams for bachelor, master, and doctoral programmes.

Regarding this process of transformation and change that took place in the Romanian higher education system, by the implementation and adoption of new measures it can be mentioned that "education in Romania is going through a process of reform. All components of education are subjected to some transformation actions: institutional organization, relational aspects, the contents put forth, the assessing and credit system and styles, and teacher training"[6]. It can also be mentioned that currently, ensuring the quality of the educational process as well as the implementation of measures that takes into account the smooth development of the entire educational process are key elements that contribute to the development of national higher education system. Student-focused education by his/her direct involvement in the education process, and the use of modern interactive teaching strategies are also important elements in this innovative process in terms of quality assurance in higher education. To back up these statements, we may conclude that "quality assurance in education is a very complex process that targets the institutional - administrative side and the educational process itself"[7].

3. The importance of teaching marketing in an applied way

Learning is a complex process that contributes to the formation and development of young generations, who constantly need to adapt to changes in society. The learning process is led by teachers whose role is to plan, conduct and coordinate educational activities and effectively communicate essential information in order to achieve the learning process.

After graduating, future specialists are faced with the reality of everyday life. It is therefore very important that during the years of study, teachers combine the theoretical aspect with the practical one when teaching. Hence, students are motivated, the main purpose being that of stimulating and gaining their attention.

In Romania, there are many universities specialized in economics where marketing is being taught. The practical approach of this subject is essential because "marketing is not an exact subject, like analytical geometry (...) marketing should not be applied according to a fixed scheme in various countries that have different economies, cultures and policies"[8]. The role of the teacher is therefore essential in conducting educational activities consisting in the fact that students acquire basic concepts that operate within this subject.

"Marketing as a topic appeared in the United States in the first part of the 20th century in the teaching of courses having to do with distribution, particularly wholesaling and retailing"[9]. According to Kotler (2006) "marketing is based on several key disciplines such as economics, psychology, sociology, organizational theory, mathematics and decision science"[10]. Marketing will evolve as new changes are recorded in these fields, changes caused by the scientific progress.

---

[5] http://www.edu.ro/index.php/articles/15116.

[6] Cucoş, C. (2006), Pedagogie. Ediţia a II-a revăzută şi adăugită, Editura Polirom, Bucureşti, 2006, pp. 434.

[7] Marinescu, M. (2009), Tendinţe şi orientări în didactica modernă, Editura Didactică şi Pedagogică R.A., Bucureşti, pp. 149-150.

[8] Kotler, P., (2006), Conform lui Kotler:cea mai importantă autoritate în marketing îţi răspunde la întrebări, BRANDBUILDERS GRUP, Bucureşti, pp. 3.

[9] Ibidem, pp. 5.

[10] Ibidem, pp. 6.

Nowadays, the advent of new technologies has a strong impact on companies that need to conduct effective marketing activities to achieve their goal, namely making a profit. It is very important to note that "the classic marketing model needs to be future-fitted. Marketing must be deconstructed, redefined and stretched"[11]. In this context, the teaching strategy must be focused on interactive, innovative and practical methods which reflect the dynamic nature of this practical science called marketing. Currently, marketing based on client relationship allows companies to build customer loyalty and to attract new customers.

In this way the important role of market research is highlighted when one wishes to identify customer needs. Marketing researchers often use effective marketing tools in their attempt to respond effectively to the most sophisticated desires of consumers. From a theoretical perspective, presenting the marketing research type is essential in starting the practical part, which, for students represents the grounds for carrying through teaching projects. Teamwork (creating working groups of four to five students) facilitates the development of the sense of competition and allows each team member to get involved in carrying out tasks when the project is initiated. In literature review it is noted that "teamwork is important for the self-detection of capabilities and limitations" and "interactive group strategies develop the ability to work together, to show tolerance towards the participants' point of view and mutual respect"[12]. In other words, teamwork is challenging and it generates creative ideas while generating at the same time tangible results that lead to achieving the desired performance.

Tudorică (2007) believes that "learning is determined by a complex interaction between the existing knowledge of subjects, the social context and the problem that needs to be solved"[13]. Thus, by outlining common working tasks, students are given the opportunity to express their own ideas and to test teamwork skills. In this situation the teacher's role is to promote students' creativity, to address open questions and to encourage them in expressing constructive ideas. An efficient teacher encourages teamwork by using an interactive learning style. Also, teaching marketing in an applied way targets educational activities aimed at acquiring knowledge and practical skills. Active participation and an environment favourable for debates allow the encouragement of the sense of initiative among students who analyze and provide solutions for solving the tasks undertaken.

It is important to note that teaching communication performed between the teacher and his/her students plays an important role in the educational process. The teacher's flexible communication and teaching style gives students the freedom to express their ideas. The positive attitude, accuracy and pedagogical tact are the main factors that contribute to the smooth course of the educational process.

4. Role of diversity in teaching marketing

In literature review, it is mentioned that success in the educational process largely depends on the following characteristics of the teacher: "attitudes towards self, students, peers, and what they teach; knowledge on subject and education theory; skills on planning, organization, and management; on communication, and on motivation"[14].

In teaching marketing, in order to capture the attention of students teachers use various teaching techniques and methods. We can mention therefore: 1. case study; 2. writing essays; 3. personal reflection; 4. Brainstorming method; 5. Jigsaw puzzle.

---

[11]Kotler, P., Jain, D., Maesincee, S.(2009), Marketingul în era digitală:o nouă viziune despre profit, creştere şi înnoire, Editura METEOR PRESS, Bucureşti, pp.10.

[12]Oprea, C.L. (2009), Strategii didactice interactive. Repere teoretice şi practice, Editura Didactică şi Pedagogică R.A., Bucureşti, pp.19.

[13]Tudorică, R. (2007), Managementul educaţiei în context european. Ediţia a II-a revizuită, Editura Meronia, Bucureşti,pp.116.

[14] Bacellar, F.C.T., Ikeda, A.A. (2006), "Marketing professors: paths and perspectives", European Business Review, Vol.18, No.3, pp.237.

1. A traditional example used in teaching marketing is the case study. Preparing a case study requires a sustained effort from the teacher's part. He/she needs to formulate questions that encourage free debate among students and the expression of personal opinions.

2. Writing essays is another method of interactive teaching that invites students to personal reflection. On specific topics previously outlined, students are encouraged by the teacher to express their opinion. This method enjoys great success among students because it stimulates creativity and freedom of expression. They combine elements of theory assimilated over years of study while offering practical examples from everyday life.

3. Brainstorming is another teaching method focused on producing ideas that stimulate creativity. It is very important to accept all ideas during the debate, ideas that are to be evaluated at the end of the discussion by all team members; then those ideas that can provide accurate answers for the debated issue are selected.

4. Jigsaw puzzle is an example of interactive group learning method that develops creative thinking and cooperation among students.

Involving students in various educational activities produces positive effects by developing their practical skills, creativity and sense of initiative.

Formulating open questions is another means by which the students' ability to learn is developed. Creating a climate adequate for free expression of students depends, as mentioned above, on the teacher's pedagogical tact. The variety of teaching methods develops students' curiosity who will be able to develop hypotheses, formulate questions and build personal values. Teachers who apply effective and interactive teaching strategies, providing students with diversity and a theoretical and practical component can achieve the desired performance, thus contributing to the development and training of young generation able to face the challenges of the labor process.

The teaching activity gains efficiency during academic seminars because "the debates conducted during seminars give the students the possibility to clarify, improve, fathom, corroborate and perfect their own skills"[15] .

Figure no. 1: Teacher-student relationship and the efficiency of applying modern teaching techniques

YES	NO
- interactive teaching (using examples and involving students in the teaching process)	- lack of interaction with students (using dictation)
- formulating open questions	- avoiding communication
- flexible style of teaching	-authoritarian teaching style
- emphasis on learning	-emphasis on teaching
- ensuring feedback	-lack of cooperation

Source: Authors

It is important to note that each individual is unique and has his/her own experiences and personality traits and the success of the teaching process depends largely on these elements. Therefore, each teacher must adapt to the needs and expectations of the group of students involved in educational activity, motivating them to actively participate and to obtain success through perseverance and tenacity. An effective teacher must react spontaneously, practice a modern and flexible teaching style, be creative and respond clearly to students' wishes who want to participate interactively during the course of teaching.

[15] Marinescu, M. (2009), Tendinţe şi orientări în didactica modernă, Editura Didactică şi Pedagogică R.A., Bucureşti, pp. 161.

Oprea (2009) highlights the following principles of interactive teaching strategies, namely: "students build their own meanings and interpretations of training; training purposes are discussed, negotiated, not imposed; methodological alternatives for teaching, learning and assessment are promoted; (…) the evaluation will be less criterial and more reflective, integrating complementary methods of evaluation; learning by detection and problem solving are promoted"[16] .

In the current European context, when new measures that have an overwhelming impact on the entire educational process are adopted, training teachers in accordance with European requirements and trends is a key point in improving the qualitative aspect of education.

The progress of new technologies significantly influences the structure of the teaching process. Thus, implementation of New Information and Communication Technologies in the education system contributes to the development of interactive teaching techniques and methods, and to the increase of quality in higher education, and it also constitutes a challenge for all those involved in this dynamic and complex process. Teachers are forced to adapt their teaching strategies according to the new technological requirements. Thus, the implementation of the eLearning structure in higher education contributes to an interactive approach of the educational process focused on students.

According to Singh, O'Donoghue and Worton (2005) "eLearning is constructed in a variety of contexts, such as distance learning, online learning and networked learning"[17]. In order to keep up with changes in the knowledge-based society, universities must use modern information systems in the teaching process. ELearning platforms imply this process. Marinescu (2009) consider that an efficient eLearning structure must be interactive and must involve students directly, who should provide immediate feedback .Also, in order to gain the attention of students, teaching strategies used by teachers must be carefully chosen and efficiently implemented. It is important to note that assessment in the context of eLearning is a complex process that pursues the following main goals: "connection to a specific learning content considered to be important; internalization of a way to assume learning, capitalizing and materializing new acquisitions by the beneficiary"[18].

In Romania an eLearning platform (Advanced e-Learning) has developed. The purpose of this platform is to stimulate competition, but also teamwork. This allows monitoring of the educational process and offers teachers modern methods of teaching and learning[19]. For students, the eLearning structure allows direct access to the contents taught, a significant advantage being the flexibility and interactive nature of the modern educational process.

In a contemporary context when the technical and technological progress leaves their mark on the structure of the education system, training of efficient teachers represents a premise in the development and improvement of the education process. In Romania, two stages aimed at the training process of teachers are known, namely: "initial training - during studies in universities; and constant training - which means improvement during practice"[20].

A good teacher must be a promoter of new, of change and must have a reflective attitude focused on students' needs. The quality of the education provided to young generations of students depends on how teachers implement the new contents, and on their pedagogical tact. Highly trained teachers focus on interactive teaching strategies of cooperation. They are open to cooperation, promote interactivity and motivate their students to actively participate in discussions during lectures and seminars. Therefore, besides the fact that students develop social skills, they acquire autonomy in

---

[16] Oprea, C.L. (2009), *Strategii didactice interactive. Repere teoretice şi practice*, Editura Didactică şi Pedagogică R.A., Bucureşti, pp.160.

[17] Singh, G., O'Donoghue, J., Worton, H., (2005), A Study Into The Effects Of eLearning On Higher Education, *Journal of University Teaching & Learning Practice*, 2(1), pp.14.

[18] Marinescu, M. (2009), *Tendinţe şi orientări în didactica modernă,* Editura Didactică şi Pedagogică R.A., Bucureşti, pp. 161.

[19] Ibidem, pp.83.

[20] Marinescu, M. (2009), *Tendinţe şi orientări în didactica modernă,* Editura Didactică şi Pedagogică R.A., Bucureşti, pp.132.

expressing personal ideas. In this way, the teaching process is no longer regarded by students as a monotonous process that promotes the classic model of teaching, when the teacher dictates the content and they have to take notes. Practicing interactive teaching strategies, teachers turn teaching into an activity that develops students' curiosity by actively involving them in this process that targets the improvement of the quality of the educational process.

Also, learning strategies have an important role in the teaching activity. Specifically, the teacher needs to take initiative and suggest topics for debate in order to encourage students to implement their own learning strategies. Sălăvăstru (2009) believes that "strategies are extremely important in the student's learning activity. When proposing a learning situation, the teacher might find out that his/her students conduct a multitude of behaviours regarding how they select, acquire, organize and integrate new knowledge. These behaviours are designated by the term learning strategies"[21].

The learning strategy represents the actions that an individual performs in order to achieve learning objectives. Students use different learning strategies that contribute to the formation and development of individual study capacities, facilitating a proper filtering of information provided by the teacher.

In literature review the following typology of learning strategies is presented: a). primary strategies that aim at "memorizing, updating and using information"; (…) as well as "identifying key concepts, establishing links between knowledge, creating conceptual networks"; b). support strategies that aim at "planning study time, control of attention focus, self-motivation, control of negative emotions, ensuring a mood proper for study, and so on"[22]. Learning strategies are considered to be self-fitting strategies that aim at planning, monitoring and adjusting learning activities. According to this strategy students plan their information on a specific topic of study, being disciplined and responsible in their learning activity[23]. A good teacher must teach students to learn. Therefore, when teaching learning strategies, he/she must provide clear information and must point out the efficiency of the use of the learning strategy selected. Students should be aware that applying effective learning strategies will help them enhance knowledge. Thus, they will progress more easily; they will set short-term and long-term goals and will also be able to develop hypotheses.

An efficient method that teaches students how to organize their learning activity is SQ3R method (Survey - Question - Read - Recite - Review). SQ3R method is a modern method of learning that has a great success abroad, being present in all university textbooks. According to this method, students go through five major steps, namely[24]:

1. The first step - Survey - refers to a primary filtering of information. Students analyze the course structure on chapters and subchapters; they select key concepts and analyze the schemes in the paper.

2. The second step - Question – refers to formulating key questions about the content that needs to be acquired, allowing them to structure the information into chapters.

3. The third step - Read - refers to reading notes and establishing connections between systematic knowledge and the main concepts.

4. The fourth step – Re-read - aims at reproducing the content covered and scoring the responses formulated in the second stage.

5. The fifth step – Review – is the last step and aims at a reproduction of memorized content, a presentation of the schemes and making connections between memorized concepts and knowledge.

---

[21] Sălăvăstru, D. (2009), *Psihologia învăţării. Teorii şi aplicaţii educaţionale*, Editura Polirom, Iaşi, pp.167.
[22] Ibidem, pp.169.
[23] Ibidem, pp.174.
[24] Ibidem,, pp.180-181.

Going through all these steps, students manage to establish connections between knowledge acquired and interact better with the content that needs to be learned for that exam preparation. Although it is a method that requires more attention and effort from students, this method proves its effectiveness through a better systematization of study time. Passing the exam for which preparation was made represents a favourable result generated by the effective planning and organization of the time needed to prepare individually, by using the learning method mentioned above.

Students must be self-taught, they must effectively organize study time, and they must control learning activities and set realistic goals. During this process aimed at learning, the teacher's role is that of "mediator of student's knowledge. He/she gets involved in the acquisition and organization of such knowledge according to the properties of the cognitive system, determining the student to be aware of his/her own cognitive resources, examine learning strategies and use the most effective ones"[25].

5. Conclusions

The teacher's role in the educational activity is of utmost importance. Effective teachers are those teachers who manage, through tenacity and perseverance to mobilize students to achieve their goals. Their creativity, perseverance and firmness in decision making develop through their engagement in activities aimed at achieving tasks. The effective communication of teaching objectives as well as effectively ensuring knowledge transfer and feedback are key elements in effectively achieving teaching tasks. Teacher-student interaction should be based on a mutual exchange of ideas, thus encouraging dialogue between the two parties. Diversification of teaching strategies contributes to professional success, the teacher therefore managing to stimulate his/her students' attention. The teacher outlines task for his/her students, he/she being the one who organizes the teaching activity.

The education system contributes through its dynamic and innovative nature to the education of young generation in accordance with the requirements of the knowledge-based society.

Education is an external factor, which acts both directly and indirectly, on human personality. Developing skills specific to a certain field of activity is a prerequisite for education and training of young generations to meet labour market requirements which is in fact, the purpose of the educational activity. In knowledge-based society, the educational objective is to promote innovation and competitiveness which contribute to setting up a proper learning space for the entire life. The role of the education activity is to support the use of interactive teaching strategies based on modern techniques used by teachers to effectively deliver contents specific to the courses taught.

Modern teaching and learning strategies based on interactive learning methods (critical thinking, implementation of theoretical concepts, formulating questions, creating projects and case studies, learning by detection and so on.,) contribute directly to strengthening learning skills, and to the development of creativity and sense of initiative. Promoting efficiency and creativity in the learning process allows students to develop their personality in a harmonious way. They will gain key skills and they will easily adapt to labour market requirements.

The education system contributes through its dynamic and innovative nature to educating the young generation in accordance with the requirements of knowledge-based society.

Nowadays young people are forced to adapt to all changes in the education process and they successfully manage this, being aware that in the future new technologies will have a significant impact on all activities because "the ability to master modern technologies intellectually, socially and politically is one of the major challenges of this century"[26].

[25] Sălăvăstru, D. (2009), *Psihologia învăţării. Teorii şi aplicaţii educaţionale*, Editura Polirom, Iaşi, pp.185.

[26] Marinescu, M. (2009), *Tendinţe şi orientări în didactica modernă*, Editura Didactică şi Pedagogică R.A., Bucureşti, pp. 78.

References

- Bacellar, F.C.T., Ikeda, A.A. (2006), Marketing professors: paths and perspectives, European Business Review, Vol.18, No.3, pp.231-241.
- Cucoş, C. (2006), Pedagogie. Ediţia a II-a revăzută şi adăugită, Editura Polirom, Bucureşti.
- Kotler, P. (2006), Conform lui Kotler:cea mai importantă autoritate în marketing îţi răspunde la întrebări, BRANDBUILDERS GRUP, Bucureşti.
- Kolb, A.Y., Kolb, D.A. (2005), Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education, Academy of Management Learning & Education, 2005, Vol. 4, No. 2, pp.193–212.
- Kotler, P., Jain, D., Maesincee, S.(2009), Marketingul în era digitală:o nouă viziune despre profit, creştere şi înnoire, Editura METEOR PRESS, Bucureşti.
- Marinescu, M. (2009), Tendinţe şi orientări în didactica modernă, Editura Didactică şi Pedagogică R.A., Bucureşti.
- Marginson, S. (2010), Higher Education in the Global Knowledge Economy, Procedia Social and Behavioral Sciences 2, pp. 6962–6980.
- Nicolescu, O. (coord.) (2007), Strategia universităţii: metodologie şi studii de caz, Editura Economică, Bucureşti.
- Oprea, C.L. (2009), Strategii didactice interactive. Repere teoretice şi practice, Editura Didactică şi Pedagogică R.A., Bucureşti.
- Pachef, R.C. (2008), Evaluarea în învăţământul superior, Editura Didactică şi Pedagogică, R.A., Bucureşti.
- Sălăvăstru, D.. (2004), Psihologia educaţiei, Editura Polirom,Bucureşti.
- Sălăvăstru, D. (2009), Psihologia învăţării. Teorii şi aplicaţii educaţionale, Editura Polirom, Iaşi.
- Singh, G., O'Donoghue, J., Worton, H. (2005), A Study Into The Effects Of eLearning On Higher Education, Journal of University Teaching & Learning Practice, 2(1), pp.14-24.
- Shin, D., Curtis, M., Huisingh, D., Zwetsloot, G.I. (2008), Development of a sustainability policy model for promoting cleaner production: a knowledge integration approach, Journal of Cleaner Production 16, pp. 1823–1837.
- Tudorică, R. (2007), Managementul educaţiei în context european. Ediţia a II-a revizuită, Editura Meronia, Bucureşti.
- Tudorel, A., Teodorescu, D., Oancea, B. (2010), Characteristics of higher education in Romania during transition, Procedia Social and Behavioral Sciences 2, pp. 3417–3421.
- http://www.edu.ro/index.php/articles/15116

REFLECTIONS ON THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

COSTEL STANCIU[*]
SORIN-GEORGE TOMA[**]

Abstract
In the European Union all members states have already transposed Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees into national law. In Romania, the state, through its legislative institutions, the Parliament and the Government, and through those who take care of market surveillance, in our case the National Authority for Consumer Protection, should ensure the consumers a high level of protection. The aims of our paper are to render in brief the legislative framework related to the consumer protection and to clarify a number of issues regarding: the distinction between products that benefit a 2 years legal warranty and those for which the legal warranty is limited to the average duration of use (household products); the legal warranty for second-hand products; the importance for the consumer of the presumption of the product's noncompliance; the situations that involve repair, replacement, appropriate price reduction, contract resolution; the deadline for the product to be repaired; the issue of replacement parts when product repair is in warranty or post-warranty; hidden vices. The methodological approach was based on the literature review. Our paper contributes to a better understanding of the sale of consumer goods and associated guarantees and provides a platform on which to build further studies on the same subject.

Keywords: *commercial guarantee, legal warranty, goods, consumer, lack of conformity*

Introduction

As we are living in a consumer society, many different businesses and service providers offer guarantees. That is why many products we purchase may come with a manufacturer's guarantee. A guarantee is generally provided by manufacturers whereas the warranty is given by most of the retailers or distributors.

In the European Union all members states have already transposed Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees into national law. Consumers have certain rights vis-a-vis the manufacturers and the sellers in the case of non-conformity of the goods.

In Romania, the state, through its legislative institutions, the Parliament and the Government, and through those who take care of market surveillance, in our case the National Authority for Consumer Protection, should ensure the consumers a high level of protection.

Our study focuses on the consumer protection domain. The aims of our paper are to render in brief the legislative framework related to the consumer protection and to clarify a number of issues regarding: the distinction between products that benefit a 2 years legal warranty and those for which the legal warranty is limited to the average duration of use (household products); the legal warranty for second-hand products; the importance for the consumer of the presumption of the product's noncompliance; the situations that involve repair, replacement, appropriate price reduction, contract resolution; the deadline for the product to be repaired; the issue of replacement parts when product repair is in warranty or post-warranty; hidden vices. The methodological approach was based on the literature review.

[*] Associate Professor, Ph.D., "Nicolae Titulescu" University, Bucharest (e-mail: costelstanciu@yahoo.com).
[**] Professor, Ph.D., Faculty of Administration and Business, University of Bucharest.

The paper is organized as follows. The second chapter of the paper deals with the conceptual framework of the main aspects regarding the sale of consumer goods and associated guarantees, emphasizing some of the main issues derived from the European legislation. This is followed by conclusions.

Aspects of the sale of consumer goods and associated guarantees

In the old Member States of the European Union (all ten of them), the notion of guarantee is understood as the commercial guarantee offered voluntarily by the business operators - manufacturer, importer or seller - to the consumer.

Such thing was motivated by the existence of competition on the market, fact which led the business operators to take a series of measures including this guarantee which is offered voluntarily, the ultimate purpose being to provide consumers with the best possible product markets.

As time passed by, consumers within these states were discontent because of the products purchased and the fact that these commercial guarantees were either functioning with deficiencies or simply did not exist for certain groups of products or certain manufacturers, importers, distributors.

In this situation, the European legislator had to draft a directive to impose certain conditions regarding the sale of consumer goods and associated guarantees. Thus, the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees was enacted.

Basically, this Directive stipulates that the guarantees, in the sense of certain voluntary commercial operations, become mandatory for the one who declared them so that consumers can have a legal basis in case of failure to fulfil obligations provided under them.

Another important concept stipulated in the Directive is the one regarding the consumers' right to beneficiate without additional costs of the restoring, replacement or the reimbursement of the product value should these non-conformities occur within 2 (two) years from date of purchase.

In Romania, the situation is slightly different meaning that, until the entry into force of Law no. 449/2003 on sales of consumer goods and the associated guarantees transposing the provisions of the Directive mentioned above, the Romanian consumer had used only to the existence of the mandatory guarantees required by the law, guarantees which differed according to the nature of the product, namely periods up to two years for durable products depending on the classification within certain groups (see Government Decision no. 394/1995 currently repealed), respectively 30 days for the immediate use products (e.g., the Government Decision no. 665/1995 - currently repealed).

It is true that, in certain situations, depending on market development, as well as the increase of competition on certain segments, some business operators offered commercial guarantees - in the European sense of the term – which were higher than the minimum required by law.

Given the data presented above, it results that we currently need a change in the way of approaching this issue, including the consumers' mentality, but also the business operators' mentality, with the purpose of addressing this issues in the European sense. This will cause the Romanian consumers some difficulties in understanding as it will be complicated to distinguish between guarantee – a voluntary commitment undertaken by the business operator but legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising, the seller's liability if lack of conformity occurs within a period of two years from the date of delivery of the product or hidden vice for whose repairing it is necessary to resort to the procedures set forth in the Government Ordinance no. 21/1992 supplemented, where appropriate, with provisions of the Civil Code.

One should also bear in mind that in the event that any lack of conformity is occurring within six months from the date of delivery of the product is considered to have existed at the time of delivery, hence for this case the consumer is not required to demonstrate, with evidence that the product is without conformity. However, in the period from six months to two years, the seller is has

the same rights as the consumer and within the presumption of lack of conformity the obligation to prove that the product was without conformity belongs to the consumer.

From a legal perspective, this normative act covers all types of consumer products, with few exceptions – goods that are sold after being confiscated or seized under a court enforcement procedure or based on any other document that is issued by court authorities, as well as the water and gas which are not packed in limited amounts or in a fixed amount and electric power. However, there will be cases of products for which there are specific laws, for instance food products for which the concepts of validity and date of minimum durability are applied.

We are also mentioning the fact that Law no. 449/2003 is a general law regulating the issue of guarantees, but certain normative acts may set forth specific regulations as follows:

- The durable products must mandatorily have certificates of guarantee, thus they will have a guarantee that is legally binding (Government Ordinance no. 21/1992 – Article 20);
- The refillable lighters must mandatorily have a written guarantee from the manufacturer for at least 2 (two) years for each lighter (Article 1, letter a – Order no. 10/2007) on trading on the market of child-resistant lighters, as well as the interdiction to trade fantasy lighters (the joint order of the National Authority for Consumer Protection and the National Agency for Fiscal Administration.

In terms of scope, it refers to products, including those made upon order and the said products must be compliant with the specifications included in the contract of sale as stipulated under Chapter II of Law no. 449/2003.

Law no. 296/2004, regarding the Consumer's Code gives the definition of contracts on point 14 of the Annex, namely the contracts between traders and consumers which include warranty certificates, order details, invoices, bordereau or delivery certificates, bills, tickets which contain stipulations or references to general present conditions. Given the provisions of Government Emergency Ordinance no. 28/1999 on the obligation of economic agents to use electronic cash registers, namely the provisions of Article 1 paragraph 2: "The economic agents described under paragraph (1), hereinafter referred to as users, are required to issue fiscal tax receipts using electronic devices and hand them to the clients. Upon clients request, users will issue a fiscal invoice" – therefore it results that a consumer may request at any time, a fiscal invoice together with the electronic tax receipt.

Therefore, we can conclude that, under the Law no. 449/2003, the tax receipt is enough to be considered contract.

Moreover, Article 5 of Law no. 449/2003 clearly stipulates the conditions in which the products are considered to be compliant with the contract of sale, for instance the case where the products comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model or the situation where the products are fit for the purposes for which goods of the same type are normally used.

Law no. 449/2003 on sales of consumer goods and the associated guarantees came into force on January 1, 2007 and the Law transposes into Romanian legislation the Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees repealing Article 14, paragraph 1 and Article 20 paragraph 2 of Government Ordinance no. 21/1992 and Government Decision no. 665/1995 on the replacing, repair and reimbursement of the equivalent value for products with quality deficiencies.

1.Scope

Law no. 449/2003 shall apply to all the contracts of sale of goods concluded between economic agents, physical or legal entities, and consumers, physical or legal entities.

The product, as defined by law, represents any movable tangible item whose final intended purpose is to be consumed or used individually or collectively, including those that are purchased under a contract of sale of goods that will be produced or processed.

The following categories of movable goods do not fall under the present Law:

- Movable incorporeal goods: shares, bonds, etc.
- Movable goods sold:

- After being confiscated;
- After being seized under a court enforcement procedure;
- Based on any other document that is issued by court authorities.

- the water and gas which are not packed in limited amount or in a fixed amount (bottles, gas bottles, other recipients);
- electric power;
- second-hand movable goods that are sold through public auction in a procedure that consumers can attend personally. The exclusion is justified by the fact that the consumer's presence at public auction allows the consumer the opportunity to choose knowingly. This is not valid should the consumer not be able to attend the auction personally, therefore, goods purchased in this situation will fall under this law.

The consumer is defined as any natural person or group of natural persons who get together in associations that purchase, acquire or consume products for purposes that do not fall within the sphere of is commercial or professional activity.

Two clarifications need to be made here. First of all, the law uses the generic formula of "group of natural persons formed in associations". In this case, we are referring to the legal entities constituted under the Government Ordinance no. 26/2000 on associations and foundations, meaning associations, federations and foundations.

Secondly, the provision regarding the "commercial and professional activity" applies only to the natural persons, as associations in a generic sense are non-profit legal entities that cannot carry on such activities.

The category of natural persons who purchase, acquire, use or consume products within their professional activity may include the following:

- persons with liberal professions such as doctors, lawyers, etc.
- persons who acquire by themselves the necessary means in carrying out their professional activity within companies where they are hired.

The seller is defined as any natural or legal person authorized - companies, cooperative societies, natural persons engaged in independent economic activities and authorized family associations – that as part of its activity sells products under a contract with the consumer.

The producer may be the following:

- an economic operator that produces a finished product or a component of a product
- an economic operator that produces raw material;
- an economic operator that applies its name, trade mark or another distinctive sign on a product;
- an economic operator that reconditions a product;
- an economic operator or distributor that modifies and changes through its activity the characteristics of a product;
- the representative who is registered in Romania of an economic operator who is not headquartered in Romania, or, if there is no such representative, the importer of that product;
- an economic operator that imports products in order to perform a sale, rent or
- leasing operation at a later time or any other form of distribution which is specific to running a business;
- the distributor of the imported product, in the event that the importer is unknown, even if the producer's name is specified;

- the distributor of the product, in the event that the importer cannot be identified, if the distributor fails to notify the injured person about the importer's identity, within 30 days from the request thereof.

2. The legal guarantee – obligation of conformity with the contract

The Law establishes an obligation for the seller to deliver goods which are in conformity with the contract of sale and to be held liable for any lack of conformity existent at the time of the delivery.

Conformity

Products should be considered as being in conformity with the contract provided:

a) they are suitable to the description made by the seller and has the same qualities as the products presented them by the seller as a sample or model;

b) the products satisfy any specified purpose requested by the consumer, purpose made known and accepted by the seller at the conclusion of the sale;

c) products are suitable for the purposes for which they are normally used products of the same type;

d) they present the quality and normal performance parameters, which the consumer can reasonably expect, given the nature of the product and public statements regarding the specific characteristics thereof, made by the seller, by producer or his representative, particularly by advertising or by the product label registration.

The seller will be liable also for the lack of conformity resulting from the situation in which the product purchased by the consumer is incorrectly installed by the seller, while the installation is stipulated in the contract as an obligation of the seller. The same thing applies for the situation in which the product intended to be installed by the consumer that was incorrectly installed due to deficiencies in the operating instructions.

Seller's Liability

The seller is liable to the consumer for any lack of conformity which exists at the time the goods were delivered and the consumer has the right to require the seller to bring the product into compliance without additional costs and he can choose he wants the product to be brought into conformity, either by replacement or repair, or by price reduction or rescission of the contract.

The seller will bear all the necessary costs incurred to bring the products into conformity, including the postage expenditures, labour, materials, transportation or technicians' trip to the consumer's residence.

A. The consumer has the right to choose how he wants the product to be brought into conformity, by repair and replacement of the product with no additional costs, provided that the means chosen are not disproportionate or impossible:

a) A redressive measure is considered disproportionate if it imposes unreasonable costs on the seller in comparison with the other redressive measure, taking into account the value of the product, with the lack of conformity, the importance of the lack of conformity and any possible inconvenience caused to the consumer.

b) The replacement is considered impossible if the seller does not have an identical product for replacement, which means that the product is no longer manufactured nor available on the market.

The redressive measure, repair or replacement of products must be brought out in a reasonable period agreed between the consumer and the seller, and without any significant inconvenience for the consumer, taking into account the nature of the product and the purpose for which it was purchased.

B. The consumer is entitled to the proper price reduction or rescission of the contract in any of the following cases:

a) the consumer has not received neither repairing or replacing the product;

b) the seller has not take the remedy measure within a reasonable time;

c) the remedy measure is causing significant inconvenience for the consumer.

Should the lack of conformity be minor, the consumer cannot request the rescission of the contract.

Duration of legal guarantee of conformity

The seller's liability in terms of guarantee of conformity is engaged if the lack of conformity occurs within 2 (two) years calculated from the date of product delivery. For used products, the consumer may agree with the seller to reduce the term of two years, but not less than one year after product delivery.

For the consumer's benefit, the law stipulates a rebuttable presumption, meaning that any lack of conformity occurring within 6 months from the date of delivery of the product is considered to have existed at the time of delivery, except for the cases when the presumption cannot be invoked as it is incompatible with the nature of the product or the lack of conformity.

The presumption of the lack of conformity means that if such lack of conformity occurs within the first six months from the delivery of the product, all the consumer has to do is to prove that the product was lack of conformity at handing. In this case, the seller can defend himself if he can prove that the defect did not exist or it was impossible to exist at the date of the delivery.

However, should the lack of conformity occur outside the period of six months, the consumer is the one who will have to prove, together with the real lack of conformity, its existence at the time of delivery of goods.

The consumer must inform the seller of the occurrence of the lack of conformity within 2 months from the date when the consumer has notice it. If the consumer does not notify the seller within this period, he will not be able to request the remedy of lack of conformity, nor the seller's liability.

A final observation must be made regarding the periods of two years and six months. As we have seen, the law does not refer to the date of noticing the lack of conformity, but to the moment of its occurrence. Therefore, if the lack of conformity occurs within the mentioned time limits, but is claimed after these periods, but within the two months period, the liability of the seller will be engaged. However, in practice, the consumer will have to prove that the lack of conformity has occurred within the two years period, or, if applicable, the six months period.

Removal of the seller's responsibility

A. If the public statements are made by the manufacturer of his representative, the seller will not be held responsible should he prove that he did not know them and could not have, in reasonably, know them.

For this situation, the law does not indicate who is responsible for the lack of conformity of the product. Therefore, the consumer will be able to recover the loss through the tort liability of the manufacturer under Articles 998-999 of the Civil Code.

B. Also, the seller will not be held responsible for the public statements, regardless their origin, the manufacturer or his representative, should he prove that:

- The public statements made by the manufacturer or his representative were corrected at the time of conclusion of the contract of sale.
- The decision to buy the product could not be influenced by the public statements in question.

C. Also, the seller will not be held responsible for the situations in which at the time of concluding the contract, the consumer knew or could not, in reasonably, be unaware of the lack of conformity or such lack has its origin in the materials supplied by the consumer.

Limitation or exclusion of liability of seller

The contractual agreements or provisions that stipulate the limitation or exclusion of the seller's obligation for conformity are null of right.

3. Guarantee for hidden vices

Under Article 25 of Law no. 449/2003, the rights of consumers, as described hereunder, shall be exercised without harming any other rights that consumers may invoke as per the other legal provisions that govern the contractual or non-contractual accountability.

Given these provisions, the consumer has the right to choose the legal grounds in terms of engaging the seller's liability from the obligation of conformity with the contract provided by Law no. 449/2003 and the obligation of guarantee for hidden vices regulated under Articles 1352-1360 of the Civil Code.

In order for the seller to be held responsible under the guarantee for hidden vices, three cumulative conditions must be met:

a) *the vice is hidden*. The seller is not responsible for apparent vices of which the consumer was able to convince by himself. Apparent vices are those which can be known by the consumer through the usual means of verification, an attentive checking of the goods. If the vice was communicated by the seller to the consumer, then the vice is not considered hidden.

b) *the vice have existed at the time of conclusion of the contract.*

c) *the vice is serious,* which means the product is improper for the usage to which is intended by nature or according to agreement or the use value of the product is reduced so much that in consumer's knowledge of the facts, the consumer would not have bought or have paid a lower price.

The consumer is the one who must prove the cumulative existence of the three elements. Also, the consumer may require either the rescission of the sale, or the price reduction, provided all the conditions are satisfied.

The statute of limitation of actions for rescission of the sale and price reduction is six months from the date of finding the vice, and if it turns out that vices were cunningly hidden by the seller, the term is three years. In both cases, the vice must be discovered within one year from the date of delivery of goods.

4.Commercial Guarantee

Under Law no. 449/2003, consumers may benefit from a commercial guarantee offered by the seller. Such guarantee is legally binding for the offeror, under the conditions set forth in the statements concerning the guarantee and or in the associated advertising.

The commercial guarantees should include mentions of the consumer rights which are provided by law and attesting clearly that these rights are not affected by the granted guarantee. Also, the commercial guarantee must contain the mandatory clauses concerning the identification elements of the product, the warranty term, ways to ensure the guarantee - maintenance, repair and replacement, including the name and address of the seller and the name and address of the specialized service.

The commercial guarantee must be written in simple and understandable terms. If the consumer requests so, the guarantee must be given in writing or on any durable medium support which is available and accessible for the consumer.

Should the conditions described above are not complied with, the guarantee remains valid and in this case the consumer can use the statements made by the seller or manufacturer and may require from the seller the compliance of the obligations laid down in these statements.

Conclusions

The idea that consumers have to have rights has been evident at least since the 20th century. In order to ensure consumers a high level of protection, the European Union has understood the need to create a legislative framework. Establishing minimum quality standards and equal rules for consumer sales and guarantees for the common European market have become an important issue starting with the mid 1970s. As Romania has been a member of the European Union since 2007, the national legislation in force has to comply with the Community's minimum requirements on consumer protection.

Our paper contributes to a better understanding of the sale of consumer goods and associated guarantees and provides a platform on which to build further studies on the same subject.

References

- Commission of the European Communities. Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers' liability, 2007, accessed January 12, 2013, http://ec.europa.eu/consumers/cons_int/safe_shop/guarantees/CSD_2007_EN_final.pdf.
- ECLG/020/05, Interim Report on Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.
- Comment faire jouer la garantie – Georges Picard, 60 millions de consommateurs no. 401, January, 2006.
- Deak, F. *Treatise of Civil Law*. *Special Contracts*. Bucharest: Actami Publishing House, 1998**.**
- Grundmann, S. Consumer Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar? *European Business Law Review*, 14/2003, pp. 237-257.
- Kingissep, M. The European Consumer Sales Directive- the Impact on Estonian Law. *Juridica International*, XIV/2008, pp. 219-227.
- The European Parliament and the Council of the European Union. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, accessed January 9, 2013, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:EN:PDF.

THE SPECIFIC CHARACTERISTICS OF PROMOTIONAL JOURNALISM – A COMPARATIVE ANALYSIS WITH OTHER RELATED CONCEPTS

CRINA ANIŞOARA TRIFAN (LICA)*

Abstract

Purpose statement – This paper's purpose is to contribute to the development of a specific know-how through the establishment of a theoretical framework of reference. This can facilitate the research steps which follow the identification; analysis; and interpretation of a new marketing instrument – promotional journalism. The objectives, of this study, relate not only to the establishment of theoretical but, also, to the practical characteristics, of promotional journalism. These are based on a comparative analysis with other related concepts and, also, on a qualitative analysis of the contents of the specific materials.

Design – The research problem imposes a methodological interdisciplinary approach; this enables the identification; systematization; analysis; and theoretical interpretation of the fundamental concepts, theories and ideas, from the specialized literature, to be orientated towards studies and articles from separate fields.

From the perspective of the research objectives and this interdisciplinary study of specilized literature, there was added a qualitative analysis of the content of the materials specific to promotional journalism found between 2002 and 2006, in the fashion magazine, Elle Romania.

Overview - The specialized literature presented key-concepts; different terminologies; and meanings apparently for the same studied "reality". This made the achievement of the process of conceptual delimitations even more difficult to the extent that promotional journalism was situated at the intersection of various sciences and the acknowledgment, of its related terms, were either similar or stated vaguely.

Originality – This paper's originality stems from the interdisciplinary perspective to the approach to the problematical aspect and the analysis and interpretitive complexity of the research results. These might prove useful both to the accomplishment of the studies in the field and for the practitioners and beneficiaries of this new marketing instrument.

***Keywords**: promotional journalism, advertorial, advertisments, hybrid messages, advertising*

Introduction

There is a concern to define and analyse promotional journalism – a practice still unknown and unassumed by a particular area - especially since there are countries (Slovenia; Russia; The United Kingdom) where this practice is forbidden. It is specific to marketing research even if it could present, in equal measure, a specialist interest in other lines of work (public relations; journalism communication science; psychology; and sociology).

Therefore, scientific research, as assumed by this thesis proposes a multidisciplinary approach which links the aforementioned fields. However, although used as a new instrument in achieving marketing goals,it remains a tributary to the interests of the actors (public relations and marketing professionals; journalists; representatives of public organizations, and promoted individuals) involved directly in achieving them..

The choice, of such an approach, is justified in relation to the goals; objectives; and research issues, and given that, theoretically, the complexity, of studying this concept, remains groundless.

This study's purpose is to contribute, through theoretical and empirical approaches, a specific research strategy established to develop a specific expertise in facilitating the identification; description; and analysis of promotional journalism.

* Ph.D. Candidate, Doctoral School of Economics and Business Administration, Faculty of Economics and Business Administration, "Alexandru Ioan Cuza" University, Iasi, Romania (e-mail: trifancrina@yahoo.com).

In this thesis, the research objective is to identify the theoretical and practical aspect of promotional journalism. Compared to other related concepts (e.g. advertorials; masked advertising; hybrid message), this is based on both a theoretical analysis and a qualitative analysis, of specific content from 2002 to 2006, in the fashion magazine, *Elle Romania*.

This thesis' originality lies in its interdisciplinary approach towards the problem and the complexity of the analysis and interpretation of research results. These may prove useful both for the studies in the field and practitioners and beneficiaries of this new marketing tool.

Research

Context of research

After studying the specialist literature, there was identified a small number of studies which related strictly to the issue. However, in considering the strong interdisciplinary concept and the multiple implications of specific practice, it is considered necessary to widen the research on the topic in order to link the following: marketing; public relations; mass-media; linguistics; semiotics; and communication science.

Also, the analysed studies presented and proposed key concepts; terminologies; and different meanings, apparently for the same studied "reality". This makes it difficult to achieve conceptual boundaries, especially since promotional journalism lies at the intersection of several sciences and the acceptance, of related terms, are either similar or formulated vaguely.

Therefore, the analysed studies revealed two directions of interest for the assumed research issues. These were: (i) attempting to build a conceptual reference framework for promotional journalism (using various meanings for the name), with reference to related concepts and establishing conceptual boundaries in relation to them; and (ii) proposing theoretical models in identifying and analysing materials specific to promotional journalism.

The people, who conducted these studies, were, in most cases, marketing and public relations specialists. They reflected their own interests in the research which were: (i) the recognition of hybrid messages as commercial texts and (ii) the identification and assessment of the effects, of hybrid messages, on readers.

In relation to the research issues, the most relevant studies, in the field, were those carried out by: (i) Tina Tomazic and Jelena Jurisic[1]; (ii) Karmen Erjavec[2]; and (iii) Karmen Erjavec and Melita Poler Kovacic[3].

In the context of the slovenian press, the purpose, of the cited research, is to define and analyse the debut of masked advertising; hybridid messages; and promotional journalism (depending on the terminology used by each study). In addition, it is to demonstrate the existence of this practice; to identify its forms of manifestation; the actors involved; and the means of production through presenting their theoretical influence on the interpretation of text.

The findings K. Erjavec[4]'s study and those, made by researchers (Stular[5]; Tomazic şi Jurisic[6]), highlighted partially the apparition and manifestation of these new journalistic practices. These were considered to be an instrument, used by organizations; institutions; and public individuals in reaching marketing and public relations objectives. However, it was, also, had an

---

[1] Tina Tomazic and Jelena Jurisic, Covert Advertising in the Context of Media Ethics on the Example of Slovenian Press", *Medijski Dijalozi* 4 (f.a.): 67-82.

[2] Karmen Erjavec, "Beyond Advertising and Journalism: Hybrid Promotional News Discourse", *Discourse & Society*, 15 (5) (2004): 553–578.

[3] Karmen Erjavec and Melita Poler Kovacic, „Relations with the media: Who are the main actors in an advertorial production process in Slovenia?", *Journalism*, 11 (1) (2010): 91–109.

[4] Karmen Erjavec, *art. cit.*, (2004): 553–578.

[5] Stular Katarina, "Hybrid messages in magazines: A case study of the lifestyle magazine Obrazi", *Medij. Istraž.*, 15 (1) (2009): 61-77.

[6] Tina Tomazic and Jelena Jurisic, *art. cit.,* (f.a.): 67-82.

important role as an illegal and unethical practice, in using specific promotional texts to influence readers of these exposed publications.

Research Methodology

Therefore, in order to reach the assumed research's objective in creating a theoretical framework to allow the identification; analysis; and interpretation of promotional journalism, there was need for a theoretical analysis for comparison with related concepts or to make reference to the same studied reality (e.g. advertorials; masked advertising; hybrid messages).

Also, in order to identify the theoretical characteristics of promotional journalism there was a qualitative analysis of the fashion magazine, *Elle Romania*'s specific content between 2002 and 2006.

Boundaries and Conceptual Clarifications – Promotional Journalism and Related Concepts

In creating the promotional journalism's conceptual framework and taking into account, also, the comparative analyses of the studies, the following concepts were considered to be relevant on a theoretical level. These are: (i) advertorial; (ii) advertisments; (iii) hidden advertising; (iv) communication journalism; (v) hybrid unlabled message; (vi) advertising; and (vii) stories.

Consequently, this subsection presents the above assessments in order of listing and their theoretical and practical characteristics in relation to particular material as related to promotional journalism.

Advertorial

The most common confusion, which allows these practices to be tolerated, is between an advertorial and materials specific to promotional journalism caused by existent similitudes between the two concepts.

In order to clarifiy the existing diferences amongst these and to highlight each concept's specific characteristics, the following clarifications are made:

- advertorials are defined in speciality literature as "forms of paid commercial messages which simulate the editorial content of a publication in structural terms, design, visual content verbal and/or the context in which it appears", whilst promotional journalism's specific materials (by inserting advertorial/promotional messages) do not simulate but represent editorial content;
- the objectives, used in the case of advertorials, are different depending on the chosen media channel and its type. Each channel influences directly a distinct category of the specific audience[7], whilst promotional journalism's objectives, aimed at specific objectives of marketing and public relations. are not only different in the context of the chosen media channel but, also, take into consideration other factors (e.g. target audience; message; context; subject);
- from a legal point of view, any content, paid or ordered, to be labeled as such – by a specific mention (e.g. advertorial; promo; infommercial) so that it cannot be recognized easily by the mass-media audience[8]. Consequently, by comparison with the advertorial – for which there are regulations regarding the obligations of its publication labeling requirement – materials specific to promotional journalism are not regulated from a legal point of view and, not being advertorials, are not subjected to the labelling rules.

Therefore, in relation to advertorials (according to the qualitative research based upon the fashion magazine *Elle Romania* from 2002 to 2006), materials, specific to promotional journalism, present the following characteristics:

[7] Clyde Brown and Herbert Waltzer, "Organized interest advertorials: Responding to the 9/11 terrorist attack and other national traumas", *The Harvard International Journal of Press/Politics*, 9 (2004): 25.

[8] Tina Tomazic and Jelena Jurisic, *art. cit*., (f.a.): 67-82.

- it represents editorial content (non-simulated) in which advertising or promotional messages are inserted;

- in most cases, they bear the signature of a journalist who is either the author or has manipulated the advertisement or promotion received from the representatives of the organizations; institutions; or public individuals and, without departing from the desired interest expressed by those that paid or created them, has used them to create materials specific to promotional journalism;

- sponsors or beneficiaries are not presented explicitly; however, sometimes, they can be identified by the nature of the article (e.g. by reference to a single industry or activity sector; brand; product or person);

- they are labeled by specific brands (referring to labels imposed by law on the publication: advertorial; promo; info-commercial etc.);

- they are assigned different sections of the publications depending on the subject or journalistic genre used in writing (if applicable); apparently, this justifies the title of editorial content;

- they contain the promotion's distinguishing marks (e.g. textual devices: title; the load; the subject; sources; vocabulary; and so on) which can be found in the article's content;

- they give the message credibility; objectivity; and impartiality by transferring to an, apparently uninvolved, third party (e.g. media channel; journalist - as an author to the article cited sources), , with expertise (specialist in the field to which the article refers); known as such (by the target audience or other specialists, even by means of the function attributed by the publication); or individuals who are famous (e.g. stars; public individuals; brand ambassadors; and brand representatives etc.).

Advertisements

Advertisements represent a form of promotion in terms of language and style used. Promotional journalism (especially news of this type) adopts this style and integrates specific elements in order to stimulate the audience's drive to consume, use or benefit certain products or services.

In speciality literature[9], through the argumentation structure used to influence consumers buying decisions, they represent a related concept to the one of promotional journalism.

Although, in the case of promotional journalism, this structure is more complex and less noticable, any advertising approach should be regarded as an argument directed to a precise target, with the purpose of making it act in a certain way.

In this regard, the following characteristics were considered commonplace to promotional journalism materials: (i) the argumentative structure used generic models of argumentation; (ii) rhetorical language; (iii) the dialogic implicit character; (iv) inter-textuality; (v) complex subtlety of gender; and (vi) the arguments offered to the potential client.

However, in order to avoid confusion in understanding the terms, researchers Tomazic and Jurisic[10] clarified the significant terms attributed to the concept of advertisement and which, most of the time is inserted in materials specific to promotional journalism. These were:

- positive remarks and praise (in the case of promotional journalism, this results in an exclusively positive review) regarding a certain product; service; or company;

- an article joined to an advertisement or a themed commercial (or, in some cases, specific to promotional journalism and associated to the person being interviewed; in case, he/she is a representative of a brand or organization);

- messages which promote a certain product; service; or company, published under the form of a journalistic article, without mentioning their advertising or promotion;

- mentioning, through celebrities, certain products; services; and brands and linked to them;

---

[9] Christina Slade, "Reasons to buy: The logic of advertisements", *Argumentation* 16 (2004): 157–178.

[10] Tina Tomazic and Jelena Jurisic, art. cit., (f.a.): 67-82.

- under the title of recommendation, announcements (editorials) or journalistic texts (usually), accompanied by photos, with the purpose of boosting sales (in the case of promotional journalism, this practice can take the shape of product placement).

Hidden advertisements and hidden publicity

Regarding the particularities which define and contribute towards identifying "hidden" advertisements, these are assessed as follows[11]:

- inserting, in the journalistic one, a part of advertising (or promoting) text with the purpose of either creating or maintaining a real or legal person's interest or determining the sale of a product or service;
- focusing the reader's attention on a specific brand or producer and on its important qualities so as to create and maintain interest in the offered products or services;
- the text is not based on news value (artificial character of the story);
- positive and emotional arguments in favour of the product; service; organisation; or promoted person; and enthusiastic, artificial and exagerated means of expression in order to present it in a favourable light;
- the advertisement is a definite sale suggestion („instructions of sale" are presented; brand language);
- the placement of a product in order to sell it; making it have a different character in comparison to similar products:
- particular mentions relating to the sale or purchase of a product or service quickly (its presentation and specific characteristics or attributes); texts contain usually information regarding time[12]; meaning a specified window of a promotional offer's availability; and the duration of an event etc.

In relation to the particular elements of hidden advertising presented above, promotional journalism endorses them theoretically in their entirety and partially, in terms of specific practice. This states that the term "ad" could be considered to be a kind of promotional journalism. However, it does not cover fully its complexity and variety of specific genres.

The typology, proposed in specialized literature for hidden advertisements and showing the features mentioned below, can be considered to be an example of promotional journalism's specific practices (as shown in research conducted on publications *Elle Romania* during the period from 2002 to 2006):

- items paid by an organization, which presents products and services, in order to improve their reputation;
- an article on a specific topic to attract attention to the advertised products referred to therein;
- text, written in journalistic style by a PR specialist, which appears unchanged in the media;
- an article containing only information favourable to a company because, otherwise, it would abandon purchasing print space in the publication (obligation or blackmail).

Also, according to the literature[13], to better underline the hidden advertisements and, therefore, to facilitate the identification of materials specific to promotional journalism, it is considered to be useful to present the following specific elements which cancel their specific character:

- in a text, criticism of a product; service; or company in a text which triggers a critical point of view with the reader thereof (e.g. those tasks which are offered usually to experts or any other independent sources, based on assumption that they do not get any benefit from praising a product);
- presentation, in an article, of a particular product or service without mentioning explicitly its commercial characteristics (e.g. price; location of sale) to people who could benefit from its use;

[11] *Ibidem*.
[12] *Ibidem*.
[13] Tina Tomazic and Jelena Jurisic, *art. cit*., (f.a.): 67-82.

- informative advertisements which, although they form a journalistic text, are not signed by a journalist and, in fact, are advertisements of products or services; this is a fact confirmed by marking them explicitly (e.g. "promotional message" or "commercial")[14].

Communication Journalism

Researcher, Jean Charron[15], distinguished the following main characteristics of communication journalism:

- the involvement of journalistic bias and use of connotative language and tropes abound along with the axiological adjectives and phrases specific to the expressive function of communication;
- monitoring contact and communion with the audience and the special features of the communication's factual function;
- the manifestation of a report "inter-subjectivity" between journalist and audience; this is visible through mutual design of the two parties (e.g. "I" - "we" and "you" - "I");
- practicing "proximity" journalism by being playful, imaginative, using puns, reflections and impressionistic judgments.

These features of communication journalism (a misnomer for the very meaning of the concept of journalism) can be considered to be common and specific materials to promotional journalism.

Critics of communication journalism, through assessments made against it[16], complete all the specific characteristics and highlight further highlighting its particular characteristics as follows:

- very careful in ensuring "comfortable reception by the public";
- aesthetic journalism, giving an appealing shape to messages in a competitive environment;
- a representation of society as a "mosaic of target audiences and lifestyles";
- a type of journalism which reduces the individual to a consumer.

In relation to these critical acclaims, the second characteristic is most relevant to promotional journalism, in terms of form and strategies practiced and the approach to the target audience. The latter may be the expression of specific features but in a more complex manner as imposed by the studied reality itself.

Hybrid Unlabeled Messages

Hybrid unlabeled messages can be considered to be the first theoretical attempt to identify and define specific elements of promotional journalism. These exceed the already well-established concepts, like hidden advertising and advertorials, with which promotional journalism is confused.

The main feature, of this type of message, is the specific structure of a mixed type, combining editorial content with publicity.

However, the element, which it has in common with promotional journalism, is being published in the publication's editorial. Thes include regular journalistic elements without sponsors or beneficiaries who paid for the development and/or the publication to be identified easily[17].

Also, the messages' actual content and their similarities with promotional journalism's specific materials occurs especially in the title; semantics; and vocabulary.

As for the title: (i) it is considered to be a "typical characteristic of hybrid genres or promotion"; (ii) contains positive elements about the company; its products; or services; (iii) "directs the reader in a predetermined direction"[18]; and the meaning is positive.

Semantic and lexical peculiarities are related to the following aspects: (i) are promotion specific, using words and positive adjectives; (ii) use positive publicity which is achieved through the

[14] Karmen Erjavec and Melita Poler Kovacic, *art.cit.* (2010): 92–105.
[15] Ioan Drăgan, *Comunicarea – paradigme şi teorii*, volumul 2, (Bucureşti: Rao, 2009), 649.
[16] *Ibidem*.
[17] Karmen Erjavec and Melita Poler Kovacic: *Art. cit.*, (2010): 91–109.
[18] *Idem*: 95

basic function and effect of promotion[19]; (iii) ensure, in ubiquitous lexical devices, consistency in promoting a favourable image of the organization; products; services; and (iv) is a direct form of lexical cohesion.

According to researcher, Karmen Erjavec[20], these two concepts include, also, the following common features: (i) partial semantics (e.g. reference to a single organization; product; or service); (ii) introducing the topic only through positive characteristics (for the purpose of building a favourable image); and (iii) the predominant use of positive words and literature (invoking expertise).

Advertisement

Some of the main features, of advertising, which may interest this research are[21]: (i) it is more reliable compared to advertising; (ii) it provides diagnostics; (iii) the use of custom communication with potential customers; and (iv) it causes them to evaluate information, even if it presents the same content from advertising.

However, in the case of promotional journalism, although, in terms of reporting to the target audience, these characteristics are given particular importance in achieving specific marketing or public relations targets, , their character remains an apparent one.

Therefore, from analyzing, between 2002 and 2006, the content of specific materials, with a promotional purpose, identified to promotional journalism, in the fashion publication *Elle Romania*, we found that the expression, of these practices, contained commonly the following features: (i) ensuring the source's credibility; (ii) acknowledgement of the lack of citation and the use of a single citation source; (iii) in relation to the subject material, diagnostics based on the signatory's false, apparent or relative expertise (in most cases, based on the position they occupied in the publication's organizational structure of the publication); (iii) custom address manner to the target audience; (iv) assessing conceptual content of information within specific material (most often by its signatories or by citing a single source and/or secondary sources which confirm or reinforce the idea enunciated by source).

In relation to the specific items listed above, promotional journalism has the following features:

(i) With regard to the first element, promotional journalism uses the target source's reliability; objectivity; and reputation to reduce public resistance to the message and to increase its effectiveness according to specific marketing objectives. In this sense, internal experts (e.g. employees or employees of publication heading the signed materials in which the article was published and the quality of "specialists") or external (e.g. representatives of brands; organizations etc.) are used to confirm or reinforce the signatory's findings in relation to the subject of the article.

(ii) The second distinctive feature, shown above, limits the publications' expression of explicit advertising editorial content to terms related to commercial characteristics (e.g. selling price; and location) and potential beneficiaries. However, in the case of promotional journalism, strategies and practices are more "subtle" in the sense that we can talk about product placement (the title of recommendations; examples; proposals) without textual presence of commercial terms. Nevertheless, the choice, for those products and the presentational characteristics and product attributes, accompanied by images of the packaging, are placed in a favourable editorial context (e.g. item advice; recommendations; trends; experiences or personal choices). These are forms of implied promotion and, sometimes, have potentially greater efficacy when compared to explicit trade entries.

(iii) In the case of informative advertisements, the third distinctive element, direct comparison in terms of promoting journalism can be achieved by one of its specific genre - "news promotion". Clearly, from the content analysis conducted for the publications *Elle Romania*, in the period from

[19] Karmen Erjavec and Melita Poler Kovacic:*Art. cit.*, (2010): 92-105.

[20] Karmen Erjavec, *art. cit.* (2004): 553–578.

[21] Martin Eisend and Franziska Kuster, "The effectiveness of publicity versus advertising: a meta-analytic investigation of its moderators", *Journal of the Academy of Marketing Science* (2010)

2002 to 2006 it had the following characteristics: (a) be signed by a journalist (not: one signature for that news item, usually there were more categories, of this kind, and each bore the signature of a magazine journalist); (b) labeled visible (false) "news"; (c) were assigned to specific sections of readers' fields of interest (e.g. fashion; beauty; health); (d) formal assignment to a specific section (given only by title) because these were included in the promotional text and/or advertising which did not target the specific section to which they were assigned; (e) their character was permanent and was published regularly in the observed sections which were framed and sequenced with the rest of the materials) and had, also, a fixed structure in the publication's economy.

Stories

Reports, of studies[22], exemplify explicitly promotional journalism practices by describing the ratio of real estate transactions.

A report, of a transaction, can be considered to be a development of an advertorial which, initially, loses its appeal and can be considered to be a type of advertising (e.g. advertisement).

Such an account is a kind of promotion; an advertisement, posing as news, such as embedded inter-textuality.

However, although it appears to be a story, it presents subtle elements to promote the characteristics of a "hybrid genre"[23].

Both specific news items and the specific advertisements are present, in this kind of genre, and the communicative functions, of information and belief, are equal.

Reporting, on real estate transactions, are considered to be "boundary objects", located between promotion and information. This is necessary in order that this genre can be placed in the broader context of the analysis.

Specific characteristics of promotional journalism

Also, following the research, conducted between 2002 and 2006 on the fashion publication *Elle Romania* and after a through analysis of related concepts, the following were considered to be specific characteristics of promotional journalism and complementary to those presented above:

- completion and publication, of materials specific to promotional journalism, are linked strictly to reaching marketing or public relations objectives;
- strategies and techniques, used in creating and publishing, are similar to those used in advertising and public relations;
- the selection, of subjects, is based on commercial reasons – boosting sales or promoting a product; service; organization; or person;
- the approach's perspective is one sided (e.g. one point of view; only one cited source);
- evaluation and reporting on the subject is strictly positive;
- the cited source is a representative of the company; a satisfied customer, or an expert in the field. This confirms or reinforces the favourable idea regarding the subject of the article;
- where no source is cited, the article's author shares his experience or opinion – strictly positive - regarding the subject of the article;
- the used vocabulary used contains only positive figures of speech (adjectives, superlatives). These underline the nature of the genre and the objectives (e.g. building and/or maintaining a favourable image; promoting atributes; and advantages of using the certain product/service);
- these ensure the transfer of particular journalistic genres specific attributes (e.g. objectivity; impartiality neutrality) and reduce resistance to messages which contain or use the specific shape structure and typology.

[22] Kenneth C. C. Kong, "Property transaction report: news, advertisement or a new genre?" *Discourse Studies*, 8 (2006): 771-796.

[23] *Ibidem*.

Conclusions

The purpose, of this study, was to contribute by creating a conceptual reference framework, in order to develop a specific know-how which would facilitate the efforts in identifying; analyising; and interpreting promotional journalism. It was difficult to both define and particularise a concept theoretically and practically amid vague boundaries concerning related cobepts which existed in speciality literature.

In this context. the objectives, of this research, focused on establishing the theoretical and practical characteristics of promotional journalism. This was based upon a comparative analysis to related concepts, and a qualitative analysis of specific content found in the fashion publication, *Elle Romania*, between 2002 and 2006.

The study's results led both to establishing and clarifying important conbceptual boundaries between promotional journalism and other popular concepts in literature. These either related to it or to represent the same studied reality, and to identify specific theoretical and practical based characteristics upon comparative analysis and analysis of the content of fashion publication, *Elle Romania*, between 2002 and 2006.

Therefore, this thesis' originality was in addressing interdisciplinary issues and adopting a research strategy to achieve its objectives - from two points of view - both theoretical and practical. These would help to enrich not only the conceptual framework, of reference, but, also, to provide a better understanding of the studied reality.

In terms of research results, establishing theoretical and practical characteristics, specific to promotional journalism, can be useful to both theoreticians and researchers in the field. This is not only in defining and analysing it but, also, in assisting practitioners and beneficiaries, of this new marketing instrument, in understanding and improving the process of creation and implementation.

Research Limitations

Regarding the limitations of the research, they were assessed as being: (i) the selection of articles and studies reviewed; (ii) analyzing; interpreting; and assessing the fundamental ideas identified in the literature in relation to the issues studied; (iii) lack of unanimity in the conceptual framework's references which were considered in order to achieve comparative analysis; (iv) the limited number of existing studies on the subject of research; (v) the selection and representativeness of the sample and units of analysis; (vi) the construction of research instruments used for content analysis and the lack of validation thereof; (vii) the absence of the quantitative content analysis component; (viii) inability of generalization of research results; and (ix) the subjectivity, of the researchers, in relation to their assessments.

Future Research

In reaching this study's goal and objectives, the following research efforts can be considered to be useful and, in particular, the use of triangulation as a strategy. These are: (i) in the editorial offices, of the analysed publications, scientific observation regarding particular practices in creating and publishing specific materials to promotional journalism; (ii) conducting in-depth interviews with the actors involved in all the steps of this practice; and (iii) creating an adequate toolkit to achieve a content analysis which will respect its predominantly quantitative character and will ensure, also, objectivity and validity of the research results.

References

- Baker, William E., and Richard J. Lutz. "An empirical test of an updated relevance – Accessibility model of advertising effectiveness", *Journal of Advertising*, 29 (1) (2000): 1-14.
- Baker, Edwin C. *Mass-media, piaţa şi democraţia*. Iaşi: Tipo Moldova, 2008.
- Batra, Rajeev., and Michael L. Ray. "Affective responses mediating acceptance of advertising", *Journal of Consumer Research*, 13 (2) (1986): 234-249.

- Brown, Clyde, and Herbert Waltzer. "Organized interest advertorials: Responding to the 9/11 terrorist attack and other national traumas*", The Harvard International Journal of Press/Politics* 9 (2004) 9: 25.
- Celebi, Serra Inci. "The credibility of advertising vs. publicity for new FMCGs in Turkey", *Corporate Communications: An International Journal*, 12 (2) (2007): 161-176.
- Charbonneau, Jan, and Ron Garland. "Product effects on endorser image: The potential for reverse image transfer", *Asia Pacific Journal of Marketing and Logistics*, 22 (1) (2010): 101-110.
- Chen, Hong Chyi, and Richard Reardon, Cornelia Rea, David J. Moore. "Forewarning of content and involvement: Consequences for persuasion and resistance to persuasion", *Journal of Experimental Social Psychology*, 28 (1992): 523-541.
- Chen, Xia, and Cheng Qiabg, Lo Kin. "On the relationship between analyst reports and corporate disclosures: Exploring the roles of information discovery and interpretation", *Journal of Accounting & Economics*, 49 (3) (2010): 206-226.
- Chen, Yubo, and Jinhong Xie. "Third-party product review and firm marketing strategy", *Marketing Science*, 24 (2) (2005): 218–240.
- Cooper, Christopher A., and Anthony J. Nownes. "Money well spent?: An experimental investigation of the effects of advertorials on citizen opinion", *American Politics Research*, 32 (2004): 546-569.
- Cunningham, George B., and Janet S. Fink, Linda Jean Kenix. "Choosing an endorser for a women's sporting event: The interaction of attractiveness and expertise", *Sex Roles* 58 (2008), 371–378.
- Curran, James. *Media and Power*. Routledge, 2002.
- Curran, James, and Jean Seaton. *Power without responsibility: The press, broadcasting, and new media in Britain*, sixth edition. Routledge, 2003.
- Darnel, Simon C., and Robert Sparks. "Inside the promotional vortex. Canadian media construction of Sydney Olympic Triathlete Simon Whitfield", *International Review for the Sociology of Sport*, 40 (3) (2005): 357–376.
- DeFleur, Melvin L., and Dennis E. Everette. *Understanding Mass Communications – A Liberal Arts Perspective*. Houghton Mifflin Company, 2002.
- Dobrescu, Paul, şi Alina Bârgăoanu. *Mass-media şi societatea*, ediţia a II-a revăzută şi adăugită. Bucureşti: Comunicare.ro, 2003.
- Dominick, Joseph R. *Ipostazele comunicării de masă: Media în era digitală*. Bucureşti: Comunicare.ro, 2009.
- Drăgan, Ioan. *Comunicarea – paradigme şi teorii*, volumul 2. Bucureşti: Rao, 2007.
- Dumitrăscel, Stelian. *Limbajul publicistic românesc din perspectiva stilurilor funcţionale*. Iaşi: Institutul european, 2006.
- Eisend, Martin, and Franziska Küster. "The effectiveness of publicity versus advertising: a meta-analytic investigation of its moderators", *Journal of the Academy of Marketing Science* (2010).
- Erjavec, Karmen. "Beyond advertising and journalism: hybrid promotional news discourse", *Discourse & Society*, 15 (5) (2004): 553–578.
- Erjavec, Karmen. "Hybrid public relations news discourse european", *Journal of Communication*, 20 (2): 155–179.
- Erjavec, Karmen, and Melita Poler Kovacic. "Relations with the media: Who are the main actors in an advertorial production process in Slovenia?", *Journalism*, 11 (1) (2010): 91–109.
- Gemser, Gerda, and Martine van Oostrum, Mark A. A. M. Leenders. "The impact of film reviews on the box office performance of art house versus mainstream motion pictures", *J Cult Econ* 31 (2007): 43–63.
- Graeff, Timothy R. "Using promotional messages to manage the effects of brand and self-image on brand evaluations", *Journal of Consumer Marketing*, 13 (3) (1996): 4-18.
- Greenwald, Anthony G., and Clark Leavitt. "Audience involvement in advertising: Four levels", *Journal of Consumer Research*, 11 (2) (1984): 581-592.
- Hallahan, Kirk. "No, Virginia, it's not true what they say about publicity's «Implied third-party endorsement» effect", *Public Relations Review*, 25 (3) (1999): 331–350.
- Hardy, Jonathan. "Mapping commercial intertextuality: HBO's True Blood", *Convergence*, 17 (2011): 7.
- Hartley, John. *Communication, Cultural and Media Studies – The Key Concepts*, third edition. Routledge, 2002.
- van HERPEN, Erica, and Rik Pieters, Rik, Jana Fidrmucova, Peter Roosenboom. "The information content of magazine advertising in market and transition economies", *Journal of Consumer Policy*, 23 (2000): 257–283.

- Holliman, Richard. "Media coverage of cloning: a study of media content, production and reception", *Public Understanding of Science*, 13 (2004), 107–130.
- Huh, Jisu, and Denise E. Delorme, Leonard N. Reid. "The third-person effect and its influence on behavior alout comes in a product advertising context: The case of direct-to-consumer prescription drug advertising", *Communication Research*, 31 (2004): 568-599.
- Keane, John. *Mass-media şi democraţia*, Iaşi: Institutul european, 2000.
- Keeble, Richard. *Ethics for journalist*. Routledge, 2001.
- Keeble, Richard. *The Newspapers Handbook*, third edition. Routledge, 2001.
- Kong, Kenneth C. C. "Property transaction report: news, advertisement or a new genre?", *Discourse Studies*, 8 (2006): 771-796.
- Knoppers, Annelies, and Agnes Elling. "We do notengage in promotional journalism. Discursive strategies used by sport journalists to describe the selection process", *International Review for the sociology of sport*, 39 (1) (2004): 57–73.
- Maat, Henk Pander. "How promotional language in press releasesis dealt with by journalists: genre mixing or genre conflict?", *Journal of Business Communication*, 44 (2007): 59.
- McMullan, John L., and Jason Mullen. "What makes gambling news?", *Journal of Gambling Studies*, 17 (4) (2002): 321-352.
- Mirzoeff, Nicholas. *The Visual Culture Reader*, second edition. Routledge, 2002.
- Norrgrann, Anu, and Halkoaho Jenniina. "Retailers and media as intermediaries for symbolic resources", *Romanian Journal of Marketing*, 5 (1) (2010): 132-151.
- Reah, Danuta. *The Language of Newspapers*, second edition. Routledge, 2002.
- Slade, Christina. "Reasons to buy: The logic of advertisements", *Argumentation*, 16 (2002): 157–178.
- Skerlep, Andrei. "Re-evaluating the role of rhetoric in public relations theory and in strategies of corporate discourse", *Journal of Communication Management*, 6 (2) (2001): 176.
- Štular, Katarina. "Hybrid messages in magazines: A case study of the lifestyle magazine Obrazi", *Medij. Istraž.*, 15 (1) (2009): 61-77.
- Till, Brian D., and Michael Busler. "Matching products with endorsers: attractiveness versus expertise", *Journal of Consumer Marketing*, 15 (6) (1998): 576-586.
- Tomazic, Tina, and Jelena Jurisic, Jelena. "Covert advertising in the context of media ethics on the example of slovenian press", *Medijski Dijalozi* 4 (f.a.), 67-82.
- Tungate, Mark. *Media Monoliths – How great media brandsthrive and survive*. Kogan Page, 2004.
- Ulrich, R. Orth, and Harold F. Koenig, Zuzana Firbasova. "Cross-national differences in consumer response to the framing of advertising messages: An exploratory comparison from Central Europe", *European Journal of Marketing*, 41 (3/4) (2007): 327-348.
- Vakratsas, Demetrios, and Tim Ambler. "How advertising works: What do we really know?", *Journal of Marketing*, 63 (1) (1999): 26-43.
- Wang, Alex. "Cross-channel integration of advertising: does personal involvement matter?", *Management Research News*, 32 (9) (2009): 858-873.

CHARACTERISTICS OF THE CONSUMER PREFERENCES RESEARCH PROCESS

MIRELA-CRISTINA VOICU*

Abstract

*Information is one of the most important resources that a company must possess. Some **information is** hidden deep in the black box - the mind of the consumer, as in the case of **information** about consumer preferences. Although it seems a concept difficult to **grasp**, it was shown that consumer preferences can be effectively measured and their research may provide a deeper understanding of the choices that consumers make when deciding to select an offer against another and when deciding to continue in time the relationship with one supplier. The following paper reveals some important aspects regarding the use of **information** regarding consumer preferences, the fundamentals behind consumer preferences research and the milestones in **the** consumer preferences research process.*

Keywords: *marketing research, consumer behavior, consumer preferences, dimensions of consumer behavior*

Introduction

Studying the consumer's behaviour is not an easy task at all, and even less simple is observing only one aspect of this behaviour, like in the present case, the consumers' preference for a certain product, label or organisation. Along the research consumers may express their needs and desires and still may act in a totally opposite way; at times, it's possible that they aren't even aware of the true motivations behind their buying behavior, or they could react to factors determining last minute changes to their buying decision. Although the consumer decisions are relatively easy to notice and quantify, the psycho-physiological processes behind them are very difficult to take into account[1].

Research related to consumer behavior looks upon its different dimensions and their relationship. The final aim of these investigations is to foresee and channel the future reactions of the demand agents, for a precise correlation between demand and supply. In this respect, all dimensions that lead to the manifestation of a certain behaviour must be studied and understood. Each of the dimensions of the consumers' behaviour we want to focus on within a marketing research imprints on it with certain specificity, a special way of approach. Therefore, the features of the consumers' preferences mark the conducted studies with certain specific features in this sense, which we must take into consideration when elaborating and conducting these studies, in view of observing the essence of this dimension of the consumers' behaviour.

1.The necessity of knowing the consumers' preferences

The preferences of the consumers are a positive motivation, expressed by the affective compatibility towards a product, service or trading form. We're not dealing with an internal bodily function, but a quality of objects that aims to fulfill our needs, quality acquired within the connection between man and the merchandise able to fulfill these needs.

Preferences can be triggered by: the features related to the material substance of the goods (shape, size, print, taste, colour, consistency, package, etc.); elements referring to label, name, use instructions that accompany the product; the statute granted to the person owning and using that particular product[2]. Theoreticians, at some point, had the tendency to limit the preference to the concept of choice; however choice and preference are two radically different entities: the first one is

* Lecturer, PhD, "Nicolae Titulescu" University of Bucharest (voicu.cristina.m@gmail.com).

[1] Kotler, Ph., 2008, *Marketing Principles*, Teora Publishing House, Bucharest.

[2] Cătoiu, I, Teodeorescu, N, 2004, *Consumer Behavior*, Second Edition, Uranus Publishing House, Bucharest, pag. 22.

an action and the other one, a state of mind[3]. Preferences are the result of a long-term relationship between the brand and the consumer, as the latter learns to associate the brand with a symbol and perceive it as having high quality. Following these deep connections created over the course of time, a strong emotion is developed which lies on the basis of preferences, remaining present even in the absence of the friendly symbol or of any other component feature.

Although a hardly comprehensible concept, it has been demonstrated that the consumers' preference can be measured effectively, and that their study can provide a more thorough understanding on the choices consumers make, when they decide to select a particular offerer as against the other, or even when they decide to continue the relationship with the offerer in time. Additionally, conducted studies have established various concepts related to the preference, such as the concept of the formed preference which underlines the idea that the consumers' preferences are not better defined, but rather formed along the process of choosing, a constructive point of view which suggests that different tasks and contexts highlight different aspects of the options, the consumer concentrating on different considerations leading to inconsistent decisions[4].

Knowledge of consumer preferences is especially important with respect to the various activities carried out at the organizational level, necessary for its survival. For instance, if an entrepreneur must determine what features must have the product he wants to create, he will interview more potential buyers, asking them to mention the level of preference for each separate feature. The consumer preferences and behavior represent the basis of the pretesting models for the new products (ASSESSOR, COMP, DEMON, NEWS, SPRINTER), which implies determining the functional relationships between the buyer's opinion concerning a product, testing it and the purchase behavior. The level of preferences is one of the variables that need to be taken into account when identifying the strong and weak points of the competitors. By measuring the consumer preferences before and after carrying out an advertising campaign, the transmitter may evaluate its success or failure[5]. The preferences towards certain products or brands may constitute the theme of a survey supplying information concerning the relative non-consumers, since attracting these represents an important means of increasing the sales volume up to the maximum limits of market potential. The companies constantly increasing the level of reminding and of preference shall attain an inevitable increase in market share and profitability. The size of profits is less important than managing to consolidate consumer preferences towards its products[6].

More frequent are the situations that emphasize the necessity of knowing this dimension of the consumers' behaviour.

After determining consumer preferences towards a brand, the producer may take the following measures, with a view to increase preferences for that brand:

- change the product;
- change beliefs concerning the brand;
- change beliefs concerning the competing brands;
- change the importance of features;
- attract attention towards neglected features;
- change the consumers' ideals.

---

[3] Hansson, S.O., Grüne-Yanoff, T., 2006, *Preferences*, Stanford Encyclopedia of Philosophy, 4 October 2006, http://plato.stanford.edu/entries/preferences/.

[4] Novemsky, N., Dhar, R., Schwarz, N., Somonson, I., 2007, *Preference Fluency in Choice*, Journal of Marketing Research, Vol. XLIV (August 2007), 347–356, http://www.atypon-link.com/AMA/doi/pdfplus/10.1509/jmkr.44.3.347.

[5] Kotler, Ph., 2008, *Marketing Management,* Teora Publishing House, Bucharest.

[6] Voicu, M.C., 2007, *Aspects Related to Researching Consumer Preferences*, Theoretical and Applied Economics, No 9/2007 (514), ISSN 1841-8678 (print edition)/ISSN 1844-0029 (online edition) http://store.ectap.ro/articole/250.pdf.

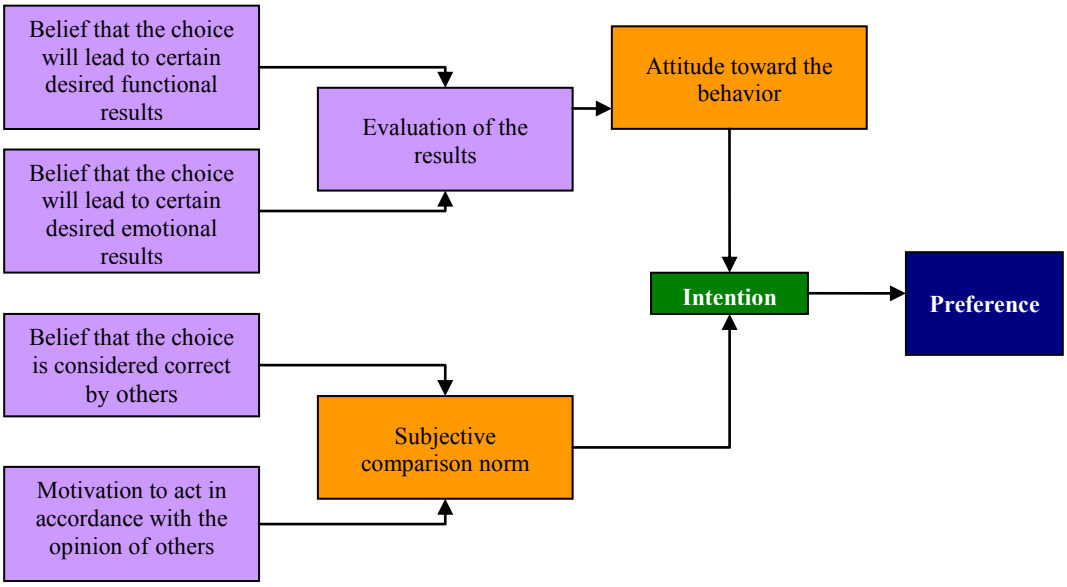
In addition, in order to attract consumers' preferences towards their own brands, producers and retailers may chose the option of "renting" those brands having won the preferences of consumers (names or symbols previously created by other producers, names of celebrities, names of movie characters etc.).

2.Fundamentals of studying the consumers' preferences

The theory of rational choice comprises attitude components which, in the end, represent the basis of forming a preference. This theory gives us a model contributing to a better understanding of the way consumers' preferences are formed and providing us, in an appropriate way, with the necessary means of researching and foreseeing the evolution of the consumers' preferences.

After analysing the way consumers' preferences are formed from the point of view of the theory of rational choice, depicted in figure 1, we can state that, in order to understand the consumers' preferences, it is necessary to determine their demands and desires regarding the performance (functionality) involved in the purchase, the expected emotional results, as well as the subjective standards consumers use to identify the tendency for a product or a service as against the others.

Figure 1. *Structural model of how consumer preferences are formed*



Source: *Developing Customer Insight: The Determination of Customer Preference*, International Communication Research, www.icrsurvey.com/docs/Customer%20Preference%20Formation_1205.doc

A first hypothesis of the presented model is that individuals perform thought purchases. In some cases, the act of thinking can be minimal when purchasing a product or a service has already become a habit. In other cases, the act of thinking can be extended over a longer period of time, whereas each element is carefully processed before performing the purchase.

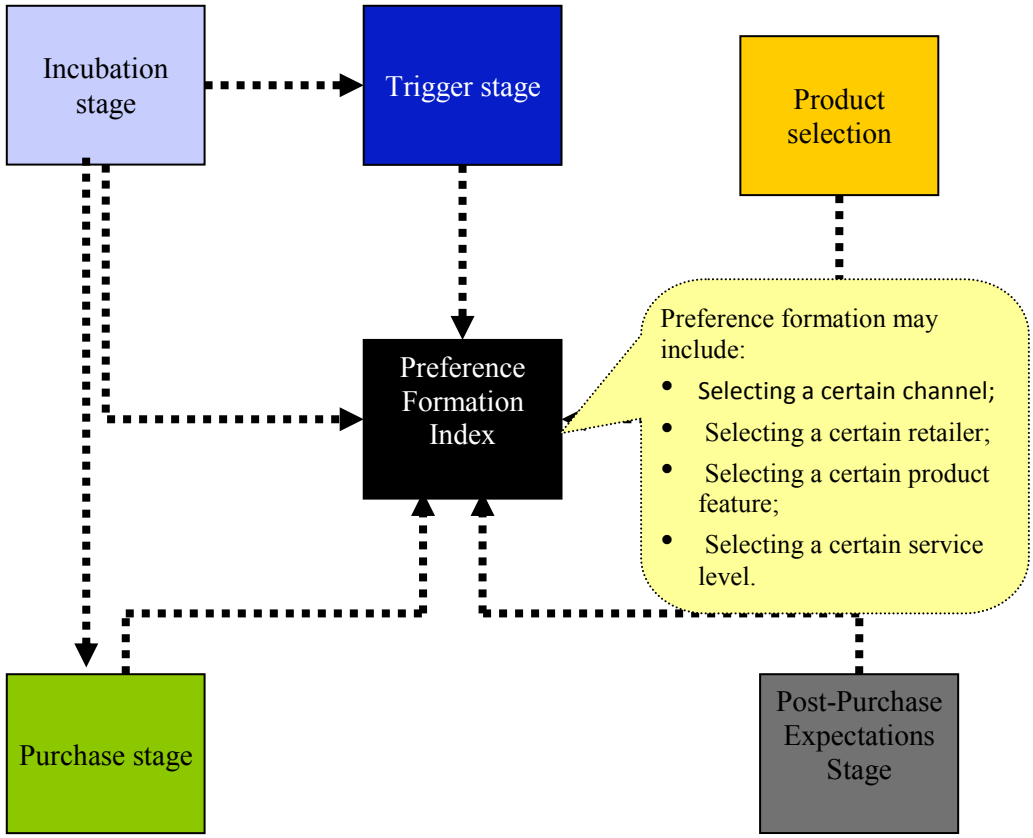
We can observe that the presented model is used by the consumer, more or less, whenever he buys and the components that influence a preferred decision are, at the same time, components that interfere in the process of evaluating the performance of the product/service bought, as well as of the

organization responsible for it. Hence, to the extent that the components of the preference change, the components that influence the satisfaction change, too, accordingly.

The theory of rational choice takes into consideration the consequences of performed actions. We prefer a product, a person or a service because we have already decided that the object suits best to our needs or demands on the performance, altogether with the emotional demands judged by our standards of comparison. Each step in the purchasing process contains emotional and performance components preferred by the consumers.

If we extend the steps of the purchasing process over the model of the theory of rational choice (depicted in figure 1), we will be able to interpret the evaluation experience by means of the purchase (see figure 2).

Figure 2. *Evaluating the purchasing experience – using the model of rational choice within different stages of the purchasing process*



Source: *Developing Customer Insight: The Determination of Customer Preference*, International Communication Research, www.icrsurvey.com/docs/Customer%20Preference%20Formation_1205.doc

Note: The indicator of preference formation represents a standardized score that varies between 1 and 100

In reality, the decision of buying is taken by making certain well-thought compromises (compensations) between the levels of fulfilling the consumers' preferences as against the significant attributes, considered by the consumers as decisive when purchasing a product (the most frequent example is accepting some intermediary levels of performance in exchange for a price suitable to the consumer's purchasing power)[7].

3.Methods used in the study of the consumers' preferences

Since the preference appears only in the context of a strong motivation, the research of preferences covers a more limited but, at the same time, a much deeper area than the study of motivations that subsumes the evaluation of the preference intensity, using also the same instruments as in the case of the evaluation of reasons.

The study of consumers' preferences can resort to *the observation method* (as when analysing the purchasing reasons), being the cheapest way of collecting behavioural information and, at the same time, the most accurate one that assures an authentic motivational image. *The selective enquiry* based on a written questionnaire is also used in studying consumer preferences even though it determines solely the declared behavior of consumers and not the actual one, as in the case of observation.

Measuring consumer preferences for alternative product concepts may be performed by using technique that is more and more widely known, namely the *conjugate analysis*. This is a method of finding out the value in use consumers attach to various features of an object. The respondents are presented with several hypothetical offers obtained by combining certain features, and they must rank these offers according to their preferences.

Testing consumer preferences is based on a variety of techniques such as: simple rank ordering, paired comparisons, appraisal scales, each having specific advantages and disadvantages. *The method of unitary appraisal* supplies much more information than the method of simple ranking and that of paired comparisons. The subject is required to order on a scale his/her preferences for each product. By using this method, we can find out not only the order of preferences, but also the qualitative levels of preferences for each product and the distance between the products. At the same time, this method is easy to use, especially when we must evaluate several products[8].

Investigating preferences may be approached in different combinations with investigations on other dimensions of consumer behavior. For this purpose, one can make use of special investigation techniques, such as contextual methods or psychodrama[9].

The research on the consumers' preferences has lead to a more thorough understanding of several important problems arisen in the research on the consumer satisfaction, especially one related to the fact that the consumer satisfaction in superior conditions at present does not assure the manifestation of the consumer preference in the future.

4. Key stages in organizing a research on the consumers' preferences

Organizing a selective marketing research is an especially complex process. In order to maximize the contribution of the marketing research to the decision-making process, this activity must be organized with most care.

---

[7] Daj, I., Stareţu, I., 2002, *Simplified algorithm of applying the analysis method of compensations in the research of the consumer preferences,* National symposium with international participation – Computer-assisted projection, 7-8 November 2002, http://dpr.unitbv.ro/adept/prasic/work/design/d23.pdf.

[8] Voicu, M.C., 2007, *Aspects Related to Researching Consumer Preferences*, Theoretical and Applied Economics, Nr. 9/2007 (514), ISSN 1841-8678 (print edition)/ISSN 1844-0029 (online edition), http://store.ectap.ro/articole/250.pdf.

[9] Florescu, C., Balaure, V., Boboc, Şt., Cătoiu, I., Olteanu, V., Pop, N. Al., 1992, *Marketing*, Marketer Publishing House, Bucharest, pag.164.

Carrying-out the marketing research involves going through certain successive phases, within a complex process, starting with determining the research aim and objectives and finishing with presenting conclusions and recommendations.

➥ *Identifying the issue and defining the research purpose*

Identifying the issues and defining the research purpose is one of the most important phases of the research process, having decisive influences over the subsequent phases. Even if perfect decisions are taken during the other phases, the research is compromised if the issue to be investigated and the research purpose were not clearly defined, and this can only be attained through a close collaboration between the person conducting the research and its beneficiary[10].

In order to exemplify such a research, we will assume that the purpose is: „Research on the preferences of tourism services consumers for the Sinaia mountain resort".

➥ *Defining the research objectives*

In the process of organizing the marketing research, formulating objectives involves determining on an operational level which information is necessary for grounding the optimal decision alternatives for each dimension of the issue investigated. Each objective must be relevant for the research purpose.

Establishing clearly the research objectives is useful in fundamenting the priorities concerning the necessary information and serves as a standard in evaluating the final results.

The objectives corresponding to the research purpose may be formulated as follows:

- Identifying the frequency of visits at the mountain resorts;
- Determining the importance of the mountain resorts' main features;
- Determining the main categories of tourists visiting the Sinaia resort, by age, sex, occupation and income;
- Identifying the main mountain resorts competing with the Sinaia resort;
- Establishing the main categories of visitors who prefer Sinaia, by age, sex, occupation and income;
- Determining the frequency of visits at Sinaia made by tourists who prefer this resort;
- Identifying the minimal length of the stay by visitors who prefer Sinaia;
- Determining the year period when visitors prefer travelling to Sinaia;
- Identifying the minimal number of people accompanying visitors who prefer travelling to Sinaia;
- Determining the main features preferred by visitors coming to Sinaia;
- Identifying the appreciation degree of the main features of the resort by tourists that prefer Sinaia;
- Determining the main reasons of tourists who prefer visiting Sinaia;
- Identifying the way tourists preferring Sinaia appreciate this resort's main features of the tourism services.

➥ *Defining the research hypotheses*

Once the research objectives are set, it is necessary to decide on the hypotheses to be tested within the research. Based on a logical analysis of all possible hypotheses related to the issue under research, those hypotheses that can be tested by the research conducted are selected.

Stating a valid hypothesis may have as a starting point the theory of a discipline, the experience acquired by certain specialists, the results of previous researches or the results of an exploratory research conducted in advance.

For our example, the corresponding hypotheses may include:

- The majority of people are frequently travelling to mountain resorts;

[10] Balaure, V., Adăscăliței, V., Bălan, C., Boboc, Șt., Cătoiu, I., Olteanu, V., Pop, N. Al., Teodorescu, N., 2003, *Marketing,* Uranus Publishing House, Bucharest, pag. 133.

➢ According to tourists, the most attractive features of the mountain resorts are the natural location and the diverse landscapes, as well as the concentration of tourist attractions;

➢ Sinaia is on top of the most visited mountain resorts;

➢ Most of the tourists visiting Sinaia are male persons with an income of 2000 Lei;

➢ Sinaia is a mountain resort preferred most specially by male persons with ages between 20 and 35 years, working as employees with higher education and with an income of 2000 Lei;

➢ At least 50% of the tourists, who prefer Sinaia, travel to this resort at least three times a year;

➢ The tourists are unsatisfied with the services provided at Sinaia mountain resort;

➢ All year long, the winter season is preferred for the package tours offered by Sinaia mountain resort.

➥ *The research sample*

It is essential in carrying out a marketing research to determine the elements concerning the research sample. Sampling relates to establishing the sample size and structure, so that one basic condition is fulfilled, for the sample to be representative with respect to the population researched[11]. In this regard, a sample base (general group, selection group and observation unit) and the dimension of the research, which will produce the best results with minimal costs (does not necessarily ensure the representativity of the information), will be established.

The sample size, apart from its theoretic foundations, must answer to the concrete objectives associated to the study under scrutiny. In practice, while it is possible to determine a sample size ensuring representativeness of all information to be gathered, is very seldom used, due to the costs involved. A compromise is usually accepted between objectives and costs, by choosing that sample size producing the best results.

➥ *The research questionnaire*

The questionnaire is the instrument most frequently used in obtaining primary data and consists in a set of questions the respondents must reply to. The flexibility of such instrument lies in the fact that a question may be asked in countless different ways.

The questionnaire is one of the most important elements the success of a selective research depends upon. Concerning the methodology of elaborating the questionnaire, it is believed it is more of answer art than a science.

Specialists agree that, in order for the questionnaire to be an efficient tool, it must fulfill the following functions:

- to ensure the cooperation and involvement of the respondents;
- to communicate correctly to the respondents what is expected from them;
- to aid the respondents in formulating answers to questions;
- to avoid possible distortions of replies;
- to facilitate the interview operator to carry out his/her task;
- to generate the base necessary for processing the data gathered.

Upon elaborating the questionnaire, aspects such as the following needs to be addressed[12]:

⇨ identifying the characteristics comprised in the survey objectives and program, and their logical ordering. Mentioning the desired information and the research objectives envisage that every objective, hypothesis and variable must reflect in the structure of the questionnaire. Also, another preliminary moment of great importance is when the method of collecting information is established, a phase with great impact on the other stages during the projection of the questionnaires. The

[11] Anghelache, C., 2008, *Treaty of theoretical and economic statistics*, Economica Publishing House, Bucharest.

[12] Voicu, M. C., 2008, *The questionnaire – a tool in the survey research*, The Romanian Magazine of Statistics, Supplement May 2008, pp.112-125, ISSN 1018-046x, B+ category, CNCSIS monitored ISI Thomson Philadelphia (SUA).

questionnaires' content and the way questions are formulated, their type and sequel, the questionnaires' length and other physical features are subject to this phase.

⇨ formulating the questions the respondent is to be asked. With this respect, one must take into account:

- the type of questions that are to be used (closed, open or mixed questions; factual or opinion questions etc.);
- the quality of questions (to be specific, simple, to avoid ambiguity, vague and tendentious wording, to avoid presumptions or hypotheses etc.);
- the order of questions (the questionnaire must be elaborated using the "funnel" principle, starting with general questions and continuing with more and more specific questions, or using the "inverted funnel" approach);

⇨ choosing the proper sizing, page layout and general aspect of the questionnaire;

⇨ coding and elaborating the code list;

⇨ questionnaire pretesting.

After applying the questionnaire and processing the data collected, we proceed to analyzing and interpreting the data in order to reach the research conclusions. The research conclusions aim at answering to the objectives and hypotheses set out in the preliminary phase of the research, and shall constitute an important source of data for the decision-maker.

Conclusions

Current debate on consumer preferences research is reduced to a few key points:

- Determining the preferences of the consumers is part of the category of strategic information. This type of information allows organizations to take a decision that would lead to the fructification of preferences, which will ensure its success on the market it activates on.
- The features of the consumers' preferences and, in general, of the consumers' behaviour impose that the marketing research appropriately adapt in order to observe an aspect of the consumers' behaviour, which is more of qualitative nature, and, as a result, hard to discover by means of a quantitative method.
- Along the marketing research it is necessary to take into consideration several key stages, which, if carried through, will influence the obtaining of certain higher qualitative information. Of great influence on the quality of the data obtained by the means of the marketing research are the stages that formulate the problem and the research objectives, as well as the stage when the questionnaire is elaborated – at some point important steps in evidencing the preferences of the consumers.

References

- Anghelache, C., 2008, *Treaty of theoretical and economic statistics*, Economica Publishing House, Bucharest.
- Balaure, V. (coordinator), Adăscăliţei, V., Bălan, C., Boboc, Şt., Cătoiu, I., Olteanu, V., Pop, N. Al., Teodorescu, N., 2003, *Marketing,* Uranus Publishing House, Bucharest.
- Cătoiu, I, Teodeorescu, N, 2004, *Consumer Behavior*, Second Edition, Uranus Publishing House, Bucharest.
- Daj, I., Stareţu, I., 2002, *Simplified algorithm of applying the analysis method of compensations in the research of the consumer preferences,* National symposium with international participation – Computer-assisted projection, 7-8 November 2002, http://dpr.unitbv.ro/adept/prasic/work/design/d23.pdf.
- Florescu, C., Balaure, V., Boboc, Şt., Cătoiu, I., Olteanu, V., Pop, N. Al., 1992, *Marketing*, Marketer Publishing House, Bucharest.
- Hansson, S.O., Grüne-Yanoff, T., 2006, *Preferences*, Stanford Encyclopedia of Philosophy, 4 october 2006, http://plato.stanford.edu/entries/preferences/.
- Kotler, Ph., 2008, *Marketing Principles*, Teora Publishing House, Bucharest.

- Kotler, Ph., 2008, *Marketing Management,* Teora Publishing House, Bucharest.
- Novemsky, N., Dhar, R., Schwarz, N., Somonson, I., 2007, *Preference Fluency in Choice*, Journal of Marketing Research, Vol. XLIV (August 2007), 347–356, http://www.atypon-link.com/AMA/doi/pdfplus/10.1509/jmkr.44.3.347.
- Voicu, M. C., 2008, *The questionnaire – a tool in the survey research*, The Romanian Magazine of Statistics, Supplement May 2008, pp.112-125, ISSN 1018-046x, B+ category, CNCSIS monitored ISI Thomson Philadelphia (SUA).
- Voicu, M.C., 2007, *Aspects Related to Researching Consumer Preferences*, Theoretical and Applied Economics, No 9/2007 (514), ISSN 1841-8678 (print edition)/ISSN 1844-0029 (online edition), http://store.ectap.ro/articole/250.pdf.
- * * - *Developing Customer Insight: The Determination of Customer Preference*, International Communication Research, www.icrsurvey.com/docs/Customer%20Preference%20Formation_1205.doc.

SUSTAINABILITY AS A PART OF BALANCED SCORECARD

LUCIE SARA ZAVODNA*

Abstract
Sustainability is a trend, which is more seriously discussed on the international and national level. But also companies in the local level are pushed to have strategies and visions, which enable better future for society, our planet and local economy. Sustainability is one of the conditions – it allows companies to implicate social, economic and environmental pillars to the company´s strategy and management. The question, which remains today is, how to measure social, economic and environmental impact on society? And more – how to enable future generations to have the same conditions as we have today? The paper provides format for a possible bridge between current strategic Balanced Scorecard system and future trend of sustainability. One of the special tools, which can be used for measuring sustainability, is Balanced Scorecard (by Kaplan and Norton in 1990s) with the complement of sustainable metrics. The paper introduces three possible methods, which can be used by implementing sustainability into the Balanced Scorecard. One of these methods is described in detail. There is a focus on the sustainable indicators included as the fifth area in Balanced Scorecard model.

Keywords: *sustainability, management, trends, balanced scorecard, measurement.*

1. Introduction

The Balanced Scorecard methodology demonstrated in this paper provides format for a possible bridge between current strategic Balanced Scorecard system and future trend of sustainability.

The sustainability concept is relatively new and in many organizations still do not know, how to implement or measure its outputs. Sustainability is key factor for success in the future market. Climate change is emerging as a key factor, which expects to transform the way we manage resources. Impacts of climate change on resources affect all regions of the world, but will manifest themselves in different ways. The uncertainty regarding the severity, timing, and frequency of events and their impacts, is the main challenge. Having robust and adaptive resource management plans will help prepare company for the uncertainty and risks that lie ahead. (Changing Currents, 2010)

Responding to societal concerns is very important to businesses, not only from a public relations (marketing) perspective but also as a means to address customer and shareholder expectations. Financial markets are also starting to examine the way in which companies address environmental / sustainability issues, adding to this public pressure to sustainably manage natural resources. Many people are not aware of the impact that such industrial pollution can have on the earth. By helping to make it known, companies can be one of the voices that will draw attention to the issue thus helping to inspire change.

Every business is usually made with the main goal in the form of profit. The management is traditionally focused on profitability, market share or some from the new measuring indicators such as EVA, CFROI, RONA, CVA, etc. Many view the sustainability report as only a companion to financial reporting. It is unavoidable perspective, when company trades abroad.

Forty or fifty years ago, it was a struggle to call general public interest concerning the state of the environment even in developed countries. Nowadays such concepts as becoming ‘carbon neutral,’ ‘green consumerism’ and ‘eco-efficiency’ appear to have been embraced in the developed world. (Elijido-Ten, 2011)

* Ing., Ph.D.,Department of Applied Economics, Philosophical Faculty, Palacky University in Olomouc, Czech Republic (e-mail: lucie.zavodna@upol.cz).

This paper focus on the way, how to implement sustainability measuring into the Balanced Scorecard and what exactly does it mean for organizations.

The paper establishes older findings by many scientists with the new view of concrete indicators, which could be implemented in the Balanced Scorecard.

Aim of the article and research questions: The aim of this paper is to introduce and implement sustainable indicators into the system of Balanced Scorecard. The main research questions are: How to measure sustainability? What are the main sustainability indicators? How to implement these indicators into the Balanced Scorecard?

Methods used in research: Examine and analyze characteristics of the sustainability and its metrics. The expected result of the research is a new model of Balanced Scorecard with the sustainability elements.

2. Original Balanced Scorecard

Robert Kaplan and David Norton managed in early 1990s to combine financial and nonfinancial issues into a comprehensive performance management system called Balanced Scorecard (BSC). In 2012 it was 25 years since the publication of 'Relevance Lost', in which Professors Johnson and Kaplan alleged that management accounting information needs had become subservient to financial reporting requirements. The goal in 1992 was to incorporate multiple perspectives into organizations that primarily manage financial issues, balance sheets and income statements. These traditional financial reports only indirectly measure the effectiveness of corporate strategy and can be misleading about whether a specific strategy has been implemented successfully.

Financial measurement systems are years ahead of nonfinancial measures. This is naturally because of governmental regulatory and obligatory reporting. Accounting experts have improved these measurements through decades in cooperation with government agencies.

The BSC model was originally created to measure four quadrants: financial, customer, internal and learning perspective.

- Financial quadrant – primarily measures revenue growth, investment return, and cost reduction
- Customer quadrant – focusing mostly on market share and customer loyalty, satisfaction, profitability, and acquisition
- Internal Business Process quadrant – identifying more effective processes for the organization to most efficiently meet its objectives
- Learning & Growth quadrant – consists of employee skills and training, IT functionality, and administration of routine processes

The basic premise of the Balanced Scorecard is that financial results alone cannot capture value creating activities. The only financial measures are lagging indicators and are not effective in identifying the drivers or activities that affect financial results.

According to Bain&Company in 2004 about 57% of global companies were working with the Balanced Scorecard model. It is used extensively in business and industry, government, and non for profit organizations to align business activities to organizational strategy.

The Balanced Scorecard is a customer-based planning and process system, which main aim is focusing and driving the change process. Sustainability is also focused on customer needs. That means company needs to implement sustainability into the company´s goals. Is there any space in BSC for it?

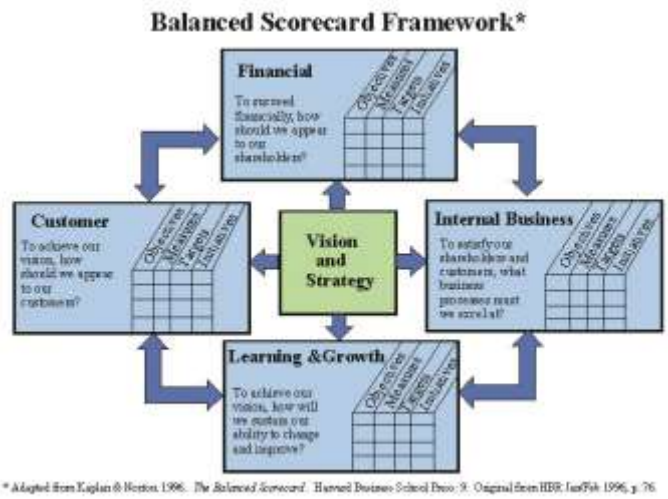


Figure 1: Balanced Scorecard Framework adapted from Kaplan & Norton (1996).

3. Sustainability Perspective Discussion

As the sustainability or environmental/green strategy is a nowadays theme of the organization's strategy, it can span the existing balanced scorecard perspectives. The sustainability concept originally refers to how organizations handle non-financial factors related to environmental, social and economic issues. This concept potentially impacts the organizations future.

Sustainability includes broader issues in area of ecology, sociology and environment as well as well-being of people and standard of life. In other words it is sustainability seen as "green" practices and can be found throughout the operations of all types of business.

The sustainability concept is also synonymous with citizenship reporting, social reporting, triple-bottom-line reporting, and other terms that encompass the economic, environmental, and social aspects of an organization's performance and planning. Public and private agencies can consider sustainability reporting at three levels: organization (internal), policy outcomes (external), and contextual or spatial outcomes (regional). (The Centre for Public Agency Sustainability Reporting, 2007)

Organization with the sustainable (also seen as green) strategy have three possibilities, how to implement sustainable strategy in BSC. (Elijido-Ten, 2011) **First**, environmental and social aspects can be integrated in the existing four standard perspectives. Environmental/social aspects become then an integral part of the Scorecard and are automatically integrated in its cause-effect links and hierarchically orientated towards the financial perspective. For example an added dimension within the financial category can be the integration of sustainability measures, such as energy costs, recycling revenues, disposal costs, and environmental dollars. Each organization can choose what specifically applies to its business environment and ignore any of the metrics that do not apply.

Secondly (and this is more likely) there can be created an additional perspective to take environmental and social aspects into account. Figge et al. (2001) propose the introduction of an additional, so called non-market perspective in order to integrate strategically relevant environmental and social aspects. Kaplan and Norton also point out that the firm-specific formulation of a BSC may involve a renaming or adding of perspective (Kaplan, Norton, 1996). Adding an additional perspective to the BSC may be the simplest approach for companies that want to emphasize sustainability as a key corporate value. The paper develops this idea later on.

Third possibility, a specific environmental or social scorecard can be formulated. Derived environmental or social scorecard cannot be developed parallel to the conventional scorecard. This scorecard is not an independent alternative for integration, but only an extension the two variants discussed above. (Figge et al., 2002) The reason, why companies establish a separate Balanced scorecard for sustainability, is that CSR strategy or/and sustainable development are seen as core strategy in creating competitive advantage.

Sustainable perspective implemented in BSC model should ensure that *the strategy of company is in link with environmental, social and economic needs of the next generations*. The integration procedure of the sustainability perspective metrics offers a possibility for organizations to translate sustainability visions and strategies into action plans.

The process of creation new perspective into BSC must lead to an integration of environmental and social management into strategy. The sustainable aspects must be integrated according to their strategic relevance. (Figge et al., 2002) By integrating sustainability measures into business practices and by clearly linking an organization's competitive strategy to its green outcomes, the BSC clarifies the relationship between sustainability outcomes and profitability/shareholder interests. (Butler, Henderson, Raiborn, 2011)

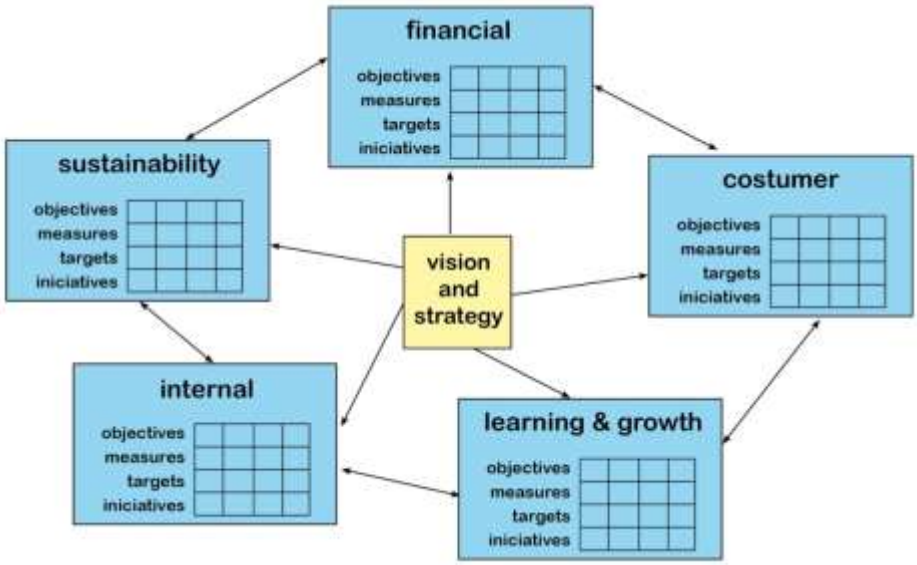


Figure 2: Balanced Scorecard with the Fifth Category - Sustainable Perspective - adapted BSC model.

"*What gets measured gets managed*" is an old accounting saying that remains true today. The sustainability perspective enclosed in BSC also needs its measurement.

4. Indicators of Sustainability

Before we can measure anything, we have to define the term sustainability and its characteristics. The definition of sustainability depends on who is defining – government, NGO, scientists. Still, common topics run through most definitions of sustainability. They usually deal with the economy or/and nature. They are about the rate of change, and about equity between generations. Many see sustainability as a continually process of development. As the sustainability is a new trend, many come with own definitions.

The concept of sustainable development was described in a 1981 White House Council in Environmental Quality Report (EPA, 2011): "The key concept here is sustainable development. If economic development is to be successful over the long term, it must proceed in a way that protects the natural resource base of developing countries." The business dictionary (2011) defines the sustainability as an "ability to corroborate or substantiate a statement" and "ability to maintain or support an activity or process over the long term". According Brundtland Commission and the report "Our Common Future" sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Donella H. Meadows (2004) sees "a sustainable society as the one that is far-seeing enough, flexible enough, and wise enough not to undermine either its physical or its social systems of support." Searching through different definitions there can be found key elements, which are common for most of the authors. These are: Consideration of future, Protection of resources, Economic prosperity and Connection between environmental, social and economic areas. These areas should be considered by creating sustainable indicators for the companies.

Management of the organization should develop certain metrics for achieving sustainability goals. BSC measures can reflect each individual company´s strategies and operations, so those measures identified will vary widely among companies. According Butler et al. (2011) measures, targets, and goals chosen for every perspective should be:

1. Controllable by all stakeholders,
2. Quantifiable,
3. Include all component elements when a multidimensional measure is used.

Multidimensional measure means for example, that the term greenhouse gasses (output to global warming) may be used for a variety of gasses (carbon dioxide, methane, chlorofluorocarbons, etc.).

At the figure 3 there is a model of incorporating sustainability into companies and other organizations. It is all based on the principles of sustainable development, which are giving the basic platform.

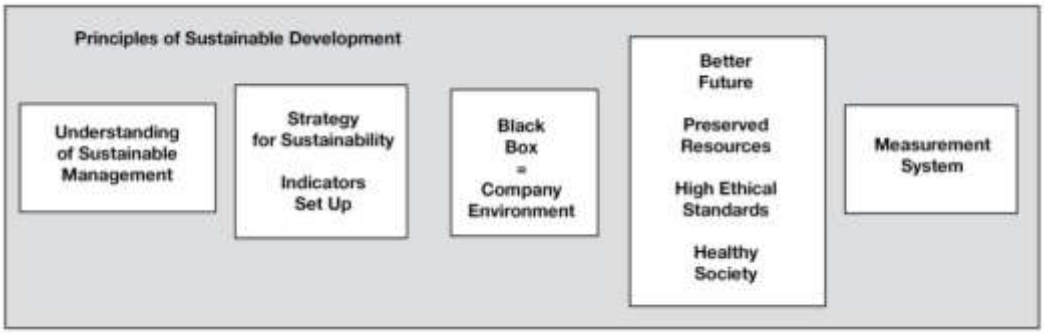


Figure 3: Model of processing sustainability in companies.

As it can be clearly seen, the main challenge is set up of measuring indicators. Indicators are statistics and are used to measure current conditions as well as to forecast. They can be used extensively in analysis to predict changes. There has been specified no rule for the right number of measures to include in a Balanced scorecard. Including too many tends to distract from pursuing a focused strategy. Generally complete balanced scorecard contains three to six measures in each perspective. (Epstein, Wisner, 2001) By creating indicators companies should be specific. Words like efficiency, low cost, and productivity has no real meaning.

The measurement system should make the relationships among the objectives and measures explicit, so the company can manage and validate them. To be comprehensive, the Balanced scorecard must include measures that interact on the basis of an established cause-and-effect relationship.

Each company defines sustainability differently. The performance indicators chosen will be based on strategy and goals of the particular company or organization. The weight given to the various dimensions of the Balanced scorecard will also depend on the goals and culture of each company. (Epstein, Wisner, 2001)

Below this paragraph there is list of indicators, which could be used in companies for measuring sustainable behavior. These are created by deduction from the national/local indicators and some of them represent ideas from brainstorming in every sustainable area.

Sustainable Perspective in BSC	
Goal	**Indicators**
Lowering **energy** consumption	Percentage of Energy Consumption from Renewable Resources Average Consumption of Solar/Water Energy Average Consumption of Energy (year and square meter) Average Consumption of Vehicle Fuel
Lowering **water** consumption	Average Consumption of Drinkable Water Average Consumption of Hot Water Management of Waste Water
Waste reduction	Number of Waste Containers Percentage of Recycled Waste Percentage of Assorted Waste: paper, plastic, glass, bio-waste Average Disposal Costs
Environment preservation	Investments for the Savings of Nature/Environment Percentage of Costs Going Back to the Environmental Protection Percentage of Office Supplies Recycled Percentage of Inclusion in Green Funds
Equality in **society**	Percentage of Local Employees Percentage of Woman in Management Percentage of Material from Local Resources Percentage of Certified Suppliers Number of Safety Improvement Projects
Lowering **noise** and **emissions**	Air Emission Greenhouse Gas Emission Average Work Week Hours Average Overtime Work Hours

Table no.1: Sustainable perspective and sustainability metrics suitable for BSC.

There is also a question of how often should those indicators be measured. The usual recommended measurement is ones a year, but this depends on every company. The limits of measurements lie in special employee or somebody, who is able to measure and control these outputs.

The system of measurement can also pose a problem. If the management focuses only on the results, employees may be preoccupied by hitting the right numbers and not doing the right things.

Executives can easily judge the performance only on monthly or quarterly numbers. It can be challenge too to define nonfinancial measures. There may be only few (especially bigger) companies that have experience in using nonfinancial numbers to measure their outcomes. Adding more performance indicators to overworked workforce may make confusion and apathy. Workers spend more time by collecting data and monitoring activities then actually doing their job.

5. Conclusions

As the Balanced scorecard was being adopted by corporations all over the world to implement corporate strategy, it could be used by companies to implement sustainability strategy to link corporate sustainability objectives with actions and performance outcomes. The output of improved sustainability performance can include for example increased employee satisfaction, lower operational and administrative cost, improved productivity, improved image and reputation, increased market opportunities, better stakeholder relationships etc. In line with the voluntary disclosure theory, it appeals that organizations adopting BSC together with collecting sustainability data have more incentive to provide public disclosure to show their divergence.

The paper summarizes previous findings and introduces three possibilities of implementation sustainability area into BSC. It is up every company, which indicators will be used for measuring sustainability. The paper suggests several indicators, which could be incorporated in each sustainable area.

The main impact for companies is in notification about the importance of such measurement and orientation. It explains in detail, how process of sustainability works and what is needed to do in order to start such direction. This concept is needed not only for organization itself, but also for future generations and society.

The future research work can focus on case studies in practice. It would be useful to summarize real problems, which could emerge during implementation period of sustainability in BSC. There would be also important comparison between all three methods of sustainability incorporation in BSC model. In the end the research of costumers and their satisfaction with green strategy of organizations would also help to improve overall situation in the market and can push more companies in implementation sustainability indicators.

References

- "Business Dictionary", last modified January 15, 2011, http://www.businessdictionary.com/definition/sustainability.html#ixzz187LlMfQ8.
- Butler, J.B., Henderson, S. Ch., Raiborn, C. (2011). *Balanced Scorecard: Integrating Green Measures into Business Reporting*. Management Accounting Quarterly, Winter 2011, vol. 12. No.2.
- "Changing Currents / Water sustainability in Canada", last modified May 05, 2011, http://www.nrtee-trnee.com/eng/publications/changing-currents/changing-currents-water-report-eng.pdf.
- Denton, D Keith (2006). *Measuring Relevant Things*. Performance Improvement; Mar 2006; 45, 3; ProQuest Central, pg. 33.
- Elijido-Ten, Evangeline (2011). *The Impact of Sustainability and Balanced Scorecard Disclosures on Market Performance: Evidence from Australia's Top 100*. JAMAR, vol. 9, no.1. 2001.
- Epstein, M. J. and Wisner, P.S. Using a Balanced Scorecard to Iplement Sustainability. Environmental Quality Management; Winter 2001; 11,2; ProQuest Central.
- Figge F., Hahn T., Schaltegger S., Wagner M. (2001). *The Sustainability Balanced Scorecard - a tool for value-oriented sustainability management in strategy-focused organization*. Conference Proceedings of the 2001 Eco-Management and Auditing Conference. ERP Environment: Shipley; 83-90.

- Figge, Frank;Hahn, Tobias;Schaltegger, Stefan;Wagner, Marcus (2002).*The Sustainability Balanced Scorecard - linking sustainability management to business strategy.* Business Strategy and the Environment; Sep/Oct 2002; 11, 5; ProQuest Central. pg. 269.
- Kaplan, R. Norton. D. (1996). *The balanced scorecard: Translating strategy into action*. Harvard Business School Press.
- Meadows, D.H., et all. (2004) *Limits to Growth: The 30-Year Update*. White River Junction, vermont: Chelsea Green Publishing Co.
- The Centre for Public Agency Sustainability Reporting, 2007 Report, pp. 63-68.
- "U.S. Environmental Protection Agency", last modified January 05, 2011, http:// www.epa.gov/sustainability/basicinfo.htm#sustainability.

ANALYZING FAT-TAILED DISTRIBUTIONS IN EMERGING CAPITAL MARKETS

FELICIA RAMONA BIRĂU[*]

Abstract
The aim of this article focuses on analyzing the implications of fat-tailed distributions in emerging capital markets. An essential aspect that was highlighted by most empirical research, especially in terms of emerging capital markets, emphasizes the fact that extreme financial events can not be accurately predicted by the normal distribution. Fat-tailed distributions establish a very effective econometric tool in the analysis of rare events which are characterized by extreme values that occur with a relatively high frequency .The importance of exploring this particular issue derives from the fact that it is fundamental for optimal portfolio selection, derivatives valuation, financial hedging and risk management strategies. The implications of fat-tailed distributions for investment process are significant especially in the turbulent context of the global financial crisis.

Keywords*: Non-normal distribution, estimation, statistical inference, asymmetric volatility, fat-tailed distributions, stable-Paretian distributions*

Introduction

The issues discussed in this article concern a theme of great interest in the financial area with profound implications for emerging capital markets modeling and forecasting. Emerging capital market behavior is characterized by a range of specific features, such as: volatility clustering, non-stationarity, extreme fluctuations, financial risks, deviations from normal distribution, leverage effect, time variation. This particular category of capital markets is a highly fertile research habitat where empirical analysis contradicts in certain circumstances the generally accepted theoretical substrate. Thus, this article can be perceived as a conceptual debate between different theoretical paradigms whose accuracy depend beyond any argument on the overall context in which they apply.

The normal distribution assumption has increasingly occupied a central place in computational finance. Thereby, the general idea was that capital market logarithmic returns follow a normal distribution. Despite the fact that this assumption was empirically contradicted based on various studies, the debate is far from being completed. Obviously, due to several reasons, normal distribution is preferred at the expense of more accurate, but complicated assumptions. Likewise, the central limit theorem and independence assumption play a rather significant role in financial time series analysis. Thus, from a certain point of view, an uncomplicated statistical methodology based on rigorous mathematical properties is perceived as a significant advantage in modeling continuous random variables. However, the theory is sometimes contradicted by practice, especially in the context of turbulent events such as the current global financial crisis. Strictly to topic, stock returns exhibit extreme variations due to dramatic events whose magnitude affects a wide range of investors. Moreover, the quintessence of this article constitute a rigorous analysis regarding the implications of fat-tailed distributions in circumstances of extreme financial phenomena, such as emerging capital market crashes. Consequently, econometric analysis and its degree of accuracy have a major significance for optimal portfolio selection and risk management strategies.

[*] Ph.D. Candidate, Faculty of Economics and Business Administration, University of Craiova, Craiova (e-mail: birauramona@yahoo.com).

Theoretical radiography of the concept

The particular issue regarding the unequivocally framing in a certain pattern of stock returns distribution remains an unsolved dilemma. However, this controversy revolves around time units. Stylized facts based on empirical evidence encourage the idea that high frequency financial time series, such as weekly, daily or intraday return data, exhibit non-normal distributions. On the other hand, to an imaginative limit it can be assumed that financial returns follow a normal distribution. Thus, for a longer time horizon, such as monthly, quarterly, half-yearly, annual or even higher, return time series are apparently perceived to be normally distributed.

Relevant information are provided by the main statistical properties, specifically Skewness and Kurtosis. In statistical terms, skewness is a measure of asymmetry of the distribution of a data series around its means. The skewness of a symmetric distribution is zero. In conclusion, in the case of normal distribution, the skewness is null. Positive skewness suggests that the distribution has a long right tail, while negative skewness implies that the distribution has a long left tail. Kurtosis measures the peakedness or flatness of the distribution of a return financial time series. The kurtosis of a normal distribution is 3, any other value generating sharp meanings in the fragile context of emerging capital markets behavior. Thus, if the kurtosis exceeds 3, the distribution is peaked (Leptokurtic) relative to the normal. On the contrary, if the kurtosis is less than 3, the distribution is flat (Platykurtic) relative to normal.

In this regard, the following figure is highly suggestive :

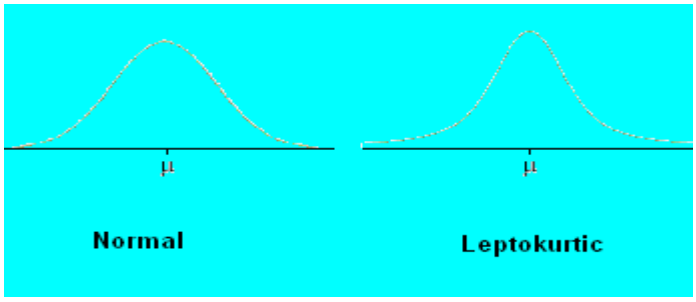


Fig. nr.1 Probability density functions for a normal and a leptokurtic distribution

Empirical studies have revealed that short term horizon stock returns are characterized by a pronounced cluster near the mean and in the tails. Likewise, fat tails involve a higher density ie a sharp attenuation of the density function in the tails. This framework is much different than a normal distribution would reflect, so this particular behavior is classified as leptokurtic distribution. In other words, this typology implies that the distribution is more peaked in the center and fat-tailed. Another interesting aspect which contradicts the classical financial theory suggests that very long term annualized returns tend to follow rather a platykurtic distribution. Making an analogy, it appears that fat–tailed distribution of returns involve the occurrence of extreme events in both directions, i.e substantial gains and major losses. In financial terms are distinguished the following categories : booms, bubbles, recessions, crisis, crashes.

In the literature this issue has been discussed with great interest in recent decades and it was emphasized by certain representative researchers (but not limited to), such as Mitchell (1915) Lévy (1925), Mandelbrot (1963), Fama (1965), Fama and Roll (1971), Rosenberg (1972), (Clark 1973), (Blattberg and Gonedes 1974), Hols et al. (1991), Tucker (1992), Mandelbrot (1997), Mandelbrot (2001), Rachev, Menn and Fabozzi (2005), Camilleri (2006), Kirchler and Huber (2007) or Mello (2008).

The analysis of emerging capital markets is based on continuously compounded return or log return, instead of using the absolute closing price variation, respectively $\Delta P = P_{t+1} - P_t$ or even on the simple net return (discrete return), which is calculated as $R_t = \frac{P_t}{P_{t-1}} - 1$.

Continuously compounded return which is calculated using the log-difference of the closing price, is calculated as follows : $r_t = \ln\left(\frac{p_t}{p_{t-1}}\right) = \ln p_t - \ln p_{t-1}$ where p is the closing price (level) of the financial asset. Mandelbrot provides a very suggestive explanation regarding the opportunity of using continuously compounded returns in financial modeling : "The only reason for assuming continuity is that many sciences tend, knowingly or not, to copy the procedures that prove successful in Newtonian physics . . . But prices are different: mechanics involves nothing comparable." On the other hand, financial time series, such as daily stock market returns are characterized by high-frequency and excessive volatility, feature known in the literature as "volatility clustering".

The main interest in understanding stock price fluctuations derived from significant economic implications. Consequently, econometric tools and financial theoretical approach must rigorously selected.

Mitchell has empirically demonstrated that commodity prices exhibit fat-tailed distributions. In his paper "The Making and Using of Index Numbers" published in 1915, he reached an unexplored financial area and opened a new horizon for empirical research. Particular concepts discussed were in the spirit of an alternative theoretical approach, namely : time-varying volatility, interrelations (co-movements), high-peaked or fat-tailed distributions in financial asset prices.

Likewise, Mills suggested in his research papers that the normal distribution assumption is inconclusive for both natural or logarithmic distributions, but noting, however, some exceptions in particular circumstances. Significantly, it is concluded that the standard deviation derived from both natural and logarithmic numbers is being applied as a measure of dispersion. According to Mills (1927) : "a distribution may depart widely from the Gaussian type because the influence of one or two extreme price changes".

Above all, Mandelbrot (1963) is also remembered for his substantial contribution to the study of fat-tailed distributions. His initial research has relied on stable-Paretian distributions (the variance of a stable-Paretian random variable is infinite) in order to provide a justification for the fat tails empirically highlighted by other researchers. In other words, Mandelbrot based on Lévy's acceptance, suggested that tails of all non-Gaussian stable laws follow an asymptotic form of the law of Pareto, respectively : if it is considered that $C'=\sigma'^{\alpha}$ and $C''=\sigma''^{\alpha}$ represent two constants interconnected through $\beta = (C' - C'')/(C' + C'')$ implicitly, when $u \to \infty$, $u^{\alpha}Prob(U>u) \to C' = \sigma'^{\alpha}$ and $u^{\alpha}Prob(U<-u) \to C'' = \sigma''^{\alpha}$. An essential role is played also by Cauchy law, i.e $u \to \infty$, then $uProb(U>u) = uProb(U<-u) \to 1/\tau$. Consequently, these two tails are Paretial if $|\beta| \neq 1$, where σ' and σ'' are the equivalent of the standard deviation of a normally distributed random variable. These particular numbers are known as the "standard positive deviation" and the "standard negative deviation." An exception is the rare case where $\beta=1$ therefore $C''=0$ (negative tail) and vice versa $\beta=-1$ therefore $C'=0$ (positive tail). Interestingly, the normal distribution was perceived just as a special case or as one of a family of stable distribution.

Mandelbrot 's approach is quite inconsistent with the central limit theorem which states that sums of random variables will converge to a normal random variable (the random variables are independent and have finite standard deviations). It is important to highlight that the central limit

theorem is based on the assumption that normal distribution is the only suitable alternative distribution which is characterized by a defined standard deviation.

Regarding the concept of stable distribution's probability density function, the most relevant approaches are the following :

a) normal distribution or Gaussian : α= 2 and β is insignifiant

b) Cauchy distribution: α= 1 and β=0

c) Lévy distribution: α= 0,5 and β=1 (δ=0 and γ=1)

d) Landau distribution α= 1 and β=1

e) Holtsmark distribution α= 3/2 and β=0

In his paper "From Mandelbrot to Chaos in Economic Theory", Mirowski performs an insight regarding the log of the characteristic function for the stable distribution based on Lévy's contribution :

$$\log f(t) = \log \int_{-\infty}^{\infty} e^{iut} dP(\bar{u} < u) = i\delta t - \gamma |t|^{\alpha} \left[1 - i\beta \operatorname{sgn}(t)\omega(t,\alpha)\right]$$

where $\forall \gamma \in \Re$, $\gamma > 0$, $|\beta| \le 1$

$$\omega(t,\alpha) = \begin{cases} \tan(\alpha\pi/2) & if \quad \alpha \neq 1 \\ -(2/\pi)\log|t| & if \quad \alpha = 1 \end{cases} \quad \alpha \in [0,2]$$

$$\operatorname{sgn}(t) = \begin{cases} 1, & if \quad t > 0 \\ 0, & if \quad t = 0 \\ -1, & if \quad t < 0 \end{cases}$$

The characteristic function is based on certain real parameters, namely α, β, δ and γ. The parameter α is the Lévy index or the index of stability or characteristic exponent (on condition that $\alpha \in [0,2]$) and β is the skewness parameter (on condition that $\beta \in [-1,1]$). On the other hand γ is the scale parameter (on condition that γ>0) and $\forall \delta \in \Re$ is a location parameter.

According to Fama (1965) : There is some evidence that large changes tend to be followed by large price changes of either sign, but the dependence from this source does not seem to be too important. There is no evidence, however, that there is any dependence in the stock-price series that would be regarded as important for investment purposes. That is, the past history of the series cannot be used to increase the investor's expected profits. Regarding the fact that empirical evidence suggests the presence of an excessive number of observations near the mean and in the tails, Fama is particularly interested on some models, such as stable-Paretian distributions (mainly), mixture of normals and nonstationarity.

Certain significant conclusions were suggested by Rosenberg (1972) : "The apparent kurtosis of the empirical frequency distribution is the result of mixing distributions with predictably differing variances. . . . The results of the experiment have widespread implications for financial management and the theory of security markets. Some of these are the following:

a) the requirements for forecasts of price variance;

b) the opening of the study of the determinants of price variance as a field of economic analysis;

c) the need to respond to fluctuations in variance in portfolio management;

d) the role of fluctuations in variance, through their effect on the riskiness of investment and hence, on the appropriate risk premium, as an influence on the price level".

The implications of fat-tailed distribution for investment process

Emerging capital market behavior is characterized by certain features such as : volatility clustering, non-stationarity of price levels, leverage effect, heteroskedastic log returns, deviations from normal distribution, time variation, unpredictability, fat-tailed distributions, time-reversal asymmetry, leverage effect, chaos. In addition, the global financial crisis has emphasized these particular features. Implicitly, certain concepts such as integration, cointegration, co-movements of stock returns, interdependence of financial structures, spillover effects, market liberalization, extreme financial events have a quite sharp connotation.

Fat-tailed distributions is considered an issue of great interest in financial economics with profound implications risk management, financial assets portfolio selection, derivatives valuation and financial hedging. The implications of fat-tailed distribution for investment process are quite significant especially in the context of the global financial crisis. An emerging capital market is a fragile structure, but quite attractive for financial investors. The financial assets price behavior in emerging capital market is quite different from the classical perception of investors optimization behavior. Nevertheless, despite the fact that normal distribution represented a cornerstone in financial theory, which is used to implement fundamental financial models, such as Markowitz's modern portfolio theory, Capital Asset Pricing Model or Black-Scholes option pricing model, empirical evidence revealed the inaccuracy of this assumption.

The interest of financial investors in hedging tail risk was significantly growing, especially in the context of the global financial crisis. In addition, innovative financial tools have been developed in order to hedge tail risk and to prevent massive losses caused by extreme events. The "black swan" metaphor has acquired sharp connotations after U.S subprime crisis in mid-2007, but the consequences of ignoring them are quite dramatic. Technically speaking, tail risk is perceived as representing a higher-than-expected risk category that characterizes a financial investment that oscillates wider than three standard deviations from the mean.

In other words, a portfolio of derivatives can be liable to this risk typology if it suffer any major decrease or downward trend. Moreover, in the investment process should be taken into account that financial derivatives are designed as complex financial instruments whose main purpose is to manage the risk associated with the underlying asset (stocks, bonds, commodities, currencies, interest rates and stock market indexes). The global financial crisis that erupted in mid-2007 has generated significant losses and consequently has raised questions about the accuracy of financial econometric models based on normal distribution assumption. Nevertheless, empirical evidence on the behavior of financial asset return distributions highlighted that fat-tailed distribution is a more appropriate alternative for risk management.

Conclusions

Emerging capital market are highly volatile and difficult to forecast. The behavior of financial investors is significantly influenced by the instability of trading mechanisms in emerging capital markets. Although, developing markets represent an increasingly attractive financial environment, they are exposed to diversified risks and structural deficiencies. Consequently, financial econometric analysis and its degree of accuracy have a major significance for optimal portfolio selection and risk management strategies. Thereby, certain aspects should be considered when measuring the importance of the fat-tailed distributions concept to ensure that the consequences are significant, respectively risk management, financial assets portfolio selection, derivatives valuation and financial hedging. In other words, an inappropriate model of the underlying asset involves a mispricing and

unsatisfactory hedging. On the other hand, the current global financial crisis revealed the stringent necessity of modeling and managing extreme risk in order to estimate rare events.

ACKNOWLEDGEMENT

This work was supported by the strategic grant POSDRU/CPP107/ DMI1.5/S/78421, Project ID 78421 (2010), co-financed by the European Social Fund – Investing in People, within the Sectoral Operational Programme Human Resources Development 2007 – 2013

References

- Birău F.R., *Diagnostic tests for heteroskedasticity on financial time series*, International Scientific Conference ECO-TREND 2012 IXth Edition, Exit From The Crisis And Revival Of Sustainable Growth, November 23-24, 2012, Târgu Jiu, Romania House Publisher Academica Brâncuşi ISSN 2248 – 0889, ISSN-L 2248 – 0889, pp. 389-392.
- Brooks, C., *Introductory Econometrics for finance*, second edition, Cambridge University Press, UK, 2008
- Camilleri, S.J, *An analysis of stock index distributions of selected emerging markets*, Bank of Valletta Review, No. 33, Spring 2006.
- Campbell, J.Y., Lo, A.W. and Mackinlay, A.C., *The Econometrics of Financial Markets*, Princeton, NJ: Princeton University Press, 1997.
- Dwyer, G.P., *Nonlinear Time Series and Financial Applications*, Federal Reserve Bank of Atlanta, January 2003.
- Fama, E., The Behavior of Stock-Market Prices, Journal of Business 38, No. 1, pp. 34–105 (p. 87), Reprinted by permission of the University of Chicago Press, 1965.
- Gujarati, D.N., *Basic Econometrics*, Fourth Edition, Published by McGraw-HiII/lrwin, ISBN: 978-0-07-233542-2, 2003.
- Haas, M., Pigorsch, C., *Financial Economics, Fat-tailed Distributions*, Complex Systems in Finance and Econometrics, Springer New York, pp. 308-339, ISBN: 978-1-4419-7700-7 (Print) 978-1-4419-7701-4 (Online) 2011.
- Kirchler, M., Huber, J., *Fat tails and volatility clustering in experimental asset markets*, Journal of Economic Dynamics and Control, Volume (Year): 31 (2007), Issue (Month): 6 (June), Pages: 1844-1874, 2007.
- Lévy, P., *Calcul des Probabilites*, Paris, Gauthier Villars, 1925.
- Mandelbrot, B. B., *The variation of certain speculative prices*, Journal of Business 36 (October): 394-419, 1963.
- Mandelbrot, B. B, Fisher, A. and Calvet, L. *A Multifractal Model of Asset Returns*, Cowles Foundation Discussion Paper no. 1164, Yale University, 1997.
- Mandelbrot, B. B., *Scaling in financial prices: I. Tails and dependence*, Institute of physics publishing, Quantitative finance, volume 1, pp. 113–123, 2001.
- Mandelbrot, B. B., *Stable Paretian Random Functions and the Multiplicative Variation of Income*, Econometrica, 1961.
- Mello, L., *Fat-Tailed Distributions and Lévy Processes*, Cornell University Library, 2008 http://arxiv .org/ftp/arxiv/papers/0808/0808.2393.pdf.
- Meyer, J. and Glauber R., *Investment decisions, economic forecasting and public policy*, Boston: Harvard
- Business School, 1964.
- Mills, F.C., *The Behavior of Prices*, Volume Publisher: NBER, ISBN: 0-87014-010-8, 1927.
- Mirowski, P., *From Mandelbrot to Chaos in Economic Theory*, University of Notre Dame, Indiana.
- Mitchell, W.C., *The Making and Using of Index Numbers*, Introduction to Index Numbers and Wholesale Prices in the United States and Foreign Countries (published in 1915 as Bulletin No. 173 of the U.S. Bureau of Labor Statistics, reprinted in 1921 as Bulletin No. 284 and in 1938 as Bulletin No. 656).
- Nolan, John P., *Stable Distributions: Models for Heavy Tailed Data*, 2009.
- Onour, I.A., *Extreme Risk and Fat-Tails Distribution Model: Empirical Analysis*, Journal of Money, Investment and Banking , ISSN 1450-288X Issue 13, EuroJournals Publishing, Inc. 2010.

- Oskooe, S.P, Shamsavari, A., *Asymmetric Effects in Emerging Stock Markets - The Case of Iran Stock Market*, International Journal of Economics and Finance Vol. 3, No. 6; November 2011.
- Premaratne, G., Bera, A. K., *Modeling asymmetry and excess kurtosis in stock return data*, Working paper, Department of Economics, University of Illinois, 2001.
- Rachev, S.T, Menn, C., Fabozzi, F., "*Fat-Tailed and Skewed Asset Return Distributions. Implications for Risk Management, Portfolio Selection and Option Pricing*", John Wiley & Sons, Inc., Hoboken, New Jersey, 2005, ISBN-13 978-0-471-71886-4.
- Rosenberg, B., *The Behavior of Random Variables with Nonstationary Variance and the Distribution of Security Prices*, (unpublished but frequently cited working paper), Graduate School of Business, University of California at Berkeley, December 1972.
- Rubinstein, M., "*A History of The Theory of Investments*", New York: John Wiley & Sons, Inc., 2006, ISBN-10 0-471-77056-6.
- Stuart, A., Ord, J. K., *Kendall's Advanced Theory of Statistics*, Volume 1. Distribution Theory (Sixth Edition). Edward Arnold Publishers Ltd, 1994.
- Xiong, J.X., Idzorek, T.M., *The Impact of Skewness and Fat Tails on the Asset Allocation Decision* Financial Analysts Journal, Volume 67, Number 2, CFA Institute, 2011.

CONVERGENCE BETWEEN FINANCIAL AND MANAGEMENT ACCOUNTING AND THEIR IMPACT ON THE ORGANIZATION'S COMMUNICATION PROCESS

ANDREEA PAULA DUMITRU*

Abstract
It is well known the role of accounting entity in the „measurement, evaluation, knowledge management and control of assets, liabilities, equity and the results obtained" during a period of management.
The accounting regulations distinguish between financial accounting and management accounting.
Detection convergence of financial accounting and management accounting stirs debate on a larger scale when it comes to integrating information from both types of accounts and their efficient use decision context.
This study aims to emphasize the necessity of using integrated information provided by the accounting and financial management so that users of such information, managers can take contact with natural depth of potential investments, provided with the possibility of making an informed decision.

***Keywords**: accounting information, financial accounting, management accounting, convergence*

Introduction

Slow evolution of the accounting system in Romania until 2003 that does not appear in legal terms no document specifying clearly how organized and how to drive management accounting made that the information provided by it to be close insignificant.

Minister of Public Finance Order no.1826/2003 for the approval of details concerning the organization and management accounting management brings clarification on how management accounting organization and specifies three possibilities, economic entities free to choose any of this. These three possibilities are: leadership management using specific accounts or accounts in financial accounting by developing a compiling technical and operative record of its own.

None of these options is detailed so that economic entities can consider it as an autonomous organization, bookkeeping emerged financially, imposed, implying that it is not mandatory preparation of such evidence, more not provide for sanctions failure to produce them.

However domestic market opening to Western capital, plenty of medium and large foreign companies in the Romanian economic cycle, need information homogenization in the European Union and beyond, make research into the convergence of the two accounting, measuring the impact of information provided by the mechanism to be one of major interest.

Researcher interest in practice is essential because as a provider of accounting information processed must ensure client the best solution to the needs of decision-making, to answer specific questions about bookkeeping sector organization-operational and financial.

These are some reasons why we aim, through this study, to emphasize the most important aspects of the points of convergence between the two types of accounting and communication process in organizations.

Theoretical framework

This study tries to find an answer to the following questions:
***A)** Can financial accounting coexist with managerial accounting within an integrated System and which is the role of this convergence in defining the managerial decision?*

*Lecturer, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: queenye04@yahoo.com).

B) *What is the degree of understanding and implementation of this mechanism at this moment within the Romanian economic entities?*

Organization, information and quality

Finding convergences between external accounting and internal accounting generates more and more ample debates when raising the issue of integrating the information provided by the two types of accounting and of using it efficiently within a decisional context.

This study intends to emphasize the need to use the integrated information provided by the management and financial accounting so that the users of such information, the managers, should be able to get in touch with the natural deepness of potential investments, while having the possibility of making decisions with full knowledge of the case.

The accounting information, under its evolved form, transforms the cognitive element while systematically processing the reports of a productive process and putting them into a numerical, significant message of results.

From ancient times to present, the main manifestation of accounting has been the activity of professionals well-known for their competency to produce, explore and authenticate quantified economic data, submitted according to normalized conventions.

The accounting professional, while observing professional norms, for the improvement of accounting information, covers a cyclic and determining way in order to obtain, filter, measure and expose such information. Therefore, the accounting information becomes the processing object both of financial accounting and of management accounting, the determining references being as follows:

- Rules, drawings, reports required by the decisional framework, used for the elaboration of the best decisions;
- Improving, monitoring informatics means, while providing control filters and the coherence of the information delivered by the different operational systems;
- The need to extract synthesis reports required by internal and external users,

monitoring the course of the operational life in order to validate post-factum the current flows of information;

The quality of the accounting information, determined by its pertinence, accuracy and reliability, provided to users, results from the accounting documents integrated in the production process of such information. The more it fulfils certain pre-established features, the more the accounting information becomes more credible.

The accounting function of any entity makes sure that the accounting information complies with generally accepted norms in strict accordance with professional deontology.

The accounting information has the quality of exact image defined through a correct implementation of the accounting conventions of the economic reality.

The proximity of accounting systems, marked by the market internationalization and globalization, by the activity of economic entities, through the increase of direct international investment, shall determine more and more the standardization of accounting information.

The need for this proximity derived from the need of international investors, who wish to compare, in a natural, normal, correct manner according to equivalent criteria, the opportunity area for capital placement.

Either at national or international level, the accounting rules do not result mainly from an academic scientific elaboration. We can only approve what a university practitioner has written: *"The elaboration of accounting rules is a complex political-strategic process where each of us defends its own interests"*[1].

[1] Broussard D. – *The second communication research seminar French Accounting Association*, Grenoble, January, 1981.

All the performances proposed by specialists may make it difficult for the accountants and managers who aim the advantage to the competition. There is a tendency to use consultants who have a "product" to sell, a product which reflects their understanding of the advantages and difficulties of the methods provided.

In such circumstances, chief accountants are made to take over the task of strategic positioning as well, not only the activity of transactions' accounting.

The significant, continuous improvement of the company's strategic positioning accounting also considers an exploitation process of its actual limits and its creation means for an extended research program for the relevant universities, the accent being put on quality and not on quantity elements.

For the client, the value represents an important element in the management of quality. From this perspective, the notion of quality may be approached, including the means used for monitoring it.

The management control determines the structuring and synthesizing of accounting information and economic rationalism, thus the capitalization of the accounting information at high quotas recognizes its inexhaustible nature.

We can say that an upper form of collecting and structuring the information, consistently processed and analyzed, generates the definition of economic intelligence.

For this purpose, it is necessary to use specialized programs and control systems which enable the achievement of significant indicators.

It is not the amount of information which determines its value, but the facts of having it before competitors do.

We consider that all these challenges constitute solid grounds for any researcher interested in the accounting field, who uses particularly the gross information from practical activity, to search for the convergence points of its various manifestation forms, while looking for the theoretical and practical answer.

Two levels of accounting: financial accounting & management accounting

There are many things that distinguish management accounting and financial accounting it from different goals that they have. We present in the following table, the most significant differences between these "two sisters" of the information system.

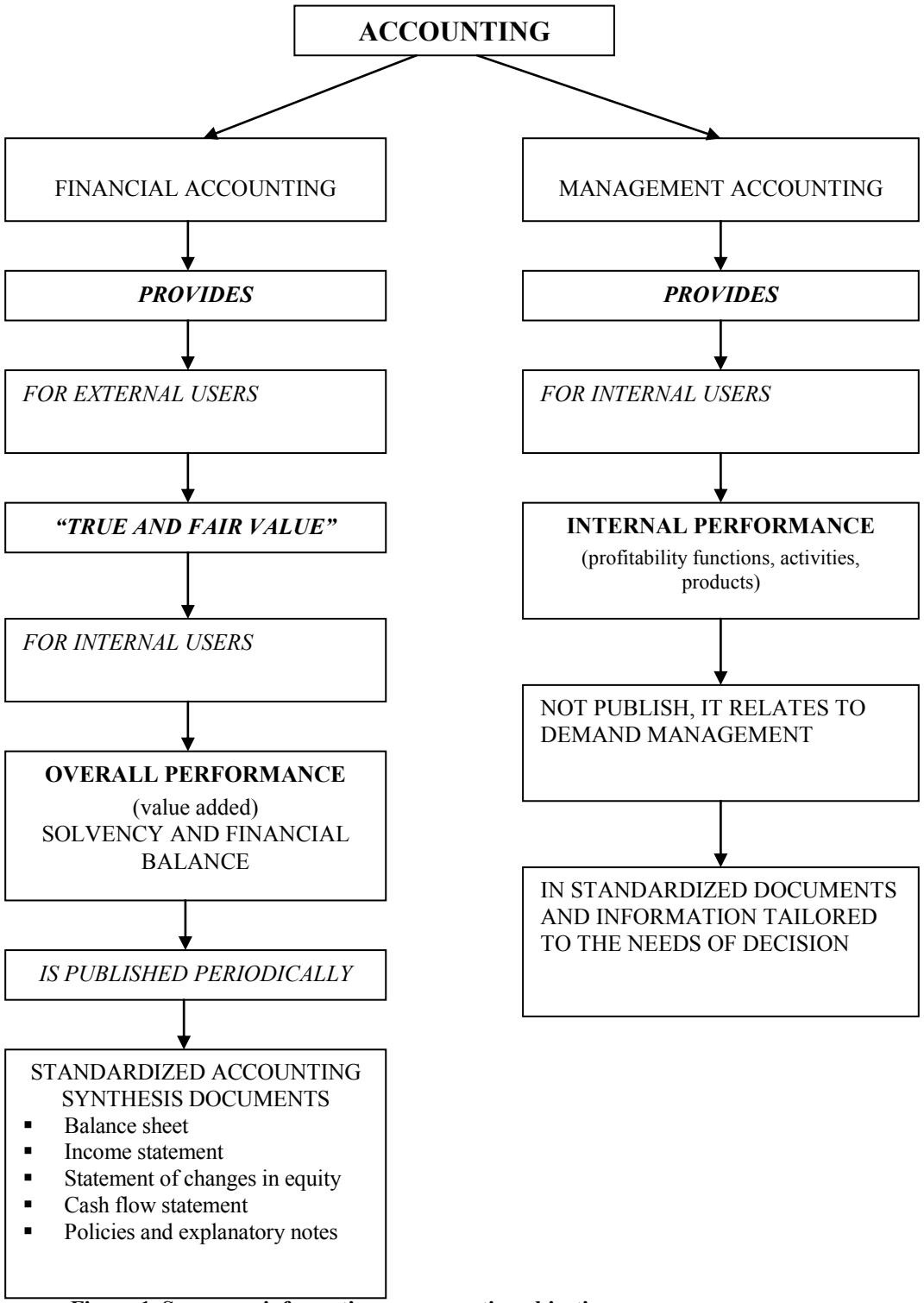


Figure 1. Summary information on accounting objectives

Financial accounting is to record the transactions of an organization with her environment to determine the regular and systematic economic and financial situation and results of operations performed.

Produces most of the *management accounting* information for decision-making processes of financial accounting can be extracted, in addition, data for the current management of relations with customers or suppliers, to base investment decisions and financing activities, to correct the effects of inflation on management decisions. Financial accounting information products within the scope of economic and financial analysis, will help to support decision management[2].

Management accounting and financial accounting serve different purposes. Management accountings quantify and report financial and non-financial information that helps managers make decisions that will enable an organization's goals. Managers use management accounting information to choose, communicate and implement strategy. They anticipate that information and to coordinate decisions on product design, production and marketing. Management accounting is based on internal reporting.

Financial accounting reporting is based on the outside. It quantifies and records economic transactions and provides financial statements prepared under GAAP. Managers are responsible for financial statements issued for the attention of investors, governments and other interested parties outside the entity. Often enterprise management remuneration is directly conditioned by the information contained in these financial statements.

Another difference is the fact that management accounting focus often on the future through budgeting activity and influence, on this occasion, the behaviour of managers and employees.

Type reports balance sheet, income statement, cash flow statement are used by management accounting. It covers an area much larger but it developed into a more advanced topics such as developing and implementing strategies and policies, preparing budgets, studies and forecasts predetermined purpose, providing financial and non-financial information[3].

Solution for improving accounts communication in organization's

Like any component of the economic system, and accounting had to undergo changes and adjustments to the new trend of globalization, harmonization and integration, trying to adapt to changes in both regional and adaptation resulting from Romania's EU integration, as well as changes internationally.

In the context of the phenomenon of international accounting harmonization, financial and accounting information quality has improved considerably in recent years. The abundance of information allows organizations to increase their competitiveness parameters in terms of information relative to competitors in the domestic and international market, representing only inexhaustible resource information, a true power factor, directly influencing a good degree of prosperity of nations.

The need for a national information system, which creates prerequisites for a correct diagnosis of the organization, to support decision makers in choosing the optimal variants of solutions to various problems of management, detect anomalies and dangers surrounding the organization, has resulted in its management accounting system.

Type and methods of the latter are selected according the organization's activities and its financial news in the absorption of management techniques, methods of determining costs, etc.

---

[2] Boghean F. – *Cost Management,* online course for distance learning, Stefan cel Mare University of Suceava, 2008, p. 6.

[3] Seal W., Garrison R.H., Noreen E.W., - *Management accounting*, Mc Graw Hill Education, London, 2006, p.126.

Management accounting serves no communication with outsiders, therefore, is not normalized as a "business modelling tool" to reach their managers in the complex processes of "piloting" of organizations.

Mechanism and methodology of reports, internal communication and the exchange of information between these two circuits are very important for organizing and conducting the accounting of any organization.

Efficient financial management and accounting concerns, required in the current context, double accounting system with an effective reporting, accounting structures to provide for flexibility, collaboration and coordination with other departments in the organization's overall objectives.

The strategy presenting the results of accounts subject to attention, being a central part of the communication of an organization's accounts.

In general, at the organizational level there are two types of communication: information and offer voluntary legal accounting information.

In the first case, of information transmitted regulated by law and accounting standards, the presentation is not always "friendly" and is more difficult to interpret by non-specialists.

The second type is fully available to the management of an organization and illustrates, on a voluntary basis, any forecast or other types of sizes, usually when they occur, or might occur significant changes, extensions or restrictions the activities of an organization.

To improve accounting and financial disclosure, transparency and creating a healthy business environment and credible efforts are being made globally. Thus, since 2002, the European Union seeks to align European accounting standards to International Financial Reporting Standards (IFRS) and also use a single language in the conduct of business by finding a point of convergence between European and U.S. accounts.

Internationally, the normalization accounting is the process of harmonizing the

presentation of summary documents, accounting methods and terminology and involves the development of rules or regulations applicable in whole or in part, to a group of countries, a set of entities or as a group of specialists from the accounting profession[4].

At the same level through harmonization/convergence of international accounting rules by national standards, differing from one country to another, sometimes divergent, are refined to be made comparable.

In this context, the general accounting and auditing continuously improving its quality of accounting information through the application of accounting regulations in accordance with E.U Directives (Directive to IV and VII).

The need for compliance is required by: globalization of national economies, Romania's access to international capital markets, transparency and simplification of financial reporting.

To achieve these objectives in recent years have been a number of changes legislation which included :

- accounting amend Law 82/1991;
- accounting regulations in accordance with Directive IV and VII to the European Union;
- adoption of International Financial Reporting Standards (IFRS) and International Accounting Standards (IAS), by Order of the Minister of Finance.

Harmonization/convergence of accounting by the Fourth Directive establishes the principle of true and fair view as the main element of the group accounting principles, considering that the other principles are derived and its subordinates. Fourth Directive of the European Economic Communities explains the need to adopt uniform accounting policies for the Member States in the following situations:

[4] Hennie Van Greuning, Darrel Scott, Simonet Terblanche, - *International Financial Reporting Standards. A Practical Guide,* the sixth edition, IRECSON Publishing, Bucharest, 2010, p.33.

Member States companies work often extends beyond the national territory, providing them as collateral for third party only capital;

- competition between companies may be unfair due to legal conditions conducive to certain activities in some countries;

- present a "true and fair view" of business.

VII of the Directive of the European Union presents itself as a continuation of European accounting harmonization process, a process started by the Fourth Directive, with the following objectives:

- to ensure comparability of information provided by the consolidated accounts for external users, especially investors and third parties;

- creation of uniform conditions for the operation of a common capital market, by eliminating national differences on how to draw of these consolidated accounts;

- developing a "true and fair view" in terms of assets, financial condition and results of the group companies.

In a market economy, the harmonization/convergence and normalization accounting rules that organize the functioning of accounting information, financial and communication in order to optimize the utility, provides:

− comparing the information in time and space;

− control and centralization of information;

− rigorous substantiation of the decisions of users of information;

− increasing trust between social partners using a standardized and understandable language[5].

The existence of a market requires the existence of a product. The accounting information is exchanged at the market of product accounting. This product exists only by the rules and regulations that define it.

In this context, national destinies are influenced by global forces of global competition, so that operating decisions, financial and investment have significant international implications. How many of these decisions are based on accounting information, knowledge of regional an international rules is crucial.

Conclusions

The researches made in the field of managerial accounting in order to obtain

information, new knowledge and results are useful for practice and practitioners. Moreover, the purpose of researches in the field of both financial and managerial accounting is to describe, explain and disseminate the techniques and practices used for the clarification and improvement of the generally employed existing organizational practices, opening thus the gates of practice oriented researches.

The need to obtain real-time clear and concise information regarding the evolution of an economic entity, useful to deciding factors, has lead us to the attempt to identify, study and develop the convergence points between the two types of accounting and the way we can solve the issue of introducing them into an operable, efficient and especially less expensive circuit.

Thus, through research topic chosen, we tried to find a possible answer to the following questions:

A) *Can financial accounting coexist with managerial accounting within an integrated system and which is the role of this convergence in defining the managerial decision?*

The beneficiaries of the research results obtained this way are:

(1) *Managers* – the answer to this question is concretized in making clarifications and improvements to the existing practices. In this approach, pertinent solutions and results are obtained for the settlement of quality issues of the decisions made;

---

[5] Feleaga, N., L. Feleaga, *Financial Accounting – a European approach and international,* second edition, vol.I, Economic Publishing, Bucharest, 2007, p. 207.

(2) *Accounting professionals* – who, being willing to provide concrete and complete solutions to their clients, will use the results of this approach; we would also like to mention their interest and the need for continuous improvement;

(3) *Education* – using the results of researches to better understand modern methods, phenomena and theories which meet the needs of an efficient management.

B) *What is the degree of understanding and implementation of this mechanism at this moment within the Romanian economic entities?*

The answer to this question is meant to highlight the need that decision factors and accounting professionals should consider the scientific and integrated organization of the accounting of the entities which they manage so that the efficiency of the decisions to be adopted is maximum.

This perspective has allowed us to make a few suggestions:

− The introduction and use of an integrated accounting module at the level of

SME s so that this is the main platform in the management and legal activity of entities. We also purpose the use of a specific common balance sheet document, called integrated balance sheet;

- The second phase of this process is the establishment, from the perspective of the price-expense-cost correlation, of the correct organization of the management accounting adapted to the main scope of activity of the economic entity;

In terms of improvement of the quality of managerial decisions, the process aims the introduction of a controlling compartment in the flowchart of the economic entity which should be the "interface" between the execution and decision compartments, a compartment which should take over the information processing tasks from the financial and management accounting and transpose them into projects and solutions at the management requests.

References

- Boghean F., (2008) , *Cost Management,* online course for distance learning, Stefan cel Mare University of Suceava, p. 6.
- Broussard D., (1981), *The second communication research seminar French Accounting Association*, Grenoble, January, 1981.
- Feleaga, N., L. Feleaga, (2007), *Financial Accounting – a European approach and international,* second edition, vol.I, Economic Publishing, Bucharest, p. 207.
- Hennie Van Greuning, Darrel Scott, Simonet Terblanche, (2010), *International Financial Reporting Standards. A Practical Guide*, the sixth edition, IRECSON Publishing, Bucharest, p.33.
- Seal W., Garrison R.H., Noreen E.W., (2006), *Management accounting*, Mc Graw Hill Education, London, p.126.
- International Financial Reporting Standards issued by the International Accounting Standards Board (IASB), CECCAR Publishing (2010), paragraph 12.
- Minister of Finance Order nr.3055/2009 for approval of Accounting Regulations in accordance with European directives, published in the Official Gazette, nr.766/10.11.2009.

EFFECTS OF MERGERS AND ACQUISITIONS ON FINANCIAL PERFORMANCE OF THE TARGET COMPANY

ADRIANA DUŢESCU[*]
ANDREEA GABRIELA PONORÎCĂ[**]
GEORGIANA OANA STĂNILĂ[***]

Abstract
Many studies revealed the fact that mergers and acquisitions are a risky business. Disregarding the M&A advisers' fees, evaluations show that most of the companies completing M&A transactions disappoint to deliver on promised financial performance. But, as many would say, it is an investment and the highest risks produce the highest results - whether they're good or bad.
Within this paper, we were intending to analyse the rate of success of relevant M&A transactions that took place in 2007 in Romania, by comparing the financial statements of the target companies before and after the acquisition, in the current economic context.
The main objective of this study is to generally determine the successfulness of the M&A transactions, starting from assessing changes induced by the M&A transaction to the target company, with the help of three important financial ratios: profit margin, ROE and receivable collection period.
Even though the study may present some bias, we have tried to be as objective as possible and not influence its outcome: that 80% of 10 most important private Mergers and Acquisitions taking place in Romania in 2007 and that meet several conditions:
o The target is part of the consumer goods and services market (mainly trade and tourism) and is an important player in its industry
o The target is a Romanian private company, and its shares are not listed on the stock exchange
o The acquirer is majority shareholder after the transaction
The target company remained as a sole entity and was not integrated into the mother company after the transaction were not successful.

Keywords*: mergers & acquisitions, financal performance, financial ratios, listed companies*

Introduction

Latest studies revealed the fact that mergers and acquisitions are a risky business. Disregarding the M&A advisers' fees, evaluations show that most of the companies completing M&A transactions disappoint to deliver on promised financial performance. But, as many would say, it is an investment and the highest risks produce the highest results.

In the early 2000, the Romanian accounting entered in a new stage of reform, built in connection to the international realities. In 2004, in Romania, the authorities have initiated a national strategy to improve the financial reporting, considered to be a true catalyst for developing a sustainable economy. The present demonstrates that the national strategy for improving the financial reporting of the private economic entities, mostly based on the elaboration of the individual annual financial statements of the public entities according to the IFRS referential, has encountered some difficulties in the complex process of implementation. (A.Popa, R. Laptes – AMIS 2011)

[*] Professor, Ph.D., Faculty of Accounting and Management Information Systems, The Bucharest University of Economic Studies, Bucharest (e-mail: adriana.dutescu@bsm-mba.ro).
[**]Lecturer, Ph.D., Faculty of Accounting and Management Information Systems, The Bucharest University of Economic Studies, Bucharest (e-mail: andreea.ase@gmail.com).
[***]Lecturer, Ph.D., Faculty of Accounting and Management Information Systems, The Bucharest University of Economic Studies, Bucharest (e-mail: gostanila@gmail.com).

Generally, the main reason behind people's decision to invest is that they think they know something that is not known by others. Warren Buffet declared: "… ignore the economy and buy a business that you understand" (Corrado et al, 2005, p.1). There are many aspects underlying an M&A transaction, the success or failure of their result relying on the appropriate adaptation to the business.

This paper analyses the rate of success of relevant M&A transactions that took place in 2007 in Romania, by comparing the financial statements of the target companies before and after the acquisition, in the current economic context.

The main objective of this study is to generally determine the successfulness of the M&A transactions, starting from assessing changes induced by the M&A transaction to the target company, with the help of three important financial ratios: profit margin, ROE and receivable collection period.

For reaching the proposed objectives, the paper will follow the main literature and theory on M&A transactions in general, followed by a more specific analysis on the Romanian M&A market.

Romanian M&A market

Romania is one of the largest markets in Central and Eastern Europe (with over 21 million inhabitants) and has an attractive location located at crossroads between EU, the Balkans and CIS countries. This position facilitates Romania being traversed by three key pan-European transportation corridors: corridor no. IV – linking Western and Eastern Europe, corridor no. IX – connecting Northern and Southern Europe and corridor no. VII – Danube River, facilitating inland water transportation connecting the Romanian Port of Constanta to Northern Europe. These, together with Romania's accession to EU since January 1st, 2007 – providing legislation in accordance with the EU legal framework – are important factors that make Romania attractive for possible investments and M&A transactions.

Starting with the 90s, the Romanian Government, following the trend set by other Central and Eastern Europe countries, decided to renounce at its domination in the economic sector in favour of private shareholders. However, the privatisations and transition periods did not happen at the same time for all countries. The comparative studies made on the restructuring effects of privatization in Continental Europe ascertain that, in the first stage of transition, Romania was one of the slowest countries of this region, mainly due to the irregular rhythm of privatization.

Regardless of the sluggish evolution, the market for corporate control boosted in Romania as nowhere else in Central and Eastern Europe, due to the various methods of privatization proposed by the Romanian government in the following stages of the transition. This allowed investors to initiate their strategies of acquisitions directly on the market. In the years following the mass privatization program, more than one tenth of the five thousand privatized companies listed on the new established stock market were targets of takeovers bids. Between 1998 and 2002, 993 takeover bids were approved by the National Security Commission (henceforth CNVM); 44 on the Bucharest Stock Exchange (henceforth BSE); and 949 on the OTC Market (RASDAQ).

The values of the Romanian M&A market highly differ from one source to another. Every company has a different measurement method when analysing the M&A market.

The Ziarul Financiar newspaper publishes a yearbook called "Top Transactions", in which its presents the M&A market value and most important taking place in the current year.

According to this newspaper, the M&A market is estimated at EUR 6.15 mld over 2000-2005, of which EUR 1.32 mld on privatisations and EUR 4.83 mld private transactions. Most important privatisations were: sale of Sidex to Mittal, Petrom to OMV, Electrica, Agricola Bank to Raffeiesen, Distrigaz Nord and Sud. Among the most important private transactions are: the sale of Connex to Vodafone (Great Britain), Astral to UPC (USA), Ion Tiriac Bank to HVB (Germany), Siveco to Intel (USA) ot Omniasig to Wiener Staedtische (Austria).

The value of transactions increased spectacularly in 2006 to EUR 4 mld, most of them made by foreign investors. The most important transaction is represented by the privatisation of

ElectricaMunteniaSud to Enel, estimated at EUR 820 mil. Other transactions include the 7.2% sale of BCR to Erste for EUR 410 mil and Cuprom's acquisition of RTB Bor.

2007' transactions

The number and value of transactions on the M&A Romanian market boosted again in 2007, due to Romanian's accession to the UE. The market increased with 63% y-o-y and with 6% compared to the whole period 2000-2005 to EUR 6.5 mld. Most of the transactions were registered in the real estate market (34 transactions), followed by FMCG market (24 transactions), energy and industry (18 transactions), IT&C (18), financial services (12) and pharma market (7).

Most relevant transactions from 2007 are: Rompetrol acquisition by KazMunaiGaz (EUR 1.8 mld), Petromservice acquisition by Petrom (EUR 329 mil.), Immoeast acquisition of Euromall Pitesti and Euromall Galati (EUR 173 mil.), Advent takeover of Labormed (EUR 123 mil) and America House sale to Ixis (EUR 120 mil).

According to Thomson Reuters, there have been 91 completed transactions in 2007:

- 13 in consumer products and services market
- 12 in consumer staples market (food and beverages, textiles and apparel, agriculture & livestock)
- 12 in energy and power market
- 10 in high technology market
- 9 in industrials market
- 9 in real estate
- 6 in materials market (metals and mining, construction materials, chemicals, Containers & Packaging)
- 6 in media and entertainment
- 5 in retail
- 4 in financials market
- 3 in healthcare market
- 2 in telecommunications

M&A in Romania during crisis

2008 M&A Romanian market sets a new record, its value being approximated at EUR 10 mld. The value, however, is increased by the partnerships valued at EUR 6 mld initiated by the state with the energetic giants for the completion of Braila, Galati and Borzesti thermals, and reactors 3 and 4 form Cernavoda (nuclear power plant). Excluding these projects, the M&A market volumes decreased with approximately 40% in 2008 compared with 2007 especially in the second part of the year, based on the real estate activity reduction and on the crisis emergence. Thus, the real estate market eased its domination, and the value of big transactions decreased from approximately EUR 3 mld in 2007 to EUR 1 mld in 2008. (Potcovel A., 2012)

"Top Transactions 2010" states that, even though the market decreased with 70-80% in 2009 as value compared to previous years, the number of transactions decreased only with 20%. This leads to the conclusion that investors did not completely disappear during crisis period, but limited themselves to small transactions. Most prolific sector was energy, proof that in the following years, Romania will be a strategic target for large players from electricity, petrol and gas. The biggest transaction in IT&C was Zapp takeover by Cosmote, and in retail, Lidl's acquisition of Plus network. In the insurance market, one of the most important moves was the entrance of Axa on the Romanian market, through the acquisition of Omniasig Life. Another sector with many transactions that was not affected by crisis was pharma and health. 2009 M&A market is estimated by the "DealWatch Emerging Europe M&A Report 2010" at approximately EUR 2 mld, 32% higher than the following year 2010, when the market is estimated at EUR 1.6 mld.

Main players

The Romanian M&A market players are divided into 2 categories:

- Independent M&A companies, founded by entrepreneurs: Capital Partners, BAC Investment, Altria Capital, Capital Mind, Osprey Partners, The Counsel
- Division of commercial banks and Big 4 companies, such as: Raiffeisen Investment, EFG Finance, BCR, BRD, Ernst and Young, Delloite, KPMG and Price Water House Coopers.

In addition, there are the most important banks such Goldman Sachs and Morgan Stanley that carry on activities in Romania through their European offices. Below, we will make a short presentation for each of the independent M&A boutiques:

Capital Partners SRL o Romania's leading independent investment banking adviser o Founded, owned and managed by four Romanian ex-bankers: DoruLionachescu, Andrei Diaconescu, Victor Capitanu and VladBusila. o Since inception, advised on transactions amounting to more than EUR 1.5 billion successfully closed across its main business lines: M&A, Corporate Finance and Real Estate such as: the sale of Mindbank to ATEbank of Greece, the sale of BT Asigurari to Groupama of France, the sale of Ejobs to Tiger Fund of US, the sale of Eurisko to world leader CB Richard Ellis, the acquisition of Romenergo by Nauru Holdings - one of the largest transactions in private energy in Romania- , or the sale of a minority stake in Internetcorp to 3TS Capital Partners. o Member of the world's largest M&A alliance, M&A International Inc (www.mergers.net)
BAC Investment o Established in 2004 – 2005 by co-managing partners at that time, MateiPaun and Tudor Boloni, and legally registered in Romania as Balkan Advisory Company S.R.L o Since 2005, BAC Romania has been involved in a large number of transactions, among the most important being the sale of Romstal Leasing and INK Broker to KBC Private Equity in 2006, for EUR 70 million
Altria Capital o Established in October 2004 by managing partner, Marian Tescaru o Provides a wide range of financial and strategic advisory services focused on M&A, corporate finance and restructuring, as well as capital raising activities o Most important transactions include: sale of Diamedix SRL to GED, minority stake sale of Centrul Medical Unirea to 3i
Capital Mind o Has offices in Bucharest and Milan, covering Romania, Bulgaria, Moldova and Italy, in the fields of Corporate Finance, Equity Capital Markets, Renewable Energy, and Real Estate o Managed by RanieroProietti
Osprey Partners o Offers the entire range of M&A services: sale and acquisition of a company, raise finance for a company, company valuation, business plans & strategy, business intelligence o Main transactions concluded: sale of Pegasus Courier SRL, sale of Artima
The Counsel o Young company founded and managed in 2009 by Guy S. Verduystert and SergiuLisnic o Provides advice on mergers and acquisitions, divestitures, corporate restructuring and finance raising

2007' Romanian Transactions Analysis

The objective of this chapter is to ascertain how many of the Mergers and Acquisitions have a positive impact on the financial performance of the target company, representing a good decision for the Acquirer's management and what their rate of success is.

For this study, we have taken into consideration the most important private Mergers and Acquisitions that took place in Romania in 2007 and analyzed the financial information of the target company prior to the transaction (years 2005 and 2006) with the financial information after the transaction (years 2007, 2008 and 2009).

The mergers and acquisitions considered for the evaluation had to conform to the following conditions:

- The target is part of the consumer goods and services market (mainly trade and tourism) and is an important player in its industry
- The target is a Romanian private company, and its shares are not listed on the stock exchange
- The acquirer is majority shareholder after the transaction
- The target company remained as a sole entity and was not integrated into the mother company after the transaction

Taking into account the financial information available on the Ministry of Finance Website, we have computed 3 ratios for each of the target companies for the period 2005 – 2009. The ratios chosen for analysis were Net Profit Margin, after tax ROE (return on equity), Accounts Receivable Collection Period.

M&A financial analysis algorithm (Source: Own compilation)

Ratio	Condition	% in Financial Ratios Evolution
Profit before tax margin, of which	*Profit before tax margin is >= than 2005 or 2006*	**40%**
2007		*13%*
2008		*13%*
2009		*13%*
ROE, of which	*ROE is >=than 2005 or 2006*	**30%**
2007		*10%*
2008		*10%*
2009		*10%*
Receivable Collection Period, of which	*Receivable Collection Period<=than 2005 or 2006*	**30%**
2007		*10%*
2008		*10%*
2009		*10%*
Total		***100%***

Below one can find a short presentation of each of the M& A transactions from 2007 that comply with the criteria.

Transactions summary

Date Effective	Target Name	Target Business Description	Acquirer Name	% of Shares Acquired	Value of Transaction (EUR mil)
12/31/2007	ProiectBucuresti SA	Provides architectural design services. The company was evaluated at EUR 50 mn in 2008 and is one of the most important players of the arhitecture and design services market.	Bantisco Holdings SRL	84.0	30.00
12/14/2007	Happy Tour	Provides travel services and is the leading player in Romania	GED Iberian Private Equity SAU	100.0	10.00
11/1/2007	SC RomsysSrl	Major player on the computer and software consulting services market.	New Frontier Holding GmbH	100.0	-
1/29/2008	Artima Retail Investment Co SA	Own and operate retail stores	Carrefour Hypermart Chain	100.0	57.95
10/15/2007	PharmaFarm SA	Wholesales pharmaceuticals	Armedica Trading	95.8	-
10/5/2007	SC Depomures SA Tg Mures	Provides natural gas distribution services	Gaz de France	59.0	-
10/1/2007	Domo Retail SA	Provides retail services of electronic products	Lynx Property BV	75.0	65.00
5/18/2007	SC Digital Cable Systems	Provides digital cable systems services.	AIG New Europe Fund	-	44.42
5/17/2007	La FantanaSrl	Wholesale spring water through water-cooler systems	Innova/4 LP	100.0	35.00
12/21/2007	Elmiplant	Manufactures cosmetics.	SarantisRomania	100.0	6.83

Source: Thomson One, www.thomsonone.com

If the total is higher than 50%, we consider the M& A transaction as a successful one.

After analysing the target company from its financial statement evolution, we have also included in the study the market evolution of the target company, in order to asses whether the drop in profit before tax margin, mainly in 2009, was really affected by the acquisition or by external factors (eg. the financial crisis).

After finding the National Economy Activities Classification category of each target company from the Ministry of Finance, we have extracted from the "www.doingbusiness.ro" Website the turnover and profit before tax evolution for each of the National Economy Activities Classification industries corresponding to the target company National Economy Activities Classification. Next, I have computed an industry profit before tax margin evolution for the years 2005-2009, and compared that ratio with the target company ratio.

Below one can find a short presentation of each of the M& A transactions from 2007 that comply with the criteria.

Transactions summary

Date Effective	Target Name	Target Business Description	Acquirer Name	% of Shares Acquired	Value of Transaction (EUR mil)
12/31/2007	ProiectBucuresti SA	Provides architectural design services. The company was evaluated at EUR 50 mn in 2008 and is one of the most important players of the arhitecture and design services market.	Bantisco Holdings SRL	84.0	30.00
12/14/2007	Happy Tour	Provides travel services and is the leading player in Romania	GED Iberian Private Equity SAU	100.0	10.00
11/1/2007	SC RomsysSrl	Major player on the computer and software consulting services market.	New Frontier Holding GmbH	100.0	-
1/29/2008	Artima Retail Investment Co SA	Own and operate retail stores	Carrefour Hypermart Chain	100.0	57.95
10/15/2007	PharmaFarm SA	Wholesales pharmaceuticals	Armedica Trading	95.8	-
10/5/2007	SC Depomures SA Tg Mures	Provides natural gas distribution services	Gaz de France	59.0	-
10/1/2007	Domo Retail SA	Provides retail services of electronic products	Lynx Property BV	75.0	65.00
5/18/2007	SC Digital Cable Systems	Provides digital cable systems services.	AIG New Europe Fund	-	44.42

5/17/2007	La FantanaSrl	Wholesale spring water through water-cooler systems	Innova/4 LP	100.0	35.00
12/21/2007	Elmiplant	Manufactures cosmetics.	SarantisRomania	100.0	6.83

Source: Thomson One, www.thomsonone.com

Conclusions

After setting the criteria for choosing the transactions analyzed, we have chosen 10 most transactions from the 2007 M&A Romanian market, which in our opinion doses not influence the result. The number of transactions is large enough to help us to formulate an opinion and also small enough to evaluate each of them in details.

Following the above analysis, the rate of transaction success balance weights more in the unsuccessful part, 8 transactions out of 10 were not profitable.

The two transactions that were successful are:

i. ProiectBucuresti SA, the first target company analyzed obtained a 47% score from the historical financial statement point of view. But, in the context of its "Architectural and engineering activities; technical testing and analysis" industry, ProiectBucuresti SA did in fact had a positive evolution since it was acquired by Bantisco Holdings SRL and performed better than the market.

ii. Depomures SA can be set as an example for an M&A transaction: all its financials indicators improved after the acquisition (the score obtained was 100%) and had an excellent evolution also when compared to the industry results, having equal profit before tax margin in 2007 and higher margins in the following years.

The eight transactions that were not profitable for the acquirers were:

i. Happy Tour SRL scored 47% in the historical financial performance analysis, and also under-perfumed the "Travel agency, tour operator and other reservation service and related activities" industry in 2009

ii. Romsys SRL acquisition by New Frontier Holding GmbH is another unsuccessful transaction for several reasons: even though it over performed its industry in all analyzed years, historically the financial indicators evaluated deteriorated in 2008 and 2009 compared to 2005 and 2006, while industry margin remained constant.

iii. Artima Retail Investment Company SRL acquisition by Carrefour Hypermart Chain represents an unprofitable had because of the poor evolution of the target company in the years after the takeover historically but also when also when compared to the industry results

iv. Pharmafarm SA (acquired by Armedica Trading) had a poor evolution historically and also when compared to the industry results, being lower than the market and the previous years in all three analysed years, 2007, 2008 and 2009

v. Domo Retail SA scored 53% in the historical financial performance analysis, butin 2008 and 2009 it performed worse than the market

vi. Digital Cable Systems SA is a company that was performing very poorly before its acquisition by AIG New Europe Fund. The acquirer managed to improve its key financial indicators only in 2007, but it still performed worse than the market in 2007, 2008 and 2009 and having negative profitability in the last two years, from an historical perspective.

vii. La Fântâna SRL had a poor financial evolution historically but also when compared to the industry results, having a profit margin lower than the market and the previous years in all three analysed years, 2007, 2008 and 2009

viii. ElmiProdfarm SRL scored 47% and is another unsuccessful transaction for several reasons: even though it over performed its industry in all analyzed years, historically the financial indicators

evaluated deteriorated in 2008 and 2009 compared to 2005 and 2006, while industry margin remained constant.

In conclusion, even though the study may present some bias, we were as objective as possible and not influence its outcome: that 80% of 10 most important private Mergers and Acquisitions taking place in Romania in 2007 and that meet several conditions:

o The target is part of the consumer goods and services market (mainly trade and tourism) and is an important player in its industry

o The target is a Romanian private company, and its shares are not listed on the stock exchange

o The acquirer is majority shareholder after the transaction

o The target company remained as a sole entity and was not integrated into the mother company after the transaction were not successful.

References

- Aiello, R. and Watkins, M. (2000) *The fine art of friendly acquisition*. Harvard Business Review, 100-107.
- Ashkanasky, N. M. and Holmes, S. (1995) *Perceptions of organizational ideology following a merger: A longitudinal study of merging accounting firms.* Accounting, Organization and Society 20 (1), 19-34.
- Badea, G. D., Novac, E. L. (2005). *International Trade and Finance*. Bucharest: EdituraEconomica.
- Breindenbach, S. (2000) *Managing mergers*. Network World 17 (23), 68-74.
- Bruton, G., Oviatt, B. M. and White, M. A. (1994) *Performance of acquisitions of distressed firms.* Academy of Management Journal 37, 972-989.
- Buono, A. and Bowditch, J. L. (1989) *The human side of merges and acquisitions: Managing collisions between people, cultures and organizations.*Jossey Bass, San Francisco, Ca.
- Capron, L. (1999) *The long-term performance of horizontal acquisitions*. Strategic Management Journal 20 (11), 987-1018.
- Cernat-Gruici B., Constantin L. and Iamandi I. (2010) *An Overview of the Romanian M&A market during the Recent Financial Crisis.* The Romanian Economic Journal 37 (September).
- Cording, M., Christmann, P. and Bourgeois Iii, L. (2002) *A focus on resources in M&A success: A literature review and research agenda to resolve two paradoxes.*In proceedings of Academy of Management.
- Doing Business in Romania, Financial Information of Analyzed Industries Retrieved February 2011 from World Wide Web www.doingbusiness.ro
- Eisenhardt, K. M. and Graebner, M. E. (2007) *Theory building from cases: Opportunities and challenges*. Academy of Management Journal 50 (1), 2532.
- Federal Trade Commission, F. T. C. (1975) *F. T. C statistical report on mergers and acquisitions*. U.S. Government Printing Office, Washington, D.C.
- Financial Newspaper, *Top Transactions*, April 2007, April 2008, April 2009 and April 2010
- Fowler, K. L. and Schmidt, D. (1989) *Determinants of tender offer postacquisition financial performance.*Strategic Management Journal 10, 339350.
- Haleblian, J. and Finkelstein, S. (1999) *The influence of organizational acquisition experience on acquisition performance: A behavioral perspective.* Administrative Science Quarterly 44, 29-56.
- Haspeslagh, C. and Jemison, B. (1991) *Managing acquisitions.Creating value through corporate renewal.*The Free Press, New York, Ny.
- Hedman, J. and Kalling, T. (2003) *The business model concept: Theoretical underpinnings and empirical illustrations*. European Journal of Information Systems (12), 49-59
- Henningsson, S. (2008) *Managing Information Systems Integration in Corporate Mergers and Acquisitions.* Lund Studies in Economics and Management 101, Lund University Press, Lund.
- Hitt, M. A., Harrison, J. S., Ireland, R. D. and Best, A. (1993) *Lifting the veil of success in mergers and acquisitions.*In proceedings of Annual Meeting of the Strategic Management Society, Cambridge University Press, Chicago.
- Lajoux, A. R. (1998) *The art of M&A integration*. McGraw-Hill, New York
- Larsson, R. (1990) *Coordination of action in M&A. Interpretive and systems approaches towards synergy*. Lund University, Lund.

- Lubatkin, M. (1983) *Mergers and the performance of the acquiring firm*. The Academy of Management Review 8 (2), 218-225.
- Lubatkin, M. H. (1988) *Value-creating mergers: Fact or folklore?* Academy of Management Executive 2 (4), 295-303.
- Marks, M. L. (1982) *Merging human resources: A review of current research*. Mergers and Acquisitions 17, 38-44.
- Miller, S. (2002) *Emerging titans.* Foreign Direct Investments (2 December).
- Ministry of Finance, Financial Statements of Analyzed Companies Retrieved February 2011 from World Wide Web www.mfinante.ro
- National Bank of Romania, Exchange Rates Retrieved February 2011 from World Wide Web www.bnr.ro
- Pop, D. (2006) *M&A market in Transition Economies: Evidence from Romania*. Emerging Markets Review 3 (September), 244-260.
- Popa, A. Laptes, R. *Boundries regarding the implementation of the national strategy for the financial reporting of the private sectorentities*. Amis 2011- ASE
- Porter, M. E. (1985) *Competitive advantage*. Free Press, New York.
- Porter, M. (1987) *From competitive advantage to competitive strategy*. Harvard Business Review 65 (3), 43-59.
- Risberg, A. (1999) *Ambiguities thereafter - an interpretive approach to acquisitions*. Lund University Press, Lund.
- Shrivastava, P. (1986) Post-merger integration. Journal of Business Strategy 7 (1), 65-76.
- *Thomson Database* – transaction multiples Retrieved on October 2011 from the World Wide Web www.thomson.ro
- Vranceanu, C., *DealWatch: Piata de M&A a scazut in 2010 cu 32% la 1,6mld. euro*, in Wall Street (www.wall-street.ro), 13 Jan. 2011.
- Sandu, S. *Romania - M&A Market Trends,* inBusiness Digest (www.doingbusiness.ro), October 2009.

STUDY ABOUT THE RELATIONSHIP BETWEEN ACCOUNTING AND TAXATION. PROPOSALS FOR DISCONNECTION

MARIANA GURĂU[*]
MARIA ZENOVIA GRIGORE[**]

Abstract
The observation that many practitioners, by virtue of strong dependence between accounting and taxation encountered in our country after years of "90, find with difficulty the way to detachment of accounting and taxation by making cautious steps, lack of courage, was the impulse for choosing this research topic. Therefore, we consider that research in accounting and taxation field must represent the combination of information obtained as a result of theoretical research with information from economic reality.
By its content, this study, perform extensive research on the intersection of accounting information with tax elements, combination oriented to disconnection between the two areas.

Keywords*: integrated reports, neutral reports, relations between accounting and taxation, convergence, divergence*

Introduction

The relationship between accounting and taxation was characterized over the time by words and phrases such as *dichotomy, subordination, convergence, divergence*, and more also, who takes imagination to see the eternal status of conflict between the two. Professor Ristea[1] believes that "we have accepted a new formulation of the relationship between accounting and taxation, the dichotomy "**connection and disconnection**". **Connection**, because by the same system, the accounting is done two purposes, accounting and taxation. **Disconnect**, considering the differences between rules and principles of accounting and tax. "

In a regulated accounting, accounting information is built on the principles, rules and regulations intended to serve their objective. Instead, tax information, subordinated to tax interest, serves as a basis for taxation, an according to the principles, rules and standards defined by tax law. The relationship between accounting and taxation is influenced by the objectives and principles of both areas aimed at helping to fulfilling them.

We propose, through this study, several measures to help disconnecting between accounting and taxation.

Relationship between accounting and taxation

Accounting is an instrument for understanding and managing of the financial position and the result obtained by an economic entity. It must provide accurate information to investors' capital, for state institutions (including tax), suppliers, and employees.

Excessive taxation and tax regulations instability leading to the choice of accounting methods that, ultimately, does not reflect a true and fair view of the financial position, but one adapted to the tax and conjectural.

---

[*] Lecturer, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: marianagurau@univnt.ro).
[**] Associate Professor Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: mgrigore@univnt.ro).
[1] Ristea Mihai, *Bază şi alternativ în contabilitatea întreprinderii*, Tribuna Economică Publishing, Bucharest, 2003.

The relationship between accounting and taxation is influenced by the reports between the two. Given this situation, the question what arises is demarcation and hierarchy of reports between accounting and taxation.

These reports can be grouped into two categories: *integrated reports* and *neutral reports*.

Integrated reports (employees) are connection reports, being determined by the intersection between tax and accountant interest. In case of these reports reveal differences between accounting and tax principles that must be harmonized. Employed reports are considering reconciliation of relations between accounting and taxation.

In the area of these reports are part mainly three problems:

- Depreciation of non current assets;
- Evaluating, and
- Taxation of profits.

In the area of integrated reports between accounting and taxation, falling rules on deductibility of expenses in determining taxable profit of the company. To this direction must be applied the principle of connection between expenses and income, which requires recognition in the financial statements for only those expenses which are incurred in carrying on the company's current activity. Other costs that it generates should not be recognized in the financial statements.

This point of view is more purely accounting. But, given the fiscal aspect of the problem, the company must record all documents that are prepared on its behalf, which means that some of them contain costs that are not recognized. These expenses must be accounted for, but when calculating income tax should be eliminated, thus obtaining a higher taxable income and consequently of the income tax payable to the budget.

Another consequence of application of the principle of linking expenses at the revenue is that: an expense is deductible for tax purposes only if they are generated by revenue. For example, if a company records expenses in the period when not engaged, expenses are considered nondeductible from a fiscal standpoint.

Neutral reports between accounting and taxation do not directly affect the profitability of the company. They occur when the dividend tax, income tax, social security contributions, VAT (when it has a pro-rate deductibility of 100%). The information provided by accounting is used from taxation in the calculation and settlement of taxes and contributions.

Neutral reports between accounting and taxation have in mind that accounting information is used for taxation like a support and purpose for determination and settlement support for taxes and contributions. These reports do not require conciliation of differences between accounting and taxation; do not generate usually problems on the harmonization of the two interests.

These reports can be exciting for the company's fiscal management, accounting default, only to the extent mobilize the imposed subject to a behavior recorded in fiscal effectiveness.

Relations resulting from the reports between accounting and taxation

The relationship between accounting and taxation must be analyzed beginning from the evidence that objective of accounting is different from the taxation one. In addition, two other factors are involved in this equation: entity, through associates or shareholders, and professional accountant, each of them with its own objective. Thus, four factors of interest are found four different objectives:

This objective sustains structures described and recognized in the financial statements.

According to financial reporting conceptual framework, the objective of general purpose financial statements is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders and other creditors in the decisions they take on providing resources to the entity.

Information about the financial position aims:

- economic resources controlled by the entity and that are useful for anticipating the entity's ability to generate future economic benefits;

- structure of funding sources, it is necessary to anticipate future needs credit and the possibility of obtaining such loans;

- the distribution of profits and future cash flows, liquidity, solvency of the entity and the ability to adapt to changes in the economic environment in which it operates.

The objective of taxation consists in calculating, charging, placing, tracking payment of taxes and contributions due from economic units, state.

These objectives are achieved by promoting financial policy economic and social. Taxes are a form of sampling a part of the income or property of individuals or legal entities to the state to cover its expenses. This sampling is necessarily non-refundable basis and without consideration of the state. It is necessary that fiscal rules to be known and respected as from payer and the tax authorities.

The objective of the economic entity, of the owner is to make a profit. Ownership unbundling and power within the entity favored the development and other objectives, but whose implementation remains subject to obtaining a satisfactory profit. These goals relate to increasing or maximizing sales and the quality of service rendered or goods.

Making a profit remains, therefore, the first purpose of the entity, but not only.

Accountant objective is to achieve the first three objectives respecting accounting and tax rules so that:

- To present a true and fair view of the financial position, financial performance of the entity and changes in financial position and financial performance (the objective of accounting);

- Ensure the correctness of the calculation and recording taxes owed by the economic entity (which consists of fiscal objective);

- To build the desired result as beneficial owners using tax incentives and accounting and tax treatments, when the choice (within the limits of the objectives of the two fields of accounting and taxation).

When accounting principles are in conflict with the taxation, arise the problem about the reconciliation between accounting, which represents the interests of society, and taxation, representing the interests of the State.

Relation accounting-taxation is a subject that can be analyzed in the context of optimizing fiscal management company.

Tax administration is considering tax parameter, respectively the entity's tax obligations. Effective realization of the fiscal management objectives is by fiscal policy entity as concrete manner using specific tools and techniques.

Searching and performing of fiscal security must ensure relationships between entity and taxation regarding substance and form and payment postponement imposed by tax law. Achieving this objective involves the carrying out of appropriate allocation of financial resources to avoid delay penalties, fines and tax penalties.

Searching and performing fiscal efficiency refers to the fact that the entity needs to optimize its economic and financial relations with taxation. Entity behavior in this direction is possible in the system of taxes and contributions provide ways of instigating entity taxable amount on line growth or profit use in certain destinations. For example reinvestment of profits involves tax reduction.

In a research study on normative type concerning change that occurred in the accounting regulations in Romania[2] in the last ten years, the authors concluded that "at present, in Romania, accounting and taxation is disconnected, only barrier left to overcome in custom accounting practitioner to think in terms of economic transactions tax ".

[2] M. Ristea, I. Jianu, I. Jianu*, Experienţa României în aplicarea Stadardelor Internaţionale de Raportare Financiară şi a Standardelor Internaţionale de Contabilitate pentru sectorul public,* Transilvanian Journal of Administrative Sciences, 1 (25)/2010, p. 188.

Although formally accepted, disconnecting between accounting and taxation, in the implementation process continues to face many difficulties. It can see great progress, sometimes unexpected, followed by recovery and reinterpretations, as noted G. Popescu[3].

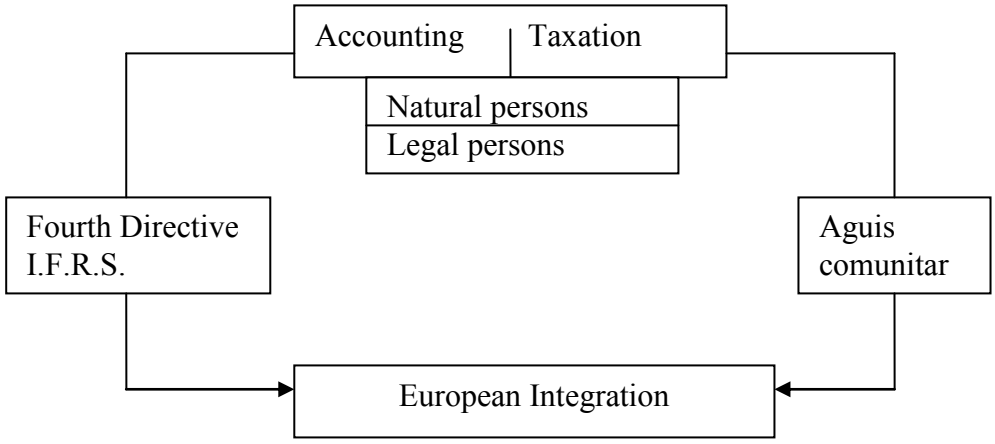
But there remains an artificial dependency between taxation and accounting, maintained by the practice. And we refer to situations in which, although there are accounting rules, it choose the taxation rule to the detriment of accounting one, for several reasons: convenience, saving time and administrative costs. An example of this is the depreciation: accounting rules may differ significantly from fiscal rules, which has the effect of keeping the two records amortization: accounting (in the accounting records) and tax records (in a special register for this purpose).

In practice it is usual to use the same method of depreciation for accounting purposes and tax purposes to avoid complications regarding double records depreciation. Most often, however, the accounting rule is deliberately circumvented in favor of the tax. Is the valuation of the inventory reflected on the balance sheet, assessing the taxation is not recognized. There are few accountants specialists who respect the accounting rule in this regard.

In general, in case of separate tax rules, different from accounting rules, must be applied two sets of rules, which may increase the bureaucratic burden on businesses. It can lead most of the time, to the failure to comply with accounting principles.

Taxation has also passed through many changes in the last twenty years. Some of the changes were dictated by state fiscal policy, by the political interests of various parties in power, and some of integrating, in 2007 the European Union. All changes related to harmonized taxation had a direct impact on each category of taxpayers, individuals and businesses, and from an accounting viewpoint changes confirms that all plans must be made for the image correlation both fiscal and accounting statements financial statements to reflect reality and to be comparable at both micro and macro level.

Briefly we can imagine the relationship between actors participate in the economic and tax in close interdependence, each generating a stimulus on the other, as shown below:



We can conclude that an important step has been made regarding the separation by the tax accounting rules on a regular, but not enough specialists as long as your account remains still victims of economic transactions habit of thinking in terms of taxation. It is imperative to achieve this separation in practice, involving the need for thorough preparation for mastery of accountants to detail the laws and accounting rules, so as to understand and to learn and to master those taxes.

[3] Gheorghe Popescu, Adriana Popescu, Cristina Raluca Popescu - *Imaginea fidelă versus fiscalitate în contabilitatea românească a anului 2006*- Gestiunea Publishing, Bucharest, 2006.

But there are many problems that an accountant is forced to face and largely state they are caused by excessive bureaucracy, the greater the number of laws that come into amending the Tax Code and accountants who make trouble.

In our opinion, although difficult path from addiction to disconnect taxation accounting has been completed, there is still a hard and difficult road from theory to practice. Theorists believe that it is the duty of helping practitioners, through their work, understand and follow this path.

Our proposals which aim to disconnecting between taxation and accounting refer to the following:

1. Assurance of a stability regarding legal provisions at least at the level of a financial period, although we consider that normative acts should have effect over a greater period. Our proposal stops at the financial period in the conditions in which the legislative modifications take place in Romania with great frequency and in any period of the year. Otherwise the fiscal stability represents an essential condition for the predictability of the fiscal and business system from our country.

2. Publication of legislation and modifications brought to this in an adequate period of time before the date of coming into force, so that the entities affected by the new legislation can take the required organizational measures.

3. Publication of application norms, not only at the adoption of a normative act but also at its modifications, at the same time with the regulation act. At present, in most cases there are provisions regarding the publication of norms in terms of thirty days. Since they are not published at the same time with the regulation referred to, a dysfunctionality occurs, many of the normative acts giving rise to misinterpretations for lack of application norms. Besides this, the foreseen term is not observed very often.

4. Use in the normative acts of a common terminology which does not create confusions. In this sense, the Fiscal Code uses at present the term of „provisions" meaning the adjustments for the debts depreciation.

5. A better analysis of the legislation, so that provisions contradictory to those from accounting regulation and fiscal legislation be eliminated, as it is the legislation regarding the fixed assets (corporal fixed assets in accounting regulations) or at the acquisition of non-corporal fixed assets which is considered from the VAT point of view, respectively of the Fiscal Code, as an acquisition of delivery of services, even if from an accounting point of view we have a acquisition of non-corporal fixed assets.

6. Republication of legislation in the accounting and fiscal field after the successive modifications which take place as to enable its adequate comprehension.

7. Simplification or taxes reduction (of the number of taxes) as well as of the fiscal statements which would lead to the diminution of time and resources used in this sense with a result, as it followed from the empirical study made, and upon the true and fair view presented in the financial statements.

8. For the situations in which the accounting regulations foresee more accounting treatments, leaving to economic entities the choice of one of them, we consider that it should exist some conditionings and norms in this sense which would minimize the impulse to creativity. The Romanian economic environment is not prepared to use the options with the purpose to present a true and fair view.

9. From the empirical study, we draw the conclusion that in most cases, where the taxation doesn't recognize an accounting treatment, this doesn't apply in practice. It is the case of balance sheet evaluation where adjustments of depreciation are not registered in most cases because they are not allowed by taxation. We propose in this sense the setting up of an obligation, so that the information from the accounting reports be complete and also comparable with those of the entities which observe the principle of prudence and recognize the depreciations in the financial period in which they appear.

10. We consider that the only solution to prevent the financial statements from fiscal pollution is to separate the accounting 'work' from the fiscal one, so that these two be performed by different persons. Although it requires an additional consumption of financial resources, this measure will guarantee the presentation of an image not altered by fiscal provisions by means of financial statements.

11. We consider that raising more awareness of all who contribute to the drawing up of financial statements, starting from recognition and evaluation and finishing with their elaboration, will have an impact upon the observance of accounting reports' objective. We propose in this sense the delegation of responsibilities when drawing up the financial statements starting from the regular level, the lowest on the managerial chain.

12. For a good informing of the factors implied, not only of institutions but also of those who prepare and assume the responsibility for the information comprised in financial statements, it is necessary the setting up of **a strategy of communication** which should have in view at least the following aspects:

- communication between the institutions of the State and professional organisms on one side and the business environment on the other side;
- communication between the economic academic environment and professional organisms in view of correlation of studies programs with the demands imposed by professional organisms, demands which result as a rule from European Directives or from standards regarding education.

13. Last but not least, we believe that it is necessary the periodical evaluation of professional accountants and even of auditors and of the way in which they respond to the demands imposed by the norms and standards issued by the specialty organizations to which they belong.

Conclusions

As a **general conclusion** of the present work, we can consider, without reserves that **significant progress was made** i**n Romania regarding accounting and taxation as well as regarding the disconnection of taxation from accounting**. This process of perfection of the accounting and fiscal system needs a special attention in the future because on an international and European plan, the mentioned fields are very dynamic, fact which also influence the national environment in the conditions in which business doesn't know boundaries and its effects, favourable or not, spread very quickly.

The conclusions, the results of the research and the examples expressed in this work can be a source of information which can be taken into consideration by the management of entities in order to establish, apply or change their own accounting policies in the context in which we all should be aware that accounting regulations corresponding to European directives encourage the disconnection of accounting from taxation.

References

- Gheorghe Popescu, Adriana Popescu, Cristina Raluca Popescu - *Imaginea fidelă versus fiscalitate în contabilitatea românească a anului 2006*- Gestiunea Publishing, Bucharest, 2006.
- M. Ristea, *Bază şi alternativ în contabilitatea întreprinderii*, Tribuna Economică Publishing, Bucharest, 2003.
- M. Ristea, I. Jianu, I. Jianu*, Experienţa României în aplicarea Stadardelor Internaţionale de Raportare Financiară şi a Standardelor Internaţionale de Contabilitate pentru sectorul public,*Transilvanian Journal of Administrative Sciences, 1 (25)/2010, p. 169-192.

- *The Order of the Public Finances Minister* number 3055/2009 *for approval of accounting regulations with European Directives*, Romanian Official Monitor, Part I, no. 766 from November 10th 2009.
- Public Finances Minister: Accounting Law no. 82 from January 24th 1991, with subsequent additions and modifications.
- Public Finances Minister: Law no. 571 from December 22nd 2003 regarding The Fiscal Code, published in Official Monitor no. 927 from December 23rd 2003 with subsequent additions and modifications.
- Public Finances Minister: Decision no. 44 from January 22nd 2004, regarding Methodological Norms for applying Law no. 571 from December 22nd 2003 regarding the Fiscal Code.
- The Order no. 2861/2009 for the Norm's approval regarding the organization and inventory of assets, liabilities and equity.

FACTORING- CREDIT OPPORTUNITIES IN ROMANIA

ADELA IONESCU*

Abstract

Capital is the main factor of production, business development becomes virtually impossible without taking into account the financial market and the resources it provides to businesses. Any business, regardless of its degree of development, is involving direct contact with financial markets, namely the institutions that mediate mobilization of capital and the services they provide. Understanding the functioning of the financial system, the specific financial mechanisms through which savings are allocated to support capital investments and the costs and risks involved is essential for the development of a solid base for business.

In this context, factoring operations can support economic agents, allowing a transfer of commercial receivables from their holder to a factor who commits to their recovery and guarantee such operations even if temporary or permanent insolvency of the debtor . Thus, factoring is a complex technique in at least two aspects, of the debt and the transfer of credit. . Factoring is a means of financing business, especially export-import transactions, less known in Romania. Maybe because of poor business environment popularize the term is as little known as it was a few years ago the leasing.

Present in Romanian legislation since 2002, factoring appears as a contract between one party (called adherent), providing goods or service and a banking company or a financial institution specialized (called factor), which the last one shall finance debts pursuing and preservation against credit risks and adherent gives factor by way of sale, debts arising from the sale of goods or services to third parties.

The article is divided into three parts. In the first part we defined the concept of factoring and international factoring, then I presented the advantages and development of factoring in Romania, and the last part conclusions.

***Keywords**: International Factors Group, factoring, product of financing, sale invoices, double sales, factoring contract , factor, financing technique, credit and payment instruments, costs, regulatory framework*

Introduction

Factoring overview

Factoring is a financial - trading activity which consists mainly of firm acquisition by a person named factor, from the producers of goods and services, the claims that they have on their customers. Factoring operation is essentially a transfer of trade receivables to a factor holder to commit to their recovery and guarantee such operations even if temporary or permanent insolvency of the debtor, retaining for this a commission. Results therefore that factoring is a complex technique consisting of at least two aspects: the credit and the transfer of debt, which is causing its financial and legal nature.

Factoring is a commercial credit agreement involving a specialized company (banking company or a specialized financial institution) in the collection of bills called ***Factor*** and a company providing products or services referred adherent **.** The adherent aims to charge invoices before their expiration term as the *Factor* seeks a benefit, usually a percentage of the invoices adherent he settled in advance. In factoring business is involved as well the customer/client of the which is notified that it will pay the bill at maturity to the *Factor*. By entering into a factoring agreement is not envisaged an isolated operation but is usually sought an exclusivity on a certain customer segment, region or country. The adherent is in a major advantage because it does not have to collect bills from a variety of customers but they receive the amount directly from the factoring company. The *Factor* accept invoices on its own risk and if the debtor does not pay cannot demand the payment from except that the adherent does not provide to its customer the services or goods covered by the adherent invoice).

*Associate Professor, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: adelaim@yahoo.fr).

To assume the risk of non-payment of an invoice, the *Factor* must first agree that invoice, in other words it will only work with agreed clients and those that provide security. If it does not accept the invoice the *Factor* can cash it under a contract of mandate without taking the risk of default. The is adherent required to notify its customers that it yielded its claims to the *Factor*, so it must pay to the latter.

Factoring is a way of financing business - especially export-import transactions - less known in Romania. Maybe because of the poor promotion of the term in the business environment it is as little known as it was a few years ago at the "Lease". Meantime if we became familiar with leases, market trend will lead logically to modernization in trade financing. This involves as well adopting factoring as a means of funding, to the detriment of classic credit.

In a more common language factoring operation consists in selling by a bank or a specialized company receivables generated from commercial invoices. In the transaction, the bank (or factoring company) offers immediate financing. Thus upon presentation of the client's invoices for products or services purchased it's paid immediately a percentage of 85% of their value. After recovery of the invoices, the *Factor* will pay the difference of 15% from which retains the value of commission and interest. Specifically, factoring is the financing mechanism which quickly obtains cash by selling bills whose maturity is short (usually comprised between 180 and 360 days). Since *the Factor* is one that assumes the risk of default of the debtor, must take into account the seriousness of the foreign partners. In this regard, the bank (or factoring company) will require financial statements and reports concerning the importers loans so it can check the situation. The *Factor* take also into account the quality of the undertaken debt.

Factoring applies particularly in export-import operations where the need for fast cash and short time to recovery invested funds are in balance, hence the success of this financing mechanism.

Factoring benefits are primarily related to the ability to obtain financing in a very short time. Thus, banks and factoring companies provide financing on the day of producing the bills, of course after signing factoring agreement. Among the advantages we may indicate an improvement in the cash-flows due to much shorter time needed to obtain liquidity than for a loan. Moreover, unlike credit funds raised should not follow a particular destination as they can be invested according to the immediate needs of the client.

For traders who apply to factoring, facilities are complemented by the fact that the number of documents to be submitted to the bank or factoring company is much lower than for a credit application. After analyzing the documentation the *factor* may refuse services only in case of shareholder partnership between adherent and debtor or if sales payments are conditioned, for advance or at delivery payment. Using factoring the companies engaged in commercial transactions also benefit that can focus on business development through the expansion of production and sales, while factor deals with tracking cashing and recording invoices conducted by factoring.

First worldwide important market that factoring has appeared was the United States', where until the 60s, most specialized firms were family companies. Since 1980, banks have seized the opportunity to promote such services and have launched a massive acquisition of factoring companies. The key to success is not the size of the market so the U.S. is inadequate reporting to into the context. It also does not matter much any knowledge of the concept of factoring. What matters is the proper organization of specialized companies and the awareness that factoring industry has its own culture. For example, the exchange of knowledge between members of factoring networks, such as "Factors Chain International", contributed to the growth of professionalism. Consequently, national companies in the sector have become able to operate internationally.

International factoring

The first form of factoring has been funded in the U.S. in 1808, after which, under its own regulations the activities promoted by a number of U.S. states, factoring quickly spread throughout the United States. In 1923, in the U.S. was adopted the world's first law of factoring.

In Europe, the first factoring company appeared in England in 1960. At present in all European countries there are factoring companies, most of which belong to international groups such as the U.S. International Factors, Walter Heller & Co., International Factors France etc. Also, it was enacted detailed legislation in this area, in each of the Western European countries.

If we look at international factoring several important factors are to be noticed and considered such as:

- the Factor is a bank, usually a wide known one, fact which on the one hand brings credibility and on the other hand allows it, through Factor correspondents in the importer's country, to acknowledge the latter financial situation so making able the best decision to take concerning the takeover of the claim or not;
- the activities tracking debt collection and credit control are taken from adherent and are made with a higher efficiency due to Factor capabilities:
- payment of invoice amount is guaranteed to the adherent;
- the Factor charge a fee of between 0.5% and 2% of the total debt (depending on volume of activities performed, the existing risks and bills).
- the interest charged by the Factor for its financing is usually higher more than 3% than the market rate.

Finally should be mentioned that factoring apply to transactions with short term credit payment (generally up to 180 days), which usually refers to goods with a low degree of processing, consumer goods and industrial products series, whose sales are repeatable so that collection facilities can be provided on an ongoing basis.

International Factoring (bills negotiation) is first and foremost a financial banking transaction with commercial support, which, based on a contractual agreement, the Factor, a specialized banking institution undertakes to ensure recovery of claims that Adherent (the exporter) has at its customers (the importers) and perform other services for the Adherent.

The Factor take over the bills representing receivable from Adherent and agree to pay them to it, either after full payment of their fee or, most often, paying some bills (between 70% and 80% of their value) immediately and rest when invoices are received in full. The Factor charges a fee for its services that covers all expenses and is earning him a profit.

The Factor take over as well all collection activity tracking the invoices and credit control including accounting operations, as well as sending statements and letters. This allows the Adherent to employ its staff for other activities, leading also to a relaxation of pressure on cash-flow and increased competitiveness of the Adherent.

In international factoring operations may come up to four parts: Adherent (the exporter), Export-Factor (a bank in the exporter's country), Import-Factor (a bank in the importer's country) and Foreign Customers (the importers).

Schematically, the mechanism of a comprehensive international factoring transaction is as follows:

- factoring transaction begins when Adherent submit the Factor its claims on third party importers as invoices with different maturities, from exports performed by the Adherent;
- comes up factor subrogation to the Adherent rights in claims mobilization ;
- payment of bills nominal fee less the Factor fee, either immediately - before the maturity of debt (old line factoring), which requires payment before maturity and thus adding to the cost of factoring an appropriate interest rate, or at maturity (maturity factoring).

In case of payment on maturity, the Export- Factor hands over the claims to the Import - Factor that recovers their value from importers making settlements with Export-Factor, which then pays the exporter.

Export- Factor can pay the Adherent at delivery a certain amount of bills and afterwards the difference will be adjusted after recovery of loans. At debt maturity the Import-Factor receives from the third party borrowers their value by showing the payment and settlement documents with the

Export-Factor. In the case of immediate payment factoring, The Export- Factor, as noted above, advances funds to the Adherent paying the bills at face value from which deducts the interest and fee. Export-Factor can grant also loans to the Adherent for development of export production. By factoring operations, the Adherent transfers on Factor the insolvency risk of its customers, the risk of collection (payment cancellation) and currency risk (devaluation of the currency in contract). In addition to taking these risks, the Factor ensures to Adherent, as mentioned above, other services too, such as sales accounting, tracking receivables from foreign customers, developing short term studies on foreign markets as well as on the Adherent customers, specialized banking services as granting and guaranteeing loans or as economic efficiency analysis for Adherent export activity. By resorting to factoring Adherent may increase its export products competitiveness.

Factoring activity in Romania

In Romania factoring has substantially grown recently. With all substantial advantages offered by factoring, Romanian companies have resorted to a greater extent to this category of product until 2001. Only then transactions exceeded 100 million Euros. Meanwhile, in Poland transaction volume measures 3 billion Euros and the Czech Republic, Hungary and the Baltic countries recorded higher volumes. The reasons for this discrepancy account both to macroeconomic conditions and the banking offer system. Lack of bank offer was a brake on expand factoring, but the current trend is on a high increase. The rapid growth of banks' revenues from factoring operations (approximately ten times in the last six years) indicate an increase in trade exchanges and need for cash of the economic agents, faced with increased tougher competition. Now the domestic bank factoring services market is divided between BRD(27%), BCR(23%), Raiffeisen(19%), UniCredit(19%) and ABN Amro(12%).

In the current economic situation it can be said that the development of factoring in Romania has some limitations caused mainly by the following facts:

- Technical issues related to nature and natural limits of factoring
- Economic situation
- Financial regulations
- The level of understanding and knowledge of the involved factors
- The need to making up specific legislation

Evolution of factoring market in Romania during the period of 2009 – 2011

In Romania factoring market is controlled in proportion of about 75% of companies in the banks. The main players are BCR, BRD, Raiffeisen and Unicredit Tiriac, which work on the factoring market through 'inhouse' departments while lending institutions such as ING and BT are on the market through specialized divisions, namely the Commercial Finance and Factoring Company. *Next Capital Factoring* Company, with totaling 5 million grants last year, is one of the leading independent players in the market. Recently, the British private equity fund North Bridge took over 29% of its share capital, the value of transaction amounting to 4 million. Most customers of the *Next Capital* are SMEs and entrepreneurship.

Factoring market in Romania increased in 2011 by 10-15% compared to 2010, when it fell by 27.8%, to € 1.3 billion, compared to 2009, in the context of marked reduction in the number of borrowers accepted by specialised companies. One of the most important players on the Romanian market is *Capital Factoring* company which finances up to 80% of the assigned customer invoices within 24 hours from the date of signing the contract, even if SMEs do not meet the necessary conditions to get a traditional bank loan. Financing that meet the necessary conditions are guaranteed by the National Credit Guarantee Fund for SMEs.

Factoring market in 2010 was 1.3 billion Euros, a contraction of 28% over the previous year when factoring market reached a total of 1.8 billion euro, an increase of 63% over 2008. Factoring market in Romania has continued to develop and in 2012, according to representatives of companies in the domain. Moreover, since 2011 new specialized companies emerged, which shows the interest

in the business. According to experts Romania is interesting to investors because of the market size, even if in this period is little hope for growth.

According to the data, Romania ranks last in the region in terms of factoring volume transactions related to gross domestic product (GDP), at a level of 0.52% compared to 0.67% of GDP in Bulgaria. The low penetration of factoring in the GDP shows that this sector has a significant potential for growth. Factoring which is a financing product implies the assignment of payment of bills on time in order to get quick cash, but funding does not include collaterals (deposit, mortgage), being strictly based on customer invoices.

For the development of factoring industry in our country I think there is a need to diversify the range of services offered by factoring companies, such as:

- the bookkeeping of sales, inventory, cash management, representatives a.s.o for the adherent;
- providing adherent information on the economic-financial situation of buyers;
- informing with statistical data on key customers, products and market sales volumes etc.

Thus adherent will find at the factoring company a source of commercial informations, a source of credit and services of banking, insurance, accounting, statistics etc.. The only concern to the adherent will be to make and sell quality and competitive goods.

Nevertheless a question arises: ***has factoring a future in Romania?***

There are many factors to be considered in order to give a positive answer to this question. But what we can say with certainty is that the success of this funding technique depends on its acceptance by customers, consisting primarily of small and medium enterprises, as well as on the behavior of the *Factors* in satisfying users requirements. Has factoring been able to meet only temporary needs due to fortuitous circumstances or needs arising from the development of the Romanian economy, only time will give us an answer.

Conclusions

At the end it can be concluded that for Romania is necessary that factoring become the subject to a legal status similar to that met in the U.S. and known as the Factor Acts, harmonized as much as possible with European Union legislation.

It must however be taken into account that the evolution of the legal nature of factoring leads to a vicious circle: to develop factoring needs a status that can not be attained but only when it is highly developed, so it is that factoring will have to be developed on the move.

It is also necessary that financial institutions which monitor factoring give to it every chance up agianst other financing techniques. We bear in mind primarly the National Bank and the commercial banks which must expand use of credit and payment instruments.Exporters that will need to mobilize their client accounts and which will not have sufficient financial coverage to obtain credit by mobilizing trade receivables will have to resort to factoring.

In terms of economic and financial obstacles, first will have to be reduced factoring costs by lowering *Factor* costs. Romanian *Factors* which appeared since a real short period may consider to improve their work efficiency. Increasing the number (and quality) of bills covered by B/E will bring to bear in that direction - that as posibilities to internal cost reduction. On the outside it is envisaged endowing with high performance equipment for data processing and communication, as well as competition and specialization of factors in different fields.

Another obstacle related to factoring costs can be deemed the relative ignorance of the prospective users to the offered services.

Candidates to factoring may only consider the importance of financial advantages of this technique, not knowing or minimizing the importance of some other advantages. Or, factoring is not reduced only to the immediate and final settlement of bills. If a company interested in this technique takes into account only financial benefits, risks to give up its use due to its high apparent costs. It

should be a shift from apparent cost to actual cost, ie know all services obtained for this cost. It depends on the promotional activity carried out by *Factors* and is a matter of educating customers on sale domain.

Factoring activity requires a single regulatory framework, given that it has potential to grow more than seven times the amount of 1.6 to 1.8 billion, reached already last year. Currently, factoring market is dominated by banks, which run internally such operations but independent players begin to force their way in as well.

References

- Boicu M., Factoring "Financially, 24.03.2010.
- Caraiani Gh, factoring in international trade, Lumina Lex Publishing House, 2004.
- .Dobrescu A., Turcu E. - Models of business contracts in Romanian and English, Niculescu Publishing House, Bucharest, 2001.
- A. Dobrescu, M. Berinde, L. Rusu - New types of contracts in international economic relations, Niculescu Publishing House, Bucharest, 2005.
- Gaftoniuc Simona, International Finance, Economic Publishing House, Bucharest, 1995.
- Monod Didier Pierre L'action commerciale a l'International, Editions ESKA, Paris, 1994.
- Peynot D., Gestion Internationale des entreprises FINANCIERE, Montchestion Editions, Paris, 1984.
- Puiu Alexander, Managing international, vol.1, Ed Economic Independence, Ontario, 1999.
- Puiu al., Dobrescu A., Herman L., Morozan C. - Conducting International Business, Ed Economic Independence, Braila, 2000.
- Popa, I., V. Danciu, international business transactions, international transactions funding by Economic Publishing House, Bucharest, 1997.
- Yves Simon, financieres Techniques Internationales, Economica, Paris, 1993.
- Stoian I., E. Dragne, Stoian M. - International trade. Techniques based electronic commerce strategies, Ed Caraiman, Bucharest, 2000.
- Law 469 of 9 July 2002 on measures to strengthen contractual discipline.
- Factoring company IFN SA, the Internet, 2006.
- http://www. ecomall. com /.

COORDINATES OF A RISK MANAGEMENT PROJECT

ALEXANDRU OLTEANU[*]
MĂDĂLINA ANTOANETA RĂDOI[**]

Abstract
High risk – high benefit: a well-known correlation both in the economic field and in the day-to-day life. Another correlation, on which this article is based: large project – numerous participants – increased risks and other malfunctions.
The risk management concept is challenged by those projects and is forced to find the most adequate "customized" ways for each project at its turn.
In this respect, the assessment of management has followed the trend of the last three decades, marked by moving of management profit analysis by risk intermediation, respectively the transition from managing profit to risk-return relationship management. Such trend assumes the obligation of participants to identify objectives and expected benefits of the project on the basis of the strategies laid-down, the elements of risk management policies, in conjunction with the indication of the most negative scenarios which they may provide.
This activity must take into consideration the process of obtaining and combining human, financial, physical and information resources in order to accomplish the primary goal of the proposed and wanted project by a certain segment of population.
Project participants are directed to evaluate their own activities in terms of revenues and risks from the business access, opportunity, operating mode, as well as the limitations and boundaries on certain sides of activity. The paper focuses on the analysis and evaluation of incomes and risks, on simulations to streamline the activities and the determination of the optimal model of project choice.
Also, the paper treats the risks that can be taken over by the sponsors, especially those related to implied guaranties, even implied guaranties.

***Keywords**:* project risk, output supplier and purchaser, swap currency, swap on interest rate, operation risk.

Introduction

The investment projects support the economic development of a country by creating and developing production capacities, achieving the infrastructure and socio-cultural objectives.

The present paper intends to identify the project participants with all their duties, and especially the risks which are relevant for the project, the stultification of their consequences, as well as risk management by the parties entitled to manage them.

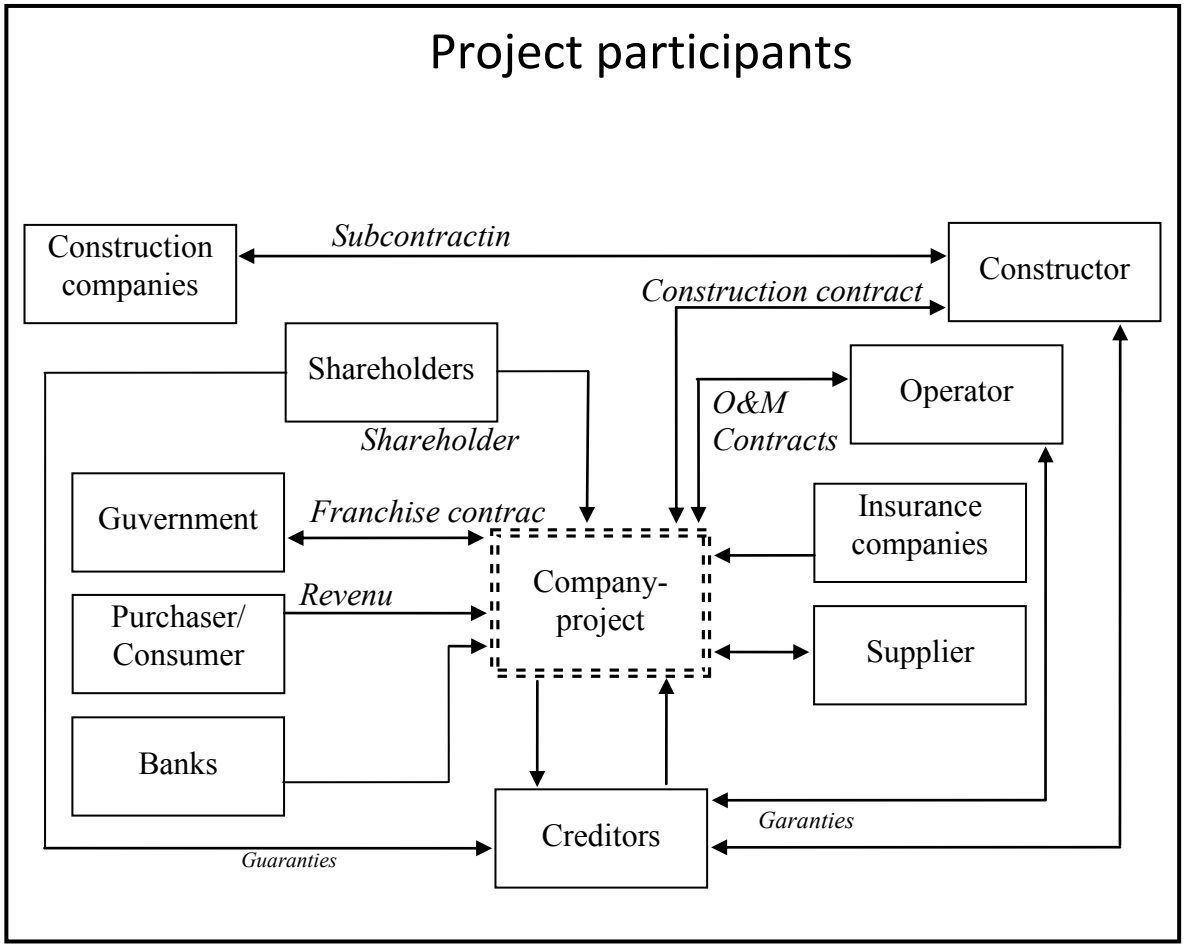
Minimizing those risks must be operated starting from the negotiation stage of the project participants and reflection of those agreed with the contract arrangements.

Discussion

Large project means infrastructure objectives or other high scale constructions to create or develop production capacities or socio-cultural objectives and implying also numerous participants. Summing up, they are those included in figure 1.

[*] Professor, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: aolteanu@univnt.ro).
[**] Associate Professor, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: madaradoi@gmail.com).

Figure 1. Project participants



In the first place, in order to reduce the risk of the project promoters (most of the cases, shareholders, named in this case sponsors), those are separately constituted, under the shape of a company-project getting out of the company finance sphere and joining the project finance field (Project Finance).

Another step is the identification of the risks which are relevant for the project, their reduction (for instance by selecting checked suppliers, with a good reputation) and managing risks towards other parties which are entitled to manage them (simplified, the construction risk is transmitted to the constructor, the management risk to the manager and so on). At this level, still, each part involved is covered and /or ensured against the risks which come with the territory (1).

Risk management differs from a transaction to another.

1.**However, in most cases, the parties participating at risk management are:** the production purchaser, the supplier, the constructor, the government, the operator, and, of course, the sponsors.

♦The *output* purchaser is motivated to assume certain risks when the project is important for his own business.

The relationship with the output supplier and purchaser is approached mainly through the indirect guaranties, as long term contracts, which can assure the availability of the needed materials, on one hand, and the project revenues on the other hand. The most known and applicable contract arrangements of the kind are: *take-if-offered*, *take-or-pay*, *hell-or-high-water*[1], *put-or-pay*, and *pass-through*.

The *take-if-offered* contract urges the purchaser of the project output to accept the delivery and to pay for the offered products and services. The contract doesn't demand the purchaser to pay in the case when the project doesn't succeed in delivering or supplying the promised services. Thus, the contract protects the creditors only if the project is operational. In general, the creditors demand further arrangements to cover for force majeure, which make the project inoperable for a certain time.

The *take-or-pay* contract urges the purchaser to pay for the goods and services even if he doesn't accept the delivery. It can be set that the parties from the contract should cover all the fixed expenses of the project (the fixed operational and maintenance expenses, the debt services, the net benefit of the shareholders) or only a part from the project capacity. In the latter case, the project sponsors have to sell the remaining part from the market transparently or to look for long term buying arrangements with third parties.

The *hell-or-high-water* contract is similar to the *take-or-pay* contract, with the bounding to pay to the purchaser further, no matter if a product is delivered or not or the services are offered or not.

The *put-or-pay* contract provides that the supplier should deliver a certain quantity of materials to achieve the project or to pay a certain amount which can allow the provision to be made by third parties in case he doesn't succeed in fulfilling his duty. The *pass-through* arrangements come to complete the purchasing ones or supplying with the purpose of protecting the investors from unwanted amendments of the goods price. For instance, a link between the power selling price and the fuel buying price for central heating can be set. Thus, if the price of the fuel increases, it increases therefore also the selling price of the power from the buying contract. Yet, if the efficiency of the fuel use decreases, namely if a unit of produced power needs a higher consumption of fuel than it has been anticipated (then the consumption on production unit increases), then the *pass-through* arrangements don't apply and, therefore, the net operational revenue won't diminish.

♦The supplier can take some risks from his desire to sell his own products.

♦The constructor most times takes risks appropriate to the construction time. On the construction market there is a strong competition, and a large project may be a profitable source of income and, in the same time, an opportunity to increase the reputation of the construction company.

In order to guaranty the constructor's responsibilities stand-by credit letters are used, bid bounds guaranties, performance bonds guaranties, advance payment bonds guaranties and so on.

♦The government is interested in promoting certain projects according to the economic, political and social context.

The involvement of the government doesn't pay a real part in certain assumptions (although, in some cases the strategic importance of a project for the national economy of a state justifies this approach), but guaranties against the political risk action (transfer, expropriation, etc.) the government co-interest in a particular project is a cautious and wise attitude, due to the fact that not few were the case in which certain projects profitability was affected by the hostile the government decisions, with social, political, environment motivations etc., more or less well-founded.

[1] The phrase (come) hell-or-high-water means in English "any difficulties which may arise".

The government support offered to a project can be expressed in implicit guaranties, but also through formal support guaranties. The latter contains insurances on behalf of the government to minimize the political risk.

♦The operator is, also, motivated to take over some risks in exchange for a convenient operation and maintenance contract.

♦The sponsors (the shareholders) assume some risks at their turn and can be demanded to contribute with some in-house further capital in case any adverse event takes place. The sponsors also have to offer some guaranties or they have to obtain them from third parties (2).

These take over the risks they don't succeed in allotting or consider they cannot manage effectively. Along the limited guaranties (as amount, time or coverage), there is also an interesting tool through the consequence it has, without having a strong background: the implicit guaranties. These are so-called guaranties, due to the fact that they don't have a legal influence over the guaranty. Still, they offer certainty to the creditors who get from the sponsors insurances that all the efforts will be made for the project to succeed. The implicit guaranties take the form of declarations, intents, best-efforts commitments. The most common implicit guaranty is the comfort letter which consists of a sponsor intent declaration to supervise the management and the development of the project. In case the financial terms deteriorate, the guarantor sponsors will take all the needed measures to prevent the project from becoming unable to fulfill its duties.

2. **Risk management organization and its objectives**

Risk management in an organization or institution is, first and foremost, the responsibility of the executive board. The main objectives of a good system of risk management concerns:

- establish a common accepted definition of "risk" and the types of risks;
- evaluation of financial sources necessary for the institution, of existing and potential internal and external risks;
- establish of clear responsibilities in the field of risk management and reporting system;
- ensuring a transparent, comprehensive system of information management, a system of monitoring and reporting of actual exposures, losses and gains;
- development of a system for measuring financial performance to take into consideration the expected loss (the cost of activity), unexpected loss (risk measurement), capital allocation for each risk, where is possible, and income adjusted for each risk (return of capital adjusted with the risks);
- define and use principles of diversification of risk and financial management of the portfolio;
- establish the price of the products, services and investments taking into account the above items;
- identify inclination/tolerance in assuming risks and establish limits of exposure;
- installing in all of the areas by organizations of plans for recovery in the event of natural disasters and/or of plans for the continuity of activity, as well as updating and testing on a regular basis to these plans;
- permanent analysis of achievements and failures of the risk management system and adjustments in accordance of instruments of control;
- providing a professional level and specialized of the employees in order to neutralize and control various categories of risks.

One of the most important risks, which must be managed by the participating organizations at an investment, is market risk. Losses arising from this risk can be significantly and can generate the bankruptcy of the organizations if the changes on markets are dramatic. After 1990's the global exposure to this risk has increased noticeably, therefore poor management of this risk has become a

leading cause of organizations' losses. Market risk represents the probability that a variation of the conditions of its markets adversely affect profit organizations. If we refer to changes in the conditions of financial markets, they can affect organizations through three interrelated transmission channels, which are separately managed: the variation of tendency of evolution and of the level of interest rates; the exchange rate variation and hence the value of the national currency of foreign assets and liabilities (building materials, investment goods); financial assets rate variation which may affect market value of the portfolio of securities (commercial) and value of financial securities issued by organizations (stocks, bonds). The volatility in price of assets (commercial or financial) is determined by the factors that determine supply and demand. If these factors change significantly, asset courses will display important variations adapted to restore market balance. This volatility has following dimensions: frequency, amplitude and speed. Since volatility in price of assets reflects efficient functioning of markets, it should not be worrisome for management of organizations. However, volatility in price of assets may significantly expose both participants of the market transactions and non-participants at risks. The change is the main source of volatility and vulnerability of markets. The process of changing commercial and financial structures change relative capacity of various institutions and markets to efficiently process the information on which depends the regular functioning of markets. The market risk concerns the possibility to affect market value in a positive or negative way and/or the profit of an organization as a result of unexpected price fluctuations. Exposure to this risk may be different from one organization to another. Assets volatility (commercial or financial) implies market risk if this volatility was not anticipated.

The volatility transmission from one national market to another involves several models that report the transmission mechanisms. The overall conclusion indicates there is a strong degree of connection of different markets and stock volatility transmission. Don Jones is the index most open to international influences, while FTSE is at least open at such influences. Market risk management can be achieved: ensuring commercial and financial assets; using derivatives (hedging instruments). Derivatives may reduce risks, but can't eliminate the need for proper capitalization of the organizations. There is no complete protection, some risks inevitably remain undiversified.

Once all the risks which affect a project are allotted to the project participants, these will reduce them further by *hedging* and insurance operations.

This final stage is, also, demanded by creditors for all these risks which remained the responsibility of the project-company. In theory, the creditors don't take risks, such as currency risk, interest risk, market and force majeure risk (including political risks) (3).

The currency risk reduces by using certain derivative tools, such as swap, futures, forward and options. Below there is an example of currency swap.

The exchange of the loan in local currency (LC) into a USD one reduces the currency risk due to the fact that the USD revenues can be paid within the swap contract, and the local currency which is received can be used to pay the debt (see fig. 2).

Fig. 2: Currency swap

Total cost: Pays 8% in LC within the loan contract

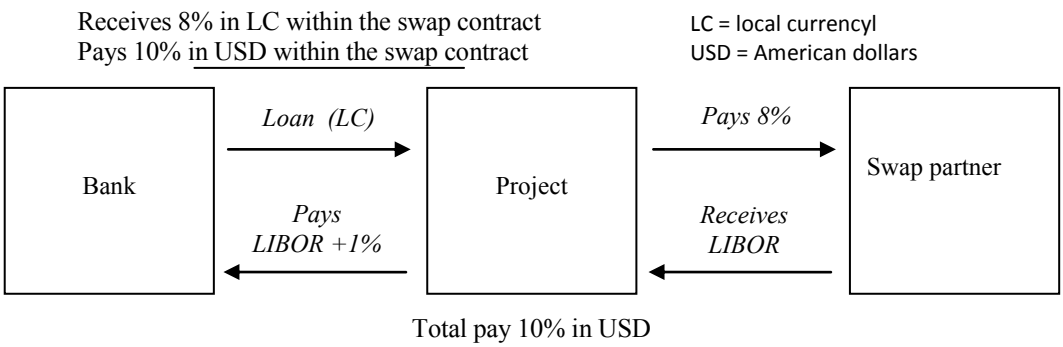


Figure 3: Swap on interest rate

The interest rate risk reduces by derivative swap futures, options and FRA's (forward rate agreement) tools. Figure 3 shows how a fixed interest rate can be converted into a variable rate, through a swap contract. The project loans founds from a bank at LIBOR + 1% variable interest rate. Within the swap contract it pays 8% and receives LIBOR. In reality, the interest rate it pays is invariable, equal to 9% (8%+ 1%).

Total cost: Pays LIBOR+1% within the loan contract
Receives LIBOR within the swap contract
Pays 8% within the swap contract
Total pay 9%

The market risks (possibility of adverse price fluctuations) are most often covered by commodity swaps (4). In a commodity swap the producer is demanded to make some payments towards the consumer in case the spot price gets over the swap contract, and the consumer pays the producer if the spot price gets under the agreed level. The commodity swaps can be achieved anytime two terms are accomplished: essential prices and spot market cleared.

The force majeure and political risks are generally insured, either by commercial insurance (for force majeure events and or some political risks), or by political insurance programs (for certain specific political risks).

Conclusions

With large projects, maybe more than other times, the risk management is asked to find that solution adjustable to any case and which can make the risks bearable by the parties. To harden the things more, the emergence of such a risk can be rarely isolated from the rest of the project, leading to a chain reaction. That's why, risk approaching for such projects must be achieved in an integrative way, considering all the details. There is no universal rule regarding the risk management for large projects, still in the middle there is the principle of risk distribution to the parties more liable of managing them.

For an effective management of project risks, management of the organization must follow closely the main objectives of an effective and efficient management system.

Effective enforcement of these objectives is likely to lead achieving the goal of risk management, that of "maximizing shareholders", and the implementation of customer, employees and organizations requirements.

The most important objectives to be mentioned are: establishing clear responsibilities in risk management; transparency and comprehensive reporting system; existence of a financial performance measurement system , expected and unexpected losses and capital allocation for each risk; assessing the cost of capital, the minimum rate of return and limits exposure to organic growth; using principles of risk diversification; existing plans for disaster recovery or business continuity

plans; independent and efficient control of risk management; highly professional and specialized knowledge employees etc.

The paper has analysed the losses generated to organizations by the market risk especially emphasizing the asset price volatility (goods, financial investments) driven mainly by factors affecting supply and demand in the market. It was found that the price volatility can significantly expose both participants in market transactions and non-participants at risks.

The conclusion of risk management analysis is referring to the most important factor that led organization to focus on market risk was that, after years 70's, the global exposure has increased noticeably, so the poor management of this risk has become a leading cause of loss organizations.

Under these circumstances, and especially when it comes to projects at large the phrase which best applies for the effective risk management is: "just cannot do without it!".

References

- Christian Ost, L'entreprise dans la conjoncture: Principes et méthodes d'une gestion conjoncturelle, 2e édition, Entreprise -De Boeck Université, 2000.
- Nataf J., Les mécanismes financiers dans l'entreprise, Dunod, Paris, 1971.
- Eglem, J.Y., Mikol A. et Stolowy H., Les mechanismès financierès dans l'entreprise, Ed. Montcretien, Paris, 1988.
- Stancu Ion, Finance. Theory of financial markets. Finance companies. Analysis and financial management, Economic Publishing, 1996.

GENERAL OVERWIEV ON EU ECONOMY

NICOLETA GEORGETA PANAIT*

Abstract
The impact of the international economic crisis on new EU member states has proven to be more severe than the first estimates of the economic analysts. The situation is different for each Member State, the nature and the dimension of the challenges faced are not identical, and the pace of reform is not the same. The economic crisis has prompted intense and sustained action by the EU's national governments, the European Central Bank and the Commission. All have been working closely together to support growth and employment, ensure financial stability, and put in place a better governance system for the future.
Sustainable development in the future is the common responsibility of all Member States and EU institutions, because our economies are closely interlinked, and the EU economic governance now reconfigured to provide more effective responses at the policy level, to give a good reaction to the present and the future challenges.

Keywords: *economic crisis, innovation, economic growth, investment, banks*

Introduction

The countries from Euro area have been affected by the crisis differently - while Germany and the northern countries generally have better overcame the crisis, the Southern part was confronted with a succession of crises and unprecedented recession.

There is no rule applies to all in order to stimulate growth and employment, but there are common objectives and a series of reforms that we need to develop differentiated on further fiscal consolidation, the resumption of normal lending to the economy, promoting growth and competitiveness in present and to the future, finding solutions to unemployment and the social consequences of the crisis, public administration modernization.

Spain, Portugal, Greece, Ireland, Italy, faced current account deficits in the past decade and in the same period, Germany, particularly, Austria, the Netherlands, Finland, Belgium had trade surpluses.

The analysts put this situation into account of common currency that would prove to be inadequate to the scale of a continent where countries coexist with very different economies.

In addition to an overvalued euro, the southern states have had a common impact of any economic crisis: public expenditures remain relatively stable (in the big public sector wages must be paid), but the revenues plunge immediately (loss crisis firms, thus less tax income receivable, less money from VAT, etc.).

For these countries there are few solutions: either immediately reduce wages and make mass redundancies or borrow. Greece borrowed heavily in the financial markets and this fact has had a big effect when investors alarmed by the financial condition began to demand an interest rate of 12% instead of 3% Thus, Greece and other countries have had to draw on IMF and other foreign donors in exchange for austerity policies, which are likely to be ineffective.

The situation in Germany is different because was slightly affected by the housing bubble; it's traditional more oriented to export than for consumption. This, combined with a policy of wage moderation, drove German export prices to be stable and fairly low. So that's why, today Germany has a constant competitive advantage, and that keeps the euro at an exchange rate quite high. In fact, as U.S., Europe suffers from China's currency manipulation in exactly the same way it suffers Spain, Portugal or Italy because a euro too strong.

* Assistant Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: nico.panait@gmail.com).

Due to financial and economic crisis, Europe has adopted a series of measures such as the creation of the European Fund for Stability, idea of banking and fiscal union and ECB interventions. Although these measures had important results, return to growth requires more effort and international financial institutions to be involved in these efforts, and the focus on promoting sustainable economic performance in the EU region.

The western world is going through a combination of crisis financial, social, of the euro area and one of globalization.

Economic development in the emerging countries under the influence of the international financial crisis

In Romania in 2012 the economic growth, was due as a result of the significant increase of the volume of activity in the segment of services and the increases of taxes. Statistic data show that the results from agriculture and industry have negatively affected GDP growth (-1.4% influences the total GDP, respectively, -0.6%), while the building industry had a neutral effect.

Industry, agriculture and construction fields should be as high in total GDP in order to put a label whether a country is developed or not. Thus the services sector it creates gross value, but the weight in the GDP is less. The Lisbon strategy was established that EU countries must support the development of manufacturing in Europe not in other areas, because this part of industry will have the largest share in the wealth.

To achieve higher GDP EU countries should shift to developing sectors where there are as many operations with big complexity.

Agriculture did not affect the development of GDP in the first half of the year; the negative influence was strongly concentrated in the third quarter and declined in the last quarter of the year. On the other hand, services sector recorded a significant lead in the second half, managing to mitigate the decline in the third quarter GDP and return to positive territory in last quarter.

The construction domain felt a boost in mid, but only managed to cover what he lost at the beginning and end of 2012. We could not record growth for 2012, with no increase in taxes, so net taxes (taxes levied - State grants) supported the result of economic growth so the entire year, and each quarter, less an election period.

In this context, it is noteworthy that the development of industrial sector sets the tone for the whole economy and counts for the progress of labor productivity. Here this results achieved this year were lower than in 2011, except during recovery period in the second quarter when the outcome was almost similar with 2011.

For Romania the manufacturing industry has the largest share in the stock of foreign direct investments. Certainly it would have been much better for the Romanian economy if the foreign investment was bound to a greater extent for manufacturing, a domain where the added value is bigger comparing with other sectors. Manufacturing sector has the largest share in GDP. Companies with foreign capital who activated in the manufacturing sector had 43,4% of employees and created in 2011 64% of turnover and 57% of value added in the economy. Industrial sector has contributed with approximately 30% to Romanian GDP.

One reason would be joining the European context; our result is still above the average growth of -0,3% recorded in the EU27. Eurostat data showed that in 2011 only seven countries had growth above 1% (Latvia, Lithuania, Estonia, Slovakia, Poland, Sweden and Malta), while eight states saw declines of over 1% of GDP (Greece - with a minus 6,4%, Portugal, Cyprus, Slovenia, Italy, Hungary, Spain and the Czech Republic).

As the period of economic uncertainty remains in Europe, state members were made unable to fulfill Europe 2020 objectives regarding employment, research and development, climate change energy, education and fighting poverty, so we can say that Europe didn't achieve its objectives. It is necessary to make progresses in all these areas to evolve towards a European smart, sustainable and positive development.

Under this strategy, Member States submit with annual frequency, the national reform programs, in accordance with the integrated guidelines, aimed at removing obstacles to economic growth and employment at national level.

The efforts of Member States are supported in the EU by initiatives and policies which are associated, for example, with the process of achieving the single market for funding research and innovation and to improve access EU firms to international markets.

Economic reforms undertake in the goods, services and labor market have to be flexible and to stimulate competition and they are essential for the smooth functioning of EMU. These reforms allow Member States to increase potential economic growth and the level of employment. Also, these reforms are the base support for Member States to improve productivity and competitiveness, while improving resilience of these economies to economic shocks. Implementing structural reforms in the euro area is a must, because Member States cannot use monetary and exchange rate policy as an instrument of national economic policies. Therefore, structural reforms are also essential to avoid imbalances in the euro area.

On a short-term the fiscal consolidation can have a negative effect on economic growth; this effect can be amplified during the financial crisis when funding conditions for other operators are also strict. The fiscal consolidation is not the only factor that matters for growth: according to the choices made on the structure adjustment "multiplier effect" of fiscal policy will be different.

In countries with relatively large shares of public expenditure in GDP and relatively high tax rates, the fiscal consolidation achieved through spending cuts rather than through a further increase of the tax revenue contributes more to long-term economic growth.

Less developed member states are unable to finance their needs and that's why they have to address to markets and to make efforts to control rising spreads for bonds because doubts of investors about the sustainability of their public finances. To restore investor confidence, reduce costs and debt repayment create fiscal room for maneuver in these countries need sustained effort, at a pace appropriate for the inclusion of public finances on a sustainable path. Negative impact on growth can be largely mitigated, provided that fiscal adjustment is correctly designed. Regaining fiscal sustainability will be the benefit of the public and the private ones of these countries and will contribute to the overall financial stability of the EU.

EU states have different economical and fiscal position and that is why the EU Commission is in favor of filing a differentiated fiscal consolidation effort, appropriate for each country. Under the Stability and Growth Pact, these strategies should focus on the progress made in structural terms rather than in purely nominal and include a structural adjustment to support both growth and social equity. Such a differentiated approach also contributes to readjust current account imbalances.

Aspects of banking system in emerging countries

Deteriorating of sovereign debts continued to affect seriously banks' funding costs and market access. Sovereign debts problems may affect banks in various ways, from direct losses on sovereign debts and lower values for the activities and funding guarantees from the central bank, to lower benefits that banks derive from government guarantees, including a damaged quotes bank.

Market participants remained concerned about sovereign exposures after the European Banking Authority (EBA) published on the 18 of july 2012 the results of the second round of bank stress tests. The financial markets react not so confident, encouraging, despite improvements in the quality, seriousness and cross-checking against comparing with the last year's exercise.

EBA identified capital shortfalls in eight of 90 major banks, and recommended raising capital for another 16 banks which have passed within a 1 point percentage compared to the threshold of 5% for Tier 1 capital. The impact of this identified data on the market was limited but showed somewhat greater differentiation between banks. CDS rates rose for Greek and Spanish banks, and fell for Irish and Portuguese banks. The analysts focused on sovereign exposures communication accompanying the official results to run their own sovereign default scenarios.

In most cases, it has been suggested that reductions generated by peripheral European debts could lower the capital ratios, but at manageable levels. However, serious concerns regarding the expansion of the sovereign debts crisis in Italy and Spain led to a vast sale of shares and securities in banking system. Increased selling pressure from banks in Italy and Spain, those of Belgium and France, and later in banks across the continent, including those based in the Nordic countries.

In the absence of market financing, banks based in countries associated with sovereign debts problems continued to rely on ECB liquidity to finance a significant portion of their balance sheet. For Greek banks, central bank financing was 96 billion euro, plus cash emergency for Irish and Portuguese banks, the corresponding figures were 98 billion Euros and 46 billion Euro. Banks in Italy have doubled borrowing from the ECB as at 85 billion Euros. However, research in the area indicates that most large European banks have already funded about 90% of their funding target 2012 and 2013 were pre-funded.

This year Romanian banks faced a shortage of consumer confidence, which was in the end expressed by a low credit portfolio.

According to the specialists, a preliminary financial result for the 40 credit institutions on the Romanian market indicates cumulative record loss of 2.12 billion lei last year, almost triple from 2011. Last year was the third year in a row when the Romanian banking system recorded a negative result, bringing the highest increase in volume loss1.

This was the consequence of worsening the deterioration of loan quality, but also the balance of credits, while the production of new loans collapsed and many banks have become non-performing assets sold packages. Negative results have been affected both large and small banks. In 2011, cumulative losses of banks totaled 777 million lei and in 2010 about 516 million lei. At a loss of 2,1 billion, return on equity in the system remained in negative territory with a loss of 5,4%. As in previous years, the central bank continued to press banks with negative shareholders to provide additional capital amounts so that the average solvency system stood at 14,6% at the end.

Throughout 2012 the banking system solvency was over 14,50 %. The system is stable. Not all banks had the level of solvency over 14,50 %. Are 16 to 17 banks where central bank imposed a higher solvency limit of 10%, not 8%, and asked them monthly reporting, not quarterly, given their previous developments.

According to estimates made by the central bank, at the end of last year, performing loan ratio in the Romanian bank system rose to 18,2 %, almost four percentage points higher than previous year. This growth is not surprising, given that the economy has not recovered, many insolvencies continued to show among companies, many of restructured loans in the first years of crisis have come to acquire new debts, transforming into "toxic actives". Also, the banking system has been shaken by a series of fraud cases that are still under investigation, and the high level of non-performing loan suggests weaknesses in risk assessment systems. Analysts say that the growth of "toxic waste" does not stop even this year.

Companies, besides the difficult access to financing their activities, they are loaded by increasing pressure on interest. Banks derive a gain of 4,6 percentage points for new loans comparing with deposits of firms and 5,2 % for the hip, double the other countries in the region.

In Poland, the profit margin was 2,2 % for new loans and 2,1 % for those sold referring to deposits in December, banks in Hungary, had a profit margin of more than HUF deposits of 2,6 % in December, the Czech Republic, the difference between interest rates on loans and deposits by firms (in crowns, local currency) was 2,2 percentage points at the end of last year. Same margin exists for loans in sold.

[1] National Bank of Romania (NBR), "Financial Stability Report", 2012.

Only banks in Bulgaria have higher margins of profit, comparable to those in Romania in relation to firms, 5 % for th loans to the hip and 4,3 % for new loans. Although high profit margins and commissions increased lately banking system in Romania posted a record loss last year of 2,1bn lei. NPL ratio reached 18,2% in November last year, from 14,3% in December 2011 and about 2% in 2008. The largest banks in the system have non-performing loans over 20% of the portfolio.

BCR (Erste Austria) had a rate of nonperforming loans (NPL) of 26% in September 2012. For comparison, the Czech Republic banks have an NPL ratio of 5,2%, Poland 8,7%, while banks in Hungary have an NPL rate of 18%, similar to those in Bulgaria. Most banks balance sheets hit corporate loans, where NPL rate is increasing because of poor risk analysis for real estate financing granted before the crisis and the difficult economic environment in other sectors.

Banks in Romania intended in 2012, to decrease the level of nonperforming loans (NPL), unlike other years, when they had focused more on high volume for the loans.

The existence of a well-crystallized risk management and a proper capitalization is essential in order for the banks to operate in a healthy manner and contribute to the stability of the financial system. In this context, the identification of possible weaknesses in the management of key banking risks was still the center of gravity of supervision.

Analyzing the nature of foreign capital entered to the Romanian banking system we notice the European domination even from the countries of the European Union. And here we could see an interesting concentration, the accumulation of over 40% of the investors in just two countries, Austria and Greece, which are not reference economic powers in Europe.

Sure that dominant infusion of foreign capital, contributes equally to a strong dependence for the banks in Romania to the international financial turmoil, and this fact contribute to the stability of our financial sector.

Conclusions

European Union shall take effective measures to gradually overcome the biggest financial and economic crisis in decades. The impact of the international economic crisis on new EU member states has proven to be more severe than the first estimates of the economical analysts.

The situation is different for each Member State, the nature and the dimension of the challenges faced are not identical, and the pace of reform is not the same. Reforms are implemented and yet important adjustments occur, but there you can see a recovery.

It is necessary to continue the process of adopting the reforms in order to build future economic growth and competitiveness, smart sustainable and inclusive growth, job creation, and in the same time the EU must be able to demonstrate that their policies work, that will produce results in time and will be implemented fairly in terms of the impact on our societies.

Sustainable development in the future is the common responsibility of all Member States and EU institutions, because our economies are closely interlinked, and the EU economic governance now reconfigured to provide more effective responses at the policy level, to give a good reaction to the present and the future challenges.

The first, who will notice the results of these policies, are Member States which have undertaken profound reforms, reduces imbalances and improves competitiveness. Reform process must be aimed not only at restoring economic growth, but also on setting the foundations of a different quality growth after the crisis. Structural reforms at national and EU level should strengthen the EU's ability to compete globally, generating internal growth through sustainable activities that will equip the EU with the policies and tools to ensure a prosperous, and effective use of resources.

Unity and equity in the Member States and at EU level will be essential elements to ensure that efforts will be acceptable politically and socially, and in the end is also the benefit of all.

References

- **N. Gregory Mankiw, Principles of Economics, Hardcover, 2011.**
- Beck, T., 2007, "Financing Constraints of SMEs in Developing Countries: Evidence, Determinants and Solutions", KDI Conference on Financing Innovation-Oriented Businesses, May 2007.
- Georgescu Florin, The Evolution of the Banking System after one year since the accession in EU, Bucharest, November 28, 2007.
- Bank Financial Marketing, Radoi Madalina Antoaneta, Bucuresti, 2009.
- Colander, D., Föllmer, H., Haas, H., Goldberg, M., Juselius, K., Kirman, A., Lux, T., and Sloth, B. The Financial Crisis and the Systemic Failure of Academic Economics. Department of Economics, University of Copenhagen, 2009.
- National Bank of Romania (NBR), "Financial Stability Report", 2012.
- National Institute of Statistics (NIS), "Statistical Yearbook 2011.
- *** www.ebrd.com.
- ***www.europa.eu.intS.

STUDY ON FINANCIAL OFFSHORE CENTRES, THE RISKS AND DEREGULATION OF THE INTERNATIONAL FINANCIAL SYSTEM, CAPITAL LAUNDERING AND TERRORISM FINANCING

MĂDĂLINA ANTOANETA RĂDOI[*]
ALEXANDRU OLTEANU [**]

Abstract
After the end of the 90's crisis, the settlement of the international financial system has taken an important place within the international organizations. There are important debates regarding the need of a compulsory reform to prevent crises.
Means of preventing crises, especially within the field of foreign vulnerability assessment regard: transparency, following the international regulations and codes, refoundation of the financial compartments, liberalization of the capital movements.
In addition, a set of work program is needed regarding the crises settlement and sovereign debt restructuring. Serious matters are requested regarding the adoption of fight tools against money laundering and terrorism finance.
Offshore financial centers assessment is placed in the field of activity by refinancing of the financial sector, it is one of the health balance sheet elements achieved by the IMF and by the World Bank within the financial compartment assessment program.

Key words*: offshore financial centers (CFO), risks CFO, FATF (Financial Action Task Force), FSF (Financial Stability Forum), bankruptcy risk.*

Introduction

The aim of this study is to analyze the role of the offshore financial centers within the international financial system and the risk for its stabilization. The main thesis on the result analysis is the following:

The risk for international financial system stabilization increases together with the development of the activities from the offshore financial centers. The surveillance and control of the offshore financial centers is a must. The risk for the international financial system diminishes with the increase of the respect for the international regulations. In the future, information transparency and international regulation enforcement could replace offshore financial centers surveillance and control. Their Assessment program drawn by IMF is an important factor in risk reduction.

The drawn analysis regards:

- Features of the offshore financial centers (CFO);
- Risks cause through CFO;
- CFO Assessment results.

[*] PhD, Associate Professor, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: madaradoi@gmail.com).

[**] PhD, Professor, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: aolteanu@univnt.ro).

Literature review

1.Features of the offshore financial centers (CFO)

1.1 Offshore financial centers concept

The offshore financial centers belong to the international financial market, which concerns activities among non-residents.

Four types of transactions are available in the international financial centers, represented in Diagram no.1.

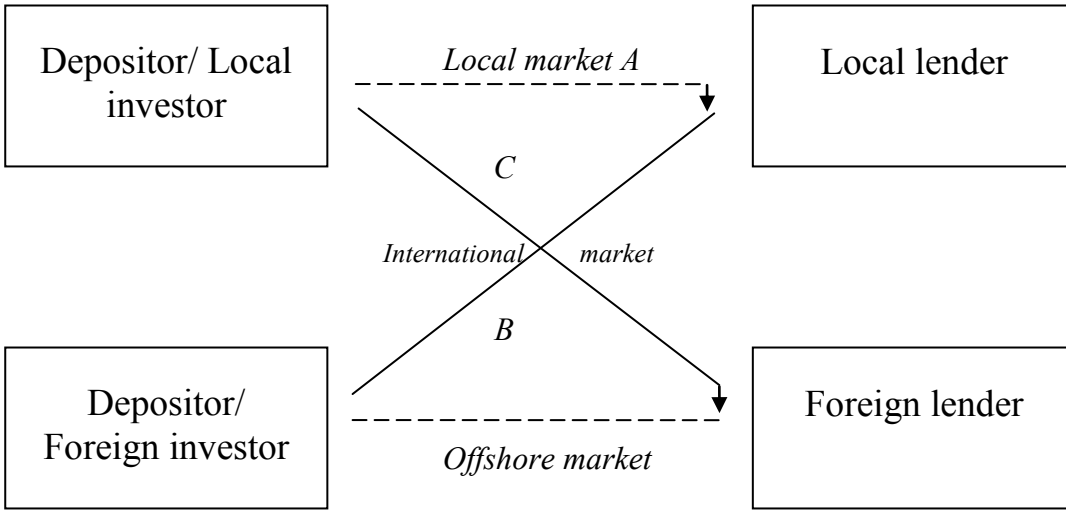


Diagram no. 1. Transactions scheme in international financial centers

If the depositors or local investors offer real funds to the local lenders, we deal with Local market A.

We deal with an international market B, C if the foreign funds offered to the local customers or the local funds offered to foreign customers.

The offshore market D appears when the foreign funds are offered to foreign investors.

It's not a satisfactory definition for the offshore financial centers.

We should mention that, in general, a financial offshore center is a right where many activities are undergone by non-resident persons and which have unfavorable circumstances for international financial activities.

The word "offshore" means "outside the continent" and regards the islands situated far from America and Europe, which offer reduced taxes and mild terms to register companies. In English, the terms "offshore" and "overseas" are used with the meaning "external". The beginning of the concept's use in USA dates back in the 30's. The development of the CFO takes place in the 60's and the 80's once with the taxation increase and restraints regarding the capital circulation and exchanges, and, also, the expense increases on the national markets.

The appearance of the euro market in the 60's represented the beginning of the financial operation liberalization in a currency, other than those of the countries or the establishment where it is situated. The European financial places (London, Paris) offer deposits, loans, bonds issuing in Eurocurrency. Then the transactions are achieved through offshore centers.

We should notice that the offshore centers are difficult to compare and classify due to the great differences on their size, their geographical position, their population, the GDP level, according to their main activities. Among the offshore financial centers, greater jurisdictions such as: Hong-Kong SAR, Luxemburg, Singapore or Switzerland can distinguish, but also smaller economies with international financial centers such as: Bahamas, Belize, Anguilla or Gibraltar. Richer centers, better structured, are competitive due to the efficiency of the services provided. The new centers, smaller and poorer, don't have time or funds to increase the efficiency of the financial compartment. The GDP level is very weak in comparison with the financial inset which is being transferred. In order to get acquainted with the CFO classification, there is no unique list according to which a country of the offshore center can be classified.

The offshore lists are created by the countries, international organizations, agencies marked by the country risk and used to end the differences among them. If the countries admit "high tax", they apply the prescriptions against the fiscal paradises the other way round.

FATF (Financial Action Task Force on capital laundry) and FSF (Financial Stability Forum) set a list of the "uncooperative" countries which don't follow the international regulations or don't do any effort to approach them. The lists are altered and updated periodically. The list drawn by the IMF together with OECD, Financial Stability Forum and the World Bank, contains 40 centers of offshore financial centers. The present document uses a list of 44 jurisdictions published in 2005 with the IMF report[1)] (1).

1.2 Activities led within the offshore centers

The financial activities undergone offshore are numerous. They offer banking services, insurance operations, stocks and shares, shares control. They can also achieve such non-financial transactions such as the marine or car book, airlines or home.

International Business Companies (IBC), located in CFO, are screen companies with duty free limited responsibility, interceding to fulfilling activities at the capital level via shares, stocks and deed tools issuing.

The main customers of the offshore centers are private multinational companies for their own fortunes.

The offshore centers offer the customers a reduced or zero tax a convenient legal system, a high quality banking system and experienced auxiliary force. Finally, the offshore centers adopt, in order to attract customers, a larger notion of the bank secrecy.

The most frequent activity types are the banking services offered through the international bank branches located in the offshore centers. The number of the financial institutions which offer services in the offshore centers and the number of local institutions is given in Appendix 1.

The banks don't exist in centers, or they are in minority. For instance, in Labuan-Malaysia there are only 49 offshore banks, Vanuatu has 34 offshore banks and 4 home banks, in Bahamas there are also 212 banks, from which 203 are offshore. Another example of offshore institution domination is Barbados with 199 insurance companies, from which 180 are offshore.

If we analyze the international business companies, they are plenty. For example, in the British Virgin Islands there are 350.000 international business companies, 47.000 in Bahamas and 35.500 in the Mau Islands.

The organization of offshore centers offers advantages and costs for the receiving countries. The advantages are (2):

- function expenses through the offshore institutions (banks, insurances);
- salary payments to institution public servants can be a major advantage;
- taxes on benefits and license rights are a revenue source for the receiving countries;

[1] From a list of 44 contacted jurisdictions, 41 were assessed offshore.

- easier access to the international financial markets;
- increase of the local staff experience;

The costs for an offshore center for the host countries are:

- activating an expensive communication service;
- control making to follow minimum regulations, which induce the costs;
- losing the local currency independence;
- increased competition in local finance through international banks;

The offshore typology analysis shows three types:

(1) the New York type, where there is a special agreement of founding the offshore center such as N. York, Tokyo and Singapore;

The international activity accounts are different from the national accounts. The international accounts benefit from the reinforcement of some national activities mandatory restrictions (for example the mandatory reserves);

(2) the London type which is characterized by transaction liberalization for both residents and non-residents;

(3) the "high installment" (fiscal paradises) where there are no duties for non-resident transactions.

The offshore centers are used both as transaction counting centers and operation centers (3). London is a typical transaction operation center at large. Cayman is an example of transaction counting which takes place outside the center.

The fiscal paradises are used to:

- diminish the person's duties;
- reduce taxes on civilians.

The fiscal paradises are one of the CFO forms concerned with diminishing taxation. In order to obtain such advantages, individuals can receive citizenship of CFO (actors, athletes). Company tax reduction is possible only for companies registered within the fiscal paradises.

2.Risks caused by CFO

In the beginning, the activities and financial inset weakness in the offshore centers didn't imply surveillance and assessment through international institutions due to the reduced deregulation risk for the international financial system.

Risks have increased once with the growth of the CFO activity and world financial market growth integration.

The CFO more important risks are:

- international financial destabilization;
- run away from taxation;
- bank crises;
- capital laundry and terrorism finance.

International financial destabilization

If we consider the financial stability from the country's point of view and not from the CFO's, the aspect of the financial activity from the offshore center it's not so important because it can regard tax evasion and diminish of the budget expenses.

But in host countries the offshore center, especially in small countries where there is a great inequality between the number of local and offshore institutions, the offshore activity can destabilize

the economy of the host country. This can lose its political currency independence and there can occur the possibility of a financial crisis.

From an international perspective, it is emphasized that today the centers wind hundreds billion dollars; the effective amount of the financial activities is large and it concerns many people from the world.

The IMF experts calculations which are based on data given by the BRI, suggests that the CFO cross-border assets were almost 4.6 trillion USA dollars (an average of the total cross-border assets), from which 0.9 trillion USA dollars in Caribbean and a trillion USA dollars in Asia. Most of it (2.7 trillion), is CFO assets from London, J'IBF (International Banking Facilities) from New York and JOM (Japanese Offshore Market)[2)].

Unfortunately, the smaller ones, the offshore financial centers are today about 20% from the cross-border banking outset.

Every year, about 60 thousand companies are registered in offshore centers. The deposit value in centers exceeds 1300 billion USA dollars. Their role is to transfer capital and manage growing assets. About 60% from the world assets are underwritten through offshore centers.

These aspects of the activities from the centers risk compromising the international financial stability. The abilities of the centers to attract global financial operations, imply an important surveillance factor against competition on the international market.

The competition and the benefit brought when it corresponds to the innovation tools and the financial products reduce the cost of the financial services all over.

But it is concerning when cost reduction comes from not obeying the regulations and control laws.

A jurisdiction that doesn't obey the minimal norms can be subjected to financial instability.

The absence of the reduced data regarding the operations from the centers still represents an obstacle in risk assessment for the international finance stability.

Run away from taxation

Run away from taxation can be a movement of the activity in a fiscal paradise where taxation can be reduced in comparison to the native country. Moreover, registering an offshore company makes it not to pay taxes. The revenue level in the world hit taxation. The loss of budget revenues by the countries are estimated at 3% (Finland) and 23% (France).

The company Euron is an example of tax reduction due to the registration of 900 branches in the offshore centers. Euron created 692 branches in Caimans, 119 branches in the Turkish islands and Caicos, 43 in the Maurice Islands and 8 in the Bermuda. For three years, Euron didn't pay taxes and in the same time received VAT refund. In total, the bursary of the USA lost about 382 billion USA dollars. The recent obligations in branches, the creative compatibility and the audit considered distorted led to the fall of the Euron stock course, after the relevant information and eventually the Euron bankruptcy and destabilization of the capital market.

Banking crises

The most important risk on the bank market is the bankruptcy of the offshore banks. For example, the famous case of bankruptcy of the Credit and International Trade Bank in 1991 and of the Meridian International Bank in 1995.

The operations of the offshore banks play an important role in the financial crisis from Latin America and Asia and now in the 2007 global crisis. The absence of the real regulations at the consolidated banks allowed arbitration operations to take place by frequent transfer between the offshore establishments and the offshore related banks.

[2] Offshore Financial Centers – IMF Background Paper, June 23, 2000, p. 9.

More offshore banks from Asia are used for operation on the capital markets. They don't know the contribution of the offshore funds to the credits in the region. This is the cause of a liquidity risk on the exchange market and on the financial system of those countries.

Another risk is represented by the greater offshore banks in comparison with the onshore banks. The assets concentration in offshore banks produces a risk for the local banks. The solution doesn't consist only in a close surveillance of a CFO, but a consolidated surveillance in the origin countries is imposed. This is due to the fact that IMF introduced the financial vulnerability assessment for both: onshore and offshore centers.

Capital laundry and terrorism financing

Nobody knows exactly what the actual level of world capital laundry is. The level is estimated to reach between 2 to 5% from the global GDP (4).

After September 11 2001, capital laundry and terrorism financing have become issues to be discussed globally.

The social and political costs of capital laundry are consistent. "Organized crime can be the core of the financial institutions, which can produce reduction in large economic sectors and can corrupt the political system. Dirty money also destabilizes the financial system of a country and supports a severe crisis."[3)] The offshore financial centers offer favorable conditions for such activities, due to the fact that the offshore financial centers assessment program contains FATF norms.

3.Results of the offshore financial centers assessment

3.1. Initiatives of the international institutions

The control authorities and a number of international courts work together on control issues on offshore financial centers activities. The analyzed issues regard less than three aspects: money laundry, fiscality and financial regulations. We should emphasize the role of IMF, GASI, OCDE and FSF among the institutions who deal with CFO.

The financial action group for capital laundry (FATF) deals with the implications of money laundry and terrorism financing at criminal and legal level.

In FATF last report it was signaled that from 12 centers, the anti-money laundry devise shows weak criticism. FATF publishes in his report a list of 15 "non-cooperative jurisdictions". This list was corrected in the sense that seven jurisdictions in progress were removed from the "non-cooperative" list from the countries territory, but they supported 6 new centers. In 2005 IMF and the World Bank made 48 FATF recommendations regarding the reference their operational activities register.

OCDE focuses on fraud, fiscal competition and fiscal regulation differences. It launched a project on "damaging fiscal practices", which regards the centers. OCDE published a list with 35 jurisdictions identified as a fiscal paradise ("high installment"). During the Barbados reunion, OCDE and the developing countries (CFO included) created a special group to deal with the regulations acceptable for the operations from the fiscal paradises.

The Financial Stability Forum (FSF) delegated the work group in April 1999 to study the implications of the offshore financial centers in the international financial stability.

The first report[4)] of the group regards the financial surveillance of the CFO, the second (May, 2005) classifies the centers in three categories according to the control quality, cooperation level and priority set for the future assessments.

---

[3] Op. Cit. [5)].

[4] The report of the work group was published in April, 5th, 2005, it is available on the Forum site.

In the first group there are included the CFO which have the fiscal paradise status opposite the ones which use the regulations against the fiscal paradises. The second group regards the countries which are not fiscal paradises. And the third contains the countries which are occasionally included in the paradises list.

Other assessments

The results of some of the CFO assessments are published in the following reports:

- "The Edwards Report", published by the government of Great Britain in 1998, which assesses the centers situated on the territories from Great Britain (Jersey, Guernsey, Sark and the Man Islands);
- "The KPMG Report", completed in 2000, assesses 6 overseas territories of Great Britain which offer offshore services (Caimans, the British Virgin Islands, Turk Islands and Caicos, Anguilla, Monserrat and Bermuda).
- "The Ad-Hock Group on Non Cooperative Jurisdictions", created by FATF in 1998[5)], assessed 31 non cooperative jurisdictions, according to 25 criteria from the capital laundry point of view.
- A 15 non cooperative jurisdiction list was published as a result of this activity in 2000.

3.2. CFO assessment program by IMF

In 1999, IMF together with the World Bank started the activities regarding CFO, by announcing an assessment program of the financial sector (PESF), launched as an experiment. The program consists of a health exam for the financial sector of the countries and allows interpretation of the macro caution indicators which shows the past crises. The assessment program (PESF) equally regards the offshore financial centers.

The program which assesses the offshore financial centers was launched by the IMF in 2000. It contains two groups (5):

- Financial control, containing the assessments;
- Technical assistance and statistics.

The assessment of the offshore financial centers is optional and it is achieved on three levels of intensity (6).

- The 1st module is a self-assessment, with the professionals' technical assistance, if the PFO follows the regulations. It regards the PFO responsibility and it is an introduction to the independent assessment.
- The 2nd module is an independent assessment performed by the IMF on keeping the regulations.
- The 3rd module is a complete assessment, set by the IMF, of the risks and vulnerabilities if the presumptive international and regulation observance.

As the assessment in modules 2 and 3 is concerned, it can be achieved by a group of surveillance professionals from the surveillance agencies from the offshore centers, experts from the World Bank and additional experts as the one from FATF. In assessing the standards from each module, the priorities are decided according to the activated lead within the centers, insisting on the effort against capital laundry.

IMF supports the offshore centers to gather information which can allow voluntary self-assessment through its technical assistance. In 2004, 4.3% (7) from the technical assistance it was

[5] http://www.imf.org/external/rp./mae/oshore/2000/eng/role.htm.

offered by IMF for the offshore financial centers and the fight against capital laundry and terrorism financing.

Technical assistance to support the centers decreases the statistics and especially helps their participation to the statistical data collection.

3.3. Results of the first CFO assessment stage

According to the IMF report from February 25, 2005 (8), the first stage of the CFO Assessment program was ended (1). 41 from 44 contracted jurisdictions were assessed and published in their reports. Within the 2nd module, 24 jurisdictions were assessed; 14 chose PSEF (Financial Sector Assessment Program). From the last three, one was assessed within the PSEF and two received technical assistance.

During the first stage the international norms were assessed, as follows:

- The basic principles from Bale – for a more effective financial control – were assessed in 41 jurisdictions and partially in one (Monaco).
- The basic AIS principles (Association Internationale des Controleurs d'Assurance) were assessed in 21 jurisdictions.
- The objectives and the regulation principles for the OICV securities (Organisation Internationale de Commissions des Valeurs) were assessed in 16 jurisdictions.
- The FATF norms (Groupe d'action financiere sur le blanchement de capitaux) were assessed in 25 jurisdictions.

Two jurisdictions (Nauru and Nine), whose activities were limited, weren't subjected to an assessment, but they received technical assistance. We should still add that the assessment doesn't hint the same centers: it is distinctive at the centers which don't take part in Module 1, Module 2 and in the assessment programs of the financial sector (PESF). The statistics background is not the same.

The assessment depends on the development level of the activity sector, especially of the banking sector, money laundry and terrorism financing, company and stock exchange markets, as well as suppliers and fiduciary services.

BANKING SECTOR

The more important activities from the offshore centers are the banking services. More banks placed in CFO represent the branches and subsidiaries of the international banks. Their first activity is receiving deposits on different markets and their sending to their origin establishments.

The offshore banks make, in companies' accounts, capital tax free operations in foreign currency, on companies, value added, dividends or interest and exchange control. Banks offer special services to natural persons such as managing goods, successional planning, and currency trade and withdrawal regimes. Such proposals regard the non-banking services such as the fiduciary and surveillance services. Assets management in CFO is motivated by different factors: further protection against origin country quest, fiscal optimization.

The contribution of the financial sector in GDP in CFO is large enough.

But there is not enough information on the subject. For example, this indicator reaches 53% from GDP in Jersey, 40% in the Virgin British Islands, 25% in Gibraltar and only 7% in Barbados.

The number of banks registered in centers differs a lot: from one bank in Sf. Lucia to 427 in the Caiman Islands (appendix 1).

The extension of the cross-border financial assets in connection to the % GDP is enormous in certain centers. For example, in the last years, in the Caiman Islands, this indicator has risen to 56871%, in Guernsey to 7384% and in Jersey to 6879% from GDP. GDP is in these centers.

The results of the assessment are shown in Chart no. 1 on 27 offshore financial[6]. Within the assessments, the compatibility level with the banking surveillance principles of the Basel Committees (BCP – Basel Core Principles)[7].

Chart no. 1 Level of compatibility with the Core Principles for an effective financial control

No.	Principle Title	Part of the centers consistent with the principles– in %		Number of assessed centers	
		In 60th group	In 27th group	In 60th group	In 27th group
1.	Effective systems:				
	• transparency, surveillance responsibility	87,0	80,8	60	26
	• independence and resources	60,0	61,5	60	26
	• legal framework	90,0	80,8	60	26
	• surveillance force	80,0	84,6	60	26
	• legal protection	60,2	96,2	59	26
	• information access	68,0	79,1	60	26
2.	Permitted activities	93,0	96,2	60	26
3.	License	85,0	80,8	60	26
4.	Property transfer	73,0	88,5	60	26
5.	Investment criterion	73,0	61,5	60	26
6.	Capitals justice	65,0	61,5	60	26
7.	Credit policy	60,0	50,0	60	26
8.	Loan assessment	71,0	53,8	60	26
9.	Risk exposure	75,0	65,4	60	26
10.	Associated loans	58,0	61,5	60	26
11.	Country risk	42,3	56,0	47	25
12.	Market risk	52,0	48,0	60	25
13.	Other risks	55,0	57,7	60	26
14.	Internal control	68,0	73,1	60	26
15.	Money laundry	50,0	80,8	60	26
16.	On-sit and off-sit surveillance	80,0	50,0	60	26
17.	Banking operations power of understanding	87,0	76,9	60	26
18.	Off-sit surveillance	70,0	76,9	60	26
19.	Independent assessment	80,0	69,2	60	26
20.	Consolidated surveillance	39,8	82,4	57	17
21.	Accountancy and trust	77,0	65,4	60	26
22.	Collective action	58,0	80,8	60	26
23.	Worldwide consolidated surveillance	58,3	82,4	43	17
24.	Host counties surveillance	67,5	88,2	48	17
25.	Foreign banks setting	71,4	87,5	59	24

[6] Offshore Financial Center Program a Progress Repport. Prepared by the Monetary and Exchange Affairs and Statistics Departments. March 14, 2009. IMF www.imf.org/external/np./mae/oshore/2009/eng/031403.htm.

[7] Core principles for effective banking supervision. Basel committee on Bouncing Supervision, Basel, September 1997.

Source: Report of OFC, Module 2 and FSAP Assessment: Offshore Financial Centers The assessment program: An Information Note. http://www.imf.org/external/np./mae /offshore/2009/eng/082902.htm

The chart list contains 25 principles. The results regard banking surveillance in 27 offshore centers[8)] which were compared with the assessment results from 60 countries (9 developed countries, 15 transition countries, 36 developing countries). The obtained results show the compatibility degree level with the principles, in 60 international financial centers and 27 offshore centers, which is relatively high. In certain cases, it is higher in the offshore centers just as in the cases of those 60 countries assessed within the program.

If we consider the compatibility level with the basic principles, two groups of countries distinguish in the offshore centers: countries with high compatibility level and countries with reduced compatibility.

About 35% from the countries show a reduced compatibility level with the Basel Committee Principles. These are countries with 1% offshore total assets. In average, these are not offshore banks and the assessment results show that the national banks surveillance principle is followed.

The great offshore centers, with an important activity, won't lose their good reputation and focus on the surveillance of the sectors which are connected to their cross-border activity and their business. Most of the centers are according to the surveillance principle exercised through the receiving countries (principle 24), and also with the consolidated surveillance principle (principle 20) and global consolidated surveillance (principle 23). Such a correspondence takes place in the case of the principle regarding the fight against capital laundry (principle 15).

When the activity of the offshore banks as lenders is reduced, the principles regarding the credit policy and loans classification are not met (principles 7 and 8).

The smaller centers are the ones who ignore the national banks surveillance principles (principle 16) and the market risk (principle 12).

In the same time, the centers are encouraged to increase their internal and external surveillance funds. On their side, the financial institutions wish to increase the services range which is a need of a greater correspondence to the principles limited to the market and credit risks.

The often cities lack in Basic Principles implementation for an effective banking control, concern the following fields:

– caution regulations and adequate capital (principles 6-14);

– control implementation methods (principles 16-19);

– place for the control authorities in the structure (principle 1).

Reductively, in about half of the organizations, the need for intensive activities in the field of bank risk management control was noticed. The banking customers' experience in the field of loans is reduced.

The control representatives have much knowledge on banking activities and banks, enhancing their use and complementary expertise use regarding, for example, the risks.

Fight against capital laundry and terrorism financing

After 2002, IMF and the World Bank intensified the assessments regarding the fight against capital laundry and terrorism financing. The assessments for the offshore centers involve from now on a shield committed to the fight against money laundry and terrorism financing. The mission of offshore financial centers assessment allowed to raise certain points in drawing the national

[8] Which are: Andorra, Anquilla, Aruba, Barbade, Belize, Iles Vierges britaniques, Costa Rica, Chypre, Gibraltar, Guernsey, Ile de Man, Jersey, Labuan (Malaesic), Lichtenstein, Macao, SAR, Luxemburg, Iles Marshall, Monserrat, Antilles neerlandaises, Polau, Panama, Sarura, Seychelles, Swiss, Bahamas, Vanuatu.

authorities intentions, of objective recommendations. Among the elements highlighted by the assessment, there are: the failure of the juridical frame and lack of efficiency against money laundry.

The most important lack of compatibility with the principles FATF HO + 8 standards is the surveillance weakness. The field whose demand is a control restatement belongs to the cooperative inter-agencies (home and cross-border) and the terrorism financing crime. The countries have the duty to take measures to reform the devices for fight against capital laundry and terrorism financing. The IMF action plan resorts to paying more attention to this fight, by consulting art. IV. But the quality and the effectiveness of the fight against terrorism financing were questioned.

IMF supports the jurisdictions by technical expertise and regulations and law forming drawing and enforcement.

The great countries can agree on taking some discriminating measures against the centers which don't follow the norms, for instance in the fiscal or financial field (market access, norms for inherent funds and special waivers).

The launched CFO assessment program was drawn to carry out two stages of achievement. The IMF managers decided that a second stage contains 4 elements:

- permanent surveillance of the CFO activities and standards conformity;
- surveillance system and CFO activities transparency;
- technical expertise development;
- increased collaboration among the organisms fixed by the norms and national and extraterritorial control bodies.

The existent weak points are still in more fields, such as:

- fight against capital laundry and terrorism financing;
- cross-border cooperation;
- exchange of information between jurisdictions.

The detection of the weak points supports the priority definition for future assessments.

Conclusions

All of the above underline the idea that the offshore financial centers can cause risks for the stability of the entire international financial system. The international financial system destabilization risk, caused by the CFO, increases together with the increase of the financial markets and their activities in CFO. The assembly study confirms the thesis according to which the CFO surveillance and control are needed in order to diminish the risks.

The international norms implementation is an important factor in risk reduction. The implementation process of the international norms in CFO is advanced, but applying those norms is not identical in all the centers.

The assessment program of the offshore centers allowed obtaining needed information to identify risks. It is essential for the assessment results to be made public. The information transparency over the CFO activities and the international norms enforcement influences risk reduction connected to the centers and comes to replace CFO surveillance and control. The great CFO's are more advanced in the implementation of norms for their function which creates o better opinion over the international markets.

The offshore financial centers analyzes allow us to draw certain detailed conclusions:

It can be underlined that before the launching of the assessment programs of the offshore financial centers, there wasn't much information on the CFO activities and risks.

The assessment program identifies the risk and the weak points in CFO, but, in general, all the weak points are still hidden.

Assessment at the level of international norm conformation shows that norm obedience is increasing, but differentiated according to the activity forms and country. There are fields in which there is control reinforcement.

The strict execution of the new surveillance and control principles eliminate the risks, but the CFO costs increase.

In the future, the tax and exchange restrictions reduction in the international financial systems influence over the loss of the advantages connected to CFO creation and term equalization for the function of the financial markets.

The CFO role in the international financial system and the risk to set the international system is diminished with the progress achieved in uniting the terms, services effectiveness on the international markets and reduction of the differences in the financial centers.

References

- Offshore Financial Centres. The Assessment Program – A Progress Report. IMF February 2005.
- Y. Simon. Tehniques Financières Internationales. Economica, Paris, 1998.
- Daniels J.D., Radebaugh. International Business. Addison – Wesley Publishing Company, New York, Tokyo, Milan, Paris, 1995, 7th edition.
- Lutter contre le blanchiment de capitaux. FMI Bulletin. 16 aout 2004.
- S.M. Darbar, R.B. Jonston, M.G. Zephirin, - L'evaluation des centres financiers offshore. Finances & Development September 2003.
- FMI Rapport annuel 2002, p. 35.
- FMI Rapport annuel 2004, p. 63.
- IMF Report February 25, 2005.

Appendix 1:

The financial structure of the assessed jurisdictions

Jurisdictions/ countries	Number of banks		Number of insured companies		International Business companies	Number of investment funds	Stock exchange
	Total	From which offshore	Total	From which offshore			
AFRICA							
- Seychelles	7	1	4	2	…	0	No
ASIA and PACIFIC	49	49	…	6	…	17	Yes
– Labuan-	23	1	24	0	12	350	No
Malaysia	3	0	5	0	5200	0	No
– Macao SAR	12	0	…	…	0	…	No
– Iles Marshall	11	8	5	1	7553	0	…
– Palau	38	34	45	15	4478	0	…
– Samoa							
– Vanuatu							
EUROPE							
– Andorra	8	…	36	…	…	…	No
– Cyprus	43	31	69	17	20000	…	Yes
– Gibraltar	19	11	8	6	8800	44	…
– Guernsey	69	…	26	…	…	525	Yes
– Ile de Man	59	…	16	…	35514	128	No
– Jersey	62	…	179	…	21120	368	No
– Lichtenstein	17	…	16	…	…	81	Yes

– Luxembourg	189	…	94	…	…	1908	Yes
– Monaco	51	…	0	…	…	60	…
– Swiss	375	…	138	…	…	2700	Yes
OCCIDENTAL EMISPHERE	7	3	20	0	3041	…	Yes
– Anguilla	7	2	29	6	4950	…	No
– Aruba	212	203	…	…	47100	706	Yes
– Bahamas	63	56	199	180	3065	10	Yes
– Barbados	9	4	18	…	15000	…	No
– Belize	11	4	30	…	350000	2606	No
– Iles Vierges britanniques	13	11	2	0	50	…	Yes
– Montserrat	45	45	27	0	20000	600	No
– Antilles neerlandaises	80	26	24	…	…	…	Yes
– Panama							

FINANCIAL LITERACY – AN ESSENTIAL LIFE SKILL IN TODAY'S SOCIETY

SANDRA TEODORESCU*

Abstract
Financial education is a concept that emerged nearly 200 years ago, namely in the 18th century. Its role grew rapidly in the 20th and 21st centuries. It is centered around concepts such as budgeting and saving, integrated into financial education programs, aimed both at explaining salary management mechanisms and at presenting financial protection mechanisms and long and medium-term investment tools. Financial literacy is not just a trend, but an essential life skill in today's society, which enable us to develop and balance our budget, make more appropriate short and long-term saving decisions, and select the best financial products that could make life easier for us.

Keywords: *financial education, saving, insurance, pensions, income, family budget*

Introduction

Concepts such as *'A bank', 'Stock Market', 'Credit Card', 'Court of Accounts', 'Inflation', 'Patrimony', 'Fair Price', 'Pension', 'Revenue', 'Salary', 'Speculation', 'Overestimation'*, and *'Assets'* are frequently used, which is perfectly normal since they refer to the ability to make appropriate saving and spending decisions. They also offer us and our society the financial stability and prosperity we need.

Looking at our history, we can see that the above-mentioned concepts emerged several centuries ago. In ancient times, in the Middle Ages and even in early days of capitalism, society was ruled by rich elites which exploited resources in their own interest, at the same time retaining political and economic power. The aristocracy, the landowners, the bourgeoisie involved in trade and banking, and, later on, the industrialists, strived to accumulate as much wealth as possible and prosper. The workers and producers had no alternative but to make saving decisions, although their access to resources was very limited, enabling them to survive, and not to grow or prosper.

Two centuries ago, after the scientific and technological revolution, economy started to develop at an accelerated pace, and many opportunities emerged, leading to general growth and prosperity. As a result of massive social confrontations and protests staged by the middle and lower classes, oppressed in history, the political elites finally understood that workers and producers should be given more access to resources, and benefit from relative prosperity.

In less than 50 years, the situation of industry employees improved significantly in developed countries. For example, one can hardly compare the Victorian Age in the first half of the 19th century, as decribed by Charles Dickens, with 'la belle epoque' during King Edward's reign, in antebelum England. People had decent houses, water waste systems, electricity, and free access to insurance policies, pensions and education. They had decent salaries, enabling them to grow and prosper. Financial services, including loans, became available, and many had the opportunity to improve their standards of living. Life became easier for most of them.

It is important to mention that countries far away from the Western community, such as Romania, where industrialization emerged in early 20th century, managed to establish a large banking system, especially in poverty-striken areas, such as the rural South, where agricultural producers and farmers were thus supported to buy land, machines and seeds or encouraged to sell

*Associate Professor, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: tsandra@xnet.ro).

their products on the markets, at a better price. In other words, they were provided everything they needed, including unprecedented access to resources. Today, in early 21st century, we are living in a diverse world, and the willingness to prosper is general, the aspirations are broad, amid a multitude of alternative possibilities. Therefore, the opportunity to fulfill our expectations depends on our ability to skillfully manage resources.

Exposition of Facts

Financial education should be fostered and enhanced, since it teaches us about the importance of preserving the resources available, which are not infinite, so that our children and future generations be able to benefit from them. I shall now offer the following example: during the December 9, 2012 parliamentary elections, two referendums were held. Unfortunately or not, many people did not participate, so the results were annulled. One of the referendums focused on Rosia Montana (Alba District), a heavily debated topic, concerning which the following were suggested:

1) To open the gold mines exploited in ancient times by Romans, and create new jobs to improve the local population's standards of living, and

2) To preserve the traditional culture, the beauty of a unique area, and its resources, and protect the environment, taking into account that cyanide is used in gold mining industry.

Although it is hard to make a decision, it is obvious that our welfare aspirations *hic et nunc*[1] destroyed the forest and polluted the river, transforming the once beautiful landscape into sprawling desert. And that was not the result of a cataclysm, but of our greedy nature. Financial education teaches us that prosperity is achieved through production, based on significant resources, which we no longer have. And that is the most dramatic challenge our civilization has to face. We are forced to make a difficult decision: either to strive for welfare and consume all resources or limit our aspirations and use resources adequately, in a balanced manner. It is thus necessary for us to be aware that the inherited resources and values are too precious to be wasted in a few generations. Therefore, saving and preserving, protecting the environment and a balanced exploitation and use of resources should be key concepts in today's society.

Going into details, I shall take into account individual or family interests, and bring into discussion our society, which faces a compelx crisis. The economic decline has a lingering financial impact. After years of growth and increased production, experienced by almost all nations, not only by the Western and Northern industrial communities, people start to believe that welfare is unlimited and everyone can enjoy it. However, a series of crises have emerged since the 1970s. Although interrupted for a short period of time, they have showed us that spending and income must be controlled if we want to have enough resources, achieve and sustain prosperity and welfare. The same applies at the family level, too.

The happy days when states, governments, institutions or employers took care of people and staff, urging them to relax, as they were watching, have long passed and it is highly unlikely that they return soon. Facing high risks, society and people should take a balanced approach, make calculations, carefully preparing budgets and spending, along with consumption plans, and maintain tight control over resources in order to be able to exploit them on the short, medium and long term, and to develop and implement financial education programs[2].

The Central Concept

A concept addressed to consumers, and, first of all, to young people, financial literacy may ensure stability and secure saving and investment opportunities, since it provides useful information

[1] Latin for here and now.

[2] See reference [1].

helping us avoid bad loans, select the best banking products and tools, and increase competitiveness and innovative capacity[3].

The financial institutions, banks, and insurance companies that have been involved in financial education programs since 2004 could be among the potential financial literacy providers and beneficiaries. And, of course, I should also mention the NGOs and sponsors. However, Germany tops the world's list, with 52 financial education programs implemented, while Romania has just embarked on the quest[4]. The financial education programs should start in kindergartens, for children aged between 3 and 5 years, according to their intellectual ability and capacity to learn. Then, in schools, for pupils aged 6-10 years, who should be taught essential financial concepts, and explained what is the money and the value of the money. Later on, in high-school, youngsters should be explained the relationship between expenditure and income, in order to make adequate saving decisions and spend money carefully. They should understand financial planning and the mechanisms for setting aside money for savings and investments as well as for the family budget, including with the help of financial institutions[5].

The European Commission also considers financial education as fundamental to form a single market and aims to stimulate the European citizens to acquire basic knowledge of personal finance. To this end, on December 18, 2007 the Commission sent a statement of financial education. This Communication aims to define the principles for national quality financial education and also the presentation of initiatives managed by the EU in this field[6].

Thus, given the lack of knowledge of consumers on financial products, and given the increasing diversity and complexity of these products, the Commission decided to promote the development of financial education in the EU. This Communication is part of the measures on retail financial services provided in the Commission report "A single market for 21 century Europe" and aims to assist stakeholders in the development of financial education programs through:

- awareness of the need to combat financial illiteracy;
- a high quality financial education within the EU;
- sharing of the best practices;
- developing practical tools to facilitate a more efficient financial education in schools.

Financial education is beneficial to individuals (e.g., it can help citizens make better financial provision for unforeseen situations), to society (reducing the risk of financial exclusion and encouraging the consumers to plan and make savings) but also to the whole economy (approved by favouring behaviour and additional liquidity to capital markets).

Commission set out eight principles that could assist in spreading financial education bodies involved in the development and implementation of financial education programs:

- Financial education should be available and actively promoted at all stages of life on a continuous basis.
- Financial education programmes should be carefully targeted to meet the specific needs of citizens. In order to achieve this aim, ex-ante research should be conducted on the current level of financial awareness on the part of citizens, to identify those issues that particularly need to be addressed. Programmes should be timely and easily accessible.
- Consumers should be educated in economic and financial matters as early as possible, beginning at school. National authorities should give consideration to making financial education a compulsory part of the school education curriculum.
- Financial education schemes should include general tools to raise awareness of the need to improve understanding of financial issues and risks.

[3] See reference [7].
[4] See reference [3].
[5] See reference [3].
[6] See reference [8].

▪ Financial education delivered by financial services providers should be supplied in a fair, transparent and unbiased manner. Care should be taken to ensure that it is always in the best interests of the consumer.

▪ Financial education trainers should be given the resources and appropriate training so as to be able to deliver financial education programmes successfully and confidently.

▪ National co-ordination between stakeholders should be promoted in order to achieve a clear definition of roles, facilitate sharing of experiences and rationalise and prioritise resources. International co-operation between providers should be enhanced to facilitate an exchange of best practices.

▪ Financial education providers should regularly evaluate and, where necessary, update the schemes they administer to bring them into line with best practices in the field.

Financial education is the responsibility of the Member States and the EU can provide important practical help. Thus, the Commission defined the following initiatives as priorities:

▪ The creation of a group of experts in financial education comprising representatives of Member State authorities (including education experts), financial services providers, consumer organisations and other groups where appropriate. Its aims will be to share and promote best practice on financial education and advise the Commission on how the above principles are being implemented;

▪ Providing sponsorship to Member States and private actors in the organisation of national/regional conferences on financial education (including messages of support and use of European logos);

▪ The publication of an online database of financial education schemes and research in the EU;

▪ Development of a teacher training module on financial literacy – The Dolceta initiative has already proved very useful in facilitating the teaching of financial issues to adult learners. Building on this, the Commission started, from the beginning of 2008, the development of the module on financial education for teacher-training purposes. This project is undertaken with the help of pedagogues and financial experts from the European Universities Continuing Education Network. This Dolceta module provides teachers in primary and secondary education with ready-to-use kits, including internet training, in order to encourage and help them to incorporate financial issues into the general curriculum on a voluntary basis. All materials are adapted to the national cultures. Upon the completion of this teacher-training module, national development teams will, where possible, participate in teacher-training events to advertise the consumer education materials and encourage teachers to use them.

At present, Romania's National Association of Insurance and Reinsurance Companies (UNSAR)[7] with *Junior Achievement Romania* (JAR)[8] support, develops a program called 'Ensure Your Success', addressed to college and high-school students. In February – June 2011, the courses were attended by a large number of pupils (6,000) from 117 towns and 37 districts (54 schools and 97 high-schools). 150 teachers participated in the program, along with UNSAR volunteers.

It comprises 5 educative modules, for two groups of pupils (aged 12-15 years, and, respectively, 15-18 years). Its main goal is to explain them salary management mechanisms, especially insurance policies. One of the modules, titled 'The Power of Savings', is addressed to college and high-school students, and is centered on financial planning and the basic principles for

[7] **UNSAR** is an insurance companies association established in 1994 to develop and boost cooperation in the field, at the national and international level. 13 insurance and reinsurance companies founded the organization which became, in 2007, a full member of CEA Insurers of Europe.

[8] **JA** is a non-profit organization founded in 1993 within Junior Achievement Worldwide®, USA and Junior Achievement-Young Enterprise, Europe. JAR is the largest international company in the field of economic education. In Romania, 284,000 pupils from 2,400 schools attend JA programs of "learning by doing", developed at the local level with the help of Education Ministry, its institutions and business circles.

setting family budgets. The other two modules, 'Risk Insurance' and 'Risk and Insurance' targets 7th and 8th grade pupils, and focuses on the basic concepts of insurance programs that can limit the potential adverse financial effect of risks. It also contains an introduction into the insurance domain. The other two courses, 'Insurance Policies, Savings and Investments', and 'Investments, Benefits and Risks', are addressed to 10th and 11th grade students, teaching them how to use financial protection mechanisms, including to make long-term investments[9]. JAR and the Romanian Commercial Bank's Vienna Insurance Group launched a program called 'ABC Insurance' in 31 schools. 44 consultants were involved in it, and 1,000 pupils attended the courses. It contains 3 modules: 'My Personal Plan', 'Investments for A Future of Growth', and 'Protecting Your Future'. Delivered during the classes, the workshop activities are based on role play, games and case studies, providing a large number of educational materials. The programs help participants familiarize with basic financial notions, including salary management mechanisms and insurance policies[10]. To enable the next age group (young people aged 18-26 years), namely the next generation of employees, entrepreneurs or family members to better retain financial information, JAR in cooperation with ING Insurance Group and Wall Street.ro, have initiated a program called 'Your Project and The Future' which provides a large amount of data on financial planning and life insurance policies[11].

As a result, on March 28, 2012, a Protocol on Cooperation was signed by Romania's National Bank and the Education Ministry, according to which the two institutions would undertake joint efforts to boost financial literacy and implement financial education programs in schools and high-schools, based on projects launched by Romania's National Bank, following the European model[12]. Addressing another group of beneficiaries, the Romanian National Association for Consumer Protection (APCR) launched a financial education program, at the national level, called 'Family Budget'. It targets broad segments of population, especially family members, and is aimed at improving their understanding of basic modern financial concepts. It also teaches them how to use tools for setting up a family budget and prevent overdebts[13]. The participants are also offered the opportunity to access a website and consult online financial experts. In addition, a series of debates were held in 5 major cities, including Brussels, with the participation of European media outlets and national consumer organizations' representatives. Other seminars are centered upon the introduction of provisions regarding the consumer credit and financial literacy in the Romanian legislation. The goal is to improve the efficiency of financial education programs, based on a unitary approach which will enable us to develop adequate tools to support financial planning[14].

In the end, I would like to mention the last segment of population targeted by our programs, namely the future pensioners or Romania's adult population, providers and beneficiaries of saving systems. ING Pensions Fund has got involved in awareness campaigns and financial education programs since 2010, holding debates on the issue, attended by students and young employees. The workshops are organzied in state and private universities, in order to explain the vital role of private pensions system in today's society.

Since it is a new concept, basic notions are approached, namely the personal pension ownership, the possibility of offering benefits such as optional pensions, which are deductible, and to choose a pension fund[15].

In conclusion, financial education programs are mainly addressed to young people. According to a European survey, 78% of the subjects believed they possessed limited knowledge and could not manage on their income, while 20% said they had no basic financial notions and could hardly

[9] See reference [3].
[10] See reference [6].
[11] See reference [1].
[12] See reference [4].
[13] See reference [5].
[14] See reference [5].
[15] See reference [2].

manage their resources. However, one should notice that 97% of the respondents were aware of the important role of financial education programs, which should be taught in schools and family[16].

Conclusion

In the end, one may conclude that financial literacy is essential in today's society. Therefore, everyone should know the basic notions in the field, in order to be able to take smart financial decisions, set out the family budget, save enough money for the future, and choose the best financial planning and management strategy and tools, in order to make life easier.

References

- Harry Smorenberg, *The Next Step in Financial Literacy*, http:// www.primm.ro/828_educatia-financiara---urmatorul-pas.html.
- *Financial Education and Protection of Private Pension Beneficiaries*, http://www.csspp.ro/educatie/educatia-financiara-si-protectia-participantilor-in-domeniul-pensiilor-private/8.
- *Ensure Your Success – An Educational Program for 6,000 Young People*, http://www.comunicatedepresa.ro/junior-achievement-romania/asigura-ti-succesul-un-program-educational-pentru-6-000-de-tineri/.
- *Romania's National Bank launches financial education projects in high schools*, http://www.zf.ro/banci-si-asigurari/bnr-initiaza-proiecte-pentru-educatia-financiara-a-liceenilor-9444696.
- *Family Budget – A National Financial Education Program,* http://www.ziare.com/social/salariu/bugetul-familiei-programul-national-de-educatie-financiara-1015832.
- *Romanian Commercial Bank Experts in Insurance Taught Financial Literacy in Schools*, http://www.responsabilitatesociala.ro/stiri-csr/voluntarii-bcr-asigurari-de-viata-vig-au-predat-educatie-financiara-in-scoli.html.
- *Financial Literacy – Trendy or Essential Programs?*, http:// www.desprepensii.ro/Programele-de-educatie-financiara-O-moda-sau-o-necesitate-a1315.htm.
- *Financial Literacy* , http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l22031_ro.htm.

[16] See reference [3].

LANGUAGE, POWER AND INTERNATIONAL RELATIONS: THE CASE OF ENGLISH IN THE EU

MARÍA LUZ SUÁREZ CASTIÑEIRA*

Abstract

Though generally overlooked, the language question is at the core of International Relations studies: it is associated with power in general and with the concept of "soft power"[1] in particular. Indeed, language cannot be considered as just an instrument of communication. In the context of the Nation State as well as in the context of the EU and International Relations in general, it has a strong symbolic value. At the level of the EU and its institutions, the linguistic governance is a very technical and political debate. On the one hand, the European institutions have been promoting multilingualism as crucial for social and political inclusion, but, on the other, English has imposed itself as the main lingua franca. Despite the affirmation of the official character of all national official languages, the EU has never clearly addressed the challenge we are facing. The main focus of this presentation is on whether in the context of regionalization and globalization, English can be stopped from being used as the main lingua franca. First the EU language reality and doctrines will be addressed. Then we shall consider the unbalance of power and the role of English in the EU and worldwide on the basis of several theoretical debates, and finally we shall conclude addressing future challenges.

Keywords: *Globalization, regionalization, international relations, soft power, lingua franca, language policies.*

Introduction

That languages are instruments of power is widely accepted. On the one hand, throughout history Nation States have often imposed, directly or indirectly, their own national language. There have been, and still are, language conflicts in many different places all over the world: in Nation States like Belgium, Spain, Canada, India, in the ex-Soviet countries, in many African countries, etc. On the other hand, there is a clear correlation between the power of the linguistic groups and the spread and prestige of their languages: Latin with the Roman Empire, Spanish with Spanish colonization, French with the French Revolution and the Napoleonic conquests, English with English colonization, etc. In the post-Westphalian order of international society, with the increasing power of international and regional organizations as well as with the process of globalization in all fields, the communication problem, and therefore the linguistic issue, has become more and more challenging. For political projects of integration like the EU, where diversity itself plays an important role, how the linguistic issue is addressed is even more problematic, particularly as the number of languages spoken within the EU has increased with successive enlargements.

Democratic citizenship in the EU is, among other aspects, dependent on the preservation and promotion of cultural diversity on the one hand, and the achievement of a common communicative sphere, on the other. In other words, the EU has the challenge of how to make the greatest possible number of EU citizens competent in three or more languages (mother tongue(s) + two) not only to allow democratic participation in multilingual (bilateral and multilateral) environments within the EU but also to facilitate participation as European citizens in wider global processes. However, in reality, and according to the 2012 Eurobarometer statistics, English as the only *lingua franca* is gaining

* María Luz Suárez Castiñeira, Associate Professor, PhD, Director of the Institute for EU Studies, Faculty of Social Sciences and Humanities, University of Deusto, Spain (mariluz.suarez@deusto.es).

[1] Several authors relate languages, directly or indirectly, to the notion of "soft power". P. Bourdieu (2001) deals with the symbolic value of language, an idea which is particularly meaningful in the context of this paper. Joseph Nye (2004) with his notion of "soft power" refers to the ability of a State to influence directly or indirectly the behaviour or the interests of their actors through cultural or ideological means. Stephen Berro (2009) states that language is the most concrete and measurable way to observe the diffusion of soft power.

ground within the EU. The question is whether in the context of increasing regionalization and globalization there is an alternative to the use of English *lingua franca* and whether in the short term it is even possible to make the majority of Europeans not only competent in English *lingua franca* but also in another EU language apart from the mother tongue.

The language reality in the EU and the language doctrines

The EU language regime was regulated by Council Regulation nº 1 called "Determining the languages to be used by the European Economic Community"[2] in April 1958 following Article 217 of the Treaty of Rome (1957)[3] which reads that "the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Rules of Procedures of the Court of Justice, be determined by the Council acting unanimously". The Council directive contains the following eight articles which define the linguistic status of the political project of European integration:

Article 1. The official languages and the working languages of the institutions of the Community shall be Dutch, French, German and Italian.

Article 2. Documents which a Member State or a person subject to the jurisdiction of a Member state sends to the institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

Article 3. Document which an institution of the Community sends to a member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

Article 4. Regulations and other documents of general application shall be drafted in the four official languages.

Article 5. The official Journal of the Community shall be published in the four official languages.

Article 6. The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

Article 7. The language to be used in the procedure of the Court of Justice shall be laid down in its rules of procedure.

Article 8. If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

At the time, when the Treaty of Rome was signed, only four languages were involved: Dutch, French, German and Italian. Today, after successive enlargements, 23 languages[4] (24 with the accession of Croatia as of 1 July 2013) have to be considered, increasing the level of complexity of the language issue. The existence of a multilingual reality is indeed one of the defining features of the European Union. However, and the rich tapestry of language goes beyond the 23 official state languages spoken today in the 27 countries of the European Union. Indeed the European linguistic diversity is fed mainly by the more than 60 non-official languages, the so-called regional or minority languages, spoken by more than 40 million citizens as their mother tongue, living or co-existing with the state languages in their respective communities. These non-official languages are characterized by a great diversity of situations both regarding their use and their internal legal status.

[2] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:I:1952-1958:31958R0001:EN:PDF.

[3] See http://www.eurotreaties.com/rometreaty.pdf.

[4] The European Union 23 official languages are Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovene, Spanish and Swedish.

This linguistic diversity has been seen as one of the key elements for building the European project since the late 1970s and early 1980s. Obviously, taken together, the minority groups have a considerable demographic and political weight, besides representing a potential source of social conflicts. From a theoretical perspective, relegating the language of the minority groups to the condition of marginalization would mean contradicting the very foundation of the European project that emerged from the destruction left by the conflicts of the 19th and part of the 20th century. Besides being a union of states, Europe must unite all peoples, groups and citizens. The European institutions have claimed on various occasions that the construction of Europe is based on cultural wealth and diversity and that in order to be European nobody must stop feeling what they are primarily, Basque, Catalan, English, Flemish, French, Galician, Occitan, Romanian, Welsh, etc., or fail to maintain an awareness of identity as received from history.

So, understandably, the European institutions are absolutely unanimous in considering language diversity or multilingualism a European value, a sign of identity that must be promoted and protected, a principle which stands radically against ranking one language above all others. Moreover, the loss of any of these languages would automatically mean a weakening of the tradition and wealth of multicultural and multilingual Europe. Consequently the two supra-national bodies, the European Union and the Council of Europe, engaged in language-policy making, have actively been promoting language diversity and plurilingualism, principles that, at least in theory, have been endorsed by all member states. Linguistic diversity refers to the fact the Europe is multilingual and all its languages are equally valuable modes of communication and expressions of identity, whereas plurilingualism refers to the capacity of individuals to develop a degree of communicative ability in a number of languages over their lifetime in accordance with their needs.

In Europe, multilingualism and plurilingualism have become political concepts closely related to the process of constructing the polity. The EU's White Paper of 1995 already referred to languages as instrumental in helping to build up the feeling of being European with all its cultural wealth and diversity and therefore in building up the needed European identity/citizenship (European Commission 1995: 67). The fundamental role of language in the creation of this polity led the EU Heads of State and Government in 2002 to set the long-term objective for all EU citizens to speak at least two languages in addition to their mother tongue(s).[5]

The European institutions seem to postulate some kind of causal relationship between language learning and European identity/citizenship. Therefore European institutions encourage the learning of languages not only as an essential condition for intercultural communication and acceptance of cultural differences, but also for participation in democratic and social processes in multilingual Europe and social cohesion (European Commission 2002, Council of Europe, 2004). Plurilingualism provides the necessary conditions for mobility within Europe, but is above all crucial for social and political inclusion of all Europeans. With respect to the long-term objectives, the Council of Europe has provided instruments of various kinds to support language acquisition such as the *Common European Framework* (2001), the European Language Portfolio, or the *Guide for the Development of Language Education Policies in Europe* (2003), as well as to support planning for regional and minority languages: *The European Charter for Regional or Minority Languages* (1992) and the *Framework Convention for the Protection of National Minorities* (1994). The EU[6] has also promoted a number of programmes in order to advance towards plurilingualism: the Lingua Programme in 1989, the Socrates and Leonardo da Vinci Programmes in 1995 and more recently Comenius in 2000, etc. The project of the European Higher Education Area, the so-called Bologna

[5] Conclusions of the Barcelona European Council in March 2002: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf.

[6] The European Commission has invested millions of Euros to finance a number of important language projects. Worth mentioning is the 2004-2006 Action Plan (8,200 million euros) to promote language learning and linguistic diversity, including regional or minority languages through an integrated approach.

Process (after the Bologna Declaration, June 1999) also depends for its success on language learning, among other aspects, as was recognized by the European Parliament in 2001 with the "Resolution on universities and higher education in the European Area of knowledge "which called on member states and universities to recognize the importance of learning foreign languages and to organize language courses for those students who did not pursue studies in the humanities or linguistics, as only the knowledge of several languages will facilitate mobility and help achieve greater European integration. Facilitating the acquisition of other languages and the command of basic communication skills has, therefore, become the responsibility of governments and education institutions alike.

The question is whether the many policies adopted by the European institutions are ambitious enough for such an ambitious political project. The European Community founders addressed the multilingual reality by granting all the official languages (Dutch, French, German and Italian) of the Member States the same official status at a time when other International Treaties limited the official and working languages.[7] Since then, with successive enlargements, all the official languages of the Member States have automatically become official languages of the regional block. It seemed a bold decision then with only four languages but now, with 23 and soon 24 languages, the language issue has become increasingly complex and even unmanageable. How does the principle work in practice?

An important political function has been assigned to language in the construction of Europe, and therefore in the creation of a common European identity, but the language question is seldom included among all the deep and theoretical debates on European Integration, such as culture and religions. Apart from the recognition of the official status of all the official languages of the Member States and the much proclaimed need to promote plurilingualism in European citizens, the Common policy in the language issue is extremely limited. There are no precise rules as to how the Union must address its citizens, how to constitute a common linguistic space or a communicative sphere, or as to the language or languages to be used in international forums. What is more, this lack of clarity also affects the internal functioning of the Union institutions, as will be explained later. In reality, there is *laissez faire* everywhere and, consequently, there is no such equality in the language issue. Plurilingualism is more a wish than a reality and, despite the reluctance of the EU, English as the dominant *lingua franca* has imposed itself in all key domains, including the institutional level.

Unbalance of power in favour of English

Current circumstances of increasing wider processes of globalization have favoured the adoption of English as a corporate language in many larger business based in Europe and as the language of instruction in higher education institutions, putting the non-competent speaker of English at a considerable disadvantage. Under these circumstances, it is difficult to see how the dominance of English could be curbed. The 2004-2006 Action Plan of the European Commission, designed for this purpose, did not do much to stop the influence of English, though certainly drew attention to the fact that English alone is not enough.

Foreign language education policies in Europe, though embedded in national education systems and their distinct traditions, are influenced by these wider processes of globalisation and the way languages are perceived to operate in global interaction in Europe and worldwide and therefore in general tend to favour English as the first foreign language in schools. This is confirmed not only by the 2012 Eurydice report[8] which shows that in many countries English is the only language taught in primary schools and that the main motivation for language learning is the language prestige, the value of the language for social mobility. English has become such a priority with parents that in a

[7] The United Nations, for example,limited the number to six official languages: Arabic, Chinese, English, French, Russian and Spanish, with English and French being the working languages, whereas the the Organization for Economic Cooperation in Europe, the OECE, later called OECD, the North Atlantic Treaty Organization (NATO) and EFTA (European Free Trade Agreement) decided to have only two languages, English and French.

[8] http://eacea.ec.europa.eu/education/eurydice/key_data_en.php#path.

number of states this has led to concomitant language-tutoring in the private sector, starting at an even younger age than in the public sector. The 2012 Eurobarometer[9] report shows that English is perceived by Europeans to be by far the most useful language to know (67%) compared to 68% in 2006), followed by German (17% compared to 22%) and by French (16% compared to 25%). Spanish ranks fourth with a 14% share (compared to 16% in 2006). The 2012 Eurobarometer also confirms two worrying trends: first that there is a notable decrease in most European countries of the proportion of Europeans who speak two languages and, second, that Europeans are hardly motivated to learn a new language; only a minority (14%) have continued learning a language in the last two years; less than one in ten (7%) have started learning a new language in the last two years. Thus, the promotion of language policies does not seem to be having a considerable impact in terms of the proportion of Europeans who become plurilingual.

The common linguistic policy concerning the internal functioning of Institutions is limited too, in its nature and scope; and the principle of equality is hardly applied. Only five institutions, the Court of Justice, the European Council, the European Commission, the European Parliament and the Court of Auditors, are legally bound by the obligation to have all twenty three languages as official and working ones, a principle established only in 2003, following the complaint of a Dutch citizen[10] who could not read the webpage of the Office of the Harmonization of the Internal Market in her own language.[11] According to the principle of equality of languages, the official Community websites should be in the 23 official languages: some are but many are not. The EU portal and the European Parliament portal are available in the 23 official languages. However, for example, the Regional Policy-Inforegio website[12] is only available in eleven languages: Bulgarian, Czech, English, French, German, Hungarian, Italian, Polish, Romanian, Slovakian and Spanish. Surprisingly, the Research and Innovation website[13] can be read only in English, whereas the CORDIS[14] (Community Research and Development Information Service) website exists in six languages, English, French, German, Italian, Spanish and Polish. Other websites exist only in three languages: it is the case Education and Training of the European Commission[15]. Whenever the website is in English and some other languages, the choice of the latter seems to depend exclusively on demographic grounds.

The linguistic unbalance also applies to Community programmes, including Community funded linguistic programmes such as Lingua - Socrates Action 4 - Language Learning and Teaching, which, oddly enough, provides information only in English.[16] This unbalance affects mostly the so called "Lesser Used languages". In some cases the expression refers to the smaller official languages of the institutions, namely Bulgarian, Czech, Danish, Dutch, Estonian, Finnish, Greek, Hungarian, Portuguese, Slovakian, Slovenian and Swedish; whereas in other cases the expression refers to minority languages, such as Basque, Catalan or Gaelic, within the Member States.

The European language policy is hardly applied in institutional proceedings, either. The EU Court of Justice uses only French whereas the European Central Bank has turned English into its only official language, as can be seen from the language policy stated on its website.[17] This

[9] http://ec.europa.eu/languages/languages-of-europe/eurobarometer-survey_en.htm.

[10] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0361:EN:HTML for Case C-361/01 P, Christina Kik. «(Regulation (EC) No 40/94 – Article 115 – Rules in force governing languages at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) – Plea of illegality – Principle of non-discrimination)».

[11] It was only available in English, French, German, Italian and Spanish.

[12] See http://ec.europa.eu/regional_policy/newsroom/detail.cfm?id=638&LAN=EN.

[13] See http://ec.europa.eu/research/index.cfm.

[14] See http://cordis.europa.eu/home_en.html.

[15] See http://ec.europa.eu/education/index_en.htm.

[16] See http://eacea.ec.europa.eu/static/en/overview/lingua_overview.htm.

[17] See http://www.ecb.int/home/html/index.en.html.

discrepancy between the declared official policy and the reality is an outstanding feature in the daily work of the institutions. At the European Commission, all the preparatory meetings and documents are made in only three languages, English, French and German, though even here there is a huge unbalance between the use of English and French, while the use of German is almost symbolic. Contrary to what can be read in the 1958 Directive regulating that the four official languages were also working languages, with the increasing number of languages added to the EU, the European Commission has thus established a distinction between official and working languages. In its website we can read that the 23 are official and working languages but "due to time and budgetary constraints, relatively few working documents are translated into all languages. The European Commission employs English, French and German in general as procedural languages, whereas the European Parliament provides translation into different languages according to the needs of its Members."[18] This obviously represents a problem for the language doctrines of the EU. And much has been written on this dilemma. The challenge for communicative integration in the EU is how to accommodate unity and diversity, since Europe needs a good degree of both. With 506 possible linguistic combinations (soon 552 with Croatia's accession), it is impossible for the Parliament and the other institutions to deal with the daily communication needs of multilingual Europe, and therefore, for practical purposes, the *lingua franca* imposes itself. [19]

Is there an alternative to English *lingua franca*

At this moment it is difficult to see how the use of English as *lingua franca* could be resisted or at least how its hegemony curbed. The challenge for the EU, as already pointed out, is not only how to make the greatest possible number of EU citizens competent in three languages (mother tongue + two) in order to make democratic participation in multilingual (bilateral and multilateral) environments within the EU possible but also how to facilitate participation in wider global processes. Despite the fact that most of the political groupings, including the European Union or the United Nations, have adopted linguistic policies, English has become the language of globalization. The correlation between English and globalization has been much debated.[20] The hegemony of the US in world affairs has made it a powerful instrument of communication. English is the language of communication used key areas such as high diplomacy, financial markets, international trade, electronic communication, international mass media and film industries. In consequence, a good knowledge of English is a requirement for jobs in the diplomatic services and in almost all big companies in the world. It has become the language needed for advanced research and the language of instruction in higher educations in many countries worldwide, not only in the English-speaking ones. English is also the most important language used in the internet. For all practical purposes, English is already the communication language in almost all world international organizations such as APEC (Asia-Pacific Economic Cooperation), ASEAN (Association of South East Asian Nations[21]), the BSEC (Black Sea Economic Cooperation[22]) or the European Central Bank. In terms of official the British Council list 80 countries in the world where English is recognized as an official

[18] See http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm.

[19] In "Europe's Linguistic Challenge" (2007) , P. Van Parijs uses the expression "*maximin* rule" in connection with the use of lingua *franca*. When confronted with the choice of a language in front of an audience, a speaker will use the language which is best known by the member of the audience who knows the least languages. This *maximin* criterion will tend to maximize the minimum competence. Thus, in the case of the EU and other international institutions this spontaneously leads in most cases to the use of English.

[20] See Joshua A. Fishman (1999) and David Crystal (2000, 2007).

[21] ASEAN member countries are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

[22] Whose members are Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russia, Serbia, Turkey and Ukraine.

language.[23] English is an official language widely spoken in many parts of the world. English expansion is of course a result of the English colonization. And the United Kingdom was the most successful country in the world as far as colonization is concerned.

English is associated with prestige and power, But then, it is not the first time in history that a language is chosen as the only communication language in international relations, associated with prestige and power. In the Western world, Latin, the language of two important international actors, the Roman Empire and then the Church, was used from the 8th until well into the 15th Centuries as a *lingua franca* between elite, as the language of science, administration, diplomacy and higher education, i.e. in a way similar to English nowadays. Latin, however, was progressively replaced by other languages as other actors progressively grew in importance. Italian became important from the 15th until the 17th century as a language for culture and diplomacy, and finally French from the 18th Century onwards. Then French imposed itself in Western and Eastern Europe as the only European communication language when France became the economic, demographic and military giant of Europe. It maintained the status of the language of Diplomacy and culture, even when France and an international actor lost importance in favour of other countries like Germany or Russia. English began to grow as an international language, at the height of the British Empire, and when the United States began taking ground as a world power.

During the first decades of the European Integration, French used to be this lingua franca but since the seventies, English has been more and more used. In the nineties, the Scandinavians, Austrians and Finns disrupted the balance between English and French due to their scarce knowledge of French. The last Eurobarometers (2006 and 2012) prove that English is by far the main second language in Europe. The question is whether its hegemony is at risk and whether another international language will rise and occupy its place. As noted by J. Fishman, "historically languages have risen and fallen with the military, economic, cultural and religious powers that supported them"(1999:10). The role of English as a world language may suffer as complex international, economic, technological and cultural changes are underway. There are many factors that may affect power of English in the future.

Firstly, even considering the number of countries where English is an official language, it is still only spoken by a small minority of people in the world. Even in the EU it is a misconception to think that English has already become a universal lingua franca. Both the 2006 and 2012 Eurobarometer reports shows that Even though English is the languages that is most learnt, only 38 per cent of Europeans are able to communicate in English, which means that almost two out of three Europeans are not able to do so. When results are analyzed at national level, then the differences between countries are daunting. English is widely spoken in countries like Sweden (89%), Malta (88%) and the Netherlands (87%), but far less widely in countries like Bulgaria, Italy, Portugal or Spain where English is much less firmly entrenched, even if most children and adolescents are now exposed to English in schools.

Secondly, both the economic crisis which is slowing down the pace of globalization and the emergence of new economic powers such as China, India and Latin American countries, are accelerating the use of regional languages such as Arabic, Chinese, Hindi, and Spanish, which are growing at a faster pace than English. Russian has been and still partly is a *lingua franca* in Central Asia, the Caucasus and Eastern Europe. Notwithstanding the undeniable power of English, a shift is taking place in favour of new world languages. Similarly, the Arabic use is still growing in North Africa and Asia and Chinese in East Asia.

Thirdly, in a number of countries like Denmark or the Netherlands, where English is firmly entrenched, there has been, since the 1990s, a bigger stress to use and protect the national official language as a growing reaction to the widely spread use of English in key domains like Higher Education. Similar reactions have happened in other areas of the world such as Canada, with the

[23] See http://www.britishcouncil.org/map_of_countries_where_english_is_an_official_language.pdf.

result of well-planned language policies. Globalization is accompanied by regionalization and the globalization of English by a tendency to defend the local language status and use. The emphasis on identity, and therefore the need to preserve one's culture and language, is becoming more and more important as a side effect of globalization. The detailed study of David Graddol (2006) for the British Council is not optimistic about the future of English as the main language for international relations.

Fourthly, in terms of native speakers, English is falling in the world's rankings in favour of Mandarin, Spanish, Hindi-Urdu and Arabic which are rising in number. All these languages play a very important role in their own regions. They are developping besides English as global languages.

The importance of maintaining multilinguism

Three factors should be taken into consideration when approaching the relevance of language learning in the context of European integration. First, as has been repeatedly expressed by European institutions, language learning is crucial for the construction of Europe as a polity and therefore requires adequate planning. Second, the importance of the language issue is evident from the evolution of transnational civil society at both a European and world level, and this requires planning, too. Indeed, the evolution of transnational civil society is closely related to trends toward global governance and, therefore to notions of discourse and debate in a public sphere. The development of European transnational society cannot be separated from the development of global civil society which, for economic, cultural and technological reasons, among others, has adopted English *lingua franca* as the language of communication in key domains. And this is a phenomenon that cannot be ignored by the European institutions. The challenge for communicative integration in the EU is how to accommodate unity and diversity, since Europe needs a good degree of both.

Third, there is the already mentioned correlation between language and power which needs to be considered in the context of the political integration of the EU. For the founding fathers, the symbolic use of the language was considered more important than its practical value as a communication tool. Many International Relations theories, particularly the social constructivist ideas which developed as reactions to the empirical and rationalist currents, support the necessity to deal with the symbolic function of the language when determining a linguistic policy or behavior in International Relations. In this connection, political philosophers such as P. Bourdieu, among others, relate languages to hegemony and the diffusion of dominant ideas. The Soviet language policy in the ex-Soviet Union, particularly in Central Asia, illustrates this relation clearly. Russian was imposed as an interethnic language in order to diffuse the Soviet ideology and ensure the merging of the Soviet nations. As a consequence the symbolic value of the national languages was diminished in favour of that of Russian. Because big proportions of populations were not fluent in that language, this resulted in an imbalance between symbolic and communicative functions of languages in Central Asia. The case of Central Asia also provides an excellent example of the relation between language policies and international relations. When the Soviet Union collapsed, language policies became one of the most important aspects of the nation-building processes for the newly independent countries, and each different language policy option was related to a foreign policy alternative.

Nevertheless, even the realist and neo-realist theories can be applied to the importance of the symbolic power of languages in the context of the EU, as they lay the emphasis on the search for power as the main engine of international relations. Promoting one's language and culture is a good way of promoting one's interests and influence on other actors in the international scene, which brings us back to the notion of "soft power" (Nye 2004) This concept can function as framework to explain the reluctance many in Europe have expressed toward "American cultural imperialism" which is may gradually have been imposed through the English language.

These theoretical frameworks are very useful to understand the importance of the language issue in the process of European integration. They help understand how, as Sephen Berro suggests

"an accurate language policy could promote political integration, or on the contrary, how the hegemony of one language in a regional block could be counterproductive, sending negative signals about the final objective of the integration project."(2009: 21).

Conclusion

The language issue is a highly political and technical debate. Both linguistic unity and linguistic diversity must be considered as vital elements in the process of European integration. The three levels of participation (subnational, national and supranational) meet at the European institutional level where day-to-day debates and negotiations on the future of Europe can evolve. In the context of multilingual Europe (23 official languages and more than 60 regional or minority languages), for practical purposes, debates can only be carried out in English *lingua franca*, according to the "maximin" principle. For this reason, a number of scholars see the European institutions themselves as contradicting Article 22 of the Charter of Fundamental Rights of the EU, which states that "the Union shall respect cultural, religious and linguistic diversity", because in day-to-day affairs, English as *lingua franca* is increasingly the dominant language in which documents are drafted and discussed. Other scholars like Breidbach (2003) are in favour of a common communicative sphere in which the interests of all Europeans can be defended in one of the multiple linguistic identities Europeans can take without having to rely on translation. For this group of scholars, what must be guaranteed is that there is equality between the EU official languages in promulgating legislation in parallel in all languages, that interpretation is provided between all languages at the most important meetings and that citizens are able to communicate with the administration in their own language.

As Breidbach (22) points out "European citizens' acceptance of policies for European integration probably depends to a large extent on their ability and willingness to participate in a European public debate." In order to become full actors in this debate Europeans need an interlingual mediator and English *lingua franca* has imposed itself in this role, as an instrument of communication. However, this is problematic for the promotion of linguistic diversity through foreign language teaching. Should English *lingua franca* become the instrument of communicative integration. The European institutions do not want to explicitly grant English such a role: "policies for language education should therefore promote the learning of several languages for all individuals in the course of their lives, so that Europeans actually become plurilingual and intercultural citizens, able to interact with other Europeans in all aspects of their lives." (Council of Europe 2003: 7). At a European and global level, under circumstances of implicit power structures, the fact of not speaking English puts the individual at a considerable disadvantage and, therefore, it is difficult to see how the influence of English could be curbed. But, then, one also needs to consider that even in Europe, those who can communicate in English still belong to a privileged minority, particularly in Eastern and Southern Europe.

The other important challenge is how to achieve the long-term objective for all EU citizens to speak at least two languages in addition to their mother tongue(s) set by the EU Heads of State and Government in 2002 at the Barcelona European Council. While, in the light of the conclusions of the 2012 Eurobarometer, the competence in English is still a challenge for the majority of Europeans, transnational discourses in Europe cannot rely on a single shared language. The symbolic aspects involved in language use also need to be considered as discussed above. Language integration, then, should work toward the achievement of adequate balance between language unity and language diversity.

References

- Ammon, U. (ed.). (2001). *The dominance of English as a language of science. Effects on other languages and language communities*, Mouton de Gruyter, Berlin.
- Arzoz, Xabier (ed.) (2008). *Respecting Linguistic Diversity in the European Union.* Amsterdam/ Philadelphia: John Benjamins.
- Breidbach, S. (2003). Plurilingualism, Democratic Citizenship
- in Europe and the Role of English, Strasbourg, Council of Europe, Language Policy Division.
- Bourdieu, P. (2001). *Langage et Pouvoir Symbolique*. Paris : Point Essais.
- Castiglione, D. and Longman C. (ed.). (2007). *The Language Question in Europe and Diverse Societies*. Hart Publishing, Oxford and Portland Oregon.
- ----------(2007). The diversity of language teaching in the European Union. A Report to the European Commission Directorate General for Education & Culture. Call for tender EAC/28/06: Contract No. 2006-3754/001-001 LE2-75EPR. Final Report September 2007.
- ----------(2008). "Multilingualism: an Asset for Europe and a Shared Commitment". Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2008) 566 Final.
- Council of Europe. (2001). *Common European Framework of Reference for Languages: Learning, teaching, assessment*, Cambridge University Press, Cambridge.
- --------- (2003). *Guide for the Development of Language Education Policies in Europe: From Linguistic Diversity to Plurilingual Education.* Executive version. www.coe.int/lang (Language Policies).
- ----------(2004). *Language education policy profiles. Guidelines and Procedures*. www.coe.int/lang
- Crystal, D. (1997). *English as a Global Language*. Cambridge: Cambridge University Press.
- ---------- (2000). *Language Death*. Cambridge: Cambridge University press.
- Dendrinos, B. and Mitsikopoulou, B. (eds.). (2004). *Policies of linguistic pluralism and the teaching of languages in Europe*, Metaixmio, and the National and Kapodistrian University of Athens.
- European commission. Eurobarometer surveys. http://ec.europa.eu/languages/languages-of-europe/eurobarometer-survey_en.htm.
- Fishman, J.A. (1999). "A World Language: Will it be English?" *Current.*
- Graddol , D. (2006). *English Next*. British Council.
- Grenfell, M., Kelly, M. and Jones, D. (2003). *The European language teacher. Recent trends and future developments in teacher education*. Peter Lang, Bern.
- Hellekjaer, G. O.(2004). "Unprepared for English medium instruction: A critical look at beginner Students", in R. Wilkinson (ed.) *Integrating content and language: Meeting the challenge of a multilingual higher education*, Maastricht University, the Netherlands, 147-161.
- Janssen, H. 1999, Linguistic dominance or acculturation – problems of teaching English as a global language. In: C. Gnutzmann (ed.) *Teaching and Learning English as a Global Language, Native and Non-Native Perspectives.*Tübingen: Stauffenburg. pp. 41-55.
- Julios, C. (2002). "Towards a European Language Policy", in Farrell, M. Fella., S: and Newman M. (eds.). *European Integration in the 21st Century: Unity in Diversity?* London, Sage.
- Kraus, P. (2007). "Intercultural Recognition and Linguistic Diversitry in Europe", in Castiglione, D. and Longman C. (ed.).
- Lauridsen, K. M. (2009). National Language policies in the era of globalisation, in European Journal of Language Policy, 1.1, 29-38.
- Joseph S. Nye, J.S. (2004). *Soft Power: The Means to Success in World Politics Public Affairs*. Cambridge, MA.
- Phillipson, R. (2002). *Journal of Language, Identity, and Education*, Vol. 1, no. 2, 163-169.
- ----------(2003). *English-only Europe? Challenging language policy*, London, Routledge.

- ----------(2006). "English, a cuckoo in the European higher education nest of languages?". European Journal of English Studies, 10/1, 13-32.
- Sano, Hikomaro (2002). "The World's Lingua Franca of Science", *English Today* 18-4:45-49.
- Sberro, S. (2009). "Could - and should - English win the "language war" in regional integration? NAFTA and EU experience". Jean Monnet Working Paper 13/09. www.JeanMonnetProgram.org.
- Starkey, H. (2002), *Democratic Citizenship, Languages, Diversity and Human Rights*. Reference study for the *Guide for the Development of LanguageEducation Policy in Europe*. Council of Europe: Strasbourg. On-line www.coe.int/lang (Language Policies).
- Van Parijs, P. (2000). "Must Europe be Belgian? On Democratic Citizenship and Multilingual Polities". In McKinnon and Hampsher-Monk, I. (eds). *The Demands of Citizenship*. London, Continuum.
- ---------- (2007). "Europe's Linguistic Challenge", in Castiglione, D. and Longman C. (ed.).
- Williams, G. (2005), *Sustaining linguistic diversity in Europe. Evidence from the Euromosaic project*. Basingstoke: Palgrave Macmillan.
- Wilkinson, R. (2004). *Integrating content and language. Meeting the challenge of a multilingual highereducation*, Maastricht University Press, Maastricht.
- Wright, Sue (2001). 'Language and Power: Background to the Debate on Linguistic Rights', *International Journal on Multicultural Societies* 3·1: 44-54.
- --------- (2004). *Language Policy and Language Planning. From Nationalism lo Globalisation.* Basingstoke and New York: Palgrave Macmillan.

THEORIES OF REVOLUTION: THE GENERATIONAL DEADLOCK

RADU-ALEXANDRU CUCUTĂ*

Abstract

The paper attempts to highlight the main characteristics and the main flaws of the most important classification of theories of revolution, the generational approach. The first half aims to discuss and present the main tenets of the most important taxonomy of theories of revolution, as well as the similar attempts made by several scholars to build alternative classifications of theories of revolution. The second part of the paper attempts to show the limits of the aforementioned perspective and the importance of looking for alternative approaches to the study of revolutions. The paper considers that the generational perspective remains impermissibly flexible and elusive, ignoring the main paradigmatic debates within the field of study and maintaining a strong bias in favor of the clearest category, that of structural theories.

***Key words**: revolution, theories of revolution, structural theories of revolution, generational classification.*

Introduction

The most important element that requires discussion is the relevance of classifications in the study of revolutions. I believe classifications are important for several reasons. On the one hand, they are important in mapping out the theoretical space pertaining to revolutions. On the other hand, the limits of classifications can become very well limits of theories of revolution. Moreover, classifications are relevant not only for the specific conceptual content of the theories themselves, but also in regard to the major paradigms of social science that influence the particular field, as well as for the very important relationship between the studied phenomenon and the theoretical framework encompassing it. Last, but not least, classifications are important in order to define the major theoretical debates that shape the study of revolutions.

The generational classification can be considered probably the most important effort dedicated to charting out the theoretical endeavors regarding revolutions[1]. The generational perspective, developed by Jack Goldstone and reaffirmed successively by John Foran divides the space of theories of revolutions into three clear generations of theories and a post-third generational perspective. The most important aspect of the generational perspective is that the classification is not purely chronological. Of course, the concept of a generation of theories is supposed not only to illustrate the apparition of successive perspectives on the revolutionary phenomenon, but also the important paradigmatic debates which are supposed to have taken place and to have influenced the study of revolutions. Moreover, the time-frame that encapsulates theories of revolution makes it easier to accommodate the influence that new events have on theoretical models and endeavors, thus showing for example how Third-World dynamics shaped and influenced theories of revolution which up to that point had been dedicated mostly to successful major social revolutions.

---

* PhD in Political Studies - SNSPA; Associated Academic of SNSPA and the University of Pitesti (raducucuta@gmail.com).

[1]For an outline of the generational perspective on theories of revolution see Jack A. Goldstone, "The Comparative and Historical Study of Revolutions", *Annual Review of Sociology*, Vol. 8 (1982), as well as his more developped perspective, „The Comparative and Historical Study of Revolutions" in *Revolutions. Theoretical, comparative and Historical Studies,* (Wadsworth Cengage Learning, 2008), Jack. A. Goldstone, "Toward a Fourth Generation of Revolutionary Theory", *Annual Review of Political Science*, 4 (2001), and John Foran, "Theories of Revolution Revisited. Toward a Fourth Generation?", *Sociological Theory*, Vol. 11, 1 (Mar. 1993).

Taxonomies of theories of revolution

The generational classification is by no means the only attempt to order a theoretical subfield of study that at times proves as elusive as the studied phenomenon itself, nor does it represent the first attempt to draw a chronological distinction between the different theories. Chalmers Johnson's draws a distinction between four categories of theories of revolution: theories that privilege the actor's role, structural theories, conjunctural theories and political process theories[2]. Another important attempt of distinguishing between different perspectives on revolution is Eisenstadt's chronological classification of „naturalist" and „structural" theories[3]. Tilly opts for a paradigmatic presentation of the numerous theories of revolution that focuses on ideal-types, thus establishing five inter-related categories that characterize theories of revolution: the Marxist, Millian, Durkheimian, and Weberian perspectives, which are joined by the revised Marxist theoretical group[4] and his own anti-Durkheimian, Marxist, Weber-indulgent and Mill-friendly model[5]. Roderick Aya divides the spectrum of theories of revolution in three large categories – theories focusing on the intentions of the revolutionists themselves, theories that take into account the results of the revolutionary process and theories that focus on the concept of multiple sovereignty[6].

A different approach is that taken by Timothy Wickham-Crowley. Although his undertaking seeks to map out the distinction between structural theories, his insistence on discussing the works of Eric Selbin, Lynn Hunt or Forrest Colburn, whose perspective is nevertheless somewhat critical towards the capacity of structural studies of understanding revolution itself makes his classification more likely a „map" of recent attempts of studying revolution. The same conclusion can be reached if we take into account the fact that Wickham-Crowley focuses on aspects that are deliberately ignored by structural theorists, such as the problem of agency and the role of cultural factors[7].

Wickham-Crowley describes two epistemic axes which connect the social dynamics to cultural ones and contingency to structure, which result in four ideal-types: structure-social plan, structure-cultural plan, contingency-cultural plan and contingency-social plan[8].

We see therefore that the attempt to offer a classification of various theories of revolution is not the privilege of the generational perspective. As mentioned, it offers nevertheless some impressive advantages on its competitors – it manages to draw a time-line that links theories of revolutions and revolutions; it manages to sum-up what are the great paradigmatic shifts and debates; it manages to illustrate a convincing image of the evolution of our accounting and understanding of the revolutionary phenomenon.

The generational classification focuses on the theoretical debates on the causes, origins and dynamics of revolutions by focusing mostly on three "generations" of theories and of theorists. There is a somewhat implicit dialectical perspective present in the generational approach: each new generation criticizes the main tenets of the one preceding it, pushing the image and the study of the revolution towards a new direction.

---

[2]Chalmers Johnson, *Revolutionary Change* (Stanford: Stanford University Press, 1982), 169-170.

[3] S. N. Eisenstadt, *The Revolution and the Transformation of Societies. A Comparative Study of Civilization* (New York: The Free Press, 1978), 6.

[4]For works representative of this current see Eric R. Wolf, *Peasants* (Englewood Cliffs, New Jersey: Prentince Hall, 1966) or Barrington Moore Jr., *Social Origins of Dictatorship and Democracy. Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1992).

[5]Charles Tilly, *From Mobilization to Revolution* (Reading, Massachusetts: Addison-Wesley Publishing Company, 1978), 44-46.

[6]Roderick Aya, *Rethinking Revolution and Collective Violence. Studies on Concept, Theory and Method* (Amsterdam: Het Spinhuis, 1990), 14.

[7]Timothy Wickham-Crowley, „Teorii structurale ale revoluției" in John Foran (coord.), *Teoretizarea revoluțiilor,* coord., (Iași: Polirom, 2004), 53-55.

[8] Wickham-Crowley, „Teorii structurale ale revoluției", 54.

The first generation of theories of revolution is „the natural history of revolution"[9]. For Goldstone, and for Foran too[10], „the natural historians" of revolution are mainly concerned with describing the patterns of revolutionary events, starting from a small series of extraordinary revolutionary cases. Most commonly, the English Revolution of 1640, the American, French or Russian Revolution represent the empirical bases from which largely descriptive accounts of the phenomenon are drawn. The first generation of theorists thus manages to identify a series of common characteristics of revolution, which end-up being seen, according to Goldstone, as empiric generalizations concerning the phenomenon itself[11]. Intellectuals „desert" the regime prior to its immediate downfall, while it tries to make-up for its short-falls with a program of all-encompassing reforms. The fall of the regime is most of the times precipitated by its perceived inability to deal with the military, economic or political challenges, and not by the actions of the opposition *per se*. The opposition manages to take over the state, and a succession of political groups contest for the leadership of the new government. The moderate factions are the immediate leaders, but they are soon replaced by radicals who go on to enact a program of wide social and political transformation fo the society. The scope of the transformation of the society leads to a conflict between moderates and revolutionary radicals, which normally ends up with the ascent to power of a military figure, that accommodates the transition of the revolution towards another moderate phase, during which the new regime acts with pragmatism[12].

The criticism leveled against the first generation of theorists and theories[13] is that there is, at least according to Foran and to Goldstone, an obvious reluctance of looking for the causes of the revolutionary phenomenon. Moreover, the „natural historians" are content with identifying the empiric occurrence of the intellectual contestation of the regime and not with its genesis[14]. John Foran boldly points out that the first generation theorists are rather more preoccupied with "describing" revolutions instead of "explaining" them[15].

The first generation is followed according to Goldstone by the general theories of revolution[16]. In opposition with the first generation, the second category remains extremely fluid both for Goldstone and for Foran. At times it seems more a residual category that needs to separate chronologically the first generation from the "structuralist" wave. The authors of the taxonomy themselves go at great lengths to ensure the paradigmatic coherence that the classification should entail: thus, initially, the "general theories of revolution" Goldstone adheres to become for the same author "general theories of political violence"[17]. Moreover, the authors belonging to this category are a matter of dispute. For example, Tilly is positioned differently by the two authors: Goldstone sees him as a representative of the second generation, whereas Foran sees him belonging amidst the structuralists[18].

Within the second generation of theories, in order to draw a clearer outline, Goldstone distinguishes between the psychological approach to the study of revolutions and the systemic

---

[9] Goldstone, „The Comparative and Historical Study of Revolutions", 189.

[10]John Foran, *Taking Power. On the Origins of Third World Revolutions* (Cambridge: Cambridge University Press, 2005), 8-9.

[11]Goldstone, „The Comparative and Historical Study of Revolutions" (1982), 189.

[12]Goldstone, „The Comparative and Historical Study of Revolutions" (1982), 189-192.

[13] For an outline of the most representative works encompassed by the tradition of „the natural history of revolution" see Crane Brinton's *Anatomy of Revolution,* (Vintage Edition, New York: Random House), 1968 or Lyford P. Edwards' *The Natural History of Revolution,*(Chicago & London: The University of Chicago Press, 1973).

[14]Goldstone, „The Comparative and Historical Study of Revolutions" (1982), 192.

[15]Foran, *Taking Power. On the Origins of Third World Revolutions*, 9.

[16]Goldstone, „The Comparative and Historical Study of Revolutions" (1982), 192.

[17]Goldstone, „The Comparative and Historical Study of Revolutions" în *Revolutions. Theoretical, Comparative and Historical Studies*, ed. Jack A. Goldstone, 5 (Wadsworth Cengage Learning, 2008), 193.

[18]Foran, „Theories of Revolution Revisited: Toward a Fourth Generation?", 2.

approach. The first[19] is built around the hypothesis that revolution is a particular response/reaction to increasing misery or oppression. The systemic approach, best exemplified by the works of Smelser or Johnson insists that the study of revolutions as an ultimate form of social change must start from the study of various forms of disequilibria within the social system[20].

Adding to the vagueness of the second generation is the form that the second sub-category takes later in Goldstone's view. Not only does he rname the generation, but he also makes room in it for Huntington's thesis on the effects on uneven modernization, as a synthesis of the two previous sub-categories, the psychology inspired theories and the systemic branch of the generation[21].

In spite of the great variety or flexibility that the second generation shows, the proponents of the generational classification try to sum-up the main characteristics of the theories comprised within this group. Nevertheless, the distinction is affirmed rather at a methodological level. In comparison with the "natural history" theorists, second generation scholars put an emphasis on increasing the number of cases they study. As comparison becomes the preferred method, second generation theorists believe that increasing the empirical sphere is warranted in order to avoid the vulnerabilities first generation theories had to deal with.

Adding to the specificity of second generation theories, Foran considers that the concepts grouped within this category can be best seen as what Rod Aya named "volcanic" theories of revolution. Revolutions are almost inevitably the result of accumulating social or emotional pressure. Theories falling in this group can be subdivided for Foran between Parsons inspired theories (such as the works of Smelser or Johnson) and psychological approaches (best summed up by the works of Gurr or Davies, focusing on relative deprivation[22]).

Although Foran tries to make the category more coherent, by trying to establish tha paradigmatic foundations of second-generation theories, he is much more successful in pinpointing the problems these theories raise. Moreover, it is important to note that Foran's emphasis on the criticisms brought against second-generation theories is proved by his reluctance to find a name for the second generation (thus eschewing the problems that Goldstone had to face).

For Foran, as for Aya, the problems facing second generation theories are numerous. Neither relative deprivation, not sub-systemic disequilibria are easy to observe or measure. Moreover, the outline of the explanatory model remains tautological and, at the same time, prone to post-factum false identifications[23]. Second generation theories are tautological because they fail to move beyond the deprivation-violence hypothesis and self-referential because of the tendency to identify disequilibria after the revolutionary events have taken place. Last, but not least, Foran emphasizes that in spite of the second generation theorists' adherence to the imperative of subjecting a larger number of empiric cases to their comparative framework, second generation theories are unable to explain the major characteristic of revolutions themselves: their rare occurrence and their totally extraordinary nature.

If the second generation of theories raises numerous questions and problems for both Foran and Goldstone, the third generation seems to offer a rather more homogenous and coherent corpus of theories and concepts. The major characteristic that links theories placed under the generous umbrella of "structuralism" is their attempt to study, for the first time, in a systematic manner the causes of the revolutionary phenomenon[24]. Most of the times, revolutions are caused by the particular

[19] For works representative for this sub-category see James C. Davies, „Toward a Theory of Revolution", in *American Sociological Review*, Vol. 27, No. 1, (1962) and Ted Robert Gurr, *Why Men Rebel* (Princeton, New Jersey: Princeton University Press, 1970).

[20]Goldstone, „The Comparative and Historical Study of Revolutions."(1982), 192-194.

[21]Goldstone, „The Comparative and Historical Study of Revolutions" (2008), 5.

[22]Foran, *Taking Power. On the Origins of Third World Revolutions,* 9.

[23]Foran, „Theories of Revolution Revisited: Toward a Fourth Generation?", 2.

[24]For relevant works that fall into this category see Theda Skocpol, „France, Russia, China: A Structural Analysis of Social Revolutions" în *Comparative Studies in Society and History*, Vol. 18, No. 2, (Apr., 1976); Theda

outline of the conflicts between states and elite groups and by structurally determined weaknesses of the states themselves.

It is important to note that most theorists falling within this category affirm the autonomy of the state as an institution; distinct from the interests of elites and dominant classes, and the existence of a competitive system of states exerts pressure on the states themselves. Within this competitive system, the states unable to cope with the challenges the system of states itself generates are subject to political crises that set-up successful revolutions[25].

Besides the preoccupation with the causes of the revolutionary phenomenon, another direction of the structural theories of revolution consists of identifying the types of states that are prone to be affected by the phenomenon. Moreover, somewhat reverting to the scope of the first generation of theories, structural theorists also try to build-up a theory that explains the results of the revolutionary process. This development is entwined with the emphasis put on the identifying the causes of the revolutionary phenomenon[26].

It is true that there is a clear difference between Goldstone's and Foran's approach. Goldstone insists on the characteristics of the generation itself and on the main issues studied by structuralist scholars – the complex relationship between the states and the elites, the causes of rural or urban revolutionary events. Foran prefers to identify the precursors of the structuralist generation, thus discussing the contributions of Eric Wolf or Barrington Moore, while trying to account for Theda Skocpol's study's central position within the third generation of theories of revolution[27]. While Goldstone focuses on identifying the main tenets of the structuralist approach, Foran is more interested on identifying the scholars that belong to it.

The generational perspective concludes with the fourth generation of theories of revolution. Its somewhat adjacent character is shown not only by the lack of a proper label, but also by its purely situational position within the efforts of Goldstone and Foran. The fourth generation, while supposing to lead forwards the efforts into studying revolutions, is defined more by the criticism brought inevitably to third-generation approaches and by the inescapability of chronology. In a dialectic manner, the fourth generation develops and refines the hypotheses and the methods of the structuralist wave, aware both of their shortcomings and of their potential. Thus, Foran underlines the fourth generation's preference for multi/causel models that strive to integrate factors as diverse as economy, politics and culture, while paying attention to the importance of discourse or ideology[28].

As far as Foran is concerned, the main characteristics of the post-structuralist generation lie with questioning the issue of agency and exploring the role culture plays in revolutionary dynamics. For Goldstone, the task of the new generation of theories and of theorists is to question Skocpol's main assumptions, such as the stability of the regimes[29]. Goldstone also tries to sum up the new elements that are factored in by the multi-causal approaches of the fourth generations. Most prominent among these are concepts such as dependent development, demographic pressures, and cultures of rebellion or loss of nationalist legitimacy[30].

Skocpol, *States and Social Revolutions*. *A Comparative Analysis of France, Russia and China*, (Cambridge: Cambridge University Press, 1979), Theda Skocpol & Ellen Kay Trimberger, „Revolutions and the Development of Capitalism" in Theda Skocpol, *Social Revolutions in the Modern World* (Cambridge: Cambridge University Press, 1997); Charles Tilly, „Does Modernization Breed Revolution?" in *Revolutions. Theoretical, Comparative and Historical Studies*, ed. Jack A. Goldstone, Wadsworth Cengage Learning, 2008; or Charles Tily, *Regimes and Repertoires*, (Chicago & London: The University of Chicago Press, 2006).

[25]Goldstone, „The Comparative and Historical Study of Revolutions" (2008), 6-7.

[26]Foran, *Taking Power. On the Origins of Third World Revolutions,*11.

[27]Foran, „Theories of Revolution Revisited: Toward a Fourth Generation?", 3-4.

[28]Foran, „Theories of Revolution Revisited: Toward a Fourth Generation?", 16-17.

[29]Jack A. Goldstone, „Toward a Fourth Generation of Revolutionary Theory", *Annual Review of Political Science*, Vol. 4 (2001): 172.

[30]Goldstone, „Toward a Fourth Generation of Revolutionary Theory", 172.

At the same time, it is important to notice that Goldstone insists that continuity between the structuralist theories and the fourth generation is maintained. Fourth generation theories remain theories that deal not only with the multi-causal nature of revolution, but also try to find explanations for the results. Moreover, the future theories of revolution must accommodate actors more diverse than earlier theoretical endeavors, while accounting for the importance of concepts such as identity, ideology or gender, while methodologically, rational choice theory, quantitative or Boolean approaches should define fourth generation studies[31].

Limits of the generational classification

The limits of the generational classification concern the exclusion of several important contributions to the study of revolutions, the problems concerning the leading characteristics that define the first generation of theories, the flexibility in identifying and defining the different categories (especially the differences that set apart the second and the third generation) and the bias towards the structuralist perspective, shown especially by the debate on the merits of the fourth generation of theories. Last, but not least, the appeal to agency and culture in the study of revolution is not sufficient to draw a distinction between the third and the fourth generation of theories of revolution as works related to the structuralist wave already employ these approaches and as the epistemic and methodologic assumptions of the third generation can remain unchallenged even while focusing on culture or ideology.

Some of the limits the generational classification exhibits are not particular to the classification itself – the flexibility and elusiveness in regards to several theoretical perspectives and concepts is common to several such perspectives. Sometimes, the classifications lead to definitional extremes – the methodological and epistemic framework of a particular theory can be transformed easily in the main theoretical tenets of another perspective. For example, Johnson is convinced that relative deprivation theories are theories that focus on agency, because of the emphasis they place on the individual apprehension of the deprivation. Moreover, Johnson believes that there are few differences that set apart Huntington and Skocpol. Eisenstadt, on the other hand, takes a different perspective, placing in the same category the „natural historians of revolution" and the relative deprivation theorists (in spite of the fiery criticism that Gurr levels against Edwards or Brinton).

Another prominent flaw of all major classification attempts is their inability to encompass all the major works in the field. The problem, which is common to the generational classification, has three aspects. On the one hand, while some endeavors may be considered proto-theoretical indeed, such as Tocqueville's account of the effects of the French revolution, their influence on contemporary theoretical models is indisputable. Moreover, while a case can be made for the exclusion of authors which do not attempt to build-up theoretical models (such as Tocqueville or Arendt), the same cannot be said about works which deal precisely with the topic of revolution – for example, with the prominent exception of Tilly's attempt, few classifications try to fit in Marx or Lenin. Last, but not least, prominent theoretical models remain unaddressed by the classifications.

The generational perspective is in essence an epistemic attempt inspired by Popper's and Kuhn's criteria regarding theoretical endeavors[32]. Thus generations are employed rather as paradigms – successive theoretical waves that initially try to explain the exemplary cases of the empiric area studied, before attacking the central major hypotheses. Moreover, in a truly Popperian manner, theories are disproven for neither Goldstone nor Foran by empiric reality, but by other theoretical endeavors, belonging to latter generations, that manage to offer a better explanation of revolutionary events. The influence of Kuhn and Popper is nevertheless not dominant – Skocpol is criticized for her theory's inability of predicting or explaining the 1989 revolutionary wave or the 1979 Iranian Revolution.

[31]Goldstone, „Toward a Fourth Generation of Revolutionary Theory", 175.

[32] See Karl Popper, *The Logic of Scientific Discovery*, London & New York, 2002 and Thomas Kuhn, *Structura revoluţiilor ştiinţifice,* Bucureşti: Humanitas, 2008.

There are at the same time several other problems with the generational classification. The chronologic influence makes it at times rigid and leads the inclusion in a generation of works and concepts that belong to different epistemic traditions and which employ different if not outright incompatible research methodologies. For example, the first generation, that of the "natural historians" seems rather a post-factum attempt of artificially setting up a category in order to group together the first attempts of studying the revolutionary phenomenon. The coherence of the generation is given rather by the preference of the authors included in the category to compare revolutions to natural phenomena and by the common professional background (historians). Moreover, chronology matters. Brinton for example, in spite of a positivist-inspired methodology, remains concerned with the importance of accepted ideological prescriptions during the course of revolution.

Moreover, if the role of the first generation is to comprise the foundational theoretical, it is striking to observe that important attempts at studying revolution are simply left out. The works of Sorokin, Adams, Le Bon, Tocqueville or early Marxist perspectives are left out. The "natural history of revolutions" serves rather as a target of later generations, needed in order to establish epistemic legitimacy.

At the same time, it is important to notice that the generational perspective is no stranger to ignoring the contributions of authors that come from outside the major debates on the nature and study of revolutions. Authors such as Arendt, Dunn, Dahrendorf, or Walzer are difficult to accommodate within the generational perspectives, although their contributions gain paradigmatic relevance.

Moreover, I believe that the distinctions between the second and the third generation are themselves problematic. On the one hand, it is obvious that some authors remain problematic and tend to blur the distinction between the two generations – Tilly's and Huntington's cases are symptomatic to this regard, both authors shifting between the two generations without becoming comfortable members of neither one of them. Sometimes the internal borders within generations shift in order to make room for "unclassifiable" authors - it is for this reason that relative deprivation becomes for Goldstone in his second attempt to describe the generational classification a theory concerning disequilibria within systems in order to better integrate Huntington's thesis on the impacts of modernization.

Moreover, the differences between the second and the third generation exclude that both categories of theories share a significant positivist outlook, being both integral parts of the tradition of explanation within social sciences[33]. The insistence on causality is another clear link between second and third generation theories. Moreover, in spite of Aya's criticism, there are few differences between the "volcanic" model of revolution and structural analysis. Both generations have a similar outlook on structural or systemic imbalances. Epistemically there can be no distinction between a theory explaining revolution as the result of an incredible accumulation of individual discontent and resentment and a theory that posits that the increasing difficulties of state institutions in front of political, military or economic challenges eventually result in revolutions. The differences lie in the level of analysis where each theory chooses to operate – while second generation theories prefer to focus on disequilibria between the different components of the wider social system, third generation theories focus either on the relationship between the autonomous states and the wider international system they are a part of or on the dynamics of particular institutions. The implicit difference seems to be rather that between the implicit functionalist assumptions of the second generations, heavily influenced by Parsons and the Marxist heritage or influence of many of the third generation theories.

[33] For the distinction between explaining and understanding see Martin Hollis, *The Philosophy of Social Science. An Introduction*, (Cambridge: Cambridge University Press, 2003) or Martin Hollis and Steve Smith, *Explaining and Understanding International Relations*, (Oxford: Clarendon Press, 1991).

Imbalances or wider institutional disequilibria are the causes of revolution – the difference is to what degree human societies do act as systems and to what degrees are revolutions functions of the system itself.

Nikki R. Keddie also insists that the concept of a gap between expectations and results or of a structural imbalance is not enough to differentiate between second and third generation theories[34]. She suggests that the difference between the two groups of theories might lie with the different empiric load theories operate with. In order to improve the validity of their predictions, second generation theorists attempt to increase the number of cases taken into analysis, even if this means sometimes leaving the space of revolutions and discussing border-line cases (or wider social collective actions involving violence), whereas the proponents of structural theories focus on a reduced number of cases (successful social revolutions). However, while Skocpol focuses indeed on a handful of cases, both Gurr and Tilly try to encompass rebellions, revolts or wider protest movements altogether, thereby expanding the field of inquiry, but raising the additional question of unwarranted concept elasticity.

Moreover, theories from both generations are concerned on some occasions with the same phenomena. Neil Smelser tries to explain collective action, the focus of many of Charles Tilly's works – it is obvious that the methodology and the dynamics of the authors are nevertheless different.

In spite of Foran's or Goldstone's attempt to draw clear lines between the two generations, theories belonging to these groups easily become interchangeable. The most puzzling aspect is that the authors belonging to the categories themselves have no trouble in breaking the boundaries between the second and the third generation. Gurr's thesis can easily be equated with that of Skocpol, as far as Eisenstadt is concerned. His own analysis on the nature of political and institutional centers is similar with Tilly's view on the relations between elite groups Aya has no trouble in explaining Theda Skocpol's hypotheses in Tilly's terms[35]: the revolutionary situations whose importance he emphasizes are the "political revolutionary crises" Skocpol considers as paramount for the outbreak of revolutions.

The generational classification also ignores agent-centered theories. Neither Freud-inspired perspectives, nor theories employing a rational approach to the study of revolutions find themselves comprised by the generational classifications (although it is important to note that rational choice theory is considered by the framers of the classification itself and by prominent third generation theorists a useful addition to the study of revolutions).

The fourth generation of theories is also affected by the imprecision regarding its definitions. Foran and Goldstone do not agree on its main tenets and research objectives, or on its relationship in regards to the structuralist theories. While Goldstone believes that fourth generation theories might perfect the flaws of the third generation, Foran is passionate about the new directions that theories of revolution might explore: integrating agency-centered approaches and culture into the study of revolutions.

While insisting on agency and culture addresses the vulnerabilities attributed to structural theories might prove itself the solution to the study of revolutions, it is important to note that structural theorists themselves (nor their precursors) are that averse to discussing ideology and culture. Skocpol herself becomes eventually convinced that ideology can fit into her causal explanatory pattern[36], whereas Eisenstadt focuses from the start on integrating cultural explanations into his theoretical model.

---

[34]Nikki R. Keddie, „Introduction" in *Debating Revolutions*, ed. Nikki R. Keddie, IX-XI (New York and London: New York University Press, 1995).

[35]Aya, *Rethinking Revolution and Collective Violence. Studies on Concept, Theory and Method*, 72.

[36]See Theda Skocpol, „Cultural idioms and political ideologies in the revolutionary reconstruction of state power. A rejoinder to Sewell" in Theda Skocpol, *Social Revolutions in the Modern World, (*Cambridge: Cambridge University Press, 2005), 199-208.

The image of the fourth generation is therefore problematic. Insistence on agency, for example, under the guise of rational choice theory is neither a new attempt, nor has it opened revolutionary venues in the study of revolution[37], Aya himself arguing in its favor under the label of "vicarious problem solving"[38]. One of the most poignant criticisms to Skocpol suggests rational choice perspectives should be pursued in the study of revolutions[39]. While some fourth generation theorists might indeed question many leading assumptions of the third (or second) generation of theorists, it is by no means obvious that the post-structuralist effort marks or should mark a paradigmatic or epistemic break with previous undertakings. Third generation theories are not hostile *per se* to discussing agency. In addition to that, discussing culture does not equate to taking an agent-centered perspective and, as Michael Taylor shows, rational choice approaches are not incompatible with structuralist theoretical endeavors.

Moreover, structures and top-down constraining influence can be cultural as well. Francesca Poletta makes a convincing appeal towards "investigating the objective resources and constraints determined by the dimension of political structure"[40]. Simply appealing to culture does not entail shifting the study of revolutions towards an agent-centered perspective. In this light, culture becomes simply another structure that can fit the multi-causal pattern Goldstone calls for. However, adding culture to the list of structural constraints only increases the conceptual elasticity within the field - Charles Kuzman makes a convincing case in arguing that multi-causal patterns beg prioritization: "states matter, culture matters, social structure matters, accidents and history matters, everything matters"[41]

The transition from the first generation of natural historians to the post-structuralist research agenda is not that sudden and is not marked by increased paradigmatic differences or epistemic debates. The conclusion that new research into revolution must bring forth agency and culture does not entail by itself major changes, nor does it warrant a breach with extant epistemic assumptions or methodology.

Conclusion

The generational classification remains undoubtedly a major focal point in the study of revolutions. Its flaws however are numerous. First of all, the categories themselves call for additional definitions, as overlapping between theoretical models seems to become at times a major issue. The distinction between the second generation of theories and the structuralist group of theories is problematic, as is the precise positioning of several authors. Secondly, numerous contributions are left outside the taxonomy, while alternative perspectives are too easily discarded. Fourth, the classification is not able to illustrate the main inter-paradigmatic debates within the field of theories of revolution. The generational classification places a major emphasis on the role of the third generation in shaping our accounts of the revolutionary phenomenon. This focus however is insufficient in clearing out the attributes and characteristics of the post-structuralist effort, which is not saved by the appeal for the study of culture and the integration into main theoretical models of agent-centered perspectives.

---

[37]For an interesting perspective analyzing revolutions from a rational choice perspective see Erich Weede and Edward N. Muller, „ Rebellion, Violence and Revolution: A Rational Choice Perspective" in *Journal of Peace Research*, Vol 35, 1 (1998): 43-59.

[38] Aya, *Rethinking Revolution and Collective Violence. Studies on Concept, Theory and Method*, 70.

[39] See Michael Taylor, „Structure, Culture and Action in the Explanation of Social Change" in *Politics and Society*, 17 (1989), 116-119.

[40] Francesca Poletta, „Culture Is Not Just In Your Head", in Jeff Goodwin, James M. Jasper (eds), *Rethinking Social Movements: Structure, Meaning and Emotion*, (Boulder, Oxford, New York, Toronto: Rowman & Littlefield Publishers Inc., 2004), 97.

[41] Charles Kuzman, „The Post-Structuralist Consensul in Social Movement Theory" in Jeff Goodwin, James M. Jasper (eds), *Rethinking Social Movements: Structure, Meaning and Emotion*, (Boulder, Oxford, New York, Toronto: Rowman & Littlefield Publishers Inc., 2004), 113.

References

- Aya, Roderick, *Rethinking Revolution and Collective Violence. Studies on Concept, Theory and Method* (Amsterdam: Het Spinhuis, 1990).
- Brinton, Crane, *Anatomy of Revolution,* Vintage Edition, (New York: Random House, 1968).
- Eisenstadt, S. N., *The Revolution and the Transformation of Societies. A Comparative Study of Civilization* (New York: The Free Press, 1978).
- Foran, John "Theories of Revolution Revisited. Toward a Fourth Generation?", *Sociological Theory*, Vol. 11, 1 (Mar. 1993).
- Foran, John, *Taking Power. On the Origins of Third World Revolutions* (Cambridge: Cambridge University Press, 2005).
- Goldstone, Jack A ., "The Comparative and Historical Study of Revolutions", *Annual Review of Sociology*, Vol. 8 (1982).
- Goldstone, Jack A. „The Comparative and Historical Study of Revolutions" in *Revolutions. Theoretical, comparative and Historical Studies,* (Wadsworth Cengage Learning, 2008).
- Goldstone, Jack. A., "Toward a Fourth Generation of Revolutionary Theory", *Annual Review of Political Science*, 4 (2001).
- Davies, James C., „Toward a Theory of Revolution", in *American Sociological Review*, Vol. 27, 1 (1962) Ted Gurr, Robert, *Why Men Rebel* (Princeton, New Jersey: Princeton University Press, 1970).
- Hollis, Martin, *The Philosophy of Social Science. An Introduction*, (Cambridge: Cambridge University Press, 2003).
- Hollis, Martin and Smith, Steve, *Explaining and Understanding International Relations*, (Oxford: Clarendon Press, 1991).
- Johnson, Chalmers, *Revolutionary Change* (Stanford: Stanford University Press, 1982).
- Keddie, Nikki R., „Introduction" în *Debating Revolutions*, ed. Nikki R. Keddie, IX-XI (New York and London: New York University Press, 1995).
- Kuhn, Thomas, *Structura revoluţiilor ştiintifice, (*Bucureşti: Humanitas, 2008).
- Kuzman, Charles, „The Post-Structuralist Consensul in Social Movement Theory" in Jeff Goodwin, James M. Jasper (eds), *Rethinking Social Movements: Structure, Meaning and Emotion*, (Boulder, Oxford, New York, Toronto: Rowman & Littlefield Publishers Inc., 2004).
- Lyford P. Edwards' *The Natural History of Revolution, (*Chicago & London: The University of Chicago Press, 1973).
- Moore, Barrington Jr., *Social Origins of Dictatorship and Democracy. Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1992).
- Poletta, Francesca, „Culture Is Not Just In Your Head", in Jeff Goodwin, James M. Jasper (eds), *Rethinking Social Movements: Structure, Meaning and Emotion*, (Boulder, Oxford, New York, Toronto: Rowman & Littlefield Publishers Inc., 2004).
- Popper, Karl, *The Logic of Scientific Discovery*, (London & New York, 2002)
- Skocpol, Theda , „France, Russia, China: A Structural Analysis of Social Revolutions" in *Comparative Studies in Society and History*, Vol. 18, 2 (Apr. 1976).
- Skocpol, Theda, *States and Social Revolutions*. *A Comparative Analysis of France, Russia and China*, (Cambridge: Cambridge University Press, 1979).
- Skocpol, Theda and Trimberger, Ellen Kay, „Revolutions and the Development of Capitalism" in Theda Skocpol, *Social Revolutions in the Modern World* (Cambridge: Cambridge University Press, 1997).
- Skocpol, Theda, „Cultural idioms and political ideologies in the revolutionary reconstruction of state power. A rejoinder to Sewell" in Theda Skocpol, *Social Revolutions in the Modern World, (*Cambridge: Cambridge University Press, 2005).
- Tilly, Charles, *From Mobilization to Revolution* (Reading, Massachusetts: Addison-Wesley Publishing Company, 1978).
- Tilly, Charles, „Does Modernization Breed Revolution?" in *Revolutions. Theoretical, Comparative and Historical Studies*, (ed. Jack A. Goldstone, Wadsworth Cengage Learning, 2008).
- Tily, Charles, *Regimes and Repertoires*, (Chicago & London: The University of Chicago Press, 2006).
- Taylor, Michael „Structure, Culture and Action in the Explanation of Social Change" in *Politics and Society*, 17 (1989).
- Weede, Erich and Muller, Edward N., „ Rebellion, Violence and Revolution: A Rational Choice Perspective" in *Journal of Peace Research*, Vol 35, 1 (1998).
- Wickham-Crowley, Timothy, „Teorii structurale ale revoluţiei" in John Foran (coord.) *Teoretizarea revoluţiilor,* coord., (Iaşi: Polirom, 2004).
- Wolf, Eric R. *Peasants* (Englewood Cliffs, New Jersey: Prentince Hall, 1966).

THE NEW DIMENSION OF THREATS THAT THE EUROPEAN ACTORS ARE SUBJECT TO IN NEIGHBORING STATES CRISIS MANAGEMENT

DĂNILĂ VALENTIN-BOGDAN[*] and DĂNILĂ MARIAN-ALIN[**]

Motto: "It's good to have power, but it's better not to need the power."
Mahatma Gandhi

Abstract
Restructuring activities of the current international system increases the amplification of the existing inequalities in developing countries with unlimited potential for the European market.
Thus, amid security system vulnerabilities and uncontrolled situations, the local conflicts may spread to neighboring regions, affecting also the strategic security environment.
The dynamics of political and military events reveals that security and defense go beyond the responsibility of a single country, a fact which causes a greater involvement of democratic states and international organizations.
Against this background, the work in question provides not only an insight into the new international dimension, but also a possible response version in order to enable risk and vulnerabilities (of economic, social or religious nature) management, in the benefit of all.
Therefore, restricting undesirable phenomena can be achieved by harmonizing the actions on the various interest sectors at national or international level, similar to the objectives underlying the American concept of "homeland security".
As a solution, the concept itself connects everything that can be connected, when we talk about security, in a widespread network of state intervention mechanisms, namely, the external instruments of power. For this reason, homeland security is characterized by a plurality of stakeholders, from a local and national level to a European and transatlantic one.

Keywords
"security environment", "global stability", "geopolitical changes", "homeland security", "strategic objectives".

The Orient continues to be a traditional hotbed of conflict. We can talk about big states, with some influence, as Turkey, Iran, India, Afghanistan, but history has shown that an outbreak of the conflict in the area has often led to a chain reaction. Regional adversity is generated by regional-cultural differences, which brings Arabs against Muslims or Jews.

Also, according to Karl L. Brown, the region has always been a *penetrated system*, subjected to a high level of external intervention, a fact which nourished the Arab-Israeli hostility. This has been due to the considerable oil resources and the geographical position of the region which is located at the confluence of NATO's interests (via Turkey), Russia, China and, most recently, the EU.

In this context, geographically speaking, Eastern Europe is very close to Russia, so that Moscow believes that the events in the area can directly influence the stability and the security of the country under the concept of *close neighbourhood*. It is important to note, however, that the Middle East is not *stricto sensu* a part of the *close neighbourhood*, as it has never dictated them their

[*] PhD Candidate, "Mihai Viteazul" National Intelligence Academy, Bucharest, Romania (danila.valentin.bogdan@gmail.com).
[**] Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest, Romania (danila_marian_alin@yahoo.com).

domestic and foreign policies in the way that it did in Moldova. The East can, however, affect the situation in Central Asia and the Caucasus - Chechnya, Daghestan – scandalizing the Islamists. Russia has good intentions regarding the cooperation with the Greater Middle East especially by settling and securing the arms market.

The war in Iraq-2003 was the United States way to demonstrate to Russia that it ignores its global leadership and power ambitions, thus, leading to misunderstandings on the part of Moscow and the EU. However, Russia was not involved in the settlement of the conflict, leaving this task to Germany and France. Russia's drawback - produced by the Iraqi conflict - lies in the fact that regional instability brought with itself the loss of several billion dollars debt, which Iraq owed to Moscow, as well as the loss of the economic-military contracts between Russia and the Saddam regime. In 2004, Moscow canceled 90% of the external debt and promised investments of four billion dollars to rebuild the country. Russia condemned the U.S. intervention, adopting the position of defender of the Arab cause.

As regards the situation in Syria, governmental forces are working now with more determination in order to neutralize the outbreaks of instability, using a variety of means of combat. However, the army has not yet used the full arms potential and combat equipment, the number of troops entering the battle remaining limited.

The chain of events and changes in South-Eastern Europe during the 90s led to policy responses, policy approaches and long-term strategies, which are sophisticated enough for this part of Europe.

The history of the South-Eastern region has no better example than these two European Union principles that interact dialectically. However, the experience of four wars in the last decade in the South-Eastern Europe calls for rethinking and improving the strategic principles and EU instruments for South-Eastern Europe.

The largest and most dangerous instabilities in international relations are typical for transition periods, during which the old and new structures of the international system at different levels are at conflict. Under these circumstances, even the smallest changes can cause strong reactions of transforming the initial conditions.

The Southeast-European instabilities are caused by several structural causes such as:
- The transition from a bipolar world to one not yet defined of the international system, a fact which has led to a trend towards unilateralism and to the transformation of the area into one global clash of interests and states. A national aspect of this process in the region is that some countries tend to gravitate from a global powerhouse to another. The European Union with its Euro-Atlantic dimension is certainly one of these centers of power.

Another consequence is the balkanization, fragmentation of regional relations between states and international relations polarization around centers of power.

After the Cold War, the European Union, the United States and other developed countries made the European integration possible; on the other hand, Russia continued to be hesitant, and wavered between playing the role of broker of the new power balance and being dependent on Balkan countries, respectively playing the constructive role of world leader in the 21st century, by stimulating the regional formation tendencies as a regional organizational expression of globalization.

- The painful changing of the region, from a condition of lack of an economic and trade area, in a more cooperative economic space.

- Internal systemic transitions of some countries in South-East Europe and various national attitudes vis-à-vis social, economic, political and strategic homogeneity, including different orientations of the recent global centers of power.

- Various models and levels of adaptation of some countries in the region to expanding Western democratic state is based on the principle of "common security" and market economy system - a process generated by the collapse of socialism in its Soviet and Yugoslav variant.

- The predominantly destructive disintegration of the Yugoslav Federation, four wars that followed, and the emergence of state-building issues in South Eastern Europe.

It is sufficient to mention only the Cold War period with its three types of state and blocks that existed at that time: NATO, the Warsaw Treaty Organization, and those who were not allied. The infrastructure - transport, communications, economic relations, etc. – has reflected the thinking and polarized actions during the Cold War.

The result was the state separation and because they were not related, it was followed by a further distancing of the region from other parts of the world, which adapted to the growing economic, informational, humanitarian imperatives.

A broader picture was clouded by the difficulty which the transitional countries were undergoing (excluding Greece and Turkey); we refer to the countries which have experienced the shift from state ownership and planned economy to private ownership and market economy. The poor management of transformation processes, including economic and political adventurer behavior in some countries, repeated criminal privatization cases so that all these instabilities have generated a whole range of risks, occasionally threatening the continuity of state authority in different countries (Albania, Romania, Bulgaria, Republic of Moldova).

Ethnic and religious antagonisms motivated by cognitive, emotional, perception deficiencies and multiplied by careerist political activism. This is the most discussed source of conflict in the last decade - a lasting source of instability, regional and national security threats. Mobilizing Croat ethnics warned observers and participants in the South East European conflicts.

Strategic components and branches that are specific elements of Southeastern Europe security: analyzing the situation in Romania we find that the national security intelligence doctrine (2003) establishes three security strategic components:

- National defense - a set of measures and actions undertaken by the Romanian state to protect and guarantee national values;

- National security - the bail provided by the State in relation to protecting and fulfilling objectives and security interests;

- Public order - a set of politic, economic, social, directions allowing the normal functioning of state institutions, maintaining public peace, assuring citizen security, respecting and protecting their rights.

In the field of international relations, phrases such as the ones enumerated belor are more commonly used:

- Collective security: the condition of the relations between states, created by taking, on Treaty, measures of common defense against aggressions;

- areal security (under-regional): situation resulting from the mutual relations established by the states in a relatively small geographic area, with a specific feature that ensures states territorial integrity, independence, sovereignty and protection against any threat;

- Regional security (continental): safety condition of the states in a continent on respect for the independence, sovereignty and territorial integrity.

- Global security: state of the international system in which each state is satisfied by being safe from any such aggression or interference which is able to affect fundamental values;

- Security Policy: an assembly of measures and actions in all social policy areas designed to ensure the optimal state preservation and to strengthen defense and to promote its fundamental interests.

In terms of everyday relationships, we are dealing with the term of citizen safety, representing the convergence of several security subsystems: food, life, economic, financial, social, health, property, environmental, etc. issues.

Hence, at least two logical reasons result:
- Security is more than safety, and by achieving safety it also maintains and protects security;
- National security is a part, but also a course of action or means in achieving security.

Modern situation

An accurate and complete analysis of the current security environment, with the threats it poses to state's national interests requires knowing the evolving trends of global environment and regional security and threats. This approach can give us a closer image on the reality in which the security status needs to be provided.

Today, we face a series of combined threats to international stability, from "modern warfare" to war "without borders" or "asymmetrical warfare". Two main ideas shape what we see occurring with "modern war": the loss of the nation state monopoly on war and the return to the world of cultures in conflict.

Martin van Creveld in his book, "Making War", argues that the modern paradigm of war, where the nation-states wage a war for state reasons, using official armies struggling with other similar organizations is unusual from a historical point of view.

The overall security environment level reveals several trends of influence in the security field, such as: globalization, multiplication and diversification of global security actors, technologies proliferation, as well as the ever-growing importance of non-state actors, environmental issues increasing pressures on military and security processes and population growth.

Dealing with initial threats of a new type of war requires a commitment to propel military thinking and potency. First, we must resort to these qualities when we try to protect ourselves from the tendency to use technology excessively in order to meet new global challenges and the ever-increasing demands on our limited resources and operational forces. Recent events show us that the warfare based on advanced technology is ineffective against terrorism, giving results only when the enemy plays by the same rules, but it cannot simply ignore terrorism.

The new type of threat is due to a wide range of destabilizing factors, from regional gangs acting in border areas to attacks on the financial infrastructure by the organized crime, resulting in new operational and informational challenges.

The connection between war and crime involves ethnic enmity, refugees and criminal exploitation type. Conflicts are often fueled by criminal actions. These criminals usually have less advanced technology, but they are at the beginning of the exploitation of modern technology. The access to this type of technology is facilitated by money offered by criminal organizations, and so goes the distinction between war and crime.

There are far more intangible trends to predict the ability of these groups to influence global stability. In our world connected by cable, global organizations with modest political or economic means may carry out activities with a high impact, but with unpredictable consequences. As regards military intelligence structures, the operational challenge is to prepare our forces to respond to a broad spectrum of unexpected and extremely ambiguous threats. A new design approach to the next war in the 21st century will represent a window throwing light on future missions and providing an accurate assessment of unexpected and undefined threats.

The Black Sea Region

The complexity of the security environment in the Black Sea region highlights a number of state actors, in this case mainly referring to coastal states and non-state actors with an international location.

Wider Black Sea Region is a concept related on the same process of expanding democratic values, stability and peace in Europe, as well as the ones defended by EU and NATO. This is also a region where governments want to achieve security, modernization and a better standard of living for

their citizens. Thus, governments in the region have to deal with cross-border crime and threats given by reheating frozen conflicts.

The main features equally acceptable for the Black Sea region are situated on the line of two concepts that have been assigned two dual visions targeting the region; thus, the region is seen alternatively as a joining area - bridge and transit area - or a dividing area, respectively a border and buffer zone.

The attempts to theorize a cohesion of the region were hit by historical arguments - which has never witnessed a zone cohesion or collaborative culture arguments - non-existent and questioned by numerous unsolved bilateral cases, but also by geopolitical reasons - taking on the specific value, very different and unbalanced of the member countries, ranging from the giant Russian Federation, through the eternal presence of Turkish interests, by returning to the forefront of Ukraine (until recently subordinated to the interests of Moscow) to Romania and Bulgaria, NATO members and the little Georgia with confessed Euro-Atlantic aspirations.

Another issue widely accepted is the need to protect energy routes in the region, no matter if it is the piping route Baku-Tbilisi-Ceyhon or TRACECA projects or on Soupsa Bako-Tbilisi tarck or railway ones Tbilisi-Poti and Tbilisi-Batumi or the route of Nabucco and the planned White Stream with its variants Soupsa - Constanta through Crimea and the branch in Odessa Brody Gdansk for gas transport in northern Europe.

The Black Sea countries (Romania, Turkey, Bulgaria, Russian Federation, Ukraine and Georgia) are interested in creating a climate of stability and security in which they can conduct cooperative projects and economic and social development.

The Black Sea Economic Cooperation (BSEC), created in 1992, includes as full members also Albania, Armenia, Azerbaijan, Greece and Moldova. Other seven countries: Austria, Egypt, Israel, Italy, Poland, Slovakia and Tunisia have observer status.

BSEC decision-making body is the Council of Foreign Ministers, whose international secretariat has permanent headquarters in Istanbul. It is seen primarily as an experiment in order to prepare the EU enlargement and to train candidates in this regard.

Aspects of military cooperation in the area have not yet been addressed in the countries of the region, but only through bilateral or trilateral security plans. A hope for the normal regulation can be brought by the BSEC Organization, where they initiated a series of measures for nomination the situation in the region and cooperation in many fields, among all Member States.

It is worth emphasizing bilateral and multilateral military relations with the Black Sea countries, including neighboring countries: Bulgaria, Ukraine and Moldova, but also the project of Naval Cooperation in the Black Sea (Blackseafor) with the participation of Romania, Bulgaria, Georgia, Russian Federation, Turkey and Ukraine. Multilateral under-regional cooperation will mark the participation of Romania, together with Bulgaria, Greece, Turkey, Macedonia, Albania (Slovenia and the USA as observers) at the Multinational Peace Force in Southeastern Europe (MPF-SEE).

In the Romanian interest area, handling minorities represent the main sources generating risks and threats to national security. Despite the positive developments of international relations, in particular with neighboring States, the history confirms that Romania's political-geographic neighborhoods have influenced our destiny often.

In geopolitics of Europe, Romania has understood the need to use, as better as it could, its whole diplomatic assembly in order to overcome territorial or border disputes, crisis or potential conflicts.

Currently, the issue of economic security moves from the field of national economies in an increasingly well-defined regional and international economic complexes space. The accession and integration structures such as the European Union or the World Trade Organization are provided to participate and benefit from the advantages of regionalization and globalization.

About Threats

Early - to mid-1990s - represented a period of drastic change regarding the national security conditions for the EU Member States and the Balkan countries. For Greece, this change was complicated by an internal political transformation that began in 1974 and continued through the 90s. Among the factors that have an influence on the security situation in Greece during this period are found the political, economic, social, and regional ones, but also the location of Greece in the Balkans and eastern Mediterranean.

On the one hand, Athens has to adapt to the new security environment that emerged after the Cold War ended. Being a part of the Balkans and Eastern Mediterranean, Greece is geographically located in an unstable area.

Moreover, Athens had to deal also with "traditional" threats. For most European countries, the collapse of the Warsaw Pact and the Soviet Union triggered a profound change in their security policies. Greece was an exception to this rule, because for decades, Greek security policy considerations were dominated by threats from Ankara. In the post-Cold War era, Turkey remains the main concern of security for Athens.

Today post-Cold War global structures are in a state of flux. Analysts and policy makers in small countries try to identify and predict trends and recommend adjustment policies in developing models worldwide.

The challenge for Greece, a country of medium size, set strategically, and independent is to protect its territorial integrity, democratic system and values. Today's Greece can be described as democratic, internationalist, Western, free enterprise-oriented, and a sensible strategic outpost of the European Union and NATO, in troubled regions of the Balkans and Central and Eastern Mediterranean.

Following two "catastrophic" changes (the Cold War and the collapse of the Soviet Union), the Mediterranean region, the Middle East and much of its surrounding areas are in the midst of a rapid geopolitical development, however, without a clear direction. Analysts discern an "arch or triangle of crisis, stretching from the Balkans to Central Asia, Transcaucasia and Middle East." Most regimes in these regions are facing or will soon be facing a crisis of political legitimacy.

In addition, the transition from free bi-polarity to polycentrism, after the Cold War, has increased the autonomy of regional actors and intensified peripheral conflicts. The new environment presents the "actors" with new threats and opportunities.

Greece's strategic position mattered in obtaining NATO membership (1952). During the Cold War, Greece provided an essential link on the southeastern flank of NATO.

Turkey, for example, could have been isolated from other NATO members, if Greece wouldn't have participated also to the Alliance. For many Greek decision-makers, the country's strategic importance to the West has been underestimated and sometimes even neglected. Successive Greek governments have continued, however, to contribute on the Western defense strategy community.

Given the rather chaotic nature of the international system, small states, with their limited capacities, try to deal with their security problems by developing strategies based on the balance (internal and external) and / or alignment. Because small countries have fewer options and less freedom of maneuver than big powers in order to promote security interests more effectively, Greece sought to integrate its policies in their partners' ones from the European Union and NATO allies.

From a historical point of view, the main strategic dilemma for Greek policy makers was whether to ally with the dominant maritime power in Eastern Mediterranean region or with the dominant land power in the Balkan Peninsula. In most cases, aware of their responsibility to defend two thousand Greek islands that stretch from the eastern Aegean Sea to the Adriatic, they chose to ally with maritime power.

During the 1940s and early 1950s, the difference between conservatives and liberals (communists were outcasts because of the civil war in Greece) on security issues and NATO had its

importance. Basically, both groups believe that the main threat regarding the Greek security comes from beyond its northern borders and communism (external and internal) threatened mutual cherished values. Therefore, NATO was seen as essential to national defense and the United States have been treated as a natural ally and guarantor of Greece.

Greek defense orientation until the mid-1960s was based on the U.S. belief that the main security problem would be internal rather than external. Greek armed forces (in contrast to Turkey's) were first stocked and organized to meet internal communist threat. According to NATO planning, it was expected that Greece, "with some limited equipment, could cause a delay of Soviet forces in the event of a global war."

Even earlier than the late 1950s, the southeastern flank of NATO has faced periodic cycles of high intensity. The emergence of the Cyprus problem in 1950, the Greek-Turkish crisis in 1960, the Greek Junta done after the 1974 coup and the Turkish invasion and occupation of the island (which continues today) was complicated by a series of Greco-Turkish friction in the Aegean region, due to the pressure of Turkey to revise the Aegean status quo. This has led to refocusing the defense doctrine in Greece, with the officially declared "threat from the East", as the main concern for security.

Restoring the democratic regime in 1974 was indeed a major turning point in Greek Security Policy. This new period of Greek political history, lasting from 1974 until now, has been characterized by diversifying the external relations in Greece, including a relative decrease regarding its relations with the U.S., in favor of economic and political integration in Western Europe and improving relations with Eastern Europe.

In the post-Cold War era, Greece faces what she considers a major threat to security and a number of risks: the threat is seen as coming from her neighbor in the East (Turkey) and risks are considered as resulting from the instability in regions like the Balkan and the Mediterranean. In addition, Greece is involved in a dispute on the issue of recognition of the official name of FYROM and is concerned about human rights for the Greek minority in Albania.

The perception of a potential military threat from Turkey was widely shared by the public opinion and reflected in expert debates, as well as in the security planning for at least the last two decades. Cyprus crisis of 1974 can be seen as turning point in Greek security considerations after the Second World War: Turkish invasion and the subsequent occupation of northern Cyprus, was for Greece, a very traumatic experience, but also the basis for "new thinking" in terms of security.

Greek security planners are concerned about Turkey's revisionist objectives regarding Greece, expressed in official statements, diplomatic initiatives and military actions (including conducting "offensive" armed forces in the Aegean). Its reduced geography and population, compared with that of Turkey further increases insecurity in Greece.

As one analyst points out, "Turkish officials' statements that, usually are on the first page in the media in Greece, has intensified Greek fears. For example, the Turkish Prime Minister Demirel stated in 1975 that "... half of the Aegean is ours. Everyone knows that it is ... We know how to crush our enemies' heads when Turkish nations' prestige, dignity and interests are attacked." Moreover, direct challenges (e.g. "the group of islands, are located at a distance of 50 km from the Turkish coast ... should belong to Turkey") and doubts about the Greek sovereignty over the Aegean islands were regarded with fear.

"Revisionist actions" in Turkey include violating the Greek airspace, the refuse to show delimitation of the Aegean continental shelf to the International Court of Justice, threats of war, in case of Greek maritime territorial limits expansion, from six to twelve miles (according to the Law of the Sea Convention of 1982), and challenges in the Aegean status quo, codified by several international treaties (1923 - Peace Treaty of Lausanne, 1932 - Agreement between Turkey and Italy, and the Treaty of Paris in 1947, which led to Imia crisis in January 1996).

Policymakers in Greece believe that Turkey hides its unfriendly intentions behind significant military capabilities. Since 1991, Turkey has launched an impressive program of modernization its armed forces. Such a considerable increase in military spending at a time when other European countries, USA and Russia have reduced their defense budgets in an effort to benefit from the "peace dividend" is a concern for neighboring countries, including Greece.

The full implementation of Turkey's weapons programs threatens with changing the principles of the bilateral Greek-Turkish balance of power, despite the economic sacrifices that confronts Greece. If, through diplomatic means and maneuvers, it might produce a balancing of the Turkish military superiority, the only option available for Greece remaining a costly and destabilizing military race, which could create economic problems for both countries and would enhance their security dilemma.

According to security analysts in Greece, the focus of any armed conflict between Greece and Turkey would be the Aegean Islands and Cyprus (by extending the occupation of the south, or even trying to control the whole island).

The end of the Cold War deeply affected Greek security. Although its strategic value probably increased, it also faced the fluidity and uncertainty of the northern borders. The disintegration of Yugoslavia and the civil war gave rise to a variety of explosive tensions of ethnic, political, social and economic nature, which represented an acute concern for Athens. The proximity and fear that instability in the Balkans (limited to the former Yugoslav Republic or general) could paralyze Greece's integration into European trends, created a state of vulnerability. The economic parameters of the problem are significant. Greece was based on rail and road communications throughout Yugoslavia which accounted for 40 percent of its trade with the European market. Prolonged rupture of this vital link had direct economic consequences on Greece and led to the imposition of sanctions by the European Union against the Federal Government of Yugoslavia. Greek authorities have estimated that the imposition of these sanctions led to losses of about $ 10 million per day.

Moreover, it is worrisome the situation that would cause a disintegration of the southern part of the former Yugoslavia, which would lead to the employment of foreign powers in conflict.

Greek-Bulgarian consultations on security issues have been encouraged by the insecurity state felt by both countries in relation to Turkey's military power and political interests in the Balkans (relations between Bulgaria and Turkey became difficult as a result of Turkish minority maltreatment during the communist regime in the mid-1980s). In this context, we could talk about the Athens-Sofia axis. Bilateral relations have peaked in 1986, with the proclamation of the "Declaration of Friendship and Cooperation" which stated that there could be held consultations between the two countries involved, whenever the security of one of them was in danger (a term used by the Greeks during Greek-Turkish crisis in March 1987).

In an attempt to interpret the Greek security policy, certain factors can be identified. In every system of policy developing, there are various political, cultural, institutional and psychological factors influencing policy implementation process. These factors are both endogenous and exogenous and reflect recent trends, but also a long-term state security policy.

The progressive approach of Greece to the European foreign policy, continuous uncertainty characterizing Greek-Turkish relations, the dominant role of personalities in decision making and the lack of an institutional organization meant to ensure long-term assessment on a wide range of security issues and assist / coordinate crisis management mechanisms are the dominant factors shaping Greek Security Policy.

The main institutional bodies responsible for foreign and defense policy - The Government Council Cabinet on Foreign Affairs and Defense (GCFDM) - do not produce alternative policies. They almost never meet, and when they do, they implement and legitimize choices already made by the Prime Minister and a small group of Ministers. Despite a number of initiatives undertaken in

recent years - such as the creation of a Foreign Policy Council (FPC) - Greece still lacks proper coordination of policies to meet the challenges of a stable regional and international environment.

FPC consists of the Minister of Foreign Affairs, members of all parties represented in the Greek Parliament, and a number of experts. The Council aims to reach consensus on foreign policy issues and to provide "continuity and consistency". The unique role of the Foreign Policy Council is to provide advice on matters of foreign policy and not to coordinate other bodies or to engage in crisis management.

It carefully considered the need of establishing a new institution able to coordinate the existing scattered bodies from different ministries, to offer timely advice on a range of issues, establish a stringent crisis management mechanism and to oversee every step in making policy.

Greece's military doctrine is defensive at the strategic level, in accordance to NATO position. Its objective is to eliminate any threat or actual attack against Greece and protect Greek national interests. Greece, as a status quo country, aims at convincing any revisionist powers, following a cost-benefit analysis, that a possible aggression would not be favorable for the latter. Deterrence by threat would be credible and can take many forms, including denial targets on the battlefield, damages suffered by the military, and other values. At the tactical level, the doctrine may have a defensive or counter-offensive orientation, depending on the circumstances.

After the impressive performance of the U.S. armed forces in the Gulf War, Greece decided to reorganize its ground forces, with emphasis on smaller units (from divisions and regiments to brigades and battalions), with increased mobility.

In 1994, Greece and Cyprus have developed the Common Defense Doctrine. According to this doctrine, as long as Turkey maintains an occupying force of more than 30,000 troops in Cyprus, Greek and Cypriot defense domain would increase the level of cooperation. In this context, any attack against the Republic of Cyprus would constitute a casus belli for Greece. The initiative (in fact, a policy of deterrence) has a clear defensive character and is aimed at avoiding or confronting any aggression against the contracting parties by improving cooperation and joint training of armed forces in Greece and Cyprus.

Since 1974, when Turkey invaded Cyprus and occupied a share of 37 percent of its territory, Greece has maintained a high level of defense spending (an average of 6 percent of GDP, which is the largest of the NATO countries). Military and intensive training spending were deemed necessary in order to offset Turkey's quantitative advantage of military equipment and labor. Although there is consensus among the main political parties and the Greek people about the need to "sacrifice" for national defense, military spending is a heavy burden for the Greek economy at a time when Greece is implementing an economic austerity program in order to join the next phase of the European Monetary Union. However, in the wake of the Imia crisis and the announcement of a Turkish weapons program of $ 31 billion (for over 10 years), Greece was forced to announce a program of $ 14 billion (on a period over 5 years).

Conclusions

Europe has a legacy of violent terrorist attacks going back to the days of multinational empires in Russia, Austro-Hungary and Germany. In the United Kingdom, Spain and France, terrorist bomb attacks occur at regular intervals. Shootings are a manifestation of the traditional challenges against national and international security. This form of violent protest against the established political order will continue to exist for a long time.

Strengthening security in a broader sense is compromised for the sake of resolving acute situation. Serious disruption on the internal market of European societies could be a form of structural threat that must be confronted by public authorities.

In Europe, an early warning sign of this trend was recorded by the Chernobyl disaster in 1986. In this context, a cloud of radiation was then sent to Ukraine, Central and Northern Europe. The

accident resulted in damage to human and animal health, agriculture and business for more than a decade.

Under these circumstances, national governments have to deal with security issues involving critical infrastructure of society and governance requirements. Thus, the objectives of national defense and international security are not allowed to build new infrastructure vulnerabilities.

The technological complexity of modern society opens up opportunities for the development of a high risk, produced by strong coupling between sectors and across national borders. Interconnecting infrastructure has become part of everyday life, since the society depends on reliable power supply systems, robust communication and IT networks operations. Naturally, antagonists wanting to harm society have interests in finding critical points, where different facilities have common elements. A major task in planning the achievement of societal security is to turn potential vulnerabilities related to the technological complexity into highly reliable systems.

The economic dimension of security is actually an extension of economic security and the other areas. The economic dimension of security, as well as the economic security itself, it has not only a linear determination - when the economy is performing, the security is more secure, but a non-linear, dynamic and complex one, characterized by uncertainty and unpredictability.

In the context of international dynamic, partnerships multiply, international organizations and bodies evolve unpredictably (some are strengthening, others corrode) and the regional ones multiply and adapt to specific conditions.

The purpose of all these partnerships, unions, organizations and bodies is to ensure conditions for optimizing economic, political, social, informational and military relations, in order to establish and consolidate a less dangerous security environment, for increasing person, property, institution, states and world security.

There is still a chance that the security environment, founded and grounded on value systems and a dynamic, explosive, complex and high performance economy becomes favorable for long-term development, progress and peace.

References

- Antonenko O., "*Putin's Gamble*" *Survival* 43, no. 4, 2001-2002.
- Arădăvoaice, Ghe., Naghi, G., Niţă, D., „*Sfârşitul terorismului?*", Ed. Antet, Bucureşti, 2002.
- Beam L., „*Leaderless Resistance*", http://www.crusader.net/texts/bt/bt04.html.
- Creţu Ghe., "*Factori generatori de riscuri la adresa securităţii statelor din spaţiul sud-est European",* Ed. UNAp., Bucureşti 2007.
- Echevaria A.J. II şi Tussing B.B, „*From „Defending Forward" to a „Global Defense-in-Depth": Globalization and Homeland Security",* The Strategic Studies Institute, 2003.
- Fukuyama F., Shulsky A.N., „*The 'Virtual Corporation' and Army Organization*", Santa Monica, RAND, 1997.
- Gustav E. GUSTENAU, „*The Concept of Homeland Security in the European Union and in Austria — A Challange for the Austrian EU Presidency",* în „Tranforming Homeland Security: U.S. and European Approaches", Ed. Esther Brimmer, Washington, DC: Center for Transatlantic Relations, 2006.
- Hansen D. şi Hagstrom A., „*I krisen provas ardningsmakten*", Stockholm, 2004.
- Henrikki H., "*Beyond the Cult of the Offensive. The Evolution of Soviet/Russian Strategic Culture and its Implications for the Nordic-Baltic Region*", The Finnish Institute of International Affairs, Helsinki, 2000.
- Hoffman B., „*Inside Terrorism*", Columbia University Press, New York, 1998.
- Lieven A., "*The Secret Policemen's Ball: The United States, Russia and the International Order after 11 September,*" *International Affairs* 78, no. 2 (2002).
- Nogee L.J., Mitchell R.J., „*Russian Politics: The Struggle for a New Order",*Allyn and Bacon, Boston, 1997.
- Onişor C., Mihalache V., „*Introducere în problematica securităţii"*, Ed. ANI, Bucureşti.
- Pavliatenko V.N., "*Russian Security in the Pacific Asian Region. The Dangers of Isolation*" in *Russia and East Asia. The 21st Century Security Environment*, eds. Gilbert Rozman, Mikhail G. Nosov, and Koji Watanabe, M. E. Sharpe, East West Institute, New York, 1999.

- Ponsard L., „*Homeland Security and the Russian Approach*", INFORMATION & SECURITY. An International Journal, Vol.17, 2005.
- Sagan S. „*The Limits of Safety: Organizations, Accidents and nuclear Weapons*." Princeton: Princeton University Press, 1993.
- Sarcinschi A., Dinu M., „*Crize şi instabilitate în Europa",* Ed. UNAp., Bucureşti 2011.
- Schmid A. şi Crelinsten R., „Western responses to terrorism", London, 1993.
- Stern K.E. „*Crisis decisionmaking : a congnitive institutional approach"*, Stockholm, 2001.
- Toffler A., Toffler H., „*A crea o nouă civilizaţie. Politica în al treilea val"*, Ed. Antet, Bucureşti.

THE NATIONAL SECURITY - MEDIA POWER LINKAGE. A THEORETICAL FRAMEWORK

KARIN MEGHEŞAN[*]
VERONICA MIHALACHE[**]

Abstract
The mechanism of national security policy is an issue of increasing interests in post cold war era. But what is the impact of the media upon national security policy decision making? New world wide events show us that more than ever national policy is often at the mercy of the media. The Wiki leaks, the Murdoch inquiry, the impact of new social media on Arab democratic movements are just some examples regarding the effect of nearly simultaneous presentation of information around the world.
The world is changing, and the processes by which national policy is developed may also be changing especially in the security domain.
The essence of this study, as the title suggests is the idea of a „dual use" media in the national security issues.
This study employs a relatively narrow definition of national security issues as only those which are concerned with national survival and preservation of our society. The media affects us as individuals and as a collective body so we will like to focus on a realistic understanding of the media-secrecy-security linkage, noting that we will do nothing else but advance and underline the main points of view from the public and scientific discourse.

Keywords: *national security, foreign policy, media, decision making, liberty vs. Security, public opinion*

National security construct

It is no doubt among specialists that national security policies issues can be included in foreign policy preoccupation.

The main argument for this assertion is that as foreign policies are influenced by a multitude of dependent and independent variables, either external or domestic by nature, so is nowadays homeland security policy more and more influenced by changes in the international system, by specific changes in the information age both nationally and internationally.

One of the most important sources[1] in the statecraft machinery, especially in new age of information revolution, is public opinion. The nature of public opinion affects one nation's conduct beyond the national border and the nation perception of security issues. A potentially important component in the public opinion - foreign policy linkage is the role played by the mass media. The value of media increases its significance as an influential and instrumental tool about building confidence or promoting mistrust among people (the behaviour of policy makers themselves are affected by their own image in the media coverage or the image of the world conveyed by the mass media) on issues related to national security.

In fact the main issue regarding the national security-media relation still is the problem between secrecy and free society. Long time ago, in a period of effervescent discussion about the moral strength of secret governmental agency (covert operations, Church Committee, Vietnam,

[*] Assistant Lecturer, "Mihai Viteazul" National Intelligence Academy, Bucharest, Romania (kmeghesan@dcti.ro).
[**] Assistant Lecturer, "Mihai Viteazul" National Intelligence Academy, Bucharest, Romania (vmihalache@dcti.ro).

[1] For details regarding the sources of foreign policy, see the model for analysis proposed by James Rosenau and adapted in K. Megheşan, *Decizia de politică externă,* Analele ANI, nr.11/2006, Editura ANI, Bucureşti, 2007, pp. 109-123.

Watergate 1970-1976) the former CIA Director, W.Colby characterized the necessity of choosing one of the answers to questions posed „should we forswear secret intelligence in order to protect our freedoms, and look to a resulting moral strenght to save us from the threats or must we accept limits on our freedoms in order to preserve our community in a dangerous world?"as a cataclysmic choice.

In Walter Lippmann's view, a nation is secure to the extent to which it is not in danger of having to sacrifice core values, if it wishes to avoid war, and is able, if challenged, to maintain them by victory in such a war[2]. Unfortunately, the term "national security" has long been used as a symbolic concept of a policy objective. Like all others "national" concepts (national interests, national values), national security has a wide and ambiguous meaning.

National interest was for far too long a guiding star for national security and foreign policies. The cores of national interest are the national values. However, individuals, states, and other social actors have many values. Therefore, some well-known analysts plead for a new framework in analyzing national security.

Security for whom? Security for what values? How much security? For what threats? By what means? Security at what costs? Security in what times?[3]

As for the problem of secrecy dilemma former, President Ford said that he would gladly share the secrets with 300000000 Americans if no further explosions would occur

Media and security policies have a strong connection in the contemporary strategic environment and this connection is better understood by public opinion in times of war or internal/international crises.

In today's information age, asserting that the media has an important impact on national security decision making is almost as saying that military capabilities, geography or resources have an impact on national security decision making.

Political or military actors work in an environment shaped by the media. Media shapes the perception of decision-makers and people. In addition, based on these perceptions the political decision-makers formulate policies, choose lines of actions. One of the most important effects of mass communication is the agenda setting.

Mass media influences the public agenda directly by weight of attention and media authority, the public opinion influences the policy agenda, and media agenda is influencing the policy agenda.

It is extremely difficult to comprehend media's power and influence in the contemporary world, therefore this article has no intention to do so. The essence of this paper is the idea of media's double utility. Media can be quite useful for security policies, can inform and educate the population regarding national and universal values, spread those values, and it can promote foreign and security policies. At the same time, through presenting controversial aspects of the society, media can be a weakness security wise. In security issues, media as well as population can be educated. This is what we would like to focus on, with the mention that we will do nothing else but advance and underline some points of view regarding the relationship between mass media and national security.

Media as a societal source in shaping national security policies.

James Rosenau (1980) first used the concept of societal source in his seminal work *Pre-Theories and Theories of Foreign Policy*, *the Scientific Study of Foreign Policy*. Any source on foreign policy is a mix between dependent and independent variables, between possible effects on

[2] Walter Lippmann, *U.S. Foreign Policy*, Little Brown, Boston, p.51, in Christopher W.Hughes, *Security Studies*, Routledge, 2011.

[3] David Baldwin, *The Concept Of Security*, in Christopher W.Hughes, *Security Studies*, Routledge, 2011, pp.24-36.

external or domestic environment. Analyzing the public opinion- foreign policy decision relation is one of the core directions in modern FPA[4] (foreign policy analysis).

All modern leaders (political, religious even military) from Obama, to Pope or imams utilize media to project their power. Nation state actors or non-state actors do the same thing through media / project power. Winning the hearts and minds of people in the new informational, technical age is about projecting power, desirability, welfare using media and new media tools.

In terms of perceptions, of popular and policy makers' images, the media have attributed "almost dictatorial powers."[5] The dynamics of media impact are different, varying, and diversified in different countries: authoritarian system, libertarian system or social responsibility system.[6] .A closed and dictatorial society can control the information and the messages that it wishes to convey to the rest of the world far more effectively than an open society. A democratic society becomes the victim of its own need for openness, transparency. The paradox of international affaires-public opinion relations is the absence of basic knowledge about foreign affaires, security, and the lack of interests on "alien" issues. The day-to-day lack of interests changes in times of trouble. The media may create new issues and new "trouble spots." As McCombs and Shaw wrote in 1972, the media may not tell us what to think, but they do tell, us what to think about. The capacity to define what is significant, what comprises a problem what constitutes an issue, what poses a crisis and what alternatives are available resides with the media.[7]

After the agenda is set ("news that fit to print," news of public interests, information's considered common goods) the media functions as *gatekeepers* by filtering the news and shaping the way it is reported.[8] In other word, the public debate appears not because events occur but because the media coverage of events.

Unfortunately, in the international arena, the major actors use media as a source of propaganda to promote some special and sometimes obscure interests in order to bring desired changes in the prevailing system. It is well known that the media has become a tool of American global agenda to influence the rest of the world for promoting its strategic interests in the post 9/11 age. In addition, the post 9/11 age is an age of war, a different kind of war but, by no means, war. Considering the fact that in war, psychological operation is not the only function which media is called upon to perform in the content of national security, some specialists agree that in a globalize society media becomes a lethal weapon against the enemy, and the population as well.[9]

"The camera and the computer have become weapons of war…This new and awesome technology enabled journalists to bring the ugly reality of war to both the belligerents and others around the world, serving as a powerful influence on public opinion and governmental attitudes and actions."[10] The new media power in the globalize world is well analyzed in George Packer article *Knowing the Enemy* [11]"if bin Laden didn't have access to global media, satellite communications and the Internet, he'd just be a cranky guy in a cave. "

---

[4] See SteveSmith , Halfield A., Dune T., Foreign Policy. Theories, Actors, Cases, Oxford Universiy Press, 2008, pp.137-171.

[5] C.Kegley, E. Wittkopf, *American Foreign Policy. Pattern and process*, St.Martin, 1982.

[6] Fred Siebert, T.Peterson, W.Schramm, *Four Theories of Press: The Authoritarian, Libertarian, Social responsibility, and Soviet Communist Concepts of What the Press should be and Do*, University of Illinois Press, apud. Nazir Nassim, Research Report 20, available at www.sassi.uk.com.

[7] Apud C.Kegley, E. Wittkopf, *American Foreign Policy. Pattern and process*, p. 317.

[8] see Lance Bennett, *Public Opinion in American Politics*, New York, Harcourt, 1980.

[9] see David Miller, *Tell Me Lies: Propaganda and Media Distortions in the Attack on Iraq*, Pluto Press, London, 2003, Greg Simons, *Mass Media and Modern Warfare: Reporting on the Russian War on Terrorism*, Surrey: Ashgate Publishing Limited, 2010, Marvin Kalb, Carol Saivetz, *The Israeli-Hezbollah War 2006: The Media as a Weapon in Asymmetrical Conflict*, available at http://hij.sagepub.com.

[10] Marvin Kalb, Carol Saivetz, *The Israeli-Hezbollah War 2006: The Media as a Weapon in Asymmetrical Conflict*, available at http://hij.sagepub.com.

[11] George Packer, *Knowing the Enemy*, New Yorker, December 18, 2006.

As a conclusion, literature is full of studies about mass media's influence during wars. We will briefly present some of the most up-to-date preoccupations below:

- ✓ Media's role in perception management in conflict situations
- ✓ Media as a force multiplier in war situations- media management awareness should be taught in the armed forces training and education. "Dealing with the media in an insurgent environment has its own pitfalls so the media policy of the establishment during terrorist activities, militancy, and low intensity conflicts should be especially well defined."[12]
- ✓ Media as initiator and sustainer of mass motivation – the basis of policies and actions associated to different stages of on-going conflicts.
- ✓ Inability of some international actors to admit and counterattack the actions of the media, actions that may endanger military tactical and strategic objectives; media campaigns that increase the actors' vulnerability on an international level.

On the other hand, in peacetime the media is viewed as an amplifier, as policy change agents. Media serves as a checkpoint by ensuring that the policy-makers are taking the right decisions.

There can be little doubt that the media have the power to influence events in national security issues on international and national scene, sometimes by its design as a societal source, sometimes by accident.

The ways in which the dynamics of mass communication influence the military and national security leadership are countless and as complex as the influences of geography, politics, logistics, or any number of other factors beyond the balance of forces at the scene of conflict. Each situation in which media dynamics plays a role in the development, execution, and outcome of military strategies must be regarded as unique."[13]

Social media. Opportunity or Vulnerability?

Another complex issue in the media-national security connection is the new media or the so-called social media[14] considered by some specialists[15] a challenge for democracies. Why is that? Because social media channels such as social networks and blogs present powerful tools to spread information to the masses. Just remember the Moldavian twitter riot, the London riots, the Iran elections[16], the WikiLeaks disclosures, or the Arab freedom movements. Social media is about sharing information, is by its nature permission based. Debates on how social media may jeopardize national security began with the case of a former Israeli soldier who posted pictures of herself while on military duty.

According to media experts[17], what is scary about social media is what has been happening in terms of social media affecting national security. Besides its social positive effect, sharing the common goods (what are common goods in terms of classified information is another controversial debate), social media appears to be adding a whole new set of factors to be considered in relation with negative effects on national security and military or political interests. The debate on how far

---

[12] Nazir Hassim, *The Role of media in National Security: A case Study of 1998 Nuclear Explosions by Pakistan*, available la www.sassi.uk.com.

[13] John Diamond, *The Media: Witness to the National Security Entreprise*, in Roger Z. George, *The National Security Enterprise*, Georgetown University Press, 2011, p. 301-331.

[14] Social media is any kind of technology that can enable people to create, augment, and/or share content among multiple interest communities and peer groups, David Appelbaum definition available at http://www.time.com/time/magazine/article/091711205362.html.

[15] David Appelbaum, Is Social media Really Social? Available at http://www.time.com/time/magazine/article/091711205362.html.

[16] Patrick W. Quirk, *Iran's Twitter Revolution*, in *Foreign Policy in Focus,* June 17, 2009, available www.fpif.org.lfpifrxrl6199.

[17] *Media Experts Convene to Discuss How Modest War is Waged in Blogosphere* at Herzlyia Conference," *Israeli Insider,* December 28, 2006, http://www.spme.net/cgibin/articles.cgi.

the freedom of expression should extend is old but the power to instantly disseminate information in a real time viral fashion is new. In addition, it is not only about instantly dissemination. The classical deontological obligation to over verify the information you share it is no longer possible in the Blogosphere. What source is credible? The indicated source it is really the source of the message? Who is the good guy and who is the bad guy? Denial and Deception are more than ever difficult to counter on World Wide Web. What is propaganda and what is counter propaganda on the Web? The efficient use of the tools provided by the new media is the new military power because electronic media and social media are the most effective and powerful means of mass motivation. Motivation is essential for both aggressor and victim. Motivation and will are in fact important elements in the Clausewitz war equation: E= CxW, where E is efficacy on the battlefield, C military capabilities and W is the will, desire to use all the available capacities.

Andrew Mack (1975, 175-200), one of the first asymmetric conflict theoretician wrote in *Why Big Nations Lose Small Wars*, that W is in fact the interest. The weak actor interest for victory is sometimes more important than huge capabilities. So motivation, willingness, interest are important variables in modern wars; media is a force multiplier in perception management, psychological warfare and eventually is an instrument of war.[18]

Secrecy vs. liberty

"The role of press in democratic society is not to take national security into consideration, it is not to implement national policy, and it is not to be patriotic. It is to be aggressive, it is to be suspicious, it is to be skeptical, and it is to be hostile to the government." In our opinion that kind of remarks, even if a media anchor like Ilana Dayan makes them[19], are nothing more than media extremism. Nevertheless, the years since the 9/11 events have been years of extremes in national security journalism. Today a journalist, (classic journalism, or new-media journalism) is not just an observer but also an action player in the national security enterprise. As any over player in this special enterprise media must well aware of its responsibilities especially in an era, in which the tradeoff between liberty and security is one of the crucial issues. "In virtually every society, individuals and groups seek security against the state, just as they ask the state to protect them against harm from other state. Human rights and state security are thus intimately related. The most profound choice relating to national security is, therefore, the tradeoff with liberty." [20]

We live in a different world today than 100 years ago, so in our opinion Benjamin Franklin's words "Those who would sacrifice liberty for security deserve neither" are no longer correct. We have to make some difficult choices between liberty and security, but we must be well aware of the meaning of both.

Unfortunately, among other negative effects on the Romanian contemporary society, the communist tragedy made us unable to find a balance between freedom and security. Traumatized by the importance of the secret and secret services from the communist period, we often forget that keeping a nation's secrets ultimately influences its very own existence and even its well-being on the international stage. Romanians often forget that in a democratic society, intelligence services' role, either civil or military, is to protect the state and its citizens. This statement might seem a display of false patriotism that is why we have other arguments at our disposal: civil controlling over services, the partnerships between Romanian and western services, alliances, multi and bilateral relations on informative line. However, such undertaking concerning both the maturity of the Romanian society and that of the media's is quite complex when it comes to the secrecy issue and the economy of the presented material does not allow such a discussion.

---

[18] Lorne Manly, *In Wars, Quest for Media Balance is also a Battlefield*, New York Times, August 14, 2006.
[19] apud. D.Wisenhaus, *Media and Politics: Role and Responsibilities*, available at www.jrnsc.hku.hk.
[20] Richard Ullman, *Redefining Security, in International Security*, vol.8, no.1, 1983, p.129-153.

In authoritarian regimes the power of secret was accepted (since there was no other option), and preserved (most of the time through coercion). However, free societies and free press strove for the revelation of the secret, creating a contest between how much should be revealed and how much should be kept secret in the nation's interest. A performant PR department with „inteligent" intelligence public releases might be a valuable asset for an intelligence service in time of peace as well as in time of war/crises because the history shows that only in times of great danger for the nation, secrets were respected. The issues, which appear in this situation, are dangerous for the very existence of a nation: to what extent is the public aware of this danger? What secrets are important in such a situation? It is well known that secrets have their own "unit of measure". When media should get involved (that means we should have an informed media regarding security issues) and objectively distinguish between sensitive information of national security and mere news whose publication does not necessary provide a better understanding of the society.[21] Who could be an authority that could decide, beyond any doubt, what information can harm national security?

Difficult questions with complex and divergent answers. What we can emphasize is that, generally national security policy deals with life and death issues. Moreover, those issues apply not of "expendable" proportions of societies and these resources -but in the contemporary world with the very life and death of whole societies and their cultures.[22]

Generally, the issues regarding freedom-security is widely analyzed in literature by media experts and human rights fighters. This is why, most of the time opinions are not entirely objective. At the same time, experts in national security cannot be considered objective either. Most of the time, they are purposely ambiguous in order to avoid accusations of infringing human rights.[23]

From our point of view, both media scoops and secret keeping are of outmost importance in a society that considers itself truly democratic. The secret is not compatible with free societies. We have to understand the difference between classified information regarding national security and information, which is mere news for the public. The understating of such differences means nothing without proper laws. In the same time, we have to be able to answer the questions about how much information should be disseminated.

For a brief explanation of the difference between news and sensitive information just remember the Wikileaks case. The public debate starts in July 2010 with the online posting of 92.000 classified U.S. government documents relating to the war in Afghanistan. For a better confirmation of the disclosed materials, Wikileaks allowed three huge media organizations The New York Times, The Guardian, and the German Der Spiegel, access to the material in order to analyze and fix the information puzzle. Even if the leaked information proved to be already known the specialists drew many comparison to the leak of the Pentagon Papers in 1971[24] . The Wikileaks disclosures renewed an old dilemma – what kind of news is good, and what kind of news are bad for the citizens and for the nation's sake?

The U.S.Admiral Mullen in a Pentagon briefing comments: "Mr. Assange can say whatever he likes about the greater good he and his source are doing, but the truth is they might already have

---

[21] In the CIA's Studies in Intelligence, Mark Mansfield reviews Spinning Intelligence: Why Intelligence needs the Media, Why Media Need intelligence (Dover, Goodman, 2009). He brings into light some controversial aspect of the *fluid*, *contradictory* and *occasionally supportive* relation between media and intelligence.

[22] Marvin Kalb, Carol Saivetz, *The Israeli-Hezbollah War 2006: The Media as a Weapon in Asymetrical Conflict*, available at http://hij.sagepub.com.

[23] see for details Richard C.Leone, Gregory Anrig, *The War on our Freedoms: Civil Liberties in an Age of Terrorism*, The Century Foundation, 2003; Steve Tsang, *Intelligence and Human Rights in the Era of Global Terrorism*, Praeger, 2006; New York Times editorial, *The Dangerous Comfort of Secrecy*, N.Y.Times, July, 12, 2005.

[24] In 1967, Secretary of Defense, Robert McNamara commissioned a top-secret study of the Vietnam War. The study (Pentagon Papers), which filled-forty seven volumes, is about the detailed formulation of U.S.policy toward Indochina, including military operations and secret diplomatic negotiations.

on their hands the blood of some young soldier or that of an Afghan family. Disagree with the war all you want, take issue with the policy, challenge me or our ground commanders on the decisions we make to accomplish the mission we've been given, but don't put those who willingly go into harm's way even further in harm's way just to satisfy your need to make a point." On the other side of the liberty-security barricade is the freedom of speech fighters. Let us remember the reactions of the Anonymous[25] group in the Wikileaks case, or in the most recent israeli-palestinian conflict.

The sensitivity of sources and information is another complex and delicate debate. Sometimes even professional journalists may not fully understand the reasons why some information is sensitive without a classified bench. On the other hand, public officials have good reasons in demanding secrecy. Government officials rightly fear that the disclosure of secret information would undermine the national security. Sometimes, they are concerned that the disclosure would betray the confidence of intelligence partners.

The most uncomfortable conflicts arise when the public disclosure of a government secret is both harmful to the national security and extremely important to public debate. Therefore, it is a matter of costs and benefits in terms of liberty security dyad.

United States authorities established policies and procedures and assigned responsibilities for identifying unauthorized disclosures of classified information appearing in the media. As US document specifies it is addressed only to unauthorized disclosure of classified information that appear in the media and does not address to unauthorized disclosure that do not meet the criteria for significant disclosures. On this subject Gabriel Schoenfeld, senior fellow at the Hudson Institute Necessary Secrets, offers us a masterpiece: National Security, the Media, and the Rule of Law. Schoenfeld discovers a growing rift between a press that sees itself as a freedom of speech guardian, a “heroic” force promoting the public’s “right to know” and a government that needs to safeguard information or even intelligence vital to the successful conduct of national defense.

Conclusions

The link between national security and media is so tight and in the same time, so risky to comment. A framework for analyzing this link begin with the classical intelligence paradigm „need to know” but in the real modern world, characterized by new threats, new security vulnerabilities, new friends and new opponents, a new paradigm is shaping the theoretical framework - „need to share” paradigm.

A need to share paradigm as a starting point for analysing the national security-media linkage – needs a multivariables factorial design. We consider this design an important issue for further studies regarding the real impact of the need to know/need to share paradigms on national security, freedom, media and new media relations.

Reference

- Chesterman Simon, *One nation under surveillance –a new contract to defend freedom without sacrifyng liberty*, Oxford University Press, 2010.
- Le Cheminant Wayne, John M. Parrish, *Manipulating Democracy: Democrating Theory, Political Psychology, and Mass Media*. London and New York: Routledge, 201.
- Colby William, *Intelligence and Security in a Free Society*, International Security, vol.1, nr.2, 1976, disponibil http://www.jstor.org.

[25] A short search online will reveal the power of this worldwide organization. Anonymous members have only virtual identity, they are web wizards, and they always try to protect on line freedom. In the lattest Arab-Israeli conflict the A. succeed to block some very important governmental Israeli servers.

- Entman R., *Projections of Power, framing public opinion and US Foreign Policy*, Chicago University Press, 2004.
- Shaw M, *Civil Society and Media in Global Crises*, London St.Martin's Press, 1996.
- Lievrouw, Leah, Livingstone, Sonia, *The Handbook of New Media.* London: Editura SAGE, 2010.
- Miller David, *Tell Me Lies: Propaganda and Media Distortions in the Attack on Iraq*, Pluto Press, London, 2003.
- Leone, Richard C., Gregory Anrig, *the War on our Freedoms: Civil Liberties in an Age of Terrorism*, the Century Foundation, 2003.
- Simons, Greg, *Mass Media, and Modern Warfare: Reporting on the Russian War on Terrorism*, Surrey: Ashgate Publishing Limited, 2010.
- Van Dijk, Jan, *The Network Society: Social Aspects of New Media*. Los Angeles: Editura Sage, 2010.
- Tsang, Steve, *Intelligence and Human Rights in the Era of Global Terrorism*, Praeger, 2006.
- Rosenau, James N., *Pre-Theories and Theories of Foreign Policy*, *The Scientific Study of Foreign Policy,* Nichols, NY, 1980.
- Marvin Kalb, Carol Saivetz, *The Israeli-Hezbollah War of 2006. The Media as a Weapon in Asymetrical Conflict*, The Harvard International Journal of Press/Politics, 2007, vol.12, no.43.

DAN DIACONESCU: THE POLITICS OF BREAD AND CIRCUSES

VALENTIN QUINTUS NICOLESCU[*]
SABINA BASIUL[**]

Abstract
Founder and owner of two television stations, Dan Diaconescu found the opportunity to rise the electoral support for his anti-system party through media channels in the circumstances of a tumultuous political year and a bitterly personal power struggle between President Traian Băsescu and Prime Minister Victor Ponta. He described the victory in the upcoming parliamentary elections as a start of the battle against the post-communist Romanian political class that impoverished the country. Through this battle lead by him and other members of his party, his „army of angels"[1], Dan Diaconescu says he can liberate the Romanian people and install „people's dictatorship" that will punish all the political class for the injustices suffered by them.
In a context of highly visible and influential populist discourse, this paper considers the self-representation of Dan Diaconescu and his People's Party – Dan Diaconescu during parliamentary election campaign in 2012. First of all, a multi-methodological approach was adopted to examine the key elements of national populist discourse: antagonistic struggle between politicians and citizens, popular sovereignty, corruption of the political class and popular mobilization for political change. After that, I will examine how this Romanian form of populism represents the rival version of western representative democracy, the populist democracy specific to Latin America based on direct representation embodied by a leader or a party capable to symbolize the power of the people. Within this frame, I will try to analyse to what degree Dan Diaconescu's populism enrolls in the logic of Latin American populism instead of a cultural or ethnic populism dominant in Europe.

Key words*: national populism, anti-system parties, populist discourse, People's Party – Dan Diaconescu*

Introduction

This paper's main purpose is to analyze to what degree Romanian populism, particularly Dan Diaconescu's, enrolls in the logic of Latin American populism due to the absence of democratic culture, the precarious socio-economic conditions, political instability and corruption inside the country. Understanding the emergence of PP-DD under these conditions, it will become clearer how this party succeeded in obtaining 14,64% of the votes for the Senate and 13,99% of the votes for the Chamber of Deputies[2] and, thus, becoming the third most represented party in the country.

In the first part of the article, I will try to explain the difficulty of establishing a definition of populism and highlight the common characteristics of these movements that mark them as populist. The second part is intended for assessing a distinction between European and Latin American populism starting from the concept of democratic representation. We will see that the absence of democratic culture and the long history of governmental populism are common features for Romania and most of the Latin American states and are at the basis of new populist movements. In the last part, I will examine the populist logic of action and Dan Diaconescu's discourse of and his People's Party's during parliamentary election campaign in 2012 to show how similar this party is with most of the populist parties in Latin America.

---

[*] Lecturer, Ph.D, Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University, Bucharest (e-mail: valentin_nico@yahoo.com).
[**] M.A. Student, Faculty of Political Science, National School of Political Studies and Public Administration, Bucharest (e-mail: sabina_basiul@yahoo.com).

[1] People's Party – Dan Diaconescu website, accessed February 20, 2012, http://www.partidul.poporului.ro/.

[2] Office for Democratic Institutions and Human Rights, *Romania. Parliamentary elections. 9 december 2012* (Warsaw, 2013), http://194.88.148.169/b4/cc/12/e5/default_851532130567.pdf?c=25b63f6fcc0da26c81c9bc1477148343.

What is populism?

Despite the widespread use of the notion of populism, all analysts admit it is very difficult, even impossible to establish a definition encompassing all features that populist manifestations share. That's why most of the literature on populism is characterized by reluctance in assigning this concept a precise meaning. Most often, as Ernesto Laclau stated[3], conceptual apprehension is replaced by appeals to intuition or by descriptive enumerations of several different features whose relevance is based rather on their level of proliferation.

Laclau considers the impasse that political theory reached in analyzing populism is due to the limitation of the ontological tools available to political analysis. Thus, the impossibility of conceptual apprehension is based on, according to Laclau[4], limited methods used by political science to approach the problem of how social agents integrate all political experiences faced over time.

I have chosen to discuss only Laclau's theory of populism because he tries to overcome the deficiency of which I have spoken above starting from the construction of popular identities as a set of strategies that make possible the manifestation of the people as a collective actor. In his analysis, populism is described in positive terms and the rationality inherent to its political logic is not excluded as it happens in most of the literature where populism is seen as vague and irrational. Moreover, I can say this theory positions Laclau on the side of those who rehabilitate the democratic nature of populism by claiming that democratic identities and populist mode of identification are based on the same logic. His theory induces us to see populism as a mode of identification rooted in the big gap between political institutions and people and highlights the limitations of an entirely institutional approach of democracy[5].

According to Laclau[6], by populism we should not understand a movement with a specific social base or ideological orientation, but a type of political logic. While social logic involves following rules, political logic is related to the institutions of society. When a process of social change occurs and it gives birth to a global political subject that brings together a plurality of social demands, political space divides. Thereby, identities are created by establishment of a political border between fulfilled democratic demands as status quo on the one side and unfulfilled democratic demands on the other. These demands not fulfilled by those in power because they are reluctant or incapable are often institutionalized in a political movement. In these conditions of emergence, whatever the social or ideological content of the political movement under discussion, we are dealing with a form of populism[7].

Laclau's conceptual characterization of populism has two other aspects, one concerning naming and the other one concerning affect. I will discuss only the first one of them due to its relevance for the paper[8]. Because the term "people" expresses the ensemble of social agents as such, without suggesting there exists a given unity of the group, the heterogeneity of the demands is only transformed by the popular identity into a unity[9]. This unity is false since the real existence of a unity is impossible as long as the unfulfilled demands are an expression of the structural system, not of the real demands of individuals. According to Laclau[10], this situation involves two consequences. First of all, the moment of unity of popular subjects only exists at the nominal level, not at the conceptual one. Second of all, the limits between the demands that are going to be incorporated into the system

---

[3] Ernesto Laclau, *On Populist Reason* (London, New York: Verso, 2005), 3.

[4] Ibid., 4.

[5] Francisco Panizza, "Review of On Populist Reason" by Ernesto Laclau, *The Political Quarterly 77*, no. 4 (2007), http://www.politicalreviewnet.com/polrev/reviews/POQU/R_0032_3179_232_1007192.asp.

[6] Laclau, *On Populist Reason,* 117.

[7] Ibid., 118.

[8] The second one treats populism as a Lacanian object of politics and due to its psychoanalytic contents it is not necessarily relevant for this paper.

[9] Laclau, *On Populist Reason,*118.

[10] Ibid., 118.

and the ones that are going to be excluded are blurred and always subject of contesting. Thus, the language of a populist discourse is always imprecise and changeable because it attempts to operate with a social reality that is heterogeneous and changeable, not because it implies an inappropriate understanding of the wide world[11].

By understanding populism as a political logic, Laclau succeeds in explaining his flexible nature as it can be used as a logic for movements with distinct ideological contents from far-right to radical left. Moreover, he highlights another two major features of populism[12]: his radical democratic substance and the common roots shared with democracy in construction of popular identities. But, on the other side, it has two major problems[13]. First of all, Laclau fails to analyze undemocratic side of populism. Although he does not affirm that populism is necessarily democratic, his arguments that democracy depends on the construction of a democratic people and that democracy is not always liberal do not take into account this side of populism. Second of all, he tends to understand populism as a natural form of radical politics or even as a natural form of politics. Laclau claims in an earlier text that 'if populism consists in postulating a radical alternative within the communitarian space, a choice at the crossroads in which the future of a given society hinges, does not populism become synonymous with politics? The answer can only be affirmative"[14]. The problem here is that not all politics in radical and not all radical politics is populist and furthermore, status quo and its radical alternatives are all political constructions[15]. Even if Laclau uses a definition too restrictive for politics to explain populism, I think this theory represents an important contribution to the literature on populism because it incorporates three important features frequently neglected, especially the one concerning the flexible nature of populism.

Besides these features of populism defined by Laclau, I will present a list of relevant elements frequently encountered in populist movements, especially at the discourse level. Because of the wide variety of populist movements, I would like to mention from the beginning that this list will not be complete and it can be extended by the reader. More than that, due to the flexible nature of populism, we can find populist movements where a part of these elements are missing. I have chosen to add this list alongside with the short presentation of Laclau's theory of populism in order to create a multiple picture of a populist movement no matter what social base or ideological orientation it has.

- antagonistic struggle between politicians and citizens (populist movements are defined by fighting against power structure and political elites whose interests are in conflict with interests of the "people"; the political elite is described as corrupt and degenerate)
- popular sovereignty - "power to the people" (populist movements claims that represent popular sovereignty[16] because people should be the source of all political power as long as "the will of the people is supreme over every other standard"[17]; this is why a lot of them militates for direct democracy so that decisions will be made by referendum or popular initiative[18])
- three perspectives of how they relate to people (their appeal is to people within the nation, the common people – plebe, and to the ethnic people)

[11] Ibid., *On Populist Reason,* 118.
[12] Panizza, "Review of On Populist Reason".
[13] Ibid.
[14] Ernesto Laclau, "Populism: What's in a Name?", in *Populism and the Mirror of Democracy*, ed. Francisco Panizza (London, New York: Verso, 2005), 47.
[15] Panizza, "Review of On Populist Reason".
[16] Margaret Canovan, "Trust the people! Populism and the Two Faces of Democracy", *Political Studies 47*, no. 1(1999), 4.
[17] Margaret Canovan, *Populism* (London: Junction Books, 1981), 4, quoted in Ernesto Laclau, *On Populist Reason* (London, New York: Verso, 2005), 5.
[18] Margaret Canovan, "Trust the people! Populism and the Two Faces of Democracy", 2.

• a different perception of democracy (populists perceive democracy rather as an affective relation of mutual identification between people and government than an institutional practice and a culture of political responsibility[19])

• popular mobilization for political change (an essential feature of populist movements is the political mobilization of the people directed by the leader for the promise of political system change and barrier between political elites and people abolished[20])

• apolitical temporality (populists promise to eliminate the time barrier between personal or collective desires and their fulfillment, time barrier that defines complexity of political action[21])

• anti-elitism (the fight that populist movements are taking is not only against power structure and political elites, it is against all dominant ideas and values in the society presumably imposed by elites[22])

• charismatic leadership (an important feature of populist movements is the figure of a providential leader[23] that represents the will of the people; populists create a personal relation between leader and people not only by personalizing him but also rejecting institutional structures, including bureaucratization[24])

What do Romanian and Latin American populism have in common?

As we could see, because every form of populism is rooted in the socio-political reality where it appears, we cannot use a list of key elements of populist movements to analyze different forms of populism from different parts of the world. This type of approach is more likely to be misleading. Following Laclau's theory on populism, I have decided to start my analysis with the concept of democratic representation and the general conceptions about it. Hanna Pitkin[25] mentions in one of her works the occurrence of two conceptions about democratic representation which may serve as a central element in development of populist movements. The first conception, dominant in the world, is based on the delegation of power through elections to a limited number of individuals that should act according to people's interests. This is typical for modern representative democracy and develops a social distance between the representatives and the represented. Opposed to this version is the second one, based on direct representation embodied by a leader or a party capable to symbolize the power of the people. This is typical to populist democracy and its origins are exclusively Latin American.

These two conceptions about democratic representations and their versions of democracy can be useful to make distinctions between European and Latin American populist movements. In Central and Eastern Europe, populism has multiple forms but the great part of them can be certainly associated with the first conception I have talked about. That's why for the most part it is reduced to ethnic and cultural populism. Guy Hermet[26] even talks about two contradictory forms of popular identification that we can find in the literature about Eastern European populism. According to the first of them, people's identity is defined by a number of aspects concerning language, religion and even physical appearance. Assuming that people are carriers of a set of genes propagated from a generation to another, it appeals to a past related to the golden age of ethnic genesis. Contrary, the second form of popular identification is a product of common history that leads to the development

[19] Guy Hermet, *Sociologia populismului* (Bucharest: Artemis, 2007), 9.
[20] Ibid., 39.
[21] Ibid., 39.
[22] Margaret Canovan, "Trust the people! Populism and the Two Faces of Democracy", 2.
[23] Guy Hermet, *Sociologia populismului*, 37.
[24] Ibid., 6.
[25] Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley, Los Angeles, London: University of California Press, 1967).
[26] Guy Hermet, *Sociologia populismului*, 212.

of a collective memory. This memory gives birth to a feeling of political membership of a collectivity that most of the time is intermingled with the national state.

Although the second form of popular identification is the only one accepted, and present in our days, we can find traces of the first one in the program and discourse of some European populist movements. This could explain partially why these movements often have reactions related to linguistic particularism and religious intolerance. More than that, analyzing the increasing importance of national state in their activity and discourse, we can see a composite that incorporates elements from both forms of popular identification. That's why East European populist movements appeal to an aggressive nationalism that refers more to primordial people than to the body of citizens of the national state in its actual acceptance[27].

Latin American populism, on the other side, represents the rival version of western representative democracy, populist democracy. It is based on the political participation through the agency of a leader or an entire party that represents the power of the people. This way, populist movements respond to the popular demand of real citizenship, people being convinced that they do not know more than some disappointing judicial or electoral features of it[28].

In Europe, we can talk about three stages of manifestation of democratic citizenship[29], stages that have gradually contributed to the construction of democratic culture. First of them is legal and refers to the recognition of equality before the law, the second one is political and it is connected to universal suffrage and the third one is rather social than political and is assigned to the development of welfare state. Contrary, in Latin America we can talk about the absence of a democratic culture as a process where three aspects[30], partially opposed to the ones that contribute to the construction of democratic culture in Europe, had a great significance. Firstly, for a long period of time a generalized non-citizenship was imposed by dictatorships and oligarchic regimes. Secondly, there was a false liberal citizenship reduced to a ballot that most of the time was falsified. Last but not least, populist citizenship appeared and not succeeded to change anything, managing only to increase the legitimacy of the ruling rich minority.

In Romania, although the democratization process had started earlier than most of the Latin American states, the absence of a democratic culture is obvious. This absence is foremost a consequence of failure in the history of a stable and enlightened governance. Even if we are tempted to blame the communist regime for the lack of democratic experience, even before the World War II Romania didn't have solid democratic basis. Although, the four decades of communist dictatorship under Gheorghe Gheorghiu-Dej and Nicolae Ceaușescu destroyed every trace of democratic culture for Romanian people. Generalized non-citizenship and false elections were just a few of the arrangements to maintain power over the people and to block democratization attempts. After the violent overthrow of the communist regime in 1989, Romanians had to build democratic structures without a social and political base and this was a tougher challenge for Romania than for almost any of their post-Communist neighbors. More than that, after more than twenty years Romania is heavily criticized for the culture of lawlessness, corruption and winner-take-all politics. Taking all these features in consideration, we can see that at least two of the three aspects that contribute to the absence of democratic culture in Latin America are playing the same role in Romania.

Romania and the majority of Latin American states do not share only the absence of democratic culture, but also the long history of governmental populism. Unlike most of the European countries, in Romania, governmental forms of populism were always in front of its non-governmental and subversive forms. The first manifestation of Romanian populism coincided with

[27] Ibid., 211.
[28] Ibid., 205.
[29] Ibid., 204.
[30] Ibid., 204-205.

the formation of this country as a political structure[31]. Over time, it took different forms from what we can call boulangism under Marshal Alexandru Averescu to the national populism professed exclusively by the state, under Nicolae Ceaușescu[32]. The domination of these forms of populism created the environment for the development of what we can call populist citizenship in Latin America. That's why I could say that we can look at the appearance of populist citizenship as an element that contributes at the absence of democratic culture not only in Latin America, but also in Romania.

People's Party – Dan Diaconescu

One of the actors that stand out from the others, through his populist logic of action and discourse, in the parliamentary elections from 2012 is Dan Diaconescu, the leader of People's Party-Dan Diaconescu. Founder and owner of two television stations, Dan Diaconescu found the opportunity to raise the electoral support for his party starting even before the election campaign through media channels. This type of populism, called frequently media populism is specific to Latin America but now it has spread all over the world. Its central element is the television that helps neo-populists to communicate with the masses as radio did for traditional populists, but it is definitely more effective in communicating their charismatic qualities[33].

Therefore, a month before the legal start of election campaign, Dan Diaconescu arrived at Romania's economy ministry with seven bags containing three million euros to pay the overdue wages of the workers from a chemical plant called Oltchim. The money didn't eventually get to the workers but the electoral support for his party was considerably increased and, since then, he started to call himself "Romania's next president" on the nearly daily appearances on one of his television stations, OTV[34].

Dan Diaconescu found the opportunity to increase the electoral support for his party in the circumstances of a tumultuous political year and a personal power struggle between President Traian Băsescu and Prime Minister Victor Ponta. Although the coalition lead by Prime Minister Victor Ponta was always favorite to win the elections and won them in a convincing manner[35], his credibility was damaged after an accusation of plagiarism in his PhD thesis and the failed attempt to impeach President Traian Băsescu in the summer of 2012. The president, also, was not having a high credibility and, more than that, he was deeply unpopular due to his backing of austerity measures and his abuse of power. Acording to the turnout of the July 2012 referendum, 87,52% of the people who voted agreed to impeach President Traian Băsescu[36].

These are only few of the problems that contribute to the political and economical instability of Romania. Thenceforth, I will present more of them. Regarding the relation with the EU, although Romania joined it six years ago, now it is brought into question if the country is apt to be part of the block. It is considered a second-tier member and it is excluded from the passport-free Schengen zone[37]. Furthermore, Romania is the second-poorest and one of the most corrupt EU states[38] and its

---

[31] Ibid., 219.

[32] Ibid., 220-222.

[33] Taylor C. Boas, *Television and Neopopulism in Latin America: Media Effects in Brazil and Peru* (Berkeley: University of California, 2004), http://lasa-4.univ.pitt.edu/LARR/prot/fulltext/vol40no2/Boas.pdf.

[34] Sam Cage and Luiza Ilie, "Populism takes spotlight in Romania power struggle", *Reuters*, November 22, 2012, http://www.reuters.com/article/2012/11/22/us-romania-politics-idUSBRE8AL0IN20121122.

[35] USL won the elections with 60,03% of the votes for the Senate and 58,63% of the votes for the Chamber of Deputies (Office for Democratic Institutions and Human Rights, *Romania. Parliamentary elections. 9 december 201*)

[36] Romania, Biroul Electoral Central, *Comunicat privind rezultatele referendumului național din data de 29 iulie 2012 pentru demiterea Președintelui României,* 2012, http://www.becreferendum2012.ro/DOCUMENTE%20BEC/Rezultate/Rezultate%20finale.pdf.

[37] Sam Cage and Luiza Ilie, "Populism takes spotlight in Romania power struggle".

[38] Ibid.

justice is constantly subject to monitoring. In the last seven years, 23 politicians have been sent to trial for corruption[39]. Although there exists a small number of very rich people, millions of people are living from subsistence farming or minimum wages[40]. More than 30 percent of residences have no running water and almost five percent do not have mains electricity[41].

Taking all these aspects into consideration and, also, the absence of a democratic culture and the long history of governmental populism that I have talked about earlier, we can understand the emergence of People's Party – Dan Diaconescu, the logic behind the actions of Dan Diaconescu and his party and the succes registered in the elections. More important than that, we can see why Dan Diaconescu's populism enrolls in the logic of Latin American national populism instead of a cultural or ethnic populism dominant in Europe. The political instability, the precarious socio-economical conditions and corruption are features of a larger framework that constitutes the basis of populist movements in poor countries and Latin America is the main scene for this type of populism.

Under the conditions of a political crisis caused by the widespread discontent with the two major parties and their leaders, seen as arrogant and corrupt, PP-DD appeared as a anti-system party capable to assemble the people who are dissatisfied with the actual political establishment. Behind the wheel of a white Rolls Royce in his shiny purple jacket, Dan Diaconescu promises to save the Romanian people from the poverty caused by the political class whose actions are exclusively dictated by their personal interests. "Once in power we will make things right. We will have bread, glass and brick factories like in the old days,"[42] Diaconescu told to the voters from Târgu Jiu, the city where he was running for parliament. As we could see, another essential feature of populist movements appears. Dan Diaconescu talks about the political mobilization of the people directed by him for the promise of political system change starting with "the revolution of the vote" ("If we all leave the house on election day, we will succeed. Only this way we could make a country like abroad, as young people say ... I propose you to make a revolution of the vote, this year in November..."[43]).

Unlike most of the populist parties in Europe, PP-DD denies a part of the features of what we call democratic power. He speaks about installing the "people's dictatorship" to punish the political class for impoverishing the country. In the name of the people, he plans to seize illegal assets acquired by doing business with the state and to create an institution called People's Court for people to be able to decide how politicians should be punished for their injustices[44]. The anti-elitism is a basic element for his party so that their proposals are based on the idea that power elites and bureaucracy are inefficient and corrupt (Romania does not necessarily need skilled people, but needs people that won't steal anymore"[45]).

Therefore, people's problems can only be solved by simple persons like him and "his army of angels"[46]. That's why, as most of the populist leaders from poor countries, he is admired by simple people because of his image as a man of a modest background who made good and didn't forget where he came from. Although he drives a luxury car, he has never fixed his teeth and doesn't talk too much about his personal life[47].What makes me also believe that Dan Diaconescu's populism is closer to Latin American populism than to the populist forms dominant in Europe are the party's

[39] Ibid.
[40] Ibid.
[41] Institutul Naţional de Statistică, Recensământ 2011, *Tab11. Locuinţe convenţionale după dotarea cu instalaţii şi dependinţe la recensământul din 2011- Rezultate preliminare. România, macroregiuni, regiuni de dezvoltare şi judeţe pe categorii de localităţi,* http://www.recensamantromania.ro/wp-content/uploads/2012/08/TS11.pdf.
[42] Sam Cage and Luiza Ilie, "Populism takes spotlight in Romania power struggle.
[43] People's Party – Dan Diaconescu website, accessed February 20, 2012, http://www.partidul.poporului.ro/.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.

inapplicable simple proposals regarding common problems of the people and his charismatic leadership. PP-DD is proposing to pay entrepreneurs 20,000 euros for starting a new business, to raise salaries and pensions, cut sales tax to 10 percent, build 200.000 apartments for poor people and people to stop paying installments for twelve months. Although it is impossible that this measures to become real, proposing them has a great impact on public because they, hypothetically, solve the simplest problems people confront with in everyday life.

Conclusions

As we have seen, there are two rival democratic representations that can help us make a distinction between European and Latin American populism. The first conception, dominant in Europe, is based on the delegation of power through elections to a limited number of individuals. Opposed to this version is the second one, typical for Latin America, based on direct representation embodied by a leader or a party capable to symbolize the power of the people. One of the basic conditions of the emergence of the second version and of Latin American populist movements is the absence of a democratic culture, absence that we can also see in Romania, foremost as a consequence of failure in the history of stable and enlightened governance.

But the absence of a democratic culture is not the only element that contributes to the emergence of the national populism specific to Latin America. People's Party – Dan Diaconescu arisen due to other favorable circumstances, like political instability, precarious socio-economic conditions, corruption and winner-takes-all politics. It is an anti-system party designed to assemble the people who are dissatisfied with the actual political establishment.As most of the populist movements from Latin America, it has a charismatic leader and propose simple but unapplicable solutions for the simplest problems people confront with in everyday life. Although it is impossible this measures to become reality, by proposing them, Dan Diaconescu managed to increase the electoral support for the party, because, in a poor country, these are the problems that really matter for people and they want simple solutions for them, solutions that they can understand.

References

- Boas, Taylor C. *Television and Neopopulism in Latin America: Media Effects in Brazil and Peru.* Berkeley: University of Califorina, 2004. http://lasa-4.univ.pitt.edu/LARR/prot/fulltext/vol40no2/Boas.pdf.
- Canovan, Margaret. "Trust the people! Populism and the Two Faces of Democracy". *Political Studies 47*, no. 1(1999): 2-16.
- Cage, Sam and Luiza Ilie. "Populism takes spotlight in Romania power struggle". *Reuters*, November 22, 2012. http://www.reuters.com/article/2012/11/22/us-romania-politics-idUSBRE8AL0IN20121122.
- Hermet, Guy: *Sociologia populismului.* Bucharest: Artemis, 2007.
- Institutul Naţional de Statistică. Recensământ 2011. *Tab11. Locuinţe convenţionale după dotarea cu instalaţii şi dependinţe la recensământul din 2011- Rezultate preliminare. România, macroregiuni, regiuni de dezvoltare şi judeţe pe categorii de localităţi.* http://www.recensamantromania.ro/wp-content/uploads/2012/08/TS11.pdf.
- Laclau, Ernesto: *On Populist Reason.* London, New York: Verso, 2005.
- Office for Democratic Institutions and Human Rights. *Romania. Parliamentary elections. 9 December 2012*. Warsaw, 2013. http://194.88.148.169/b4/cc/12/e5/default_851532130567.pdf?c=25b63f6fcc0da26c81c9bc1477 148343.
- Panizza, Francisco. "Review of On Populist Reason" by Ernesto Laclau. *The Political Quarterly 77*, no. 4 (2007): 501-520. http://www.politicalreviewnet.com/polrev/reviews/POQU/R_0032_3179_232_1007192.asp.
- People's Party – Dan Diaconescu website. Accessed February 20, 2012. http://www.partidul.poporului.ro/.
- Pitkin, Hanna Fenichel: *The Concept of Representation.* Berkeley, Los Angeles, London: University of California Press, 1967.
- Romania. Biroul Electoral Central. *Comunicat privind rezultatele referendumului naţional din data de 29 iulie 2012 pentru demiterea Preşedintelui României.* 2012. http://www.becreferendum2012.ro/DOCUMENTE% 20BEC/ Rezultate/Rezultate% 20finale.pdf.

HOBBES' POLITICAL PHILOSOPHY

MHAI NOVAC*

Abstract
This is basically an attempt at an original conceptual reconstruction of Hobbes' philosophy as set in Lehiathan, namely one in the view of which Hobbes was neither an atheist nor an absolutist, as the standard interpretation holds, but rather what we could call an agnostical pragmatist (fact which, quite surprisingly, places Hobbes in the company of Burke). More to the point, my basic claim within this paper is that Hobbes was not such an 'enemy of individual freedom' as we traditionally hold him to be and that his thought was just as attached to the notion of individual freedom as the later contractualist views. The difference however, arises from the fact that Hobbes, unlike Locke, Rousseau or Kant, was what we could call a voluntaristic determinist and consequently viewed human freedom not so much as 'unhindered action derived from reflective choice', but rather as what we could call 'reasonable fulfillment of the basic human inclinations' (self-interest). As such, I will analyze the three main focal points of Hobbes' thought, namely (i) human nature, (ii) the principle of association and (iii) the principle of authority. More specifically I will try to offer a perspective on the link between his voluntaristic determinism, his notion of legitimate absolute coercion (sovereignity) and his political theology (the view that any form of political authority rests on a religious legitimacy) in trying to demonstrate how all these were Hobbes' specific way of seeking to find individual freedom a place under the sun.

***Keywords**: self-interest, behaviorism, sovereignity, contract, commonwealth*

I. Introduction

Hobbes' thought was deeply struck by the political and social events from during the English Civil War (1642-1651). As such, very originally, its basic assumption is that the greatest threat to individual freedom is constituted not so much by tyranny or despotism, but by anarchy. In other words, the essential claim of his political philosophy would be that the unregulated freedom of all is more harmful to the freedom of each than any form of authoritarianism, however arbitrary and cruel. He sets his arguments in this respect in three main works: *The Elements of Law* (1640), *De Cive* (1642), *Leviathan* (1651).

In a general sense, the intent behind Hobbes' philosophy is twofold: (i) the determination of an eventual scientific principle of morality and politics; (ii) pacifism, namely the edification of a system that predisposes people to the accomplishment of their civic duties.

Noticeably, the former finality is rather theoretical, while the latter practical. Therein resides the strong link between these two finalities which actually belongs to the specific British version of the Enlightenment: knowledge means power. In this respect, the influence of Bacon on Hobbes is rather obvious as the basic idea in the former's thought, i.e. that the essential finality of knowledge is the domination of Nature, remains unaltered in the latter's philosophy. As such, according to this vision, the main task of knowledge is not so much of a theoretic and descriptive, but rather of a practical nature.

II. Contents

This constitutes an adequate starting point for the understanding of Hobbes' criticism of classical philosophy (Socrates, Plato, Aristotle, Plutarch, Cicero). In this respect, Hobbes adopts Machiavelli's argument in claiming that all traditional political thinkers, notwithstanding their *doctrinary peculiarities*, shared the same fundamental flaw: *they aimed too high*, i.e. they derived their claims from an idealized and artificial conception on human nature, which condemned their

* University Assistant, PhD, Nicolae Titulescu University, Bucharest (novmih@yahoo.co.uk).

vision to utopianism; they[1] made up imaginary laws for imaginary communities. He, on the other hand, will allegedly derive his political considerations empirically, i.e. on the basis of the observation of human behavior in its most *natural* environment: society. More specifically, Hobbes claimed having tried to arrive at an universal principle of morality, that is *natural law*, not so much on the basis of reason as such (as a supposed fundamental and irreducible human faculty) but of a motivation which, at least empirically, seems far more powerful: self-interest. To the extent that he is the first to systematically integrate inductive empirical observation with deductive reasoning, Hobbes can be considered the first *political scientist*. Therefore, in order to understand his political theory we must first take a glimpse of his wider epistemological perspective.

As such, in his understanding, philosophy and science[2] are essentially faced with two complementary methods:

(i) the *synthetic* method, based on deduction, which, essentially, infers from general to particular, i.e. from the prime causes to their apparent effects;

(ii) the *analytic* method, which infers regressively, i.e. from certain apparent phenomena (effects) to their supposed prime causes;

In this context we must consider Hobbes' claim that there are two fundamental principles of the universe, i.e. *the body* (*matter*) and *movement* (the displacement, as the changing of *the locus*): "(…) every part of the Universe is Body; and that which is not Body, is no part of the Universe: and because the Universe is All, that which is no part of it is nothing (…)".[3] At the same time, as we have seen, with respect to the elucidation of the human nature, Hobbes preferentially adopts the analytical method. As such, he sets about from the observation of the actual empirical behavior of humans and then regressively and inductively draws general conclusions on the prime principles of any motivation whatsoever. As such, he claims, the facts on which he grounds his analysis constitute common knowledge accessible to anyone from one's own everyday experience. In this respect, he suggests in *Leviathan* that anyone can test the validity of his considerations by pure introspection: anyone who would take the time to look within oneself and observe one's own thoughts, passions, natural inclinations, more precisely their influence on one's own behavior would arrive at the same conclusions.[4] Basically, what we are dealing here with is an empirical and causal conception on human nature, i.e. one in which the human behavior can be understood as *passion mechanics*, thereby excluding all matters of purposive explanations of our actions, namely of exterior motivations for the individual behavior. The reason for his avoidance of this sort of teleological explanations is, as he claims, twofold: first, as the *objects of passions* vary across individuals depending on heredity, biology, education etc. and second, as they can be, and for the most part actually are, dissimulated. *In nuce*, we could say that with regard to human nature Hobbes is a deterministic behaviorist.

Further on, in matters of *morals* he is a nominalistic relativist – in his conception, good and evil are nothing but words, i.e. generic labels applied to various situations, the contents of which depend upon their specific relation to the individual observing them. More to the point, according to Hobbes, when someone claims a thing to be *good*, we should not understand by it anything more than that it provides the respective individual a certain form and amount of pleasure. Moreover, in his

---

[1] Just as Bacon did, actually.

[2] This being represented, first and foremost, by geometry, the only one that, according to him, had achieved at the time a series of undisputable conclusions.

[3] Thomas Hobbes, *Leviathan*, (New York: Oxford University Press, 1996), 447.

[4] When Hobbes speaks of introspection we should take the notion in a generic sense, namely regarding only those motivations which are valid for humans in general. Precisely on this ground Hobbes claims that each of us, provided that he learns how to observe and interpret his own motivations, will manage in knowing the others' motivations as well.

view, inclinations are much stronger than rational thought: "for the Thoughts are to Desires, as Scouts and Spies to range abroad and find the way to the Things desired."[5]

Paradoxically, although a critic of both Socrates and Thomas Aquinas, he shares their notion that the principle of the moral law should be sought within nature, *human nature* that is. This basically constitutes one of the first modern explicit formulations of the so called *natural state theory*. But however modern in its formulation it actually represents an attempt at providing an answer to a very old philosophical question: are human beings *moral* willingly or only when constrained to being so? And as you could imagine, Hobbes' answer corresponds to the latter alternative, i.e. that humans act morally only by constraint. All the more, against Aristotle, he claims that human being is not a *social animal* and that only due to constraints within natural state as such humans come to associate with each other. More to the point, the natural state constitutes for Hobbes that pre-political condition in which all humans live without any form of civic government or authority which would inspire them fear of any sort. As an observation, Hobbes does not claim that any such state has necessarily actually existed at some point in human (pre-)history, but that such states exist in his time in areas which, for one reason or another, are placed outside the boundaries of the *proper order* of things: America, the European states during times of civil war (England), the inter-state relationships during times of war etc.. In a general sense, we could claim that to Hobbes, the natural state constitutes more of a counterfactual model which serves to lay bare and clarify those aspects of the natural inclinations of the human being which become relevant when seeking to design an adequate political and social order.[6] More to the point, allegedly, through this model we can determine the motives, purposes and objectives which make human individuals want to form political communities by association. Once determined, the problem becomes designing an optimal social order for the accomplishment of these finalities. This is basically Hobbes' task in *Leviathan* and, as we can see, it is set from a fairly deterministic perspective on human nature.

Now, for a more detailed exposition of the aforementioned problematical and conceptual framework. Synthetically, Hobbes' initial preoccupation in *Leviathan* would amount to the following question: *How would human condition look like in the absence of the civil society?* As a first observation, Hobbes states that humans are much more equal with each other than has been previously acknowledged and, surprisingly, that the most relevant of these supposed equalities is represented by their equal possibility of killing each other. The importance of this type of equality derives from the fact that, in his view, self-preservation constitutes the fundamental interest of any individual. This is the basic interest which all human individuals essentially share and consequently the collective backbone of any functional political community should reside in the fear of death. However, Hobbes goes on, equal abilities lead to equal *hopes of wellbeing*, respectively to equal material claims and therefore to inter-individual competition for acquiring and securing those rare things which make the object of everyone's particular interest. In other words, in his search for personal security and wellbeing, each individual comes to the point of wanting to subjugate the others precisely in order to eliminate any potential threat. On the other hand, happiness as fulfillment of personal wellbeing constitutes, in Hobbes view, not so much an *immutable state of grace* but a perpetual transition from one object of desire (which has been attained) to another (which although unattained is attainable). Moreover, in this perpetual attempt, the individuals seek not only to acquire the desired objects but also to secure and universalize their acquisition, that is to ensure their permanent possibility of attaining every conceivable object of desire. As we can see, in Hobbes view, happiness and power are two faces of the same coin.

On the other hand, power, he claims, has a special relation to vanity, understood as an innate tendency of the human individual towards self-righteousness and –flattery. And this self-evaluation is always of comparative nature, that is it takes place on the background of the relationships between

[5] Idem 48.

[6] I.e. both just and functional.

the respective individual and the others: any man wants for the others to appreciate him as much as he appreciates himself and when this narcissistic need is not met by the others (treating him with arrogantly and disrespectfully) he is unavoidably overwhelmed by the desire to destroy them.

This subjectively biased comparison principle is used by Hobbes to explain most of the collective activities of humans, even those destined for personal recreation. More precisely, when they are together, humans try to share activities that produce laughter and amusement. Laughter however is, in Hobbes view, caused either by the attainment of sudden glory, or by the perception of something deformed or misplaced in the other and in comparison to which the respective individual comes to see himself as obviously superior, thereby becoming overwhelmed by self-admiration. Precisely this latter aspect makes Hobbes establish a sharp distinction between honor and justice, claiming that the former has nothing to do either with the latter, or with morals in general – in his view, honor does not constitute anything more than the acknowledgement of someone's superiority, be it harmful or helpful for the person acknowledging it.

Further on, according to Hobbes, there are three main causes potentially responsible for the conflict between individuals: (i) competition, (ii) distrust, (iii) fear. All three reach their apex within the state of nature which is therefore basically defined as *a war of each against all*. In the *Leviathan* he provides it with the following characterization: "men live without other security, than what their own strength, and what their own invention shall furnish them withal. In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."[7]

Obviously, in the state of nature there is no possibility of addressing any form of justice, as justice and injustice lack any meaning without a preexisting law which, in this case, doesn't exist. As Hobbes puts it, within the state of nature *man is alienated from his kindred*. In a wider context, this argument is set against the classical Aristotelian view regarding the supposed social nature of man, claiming quite the opposite, i.e. that the civil state is conventional and not natural. However, this does not mean that, according to Hobbes, human nature would lack any intrinsic forces and tendencies towards association and *civility*, but only that the anti-social tendencies within man are just as powerful as these, if not more powerful given the proper conditions. Essentially, to Hobbes, nature constitutes not a model, but an anti-model for society, precisely because the latter appears through the negation of the former: by observing nature we can learn what not to do as citizens.

Consequently, he will attempt to find the two categories of *natural forces*, namely those hostile and those favorable to the peaceful coexistence of the individuals, respectively to determine those mechanisms by which the former can be inhibited and the latter strengthened. His solution resides in a certain dialectic between the fear of death and the appetence for comfort (along with the hope of attaining it by productive activities). In other words, reason is the key in finding the proper balance between these three passions (fear, desire and hope) and employing them for the better use of mankind, i.e. peaceful association. We must take note of the fact that, for Hobbes fear of death and the desire for comfort have an ambivalent status as they belong both to the pacifying and to the conflictual factors. Vanity, on the other hand is, in his view, a solely negative passion, belonging exclusively to the latter category. Synthetically, his task in *Leviathan* would basically amount to the attempt of determining those mechanisms by which reason can (i) direct the fear of death and the desire for comfort strictly towards their pacifying consequences and (ii) dominate and even eliminate vanity. In this respect, Hobbes' mechanistic determinism with regard to human nature becomes quite apparent: it represents nothing more than an immutable system of forces which, if properly known and influenced, can be manipulated just as easily as any physical system. The only specific aspect of

[7] Thomas Hobbes, *Leviathan*, (New York: Oxford University Press, 1996), 84.

this type of system is the fact that the law governing it is the moral one, i.e., in Hobbes' terms, the *natural laws*, in the hierarchy of which the supreme status is obviously held by self-preservation. In other words, all laws and political obligations stem from and are subject to the individual's natural right to self-preservation. Quite interestingly, although the political finality of this argument is different[8], this assumption places Hobbes in the proximity of liberalism. The philosophical difference however is quite important, as while for Hobbes the grounding principle of self-preservation resides in volition (passions, inclinations, instincts), for the liberals lies with pure reason. The apparent advantage of Hobbes' view in this respect is that to the extent that these so called *rights* are backed by subjective passions they attain some measure of self-sufficiency – they don't have to be imposed as they correspond to the fundamental affective principles of human existence: self-interest. Basically, what we are dealing here with is an attempt of legitimating a peaceful society on the grounds of egoism. In fact, these are the most proper terms in which we can refer to Hobbes' understanding of the concept of *natural right*: the absolute freedom in doing those things instrumental to one's own self-preservation and, complementary, of abstaining from those that endanger it. All the more, just as for Machiavelli, the right of pursuing a certain finality implies the right to the means necessary for attaining it.

Further on, to the extent that individuals vary both in intelligence and prudence (i.e. the natural capacity to anticipate danger), some understand better than others the necessities instrumental to self-preservation. However, notwithstanding intelligence, no man in particular is in fact sufficiently interested in the wellbeing of the others. Therefore, in the state of nature, each individual must be the only authority in judging the means necessary to one's own self-preservation and, consequently, of using them in any way fit to this end. Basically, in the state of nature, *every man is entitled to everything*. As previously stated, all this belongs to the so called *natural rights*.

Natural laws, on the other hand, are rational precepts instructing individuals with respect to the alternative means instrumental to avoiding the various dangers to their self-preservation. These laws stem on the one hand from their natural rights, and on the other, from their irrational desires. Quite expectedly, the ground of the system of natural laws is peace. Correspondingly, the basic natural law states that people fundamentally seek peace and are entitled in this respect to any means necessary in protecting themselves against those in relation to whom there can be no peace. All the other subsequent natural laws are instrumental to this basic one.

As such, the first natural law[9], states that any individual must renounce his potential claim on all things[10] when all the others show themselves willing in doing the same, that is to limit oneself to as much personal freedom with respect to the others as he is willing to acknowledge on their part with respect to him. This is the covenant that grounds the so called *social contract* by which the political community is born. Consequently, within the political community each individual pledges himself by contract with respect to all the others in obeying such authority (person, council, institution) they have acknowledged together as sovereign. This is what we could call political sovereignity. Moral sovereignity, on the other hand, further belongs to the individual, i.e. to one's own right of self-preservation. In this context, the task of the political community resides precisely in making sure that the two types of souveregnity converge as much as possible, the product of this convergence being peace. More precisely, according to Hobbes, each individual becomes part of the contract by virtue of his own personal interest, but, once he renounced by contract a certain right for the benefit of protection on the part of the community, he implicitly obliges himself not to hinder in any fashion those in favor of which he renounced the given right (the Sovereign) in making use of it and of its corresponding authority. In short, people, by their own personal agreement, pledge to obey the civic duties stemming from the contract. This is what Hobbes calls the *covenant principle* and it

[8] The legitimation of the absolutistic monarchy.
[9] I.e. primarily derived from this fundamental one.
[10] *Naturally valid* in the state of nature.

represents the institutional ground of justice. As such, any agreement is based on trust, but how can this trust be ensured? And his answer is that by the reciprocally shared fear of the consequences of breaking the agreement. In fact, this is precisely why there was no trust among individuals in the state of nature, namely because there was no authority equally feared by all when envisioning the perspective of breaking the agreements. Consequently, in Hobbes' view, before speaking of justice and injustice, there must be (i) an initial agreement with respect to the moral meaning of these terms[11] and (ii) a specific legitimate power, i.e. a *sovereign*, equally coercive with respect to all individuals who partook in the initial contract. In sum, the sovereign must make sure that the fear of the punishment is always greater than the attraction of any potential benefits from breaking the contract.

In a general sense, what makes Hobbes special in the philosophical context of his age is the attempt to ground political legitimacy on morality and morality on self-interest (and correspondingly, fear): we could say that, paradoxically, to him, sovereigns are morally bound to keep their soveregnity undivided, unbroken and absolute as otherwise they would fail to meet the self-interests of all his subjects on which the very existence of the state rests.[12] Given this specific view on sovereignity, Hobbes criticizes the Aristotelian notion of justice according to which the legitimacy of any political authority derives from heredity. More precisely, according to Aristotle, some individuals are born to rule and others to obey. In this univocal relationship of authority of the former with respect to the latter, the role of the leaders is to distribute benefits proportional to the virtues/defects of each individual. This is what in moral philosophy is called distributive justice. Hobbes' objection is that this notion is (i) false, as in the state of nature (i.e. by birth) all people are equal and (ii) dangerous, as it encourages vanity which can bring upon the dissolution of the political community. As such, in his view, true distributive justice requires the existence of an impartial arbiter whose fundamental role resides not so much in distributing benefits depending on every individual's merits or misconducts but in treating everybody in keeping with their natural rights, i.e. equally: if he is to be permissive he must be equally permissive with all, if he is to be oppressive, he is to be equally so with all.

We must take note of the fact that a very frequent objection to this notion of natural equality is to say that nature, quite obviously, doesn't make all men equal: some are more intelligent than others, some are born stronger or otherwise gifted than others. Hobbes' counter-argument at this point is quite interesting (and penetrating actually): if nature has made all individuals equal, this equality should be acknowledged as such, and if it didn't, people, given their essential egoism, would never agree to acknowledge their own inferiority with respect to others, and all the less to form communities with other such *superior individuals*; as such, claims Hobbes, even if natural equality between individuals were a false notion we should still pretend it were a true one for the sake of peace and of the political community as such.

Roughly, his moral conception amounts to the golden principle: *do unto others what you would have them do to you*. For the argumentation of this view Hobbes attempts a pragmatic reformulation of the theory of virtue in the terms of which virtue corresponds to nothing more than those actions, persons, situations favorable to self-preservation, respectively to its essential condition, peace. Complementarily, vice is the opposite of such things. With respect to this latter aspect however, he notes that the main flaw of the rational laws and precepts is that they, by themselves, are coercive only morally and not physically as well, in other words that they bind individuals only in consciousness and not in deed, while in order for them to be really functional it would be required

[11] I.e. to what specifically is *just* an *injust*.

[12] A consequence of this rather odd conception is the extension of the notion of *just war*. More to the point, if in the standard view of the time (Grotius, for example), a war was deemed just only to the extent that it was made (i) as a reaction to a direct aggression, (ii) in order to secure some form compensation for unjust harm or (iii) punishment in Hobbes' view (iv) preemption could also constitute a legitimate reason for war.

that people feared the consequences of their breach. This requires certain concrete conditions that ensure that all people equally obey these laws as, otherwise, even if, *in extremis*, some chose to obey them voluntarily, they would fall victims to those who chose not to. All this comes to justify the necessity of some form of sovereign political authority.

As such, common security is in the interest of each individual in particular, and it requires the existence of a social body that is to be sufficiently numerous so as by its collective strength to be able to (i) render the eventual breach by any individual of anyone else's natural rights a very *unprofitable endeavor* and (ii) defend all its members against foreign threats. In order to accomplish this task, the political community must be established as a sole and undivided legal person by a contract in which each individual, by his own will, binds himself with respect to all the others in acknowledging the will of this legal, civic and artificial person as his own. Obviously, this is the commonwealth. In other words, each individual must consider the actions of the sovereign power as stemming from his own will. Institutionally, this sovereign will can be *incarnated* by an individual (the monarch), or by a council (the Parliament).

There are two steps in the conclusion of the contract as viewed by Hobbes: (i) a voluntary pledge by each member of the future social body that he acknowledges as sovereign any such individual or council as chosen by the community and (ii) the actual vote with respect to the identity of the sovereign as such. Interestingly, Hobbes suggests that the legitimacy of the sovereign is not justified by its source, i.e. by the actual way in which it arises, but by the way in which the sovereign exercises its authority. Consequently, the social contract must not be seen as a descriptive document, but as a purely normative one, i.e. as a modal fiction, as an *as if*. In this respect, we must take note of the fact that Hobbes separates between two actual ways in which commonwealths arise, the *natural* and the *institutional* one. However, fear is in both circumstances the binding element of the political community. As such, if despotic commonwealths, on the one hand, result in a *natural way* through the fear of the subjects with respect to the sovereign (as in the case of a conqueror for example), the institutional commonwealths, on the other, result on the base of the reciprocal fear of the individuals. Either way, as noted, fear is the catalyzing element of the political association and, as such, claims Hobbes, legally, there is no difference between the establishment of a commonwealth through conquest and its institutional establishment. Obviously, says Hobbes, nobody has ever actually signed such a contract, but the point is that all those living within the territory of a commonwealth and, consequently, benefit by its protection, should see themselves (and *be seen*) as implicit parts to such a contract.

In what follows, a few considerations on the specific aspects of the sovereign's absolute authority:

(i) the right to punish – the sovereign is the only one who holds the right to punish and, as such, any form of justice must be intermediated by its authority.[13]

In this context the sovereign *cannot be abusive*, i.e. no individual could rightfully claim that the sovereign had committed an abuse with respect to an alleged initial agreement as, technically speaking, there never was such an agreement between the sovereign as such and each individual but only between the individuals themselves with respect to the sovereign. In legal terms, the sovereign was the object and not the subject of the social contract. Consequently, given that the sovereign is not party to the contract, he is the only one still having the right to all things that, in the state of nature, belonged to all individuals. All the more, given that the sovereign represents all individuals, this alleged accuse of injustice would be self-contradictory, that is the respective individual would accuse himself that he violated his own rights, which is impossible. Therefore, the sovereign cannot be held accountable by his own subjects.

(ii) the right of declaring war and concluding peace (including that of claiming the support of its citizens in these respects, both financially and physically).

[13] This corresponds more or less to what Webber would later on call *legitimate monopole on violence*.

The ground for this second authority is quite obvious: these rights, in order to be functional, must belong to the same authority that has the capacity to punish those who refuse to acknowledge them.[14]

Precisely the same ground justifies the concentration of the (iii) legislative and (iv) judicial powers in the hands of the sovereign, given that it is highly probable that people would otherwise refuse to obey the commands of someone who they had no reason to fear. In short, according to Hobbes, the law constitutes nothing more than the commands of the sovereign and it must define and regulate absolutely any aspect of public relevance: which are the goods attainable by the individuals, the nature of private property, respectively its boundaries, the publicly accepted actions, the defining elements of morality and its legitimate means of enforcement.

All the more, to the extent that the sovereign must also own the means necessary to the fulfillment of his commands, he is also exclusively entitled to the (v) executive power, i.e. it has the sole right of naming the councilors, ministers, magistrates and all other such officials.

Last, but no least, the sovereign holds the right to (vi) censorship. The reason is that, according to Hobbes, to the extent that people's voluntary actions result from their decisions and their decisions derive from certain shared moral notions, the sovereign must also have them under control for the benefit of the political community, i.e. he must be the supreme judge of all opinions, doctrines and *intellectual stands* precisely in order to be able to eliminate those potentially harmful to the common good.[15]

Now, against everything that later contractualists (Locke, Rousseau, Kant) shall have to say with respect to *rightful authority*, Hobbes claims that the sovereign must not even obey its own laws, given that it is the one generating them. This, by a very simple reason: new circumstances may require new laws and so, if the sovereign was bound by the already existing ones, it could not act appropriately with respect to the new circumstances and this would affect its capacity of doing precisely what the contract requires it to do, protect its subjects.

Now, a few of words on the rights the individuals have with respect to each other and more importantly, to the sovereign. In this respect, Hobbes accepts some form of limitation of the latter's authority based on those particular inalienable rights of the individuals which cannot be either transferred or alienated by contract. More to the point, to the extent that the contract was concluded in the interest of protecting individual life and ensuring all necessary means in this respect, the sovereign cannot demand of any *particular* individual to do anything against this fundamental personal interest – correspondingly, any individual is entitled to refuse to harm himself or do anything detrimental to his own self-preservation (provided that this is not a request addressed by the sovereign to *all* members of the commonwealth). In short, (a) the right to self-preservation is inviolable. Apparently there is a self-contradiction in Hobbes' claims in this respect – one could ask: *How does this inviolable character of individual self-preservation become consistent with the right of the sovereign to forcefully recruit soldiers in times of war? Isn't it precisely risking their lives for his benefit what he asks of its subjects? And, in this context, doesn't the coward refusal to take part in war become the right thing to do precisely on the grounds of the natural right to self-preservation?* Hobbes' answer is that avoiding participation in war is not morally condemnable but that, in such conditions, the task of the sovereign is precisely to make sure that the fear of the consequences of desertion is always greater than that that of partaking in war. In simpler words, in a state of war, the

[14] The relation to the actual political status of Hobbes' contemporary England is obvious given that *the power of the purse*, i.e. the right of imposing taxes, represented the main *point of debate* between the Parliament and the king, leading to the civil war.

[15] Obviously, this clause is relevant in religious matters as they have constituted another important cause for conflict in the history of England. In this respect, Hobbes makes an interesting distinction between religion and superstition claiming that the difference between them resides in their public acceptability; in other words, notwithstanding the fact that they both represent forms of *fear of invisible powers*, the former is permitted by the public authority, while the latter isn't.

sovereign must impose *in his own camp* a series of coercive measure which are so draconic that no individual, precisely by its personal interest, would be tempted to desert. In short, during times of war the sovereign must make shore that his own subjects fear him more than their enemies on the other side.

Other individual rights are: (b) any individual has the right to refuse to accomplish a task demanded by the sovereign provided he manages in finding a suitable replacement; (c) any condemned individual has the right to oppose an executioner in performing his task[16]; (d) any individual is entitled to refuse in making a deposition detrimental to his own interests; (e) no individual can be rightfully coerced in performing an action harmful to his own life.

By the compliance with these fundamental individual rights we can separate the good (i.e. proper, efficient) sovereigns from the bad ones; however, irrespective of their characterization, the power of the sovereign remains absolute, that is, in Hobbes view, *bad sovereigns* are entitled to just as much power as the *good* ones. In other words the sovereign, good or bad, is entitled to executing or detaining all those refusing to execute his demands, irrespective of the eventual morally legitimate character of the latter's refusal. In short, according to Hobbes, it is not legitimate for the people to rebel against bad sovereigns. Why? Because in his view, the sovereign is accountable only to God.

However, a certain limitation of the sovereigns' power derives indirectly from his ability in ensuring the security of its subjects with respect to third parties – the obligation of the subjects to obey their sovereign lasts only as long as his power to protect them. If the sovereign loses this capacity, he is sovereign no longer.

In what follows, a few words on Hobbes' view on what we would presently call *political regimes*. Basically, he addresses the classical distinction between monarchy, democracy and aristocracy while changing its meaning – in his terms, they are not three different forms of sovereignity, as there can be only one, i.e. the absolute one, but only different ways of institutionalizing it. As such we have three potential situations in this respect:

(i) monarchy – when sovereignity belongs to a single individual;

(ii) democracy – when sovereignity belongs to a council or a board in which every individual member of the commonwealth has the right to vote;

(iii) aristocracy – when sovereignity belongs to a council/board to which only part of the citizens belong;

However, as mentioned, despite using this classical distinction, he criticizes its originators' (Plato, Aristotle) understanding of it, especially the separation they established between these three *legitimate* forms of government and their three allegedly illegitimate ones, namely tyranny, anarchy and oligarchy. More to the point, Hobbes criticizes the fact that in the classical understanding, the distinction between good and bad government was drawn on accounts of the interest in which the sovereign used its authority, i.e. the common good, for the former and the personal good, for the latter. In his view however, these characterizations are relative as they derive rather from the sympathies and antipathies of the *perceiving subjects* with respect to the regime in cause, than from its intrinsic nature or some alleged objective moral standards. Therefore, those beneficially affected by the sovereignity of a single (particular) individual shall call it monarchy, while those disfavored by it, tyranny and so on. As such, in a general sense, in Hobbes' view, the distinction between a tyrant and a legitimate monarch becomes irrelevant as long as subjects and rulers (irrespective of the way and interest in which they exercise their authority) both share the same main benefits of sovereignity, namely protection and peace, respectively shortcomings of its lack, i.e. anarchy and civil war. More specifically, his argument claims that just as the people would have no interest in undermining the absolute power of the sovereign, as in this case they would lose the protection he granted them, the latter would have no interest in unnecessarily worsen the people's condition as, ultimately, his own power and political wellbeing directly depend on their state and relation to him.

[16] This having no consequence, however, on the legitimacy of the latter's performing this duty.

Probably, the tacit assumption behind Hobbes' argument in this respect is that we can never plausibly expect for a sovereign to fully obey the public good in stronger measure than his personal one, then the problem becoming not so much in finding the one who is willing to do that, but rather in devising such a political system in which the two interests converge as much as possible.

Further on, against classical positions such as Cicero's or Aristotle's, he claims that the power of the sovereign and the freedom of the subjects do not vary that much in these three political regimes, to the extent that in all cases both the absolute character of the sovereign's power and its essential finality (security and peace) remain the same. As such, Hobbes interprets one of the classical problems of political philosophy (*Which is the best form of government?*) in his typically pragmatic manner: *Which type of government is best suited for ensuring peace and security?* His answer is that as the bearers of the sovereign power are, ultimately, mere human beings, more preoccupied with pursuing their own interest than that of the entire community, the latter would best be served in that system in which (i) it is the closest bound to the former and (ii) the former is as undivided as possible.

Consequently, his resulting criticism of democracy is rather obvious: given that in such a regime each individual bears only a small fraction of the sovereignity, the number of those who will try to bend the common good to their own interests is much larger than in the other regimes. In his words, in a monarchy there can be only one Nero, while in a democracy as many as those who are willing to butter up the crowd.[17] All the more, Hobbes claims that despite the alleged superior capacity of democracy in controlling its officials, in a monarchy, although nobody can explicitly prevent the monarch from naming incompetent or immoral persons as public officials, he will most often avoid doing that, given that a bad administration of public affairs would be detrimental to his own interests. In a democracy on the other hand, the promotion of incompetent or immoral persons is unavoidable, given that such a regime functions by the very competition between various popular orators and demagogues whose power is limited only by their ability to manipulate and control the masses. The main problem would be that the unavoidable conflict between these various claimants to power breaks the unity of the people, which can very easily derive in civil war.[18] As such, Hobbes claims that those who are hostile to monarchy on its alleged lack of freedom, fall victims to a misunderstanding of both their own interests and desires and of those of the pro-democratic demagogues. As mentioned, his argument is that while the relation between sovereignity and individual freedom does not vary substantially from one regime to the another, the promoters of the notion of *equality* seek to undermine the sovereign in power only so that they could take his place. In other words, the critics of monarchy pretend to desire democracy not so much for attaining freedom for all citizens, but only power for themselves. So, essentially, Hobbes' position with regard to democracy would be that its alleged universal freedom and equality represents a mere cover for vanity and will to power.

At this point however we must draw a distinction between the *post-contractual democracy*, i.e. as the form of government eventually emerging after the conclusion of the contract and the *pre-contractual democracy* as the democratic procedure by which the individuals still living in the state of nature choose to conclude the contract and its incumbent clauses. More to the point, given that in the state of nature all individuals are equal, so that any form of legitimate obligation is in fact a self-obligation, in order for the future social contract to be legitimate, it must be grounded on the general agreement between each individual with all the others with respect to the acknowledgement of any such sovereign as chosen by their majority. Basically, the initial act of choosing the sovereign is

[17] This will become a quite typical objection to democracy. One century later we will find the same notion with Burke and Voltaire. In this respect, the latter would claim that he would rather *be governed by a single lion than by a thousand rats*.

[18] Expectedly, aristocracy lies somewhere in between these two alternatives, its quality basically depending on its bias towards one of them.

essentially democratic, irrespective of the later way in which this will exercise its authority within the commonwealth. This is a potentially vulnerable point of Hobbes argumentation as someone could ask: *Well, in this context, to the extent that some individuals withdraw their initial agreement in obeying the absolute authority of the sovereign doesn't that discharge them of the obligation to do so?* Hobbes' reply is that the initial agreement was not concluded between the individuals and the sovereign as such, but only among the individuals with respect to the creation of the commonwealth and the designation of the sovereign, so that in order for someone to legitimately withdraw from under his/its authority[19] the individual agreement of all contracting individuals would be required; as such, if a single contracting individual would refuse to withdraw its agreement, the sovereign's authority would remain untouchably absolute with respect to all individuals. A potential counter-argument to Hobbes' claim would be that in this terms there is an unjustifiable unbalance between the type of consent initially required for the designation of the sovereign, when the agreement by the majority sufficed, and the type of consent ultimately required for the dissolution of the sovereign, when the universal agreement of all contracting individuals is necessary. However we will not follow any further this direction of analysis, given that this fact is outside of the scope of our finality.

Further on, Hobbes' critical attention is directed towards the so called *mixed government*, that is what the modern theory of democracy (Montesquieu) would later on call the se*paration of the powers of the state* between the executive (monarchy), the juridical (aristocracy) and the legislative (the people) branches. His argument against this form of government is that the individual freedom is just as developed in such a regime as it could be in any of the three *pure* ones as long as there is consent among the three branches of the authority; individual freedom could increase only if conflict would arise among the three branches, but the incumbent price would be far to great, i.e. civil war which in fact ultimately leads to the complete loss of the individual freedom itself. The true sovereign, on the other hand, derives its/his strength according to Hobbes, not by consent but by the unity of all wills in a single legal person. All the more, true monarchy is the hereditary, not the elective one, as in the latter case, the true sovereign would not be the monarch, but the elective board – as such, for soveregnity to be authentic, the monarch must have the right of designating his successor and if he, for one reason or another, fails to do so, the closest kin must be designated in his place.

One of the fundamental errors which the sovereign can make at the very establishment of his/its rule of the commonwealth is for him to content himself with less power than necessary for the insurance of peace and security, precisely in order to get the respective commonwealth.[20] As such, when public safety requires the use by the sovereign of certain powers and authorities upon which it was initially agreed otherwise, this may seem abusive and lead to mutiny and rebellion.

As such, any renunciation on part of the sovereign to some part of its authority represents an infringement of its/his own duty as sovereign. His authority can be only absolute and correspondingly, he/it must make sure that the people are completely informed with respect to the grounds of its/his authority and also to eliminate any potentially usurping perspectives. As mentioned, this has to do not so much with the *interests* of the sovereign, but with his/its duty: any encroachment on the absolute character of sovereignity is potentially harmful as it can bring upon civil war and, implicitly, the loss of security and peace which represent the basic finalities of the initial contract. As such, all such *usurping doctrines* must be eliminated.

---

[19] Just as in order for the sovereign as such to be dissolved.

[20] The greatest issue with hereditary monarchy was, of course, succession and the conflicts to which it led. In this context, a very frequent phenomenon arose when having, on the one hand, a foreign claimant to the throne which was already taken and an interior group of lords dissatisfied with the present monarch. Quite expectedly, in such conditions, an agreement between the exterior claimant and the lords was concluded, by which the latter would support the former's claim to the throne, while the former that he would grant them certain privileges once he attained the rule of the commonwealth. Although somewhat profitable, on short term, for the monarch in cause, on the long term, such arrangements always lead to very unstable power relations between the monarchy and the nobles and, in many cases, to civil war.

The first type of such doctrines is the one claiming, one way or another, that there is a fundamental incompatibility between faith and natural reason. The problem here would be the fact that such views promote the idea that only individuals as such are the rightful moral judges of their own actions. On the other hand, Hobbes claims that such an argument could eventually be valid in the natural state, but under no circumstances in the post-contractual commonwealth in which only the sovereign can be the supreme moral judge. Any deviation from the absolute character of sovereignity is harmful to the commonwealth and must be eliminated.

A second type of such insurrectionist views, is the one claiming that everything an individual makes *against his own consciousness*, even when representing commands of the sovereign, constitutes a sin. Hobbes' objection in this respect is quite interesting: the subject must obey the command of the sovereign irrespective of his personal opinion on the matter and, if the respective action really constitutes a sin, then only the sovereign and not its performer will be held accountable for it by God. On the other hand, he further claims, any disobedience to the command of a sovereign constitutes a sin, even when his/its command is unjust, as the sovereign is nothing less than God's chosen representative on earth.

The third type, corresponds to those doctrines that we could call *mystical*, namely those holding that faith and grace are not attainable by study and reason , but by some form of supernatural inspiration, i.e. by subjective revelation. If this were true, asks Hobbes, how come that not all Christians automatically become prophets, but, on the contrary, most of them guide their behavior by certain *exterior models*? Basically, all such doctrines are in his view potentially harmful as they instigate to rebellion and anarchy.

I think that in order to understand all this we should take a glimpse at Hobbes view on the relationship between political and divine authority in history (corresponding epistemologically to the one between political philosophy and theology). As such, to him, *God's kingdom* was an actual commonwealth inhabited by actual citizens, namely the Jewish people. Their relationship to God was from the very beginning contractual in nature, the first agreement being the one between God and Abraham by which the former promised to grant the latter the land of Canaan in exchange for his and his offspring's loyalty. Thereby, Abraham becomes the instrument of God's power on Earth, that is the *worldly sovereign*, with the right (and duty) to punish all those who refuse to obey his (and indirectly God's) laws, under the pretense of personal revelation (the mystic attitude). The contract between man and God is renewed by Isaac and Jacob, suspended during the Egyptian exile and subsequently reinstated by Moses on Mount Sinai.

In my opinion, we could consider Hoobes' arguments in this respect as a legitimatory attempt with respect to Caesaropapism, i.e. the view holding that religious and political authority should be placed in the same hands, namely those of the monarch. Consequently, he offers a very original interpretation of the teachings of the Bible. For example, in the case of Jesus, Hobbes claims that His three basic divine qualities, (i.e. as Redeemer, Teacher and Emperor) are not concomitant but successive. On Earth, he claims, Jesus only fulfilled the first two qualities, and proof of this fact is that He never manifested any actual political intention in His stand, i.e. of changing the civil laws or to contradict the authority of the Jewish king or of the Caesar. Hobbes applies this *successivistic* interpretation to the very notion of Trinity as well. More to the point, he claims that God, as one and the same entity, was represented in three historically different circumstances: Moses represented Him as the Father, Jesus as the Son and the apostles as the Holy Spirit.

This *historical teologism* is backed by Hobbes' *manifestationist* attitude with respect to religion, essentially holding that in matters of belief, what matters is not what one feels, but what one does[21]; at the same time however, *what one must do* mostly refers to the plain obedience with respect to the status quo, i.e. to actually *not doing anything*. As such, for example, in these terms, martyrdom does not constitute a Christian imperative. In other words, if a heathen sovereign demands of a

[21] In perfect opposition to Luther's claim.

Christian to renounce the Christian God in favor of the heathen one, he should do it, as it as the *politically right* thing to do. In this case, the sin is not of the one obeying, but of the one commanding (the heathen monarch), and he is the one that shall be held responsible in the eyes of God. On the other hand, if the respective Christian were to disobey the commands of the heathen sovereign, and refuse to renounce the Christian God, he will be held responsible for it by the Christian God Himself. Why? Because the heathen king is, in some indirect form, the instrument of the Christian God's will so, if someone were to disobey him, he would disobey God's will itself. Basically (and paradoxically), according to Hobbes' claims, it constitutes a Christian sin to contest the authority of a heathen, or sinful sovereign. As mentioned, all these claims are in fact arguments for Caesaropapism: on Earth the religious authority derives from the political one as, if Constantine, the first Christian emperor, was also the Bishop of Rome, all subsequent Christian sovereigns automatically inherited his religious capacity as well. As such, basically, the religious authority adheres to soveregnity, so that the priests in a Christian commonwealth are the mere ministers of the sovereign, i.e. they draw their entire authority from his, as supreme priest.

Correspondingly, Hobbes' soteriological view is quite *realistic*: the Kingdom of God will begin after the resurrection of the dead and it will constitute an earthly commonwealth ruled by Christ himself. The Hell and the Devil are in fact on Earth, the former corresponding to the state of nature and the second to any enemy of the legitimate Church. At the same time, to Hobbes, the so called *tortures of Hell* constitute in fact only a metaphorical expression for *the envy that burns the hearts of the damned* when witnessing the happiness of the redeemed, i.e. of those enjoying the sovereign's protection.

Noticeably, Hobbes eliminates the distinction between the earthly and the divine worlds precisely in order to harness the political resources of religion. More to the point, in claiming to bring man's world in accordance with God's, he actually brought the latter in the former. Even if that does not enable us to say that Hobbes was an atheist, his influence on the subsequent atheist thought is rather obvious. On the other hand, his *theopolitics* grants him (along with Machiavelli) a specific place in the history of this type of issue as he moved the question from an ontological realm[22] (*What are the arguments for the existence of God?*) into a pragmatic one (*What are the effects of the belief in God?*). In this context, he prefers faith by virtue of its latent benefits with respect to social cohesion.

III. Conclusion

As we can see, Hobbes' thought is articulated on three focal points: (I) human nature, (III) human coexistence and (III) the principle of authority. The order of the argumentation proceeds correspondingly. In what follows, we will sum up Hobbes' basic claims in these regards. As such, he initially holds that the human individual is a deterministic system of passions and inclinations (among which reason is a fairly secondary faculty in terms of power). Correspondingly, freedom basically amounts to nothing more than self-preservation[23] and, in this understanding, constitutes the basic human interest. At the same time, however, reason constitutes the most suited faculty for the achievement of self-preservation. On the other hand reason is unattainable by the individual as such, given that, on this level, reason is *slave to passions*. Nevertheless, given that most often passions are self-contradictory, reason can become dominant in those specific circumstances in which they are properly balanced in order to cancel each other out. Still, on the individual level, this specific balance of the opposites is unattainable. As such, human association becomes necessary in order to achieve this state of reason which is instrumental in attaining self-preservation. Further on, this association is realized by means of a contract in which each individual agrees with all the others to renounce his/her individual authority in favor of the ruling authority of the commonwealth thus created. This

[22] As it had happened in the medieval scholastic philosophy.
[23] The rationalistic notion of *freedom as rational choice* is deemed illusory.

authority is the sovereign who basically constitutes (i) a collective body and (ii) the only rational person of human origin. As such, he/it is the only one preserving the natural authority which had previously belonged to all individuals. Further more, he/it must have at his/its disposal all the resources and collective force of the commonwealth in order to be able to (i) protect its members from exterior dangers and (ii) keep egoistic passions in check. Basically, given that the sovereign (as an institution) is the only fully rational person in the human world and that reason is the best way of achieving the basic individual interest, i.e. self-preservation, Hobbes holds that it is in the most direct interest of the individuals to subject their wills to that of the sovereign. However, individuals would not be willing to do that in front of a human authority and, as such, the sovereign must be seen as a direct representative of God on Earth. Only to the extent that he/it would be seen as some sort of *earthly god* could he/it inspire the necessary respect in order for the individuals to unquestionably obey its/his authority.

References

- Deborah Baumgold, "Hobbes", in *Political Thinkers. From Socrates to the Present*, ed. David Boucher & Paul Kelly (New York: Oxford University Press, 2003), 163-180.
- Lawrence Berns „Thomas Hobbes", in *History of Political Philosophy*, ed. Leo Strauss & Joseph Cropsey, (Chicago: University of Chicago Press, 1987), 396-420.
- Bertrand Russell, *The History of Western Philosophy*, (New York: Simon and Shuster, 1945).
- Thomas Hobbes, *Leviathan*, (New York: Oxford University Press, 1996).

SOCIAL EQUITY SYSTEM

ANTON-PETRISOR PARLAGI*

Abstract
*The aim of this paper is to present a application of social equity system, as normative principle, in democratic development of society. Political phenomenology of law reveals that normativism does not simply reflect the judgment of every citizen, considered **ut singuli**, but it rather reflects the effect produced by the interaction between ideonomic value and the politonomic goal of social regulation. Normative systems are set up through a social process and express the freedom of individuals ideonomically; they also socionomically reveal the individuals' freedom of choice as regards the norms specific for a certain social structure; finally, normative systems express the common action of altering normativity from a politonomical point of view.*

Key words: *phenomenology of law, ideonomy, socionomy, politonomy.*

1. Prolegomena

According to the phenomenology of law, one can notice that the ideonomic dimension of social equity system can be nowadays identified in legal liberalism theories; in this respect we make reference to F. Fukuyama, for whom liberal democracy is the final point in the ideological evolution of human race and the final form of governing conceived by the people. On the other hand, M. Duverger defines social equity system through its ideonomic significance when he states that democracy is included in liberalism because political institutions are organized and function in conformity with a set of *principles*: free elections, the autonomy of judges, parties system, political freedoms. All the elements which we have mentioned have an ideonomic character since they express a single principle, i.e. the principle of freedom; the legal formalization of the principle of freedom made it possible for free elections, the autonomy of judges, parties system, and political rights to exist. In this context, one has to mention G. Burdeau, who – focusing on the ideonomical character of democracy – stated that democracy is a utopia which manifests itself as a "political and institutional curiosity".

According to the phenomenology of law, social equity system reflects the rationality of the norms system, which makes the existence of law possible. From a politonomic point of view, social equity system imposes a system of political norms (individual freedom, social equality and participation) which makes the existence of a normative supra-structure – known as social justice – possible. Social equity system – seen as a phenomenon through which the individuals equally participate in the elaboration of a normative system – is legitimized thanks to the correctness of political governing criteria; e.g., the legal doctrine of social democracy attempts to justify isocracy ideonomically through the following three axiological political principles: freedom, solidarity and social justice. In order to complete the definition of social equity system we underline the fact that *isocracry* is a political principle of law which, together with *isonomy,* and *isegoria,* creates a complete image of the political phenomenology of law.

2. Social equity system and personality

The normative significance of the transcended "shepherd" dominated ecclesiastical law in the Western world for centuries even though (or precisely because) normative power was transcendental. The conviction that normative power was divine subsequently evolved into the political doctrine of the power state which was capable of imposing *laws* for making freedom and equality between

* Associate Professor, PhD, Department of Political and Administrative Sciences, "Nicolae Titulescu" University of Bucharest (antonparlagi@yahoo.com).

people possible. Apart from the Western conviction that divine law is imposed upon people through the force of rationality, Eastern conviction was different and upheld that law must be imposed through the force of the people; an illustrative example is represented by Confucianism, according to which political power can impose social harmony as a supreme norm that is necessary since it helps each individual manifest one's own personality.

Asian people used force to defend law for they considered it important for social harmony and not because it reflected human rationality; this explains why any individual who did not know the law – and not the one who had a different culture, religion or race – was considered a barbarian. It is important to notice that –according to the phenomenology of law– Eastern doctrine mainly justified the use of force due to the necessity to impose law, i.e. in an ideonomic way, as a system of ethical norms: this also explains the politonomic conclusion according to which power can be exercised only by the virtuous human being, the individual who can ensure social harmony. In Christian doctrine, normativity, which ensured the docile participation of the individual in political life, was paradoxically justified through the non-human character of law; since it was divine in nature, the law could not be passed, altered or repealed for the human sake.

John Dewey, an outstanding representative of pragmatism, defined the ideonomic nature of normative systems *avant la lettre* when stating that – through communication – individuals express their ideas and check them for verifying their effects, which means that they actually act "in a democratic way". From a socionomic perspective, the principles of pragmatism can partially describe isocracy as a way of collectively acting in order to adopt normative decisions; what actually interests us is the political effect of decisions, manifested as a common will to modify the normative system entirely. According to the legal doctrine, it is difficult to justify the individuals' equality of rights ideonomically as long as socionomically individuals were not, are not and will never be equal as to their rights. Consequently, the fundamental issue for legitimizing any political power is represented by the impossibility (or possibility) to legally institutionalize political rights and freedoms. That is why when referring to the political phenomenology of law one has to make a distinction between the concepts of political equality understood ideonomically and equalitarian politics understood politonomically. In this respect, it is important to point out that in the legal system of certain states there existed ideonomic norms, specific for certain ethnical or religious communities, which legally guaranteed different forms of autonomy, including the right to self-government (except for territorial autonomy): *exempli gratia,* the Kabala of the Jewish Polish-Lithuanian community, religious *millet* communities within the Ottoman Empire, the *national curies* of the late period of the Habsburg Empire, and – in modern states – the rights of national minorities.

It seems that the ideonomic significance of polical equity is sufficient for proclaiming the universality of a normative system. This form of social equity system, which is exclusively based on the rationalist component of Western Enlightenment, became concrete in the theory of the *identity* of natural rights; these rights would exist in all individuals in an equal way and without discrimination. As one can notice, political systems used this supposition regarding the normative system in order to justify any form of power; the institution of the "universal vote" illustrates the fact that the right to choose expresses the will of a political power and not the will of an individual. This legal institution no longer has anything in common with the ideonomy of the freedom of option but rather with the freedom to participate in elections (naturally on condition "political equality" is observed) with a view to legitimizing a certain political power. The hypothesis according to which the political power of an individual is equal with the power of the others thanks to the fact that the law recognizes the equality of electors in the electoral process cannot be upheld if analysed from an ideonomical point of view; in this respect, Amartya Sen states that thanks to the formal character of the law the result of elections "might be" generally recognized even if it does not tell us anything about the freedom of choice. In the chapter on *isogory* we pointed out that the freedom of choice is in its turn confined in the electoral process.

The theory according to which social equity system is ensured through the political act of elections – as an equal power of decision for individuals – cannot be justified at normative level. Firstly, from an ideonomical point of view elections have no legal significance: they tell us nothing about the principles or values which the individual wants to transmit in the normative system. Secondly, from a socionomic perspective, elections only reflect the participation of individuals who, in their majority, can choose antidemocratic normative systems; see the case of Hitler. Finally, from a politonomic perspective, elections legitimize a normative system whereby an "elected" minority has the right to govern a majority, which obviously is a non-democratic phenomenon.

If people were born equal, as Tocqueville considered, it means that their right to elaborate, alter or impose the law must is equally granted. Differently from the Anglo-Saxon legal doctrine, which attempted to legitimize the transfer of a natural right into a positive right, according to the principle that people have been equal ever since they were born other legal theories upheld that normative systems must set up equality for all individuals no matter under what conditions. According to the phenomenology of law one can notice that both theories mistake the politonomic level for the socionomic level when it comes to political equality; in the first case, the principle of equality promoted by the legal system is annihilated by the inequality generated by the social and economic system; in the second case, the principle of equality is annihilated by the political and legal systems which exclude most of the individuals from the ruling of society.

It is, thus, necessary to define social equity system as regulatory power, which is equal for all individuals and which has a triple normative significance: ideonomic, socionomic and politonomic. *Firstly,* from an ideonomic perspective, social equity system has a programatic significance, i.e. it reflects a certain normative concept (political, legal, moral, social, religious etc.) as to the individual rights and freedoms. One should bear in mind that it is *only* at this normative level where political equality is justified through the legal recognition of individual rights and freedoms. Yet, at ideonomic level one cannot reduce the notion of equality to the idea of uniformity because this would create normative "chaos", as Constantin Noica coined it since all individuals, driven by the will to be identical, actually become the slaves of uniformity; thus, equality is meaningless unless it allows as much freedom as possible (Noica C., 2007) *Secondly,* from a socionomic perspective, social equity system implies social structures (organizations, foundations and other civic associations), which try to impose their own normative criteria at political level. As we have already stated, one of the principles that are specific for the political phenomenology of law expresses the permanent tendency of sociocracy to convert into politocracy.

However, one has to notice that the individuals' belongingness to different normative structures does not express equality in a socionomic sense at all; the analysis made by Mancur Olson reveals that not all the members of society are ready to take part in social activity with a view to accomplishing common objectives. From a socionomic point of view, normativity does not reflect equality but rather the intentions of individuals who are driven by their needs or interests, which can be probably formalized by a legal institution; in fact, political participation of individuals is unequal, but since the normative system legally recognizes their equality, all the individuals pretend the same benefits. Liberal civic individualism, which extends individual freedom to the utmost, does not recognize the legitimacy of a normative system that could impose a limit upon human rights; this is actually the reason for which liberalism cannot explain the individual's participation in collective actions although it recognizes them. Marxist theories are different since they proceed from collective normativity to the individual; in this case, the subordination of the individual is established by the needs of the class (recently by the needs imposed by religion, ethnicity, sex, etc.), ignoring the fact that the individual is free to choose. According to Marxism, the political and legal system expresses normative principles and values which are specific for a social class and according to which the individual benefits only from those rights and freedoms that are useful for the system. *Thirdly,* from a politonomic perspective, *isocracy* -in greek sense-, manifests itself as a normative system which legitimizes political power; is, from this point of view, a form of manifestation of the Greek paradox

according to which power is too tough for a simple mortal, which does not imply the exclusion of a regulatory democratic system (the *demos*). Naturally, from an political perspective, a normative system does not automatically imply a democratic dimension; from a politonomic perspective, Robert Dahl considers that democracy is possible only if normative systems would recognize power as equal for each communities within the political system. Political phenomenology reveals that equality between communities is not possible simply because they are different normative systems from a socionomic point of view; some give priority to social norms, others regulate equality of chances or of governing participation conditions etc. The fundamental principle of social equity system implies that the equal exercise of normative power by all individuals legitimizes political power; normative legitimacy refers both to the content of power attributions and the purpose for exercising power. Social equity system can be understood as the equal and direct participation of individuals in the structuring or destructuring of normative systems; according to *isocracy*, political power – which by definition is unsubordinated – is subject to the *law*.

The socionomic character of isocracy can be determined by analysing from a Hegelian perspective the dialectical relation between the "quantity" and "quality" of equality in the creation of normative systems. There are opinions according to which a larger participation (quantitatively) in the expression of normative principles is enough for setting up social equity system; there are also voices according to which participation is relevant only if isocracy is accomplished in conformity with value criteria (qualitatively). A phenomenological perspective reveals that isocracy is the normative system which can surpass the conflict between norms which concern value and socionomic norms (those which refer to the degree of participation). At first sight, participation seems more important for social equity system since it expresses the political will of the majority. Let us suppose that the degree of participation reflects isocracy since it legitimizes power; however, the degree of participation does not determine the degree of utility (or social value) of the normative system. On the one hand, *the law* can be politonomically justified by the degree of participation; on the other hand, it cannot be justified if it contradicts legal principles even if it expresses the will of the majority. Moreover, as Mancur Olson noticed, participation reflects a personal interest, a fact which questions the existence of common goals in the elaboration of normative systems.

The theory – according to which the more democratic a normative system is, the larger social participation it ensures – cannot be ideonomically upheld simply because values cannot be equalized; the theory of value cannot be replaced by the theory of participation in order to justify a normative system except for the risk of transforming it into a totalitarian system. If the right to participation was assimilated with the right to regulation, all legal institutions should be modified. Firstly, ideonomically, the notion of person (seen as an entity) would be replaced with the notion of "collective actor" on the political scene, which would allow normative systems to replace individual rights with collective rights. Secondly, from a socionomic perspective, isocracy would be possible if the normative system replaced participation principles with norms of redistributing national assets. Finally, from a politonomic point of view, the normative system would become a political strategy meant to ensure equality between the parties engaged in the electoral competition, between power and opposition or between state and citizens. Within such a normative system – according to Fritz W. Scharpf – it would be enough for any "collective actor" to be able to mobilize the resources that are necessary for engaging in a political fight against another competitor. If we identified normative power with political power, we would face an ideonomic contradiction because the notions of majority and opposition would be meaningless; however, as long as both express the will of the citizens, there is no opposition. *Isocracy*, as a form of equal participation in the construction of normative systems, has, first of all, an ideonomic dimension thanks to the capacity of the individual to impose his principles; it also has a socionomic dimension, thanks to the force of regulatory systems specific for each social structure (organizations) and a politonomic dimension, thanks to the decision-making power of political institutions in the legislative area.

When it comes to the analysis of normative systems, the issue regarding the conflict between equality and freedom remains unsolved. As A. John Simmons noticed, liberalism cannot offer a satisfactory explanation for our political links because as long as the individual does not have interpersonal relations with the legal entity of the state, the latter is not bound to observe the norms imposed by those persons. In reality, the individual is nevertheless obliged to have legal relations with the state government where he resides as a citizen; however, since citizenship tends to become a transnational institution, it is important to observe national normativism. Carole Pateman has noticed that the issue of personal obligations cannot be solved unless political theory and practice detaches itself from the liberal notions and categories. *Firstly*, the theory of equal participation in the construction of political and legal systems ideonomically implies conceptual instruments for exercising power; we should not leave aside the fact that access to power is controlled ideologically exactly because political power is a means of social control. Ideonomically, the control of the individual is accomplished as ideocracy, through ideological persuasion; in this respect, Plato used to say that religion ensures the individual's obedience through its noble lies; Aristotle used to speak about the persuasion of the crowds; Machiavelli compared rulers with lions that dominate through force and with foxes that rule through cunning; V. Pareto borrowed the idea of power that is imposed through force and cunning; Lenin used to say that domination has two social functions, i.e. acting as a tyrant and as a priest. In modern societies political domination is ideonomically justified through the necessity to guarantee individual rights and freedoms; in consequence, participation in elections is merely a technical method of legitimizing power no matter the content and value of rights and liberties. *Secondly,* socionomically, the classical theory of democracy used to consider that political equality is necessary for the equal distribution of welfare; political phenomenology of law reveals that political equality does not generate an equal distribution of welfare. The phenomenon was thoroughly analysed by J.A. Schumpeter, who defined democracy as an "institutional set up" whereby some individuals are granted the right to adopt decisions subsequent to the organization of elections.

The socionomic character of social equity system is probably best defined by the *constructivist* theory, which explains the formation of political, social, etc. structures as a permanent combination (aggregation) of interests and/or contradictory objects of dispute. From a constructivist point of view, the political solution for settling the conflict between state normativism and individual freedom can be accomplished through a *network* which allows interaction between different social groups and their public actions. From an ideonomic point of view, the isocratic value of political decisions is assured through legal institutions; from a socionomic point of view, political value depends on the quality of social institutions; according to politonomy, the value of social equity system derives from the capacity to negotiate politically either through the recognition by power of a common system of negotiation norms or through concluding a legal agreement between those who participate in the political decision-making process. According to social equity system, constructivism is, thus, socionomically useful because it requires state institutions a series of political obligations: either to settle social conflicts for ensuring equal opportunities or to regulate equity through professional statutes. *Thirdly,* from a politonomical perspective, social equity system depends on the force of regulatory institutions, which is recognized by those who govern and those who are governed; in this respect, we have previously stated that free elections are not enough for legitimizing political power. According to the phenomenology of law, we could include social equity system within the system of "horizontal democracies", as defined by Giovani Sartori and understood as a form of citizen participation in the elaboration of normative decisions. (Sartori G., 1999, pp.305-320)

3. Social equity system and consensus

Political consensus must be included within the category of isocratic pillars thanks to its ideonomic value: dialogue may reconciliate ideological gaps which exist between those who wish to change the system for their own interest and the state that wishes to maintain the normative system in

the name of everyone's interest. A large number of authors consider that the *isocratic* value of political dialogue is a *sine-qua-non* condition for democracy; thus, some authors have come to define political institutions through dialogue. J. Gicquel states that within Western constitutional regimes there are numerous forms of political dialogue; e.g., political representation is a form which regulates dialogue between the elected ones and electors; political pluralism creates political dialogue through the parties which constitute an interface between power and citizens; legislative assemblies are institutions which cannot function outside political dialogue**.** The force of political dialogue does not derive from the citizens' legal equality; on the other hand, dialogue legitimizes a normative system since it ideonomically reflects the wish of the parties. According to phenomenology of law, political dialogue must be legally formalized and institutionalized first of all at constitutional level and also through the laws that regulate the way exercise of power. If we take Jurgen Habermas' remarks on normative suppositions about democracy as a starting point, it is necessary to analyse the way in which political dialogue facilitates normative construction. To Jurgen Habermas equal and democratic access to dialogue implies the existence of a *non-coercitive* accord – known as "ideal discourse situation"- whose influence on moral consciousness is serious. One has to mention the fact that the equality of the parties involved in a dialogue does not imply political equality except for the situation when there is a legitimate power that guarantees this institution legally. In fact, Jurgen Habermas underlined the idea that a crisis of the state's rationality illustrates a legitimacy crisis when the norms imposed by the political system come into contradiction with the norms of "civic individualism" (Habermas J., 1976). The more "individualist" political behaviour of citizens within civil society is, the less empathic and solidarity they are (in our opinion, solidarity is an ideonomic value which is extremely important for political participation). As regards isocracy, participation in political dialogue tends to be more and more "individualist" because every individual tries to avoid participation without giving up the rights he/she obtained through the others' participation. Political phenomenology abounds in examples regarding the way in which individuals become attached to institutions only after the latter guarantee their individual rights; however, once obligations are imposed, individuals refuse to recognize the institutions that grant their rights. Phenomenology of law reveals that political dialogue is more consistent when power needs legitimacy; on the other hand, when power is stronger, the right to dialogue is confined through discretionary legal acts. Hermet Guy's hypothesis regarding the present forms of social equity system is illustrative for it presumes that political participation is either a legal form of approving previously adopted decisions or a way of accomplishing electoral goals; at the same time, Lizette Jalbert considers that dissociation of citizenship – as an effect of the crisis of democratic participation – is similar to "controlled participation". (Guy H., 1988; Jalbert L., 1987)

Normative systems acquire an increasingly *non-legal* character due to the fact that a series of clauses regarding political participation are established through consensus. In this respect, it is worth mentioning the increase of norms for negotiation procedures and the improvement of social dialogue techniques and contractual science, which determine, modify and create more and more complex normative non-legal systems. First of all, one has to notice that non-legal normativism is similar to the politonomic process of legal constructivism: the more complex and numerous norms of political and social conventions are, the more independently they start functioning and the freer they are from those who created them. Secondly, political consensus can be set up only if the legal system and the non-legal regulatory systems are interdependent. Although positive law is institutionalized through law, one should not neglect the fact that positive law can also be institutionalized through conventions that were concluded prior to political decisions simply because positive law establishes the content (orientation) thereof. From an phenomenological point of view, we are interested in the political effect of these non-legal regulatory systems since they function in parallel with (or even differently from) the legal system.

A political phenomenon which is relevant to social equity system is represented by the fact that *collective negotiation systems*, which initially regulated only the parties' interests, have rather

become systems of accomplishing objectives that transcend these interests. In other words, a non-legal regulatory system which settles a social issue more quickly, more economically and more democratically is, from a political point of view, more efficient than a legal system. Collective negotiations – as a form of participation in the elaboration of laws – are more and more used for justifying political equality and isocracy. A normative act which was negotiated prior to its adoption has a double effect: socionomically, it creates consensus between social partners and politonomically, it expresses the will to commonly accomplish general interest. According to the political phenomenology of law, negotiation functions as an isocratic principle due to the parties' equal positions in the elaboration of laws. Through the delegation of legislative power, social partners (trade unions, employers' associations, professional associations, etc.) draw up drafts of normative acts which the lawmaker is entitled to validate or invalidate according to the so-called method of the *blocking vote*. It is also possible for the legislative power to elaborate the draft of the normative act and negotiate it with social partners to subsequently adopt the negotiated solution. Political consensus is also specific for the process of law application, whenever collective negotiations are set up as instruments for enforcing the law; this happens whenever the lawmaker provides that the application of the law requires conventional norms. Analysing this phenomenon in labour law, Alain Supiot considers that the transfer of power – towards negotiators so that they could apply the law – is similar to investing social partners with legislative power, a fact which makes law become a subsidiary norm. (Supiot A. 2005, cap.4.) The application of law by social partners manifests itself as an "executive power" since these organizations elaborate norms for applying the law only conventionally. Phenomenology of law reveals that there are numerous situations in which the legislative assumes the power to regulate laws and also adopts norms for the application of law, thus, "subduing" the executive power of the government.

Social equity system brings into evidence the hidden non-democratic aspects of regulatory non-legal systems. A first observation refers to the conditions under which a collective convention can be concluded and which were institutionalized in a non-legal way; it is known that the signing of conventions was initially granted to all participants in the social dialogue; afterwards, this possibility was gradually confined and, thus, the institution of the *conventional capacity* was created (obviously this institution is different from legal capacity). The institution of the conventional capacity is the corollary for the evolution of the collective convention system; if these collective negotiations ensure isocracy, political power must protect them, set up norms (institutions) whereby the equality of those who participate in negotiations could be guaranteed. The normative system was created through social conventions and it socionomically illustrates non-parliamentary democracy, a kind of social consensus created by the legal system. In this respect, ideonomically, social conventions are firstly justified through an accord of will, which is not legally formalized, and secondly through freedom of negotiation. From a politonomic perspective, the creation of social conventions depends on the existence of political conventions and institutions that allow (do not allow) social negotiations; that is why, in order to have consensus between social and political institutions, there has to be a regulatory system, known as the law. The legality of social conventions is not the same with the legality of the goal that these conventions try to achieve; naturally, according to the regime of contractual freedom no one is legally bound to negotiate and conclude a contract and the object of the contract cannot infringe the law. Since social conventions are not legally concluded, the Roman principle *quod nullum est nullum producit efectum* functions as a political principle. What matters from the perspective of political phenomenology of law is the fact that social equity system is more and more accomplished as a consensual non-legal normative system and less and less as a confining legal system.

Social equity system is extended in democratic societies through *public action contracts*, which, beyond their legal significance, are politically meant to protect individual rights and freedoms. By means of these contracts there were created both a rather political than legal regulations and "laws" on partnerships, which place social equity system at the congruence of classical

institutions – see the cooperation in the public domain of private law with civil law institutions. The isocratic character of public action contracts does not derive from private law norms nor from public law norms, but rather from consensual norms. Firstly, contracts of this kind have an ideonomic dimension because principles and non-legal means of public action are set up through negotiation procedure norms. Secondly, contracts of this kind have a socionomic component through the non-legal dispositions on material, financial, human, etc. resources that are necessary for the partnership to be fulfilled. Finally, the politonomical component of public action contracts takes into consideration the political will in order to maintain the status-quo; these contracts are concluded in different domains: environmental protection (the Netherlands), social protection and urbanism programmes (Italy, Spain); such contracts are also concluded for setting up of ad-hoc work groups (Germany) or (in compliance with *common-law*) for adopting public-private financial conventions of infrastructure (Great Britain). According to the political phenomenology of law, public action contracts confine the area of law enforcement. The complexity and political efficiency of public action contracts confine the normative intervention area of the state; on the one hand, the political force of these contracts confines the citizen's degree of participation in the adoption of normative decisions; on the other hand, the social force of these contracts reduces legal responsibility of those who govern. In this respect, one has to mention generated a wrong interpretation of social equity system, liability is shared by partners. The possibility of accomplishing social equity system as a form of governing through a contract made some authors support the idea of a new "political regulation" of society. J. Commaille brings a set of socionomic arguments to demonstrate that one can govern without political institutions if governmental agencies, ad-hoc commissions, debating forums belonging to commissions, etc. are created. Actually, these institutions can function very well outside legal regulations; the problem is that they have a clear objective, a confined sphere of applicability and a limited social effect. Consequently, a normative system which functions outside a legal system has a non-equality character. No matter how democratic such a system of public actions is, it excludes a part of the individuals from political participation, and finally from ruling society; even if citizens are entitled to vote during elections, a convention or a contract which produces effects only between the signatory parties is political, non-equal.

Social equity system illustrates the fact that political identity evolves and, in consequence, political identity is reflected by a normative system to the extent to which political power allows this identity to evolve. If democracy was defined only as *isonomy*, as equality of all citizens before the law, regulation of political rights would no longer be necessary; if democracy was confined to *isopolitia*, as political equality between citizens, regulation of individual rights and freedoms would no longer be necessary; finally, if democracy was confined to *isogonia*, legal systems would be useless because normativity would simply impose itself within human communities. J. Linz and A. Stepan approached this aspect in their study dedicated to the transition towards democracy, underlining the fact that in present societies there are no "multiple and complementary" identities of individuals. Political identity is an important issue to isocracy because any modification in the normative space generates a confinement or an extension of the content of individual rights and freedoms. Firstly, we must notice that once the political structure of the legislative power is modified, its ideonomy also alters, so that the way isocracy is regulated will be different. It is easy to notice that the ideonomy of political institutions, after a post-electoral coalition is created, is different from the ideonomics thereof before elections: politonomically, this phenomenon illustrates that parliamentary activity of parties no longer expresses the electors' political will. If all who are elected formed a single parliamentary group or if all who are elected declared themselves politically independent, they would enjoy the ideonomic dimension of the normative process simply because each MP will represent himself. Secondly, we must notice that legislative activity illustrates the ideonomy of political parties though political parties have never received such a mandate from electors; MPs should represent citizens' will exclusively and not their party's will. In this respect, Samuel Huntington is right to state that political parties supplement or replace traditional political institutions

which had a fundamental role in organizing the citizens' political participation. (Huntington S.P. 2004, p.45; ibid. 1999, p.79). Parliament must embody the ideonomy of nation so that one cannot accept that a part of the legislative, be it political or non-political, expresses a different ideonomy; as Alain Supiot has noticed, no intermediary body can impose the law to the others. Since each MP expresses the will of the nation, the concepts of *power* and *opposition* are meaningless; ideonomically, no representative of the people can oppose another representative of the people just because his/her party belongs to the opposition. Thirdly, if we accept the hypothesis firstly formulated by M. Hauriou, according to which the legislative is a *buffer-institution* between power and the electoral body, we can conclude that isocracy is ensured only if legislative activity is subject to constitutional norms, no matter if it reflects the citizens' will or not. In order to define isocracy, it is not enough to have a normative system based upon the principle of equality in the act of governing; it is also important to have an equal module of participation for electing the members of the government. If we confine democracy to its socionomic dimension, as this is reflected in the legislative process, we can indentify just one of the conditions which are necessary for isocracy to exist. Similarly, representatives must continue to regulate the individuals' political equality through norms that illustrate *how, when, who* and *by what means* this equality is accomplished.

Phenomenology of law reveals that social equity system expresses the relation between the ideonomia of political institutions and the socionomia of social structures in the process of creating normative systems. In order to prove that isocracy has an ideonomic dimension it is necessary to firstly notice the rational conditions of the choices which individuals make, of the factors which determine the choice of a certain normative institution to the detriment of another one. *Firstly,* ever since politocracy organizes the so-called "free elections", the individual's capacity to express his/her opinion is limited to the organized ballot; *e.g.,* if a list election is organized, the elector cannot express his option for a certain candidate. Freedom of choice is also limited when normative systems are altered either because society undergoes a process of transition from totalitarism to democracy or vice versa; normally, electoral laws are passed according to a set of non-legal criteria (ethnical, religious, community etc.), which are meant to bring advantages to a leader or a certain political party. As S. Huntington pointed out, young democracies do not manage to structure their institutions in order to minimize their attempts to make use of such legal solutions for obtaining votes.

Social democratization through political institutions generates an undesired effect in the sphere of *isocracy* because it allows access to power for non-democratic, extremist parties, which confine both the individual's freedom and the sovereignty of the state: in this respect, the case of Yugoslavia is suggestive. Secondly, social equity system manifests itself thanks to the fact that normative systems eliminate the confinements exercised by the state over the individuals and extend the sphere of individual rights and freedoms. In this respect, one can identify another paradox of democratization: if politonomically an *upgrade* of political freedoms is accomplished, ideonomically one can identify a degradation of political freedom. Political democratization ideonomically questions the value of normative systems because it allows various kinds of freedom: asocial, amoral, acultural etc. *Thirdly,* the process of democratization displays an unstable character of political structures and legal institutions, which is determined by the fact that politocracy makes use of the right to force rather than the force of law. In this respect, E. Mansfield and J. Snyder consider that during the period of transition towards democracy states become more aggressive and more inclined towards provoking a war. *Fourthly,* one does not have to mistake social equity system, as a form of power, for democracy; phenomenology of law provides many examples of normative policies that intentionally subdued democratic institutions in order to prove the inefficiency thereof and to justify autocracy or dictatorship.

4. Social equity system and delegation of power

The mechanism of political representation does not only imply equal participation in elections, but also equal participation in political dialogue. In all political regimes, which function

according to the principle of representation, normative systems regulate the obligation of elected representatives to meet, discuss and consider the electors' opinions. Socionomically, political equality depends on the parties involved in the political dialogue, as well as on the consensus that can be reached by social structures and power representatives. If the normative system does not grant equality to the parties involved in the dialogue or does not ensure communication or does not allow divergent opinions to exist, isocracy acquires a conformist character: that is why isocracy can be set up in totalitarian systems if it lacks its ideonomic dimension. Politonomically, one can notice that all representative institutions function thanks to the dialogue between power and opposition, the opinion exchange between the powers of the state, thus, as Clemanceau said, ensuring the glory of a country in which people enjoy freedom of speech. Ideonomically, confusions between the legal institution of representation and political representation led to a wrong interpretation of social equity system. Those who embrace Rousseau's theories consider that representative institutions can express people's will through the elected ones on condition that the latter exercise their term of office in an imperative way; one of the promoters of the imperative term of office, L. Duguit, considered that there is no difference between the members of the legislative body and ordinary mandataries. It is obvious that the error incurred by this theory consists in the fact that it transposes a contract of mandate from the civil sphere to the political sphere. On the other hand, the setting up of *representative* institutions itself appears under different forms in the context of a political system.

Representative bodies can be set up subsequent to elections on the basis of proportional representation, as it happens with most European states through the *first-past-the-post* system, which is specific for normative Anglo-Saxon systems. Firstly, one has to approach the problem of proportionality, i.e. the criterion according to which the number of representatives is established; no matter how high, the number of representatives contradicts the principle of social equity system according to which all individuals must equally take part in the act of governing. The same problem exists in the case of representatives who were elected with a majority of votes but did not obtain all the votes. Paradoxically, social equity system as an equal way of exercising political power is limited by representative institutions: due to the fact that society is vertically structured, pre-electoral isocracy is after elections replaced with representative institutions so that the will of most electors is replaced with the will of the elected minority.

Ideonomically, one can notice that social equity system illustrates the choice of representatives whose unique political quality is the fact that they become "more equal" than those who have chosen them; socionomically, isocracy illustrates only direct, equal and free participation of citizens in appointing representatives; politonomically, isocracy only reflects the democratic character of political competition in the process of setting up representative bodies. In this respect, Robert Dahl stated that democracy must be a selective *poliarchea* and a *merit poliarchea* (Dahl R.,l953.); to support his opinion with arguments he made reference to political power distribution within different communities. As far as we are concerned, a political system based on representation cannot be mistaken for isocracy, which must represent the political system; in other words, representative institutions are not isocratic by themselves, but in the way they reflect, organize and respect the citizens' will.

The need to have legitimate and relatively stable power institutions determined the legal distribution of responsibilities towards the majority, towards a politically active minority. R. Michels was one of the first who analysed the phenomenology of delegating political power and he referred to the way in which big organizations appoint a leading minority in order to be efficient. One negative effect on social equity system would be the fact that delegation grants political leadership to a minority that detaches itself step by step from majority and transforms itself in oligarchy. Ideonomically, one can notice that oligarchical phenomenon is in contradiction with isocracy, which presumes that political participation in social ruling is extended. That is why, once the majority expressed the will to delegate power to a political institution, social equity system must be ensured by that very institution. In this respect, J. Schumpeter elaborated an alternative theory of democracy

according to which the majority can appoint a number of persons who are obliged to observe the electors' will; in their turn, electors are obliged to appoint a national executive power, called the government. Thus, Schumpeter considers that democracy is reduced to an institutional system in which some persons acquire the power and make political decisions statutory after winning the votes of the majority.

According to the political phenomenology of law, the success of polical equity depends – if power is delegated – on a series of problems. First of all, these problems are ideonomical because the appointment of a representative expresses the will of those who appointed him / her, and not the will of the elected one. Citizens' representatives are not invested with the power to express their own ideonomy but rather with the power to fulfil the electors' will. The fact that those who are elected subsequently assume the right to impose their own ideonomy as "representatives" of the citizens is illegitimate; let us not forget that Gaetano Mosca criticised the pluralist political system (Mosca G., 1939) exactly because the elected "representatives", no matter the parties they come from, would make use of imposture, lies or bribery in order to accede to power. Ideonomically, the consequence of this state of facts is the mistrust of electors as regards the correct attitude of the elected ones and the sanctioning of the latter during elections. Garry Crotty and William Jacobson thoroughly describe the electors' mistrust and the fact that the sensible assessment of politicians' performance leads to the sanctioning thereof during elections by simply refusing to vote for them.(Crotty G., & Jacobson W., 1980). One has to notice that elected representatives also have political instruments and techniques whereby they ensure, at least apparently, political legitimacy; one of these instruments is exactly the institution of representation. In the process of representation, each elected person has to choose between expressing his/her own will and expressing the electors' opinion; thus, the institution of representation does not interdict freedom of opinion but it limits the content thereof. Politonomically, one can justify the ideonomy of an elected representative who acts in the interest of the state, even if this representative aggrieves his electors' ideonomy.

The problem of the contradictory ideonomy existing between a representative's free will and his/her obligation to politically obey his party was differently settled in the American doctrine; the problem was solved by politically influencing civil service according to the citizens' rights to know their representatives' ideology; German legislation regulates the "neutral" character of the civil service, whereas the French system is more liberal and admits "compromise". Politonomically, the legal institution of *representation* justifies the exercise of political power by persons who were especially appointed for this purpose. Ideonomically and socionomically, the universal vocation of representation has a series of consequences simply because the idea of representation logically opposes the extension of political rights for, as long as an individual is sovereign, he cannot be replaced. Socionomically, individuality – understood as unique will – comes in contradiction with the principle of representation, which ignores this form of individuality. According to Dominique Schnapper and Christian Bachelier the "republic", i.e. the political regime based on the principle of citizenship, must not be mistaken for "democracy" in the sense of applying republican principles on everybody. (Schnapper D. & Bachelier Ch., 2001, p. 108)

The principle of citizens' representation was put into practice before the universality of the vote was constitutionally guaranteed simply because ideonomically politocracy must justify its power through the so-called democracy of the suffrage, democracy which ensures "equality" of the vote. Even if the vote can be ideonomically considered equal, in the sense that each individual is entitled to a single vote, still from a politonomical point of view, the vote is unequal when certain individuals are not entitled to vote. We do not refer to disenfranchised citizens (who are not entitled to vote due to certain objective reasons: they are minors, they are mentally insane, the judiciary withdrew them this right); we refer to *censitary suffrage systems* that exclude a part of the citizens from exercising electoral rights based on the following criteria: race, residence, ethnical origin, religion, sex, etc. Political phenomenology of law reveals that there are more powerful censitary suffrage systems than those that were legally set up and in this respect one can give the example of absenteeism;

individuals who do not vote were not excluded by the normative system, but by the political system. Recent research has revealed the fact that social categories which are politically not ready to exercise their electoral do not vote, even if they have reached a certain ideonomical level: see the case of young people or those who are politically indecisive, or those who contest a political regime etc. Due to these phenomena,

Daniel Gaxie considers that elections are merely a mechanism which hides relations between political forces, a way of dissimulating social relations even if elections allow freedom of expression. (Gaxie D.,1978, pp.248-250). Marxist doctrines argue that this dichotomy between the citizens' legal freedom and their political inequality can be explained economically; thus, citizenship is formal and it masks the system of domination. Elections are a premise of social equity system because they regulate the way in which political systems are organized and function. Ideonomically, elections ensure the domination of the majority ideonomy in representative institutions; socionomically, elections impose community norms in representative institutions; politonomically, elections politically legitimate normative institutions. From the perspective of the phenomenology of law we are interested in the legitimate relation between these representative institutions and the legitimacy of the government; in other words, a legitimately appointed institution can perform illegitimate actions and vice versa. On the one hand, citizens can directly sanction their representatives through vote; on the other hand, representative institutions can be sanctioned through motions of censor adopted by parliament for reshuffling government. Thus, social equity system depends on the intervention or lack of intervention of a representative institution on an executive authority. For social equity system, what matters is the very relation between a representative institution's legitimacy and the way in which political right of individuals are represented. If in the former case legitimacy is ensured through elections, in the latter legitimacy derives from the way in which power is exercised. Thus, an institution which enjoys democratic legitimacy thanks to the fact that is elected but which breaks the constitutional limits of power is obviously non-democratic.

For representative institutions not to become discretionary, formal or informal institutionalization must be limited through social control mechanisms, including through elections, a fact which makes us conclude that social equity system is socionomically determined. Elections constitute a socionomic system which regulates isocracy, as a political relation between citizens and those who govern, due to the fact that citizens validate or not the activity of those who are elected and grant them or not a mandate to act. In presidential democracies, which have populist or plebiscite tendencies and a limited term that cannot be renewed, socionomic legitimacy is affected because the president's political responsibility towards the electorate is reduced; in the absence of a socionomic control system – as the one represented by elections – a president may commit power abuse. Apart from a president, a prime-minister who is not legitimized during elections is less probable to abuse power because he is controlled by other political institutions: he can lose legitimacy through the vote of mistrust expressed by the opposition or he can lose political support of his/her party. In presidential democracies, the situation is different; in this system early elections do not exist so that crises provoked by a discretionary power cannot be settled, as it happens in parliamentary systems. Democratization of societies does not only imply the problem of modifying representative institutions, it also implies the problem of modifying normative systems so that isocracy can function. Consequently, criteria established by R. Dahl for evaluating the level of democratizatization in a society may be left out. Even if elections are free, power institutions have a representative character and power distribution is accomplished at all levels, the mechanism of passing, adopting and enforcing normative decisions limit social equity system.

5. Social equity system and majority

In ancient democracy, the majority of the people had a procedural value because ancient democracies offered a political solution when passing a new law. The system of government which is legitimized by the will of the majority was anticipated by the political philosophy of the

Enlightenment, which came up with the idea that the sovereign people had the power to set up its own laws. Since the law was considered the expression of the majority will, the vote was favoured and it was used in order to replace the ancient democracy method of cast lots. The quantitative approach of the majority principle, which was imposed in the deliberating procedure of medieval institutions, prevailed after the French Revolution to the detriment of any qualitative criteria because it illustrated equality of the individuals'. Let us remember A. De Toqueville's ideonomy, according to whom the act of governing can be simplified with the numbers that make the law. In the ideonomy of isocracy, the problem of the majority must be correlated with the political character of normative decisions. We would like to mention that a quote by Thucydides from the Preamble to the European Constitutional Treaty was eliminated; according to this quote democracy implies the power of the biggest number; it is obvious that it was not the legal meaning of the majority which was not acceptable for the European institution, but its political meaning because Thucydides definition was contrary to the principle of equality between the states and not to the legal principle of equality between individuals. Thus, if remain in the sphere of ideonomy, the principle of *majority* has no political meaning because it refers to a concept, a prevailing theory, a body of opinions which contradict the views of the minority. According to socionomy, the principle of *majority* defines a force relation between different social structures (groups) that participate in adopting normative decisions in conformity to a set of rules: *relative* majority, *absolute* majority*, qualified* majority etc. According to *isocracy*, which defines political equality in the act of governing, one has to mention the fact that *majority* must not be mistaken for *unanimity* either ideonomically or socionomically. Political phenomenology of law recorded cases in which a majority, although legally entitled to adopt a law, could not do this without the citizens' political accord; in a semi-direct democracy, the people divide power with their representatives and, thus, a law adopted by parliament, even if unanimously, does not come into force until it is voted by the majority of the electors who become "deputies for a day", as Charles de Gaulle used to say. (Haskew Michel, 2011).

As regards the referendum, even if a bill was adopted with a majority of votes in parliament, this must be accepted or rejected by the people's vote. Even if it is almost impossible to justify the principle of unanimity from an ideonomic perspective, it is possible to explain it politonomically. Unananimity is not ideonomically possible because individuals are mentally and affectively different, they have different cultural levels and it is impossible for all of them to have the same normative opinion at the same time. Socionomically, the legal notion of unanimity lacks a real support because society is made up of a series of layers, different groups, categories or social classes who have various needs and values. Moreover, the concept of unanimity discourages different opinions which are essential for economic, social and political progress; Tocqueville used to say that we should fear despotism generated by the anonymous ruling of opinion and the majority conformism. Finally, in the sphere of politonomy, unanimity can be paradoxically explained through the infringement of isocracy because a *total* majority is not possible outside force or the threat of force. According to some authors, not even the majority is necessary; according to J. Schumpeter, democracy can function very well only through "electoral competitition" without depending on a majority; in this respect, he gives the example of Victorian Great Britain, when females and most of the males were not enfranchised.

The concept of democracy is often defined ideonomically as a measure of exercising power in conformity with the majority's will; this makes us draw the politically incorrect conclusion that power might be exercised in a non democratic way if it expresses the will of that majority. In this respect, Raymond Aron stated that any political regime is to a more or less extent an *oligarchic* regime even if decisions are democratically adopted by a majority. (Aron R., 1965) . As long as people are not governed by saints, those who participate in the governing system will benefit from power. If a normative system offers institutional and legal guarantees, oligarchic tendencies are limited, more than in any regime. Actually, Raymond Aron considered that it is only in a

constitutional system where political elites are open, allowing, at least theoretically, all citizens to accede to power through elections.

The principle of *majority* is of interest to social equity system in a triple way: ideonomically, because elections illustrate the majority's normative option; socionomically, because elected representatives exercise legislative attributions; politonomically, because the majority can impose a norm upon a minority. From a legal perspective one has to distinguish between the principle of majority and constitutionalism; socionomically, constitutionalism implies a relatively large consensus as regards the supremacy of the constitution and especially the acceptance of "self-limitation" power procedures, as well as the possibility to modify the system with the help of an exceptional majority. For democratic societies, in which *nomocracy* (the ruling of the law) is observed, constitutionalism implies a clear hierarchy of the laws, an independent system of legal interpretation and a solid legal culture of the civil society. Another observation refers to the fact that the rule of the majority has strong ideonomic significance for law; e.g., if certain norms are adopted through the vote of the majority, it is necessary that these norms are correct and efficient for democracy to function. It is obvious that the passing of an electoral law by a parliamentary majority, whereby a party is granted 2/3 of the seats in parliament, even if that party did not obtain the majority of votes expressed by the citizens contradicts the principles of socionomy but it is correct from a politonomical point of view. Ideonomically, one can also notice the fact that even if the law is the expression of a majority's will at parliamentary level, this law does not express the will of most of the citizens. In this case, the vote of the parliamentary majority is meant to impose a constitutional norm that contradicts the principles of constitutionalism, which requires another democratic majority, i.e. the citizens' majority. We must also take into consideration the fact that social equity system ideonomically imposed itself in the legal system through the rule of the majority, which is *politically limited* and according to which the rights of a majority of the population cannot infringe the rights of a minority; thus, when defining isocracy, one has to take into consideration both the ideonomic component (normative policy) and the politonomic component (political normativism).

6. Conclusions

Social equity system which ensures equal participation of citizens in the ruling of society is legally regulated through norms, institutions and legal systems. Thus, social equity system implies both the institution of representation and its correlative – confining the citizens' possibility to participate in political ruling in the context of extending and diversifying the political body of the *demos.* To Ch. Lindblom, as well as to Robert Dahl a set of political conditions would be enough to make democracy possible: freedom of expression, freedom of political association, the right to vote, the right to be elected, as well as the right of leaders to take part in free and correct elections.(Dahl R.,1953). Ideonomically, one can notice that the requirements of isocracy are formulated as political freedoms and not as legal rights; in fact, an individual who enjoys freedom of speech but who is not entitled to exercise it is excluded from power. According to the phenomenology of law equal participation in the exercise of power is legal fiction since each individual is considered to be equal with the others; however, it is only through this legal fiction that the individual can effectively participate, e.g. as a citizen, in elections; it is only through this fiction that a child is granted political rights but is not given the right to exercise them. Moreover, as Giovanni Sartori noticed, equality, understood economically, might mean equal fortune for all or the lack of any fortune for anyone in case all assets belong to the state. (Sartori G.,1999, pp.309-310). Thus, it is obvious that defining equality requires specific legal instruments and must comply with the will of politocracy. Marxism was wrong in mistaking one of the conditions for exercising power for power itself and when it reduced political force to working force or when it assimilated political rights with economic rights. The technocrat doctrine denies the idea of equal participation of citizens in the exercise of power; according to Helmut Schelsky, "no ordinary citizen has the knowledge and technical means whereby to participate in the over-formalized decision-making process" (Schelsky H.,1961, p.29). A. Frisch

also stated that direct democracy is no longer possible today and, thus, the vacuum must be filled with technocrats. If power becomes a form of technical and scientific governing, normative systems should invest science with legislative powers, legitimize management as executive power and invest coordinating institutions with jurisdictional powers. Political phenomenology of law paradoxically reveals that political systems cannot be classified in conformity with political principles; however, they can be differentiated through legal norms and institutions. Firstly, one has to notice the fact that according to legal institutionalization, each political system has a set of different legal principles and values. Secondly, each political system differently regulates participation in the ruling of society; some political systems allow access to power only to aristocratic, traditional or bureaucratic elites; others also allow middle categories to participate in the exercise of power, whereas large democratic societies allow all citizens to take part in the exercise of power. Thirdly, as S.P. Huntington noticed, political regimes are different from each other according to the relation between political institutionalization and participation: political systems with a low level of political institutionalization and a high level of participation are those in which sociocracy –while using its own methods– directly acts in the sphere of policy. Huntington mistakes the socionomic level of participation for the politonomic level of institutionalization, in which participation is possible only due to a formalized legal system.

References

- Aron R. (1965) Democratie et Totalitarisme, Paris Gallimard.
- Crotty G. & Jacobson W., (1980), American Parties in Decline, Boston: Litlle, Browne and Company.
- Dahl R., Lindblom Ch.E., (1953) Politics, Economics, and Welfare, New York: Jarper and Bros.
- Gaxie, D., (1978) Le cens cache, Paris, Seuil.
- Guy H., (1988) Paradoxes of Democracy, Gyan Publishing House: Delhi.
- Habermas J., (1976) Legitimation Crisis, Heinemann, Londra.
- Haskew M., (2011) De Gaulle-Lessons in Lidership from the Defiant General*,* Palgrave.
- MacMillan, London.
- Huntington, P., S. (2004) "Democraţia pe termen lung", în „Cum se consolidează democraţia, Collegium, Polirom, Iaşi; ibid.(1999) Ordinea politică a societăţilor în mişcare, Polirom, Iaşi.
- Jalbert L.& et Beaudry L., (1987) Le neo-liberalisme, signification et portee politiques, in.
- Les Metamorhoses de la pensee liberale, Sillery, PUQ.
- Montesquieu, J.L.S., (1951) L`esprit des lois, Oeuvres completes, vol. II, Gallimard, Bibliotheque de la Pleiade, Paris.
- Mosca G. (1939) The Ruling Class, New York: McGraw-Hill.
- Noica C. (2007) Jurnal de idei, Humanitas, Bucuresti.
- Sartori G. (1999) Teoria democraţiei reintrepretată, Polirom, Iasi.
- Schelsky H. (1961) Der Mensch in der Wissenschaftlichen Zivillization, Koln: Verlag Opladen.
- Schnapper D. & Bachelier Ch., (2001) Ce este cetăţenia?, Iaşi:Polirom.
- Supiot A., (2005) Homo Juridicus. Essai sur la function anthropolgique du droit. Editions du Seuil, Paris.

THE IRONY OF SAMENESS
EUROPEAN UNION AND INDIA'S COLD RELATIONSHIP

MIHAELA PĂDUREANU[*]
SILVIU PETRE[**]

Abstract
Trying to establish themselves as global actors, both European Union and India pursue their interest through multiliteralism. Although both of them developed intense relationships with the United States, Russian Federation, China and other regional actors, EU and India do not find profoundly attracted to one another. While EU steers Central Asia or China, India in its part sees the European framework as the sum of its parts at best and prefers bilateral proximity with individual nations once at the time: UK, France Italy, Germany or Poland. The irony of this state of affairs is that both EU and India have similar traits if judged by their effort to bridge ethnic, religious and economic diversity into a single body. Apart from that both EU and Indian economies struggle to shape a compromise between social protection and the neoliberal agenda.
In this paper we analyze the relationship between European Union and India by focusing on their foreign policies. Our main hypothesis is that EU and India should cooperate due to their attraction to the same values and norms. As future unfolds along with common challenges such as regulating financial flows or tackling terrorism and environmental issues, European Union and India should try to reach a common language.
This relation can also be a test for EU's aim to become a global actor because an established cooperation with an Asian country would provide the necessary framework to work outside the European space and to demonstrated its commitment to become an important player in IR.

Key words: *democracy, values, security, liberalism, EU, India, European military, industrial complex, Dassault-Rafale*

Introduction

In this paper we focuse on the EU's foreign policy towards India, mainly on the speed with which this relationship has developed in the last decade. We seek to explain why the relationship has evolved so rapidly and why it began to include areas like security, common threats, the role of international institutions. In order to support our research we use qualitative methodology, a case study about the EU-India relation. This case study is important because it shows the importance that shared norms, values and institutions have on the partnership, and we consider them methods to deepen it; and in the second place we observe a paradox, because the both actors are subscribing to the democratic process their relationship has showed some slowing.

1. The theoretical framework

For a long time, the relation between India and EU (European Community) was based on trade and economic cooperation and hasn't went through tense times. In the 90's their partnership began to contain more concrete objectives that were enforced by a more and more institutionalized framework: in 1994 was signed the Cooperation Agreement, in 2000 the Summits were introduced as a tool to facilitate the political dialogue, since 2005 India has been EU's "strategic partner" and the European External Action Service has worked on a Country Strategy Paper for India 2007-2013. In

[*] Beneficiary of the „Doctoral Scholarships for a Sustainable Society" project , project co-financed by the European Union through the European Social Fund, Sectoral Operational Programme Human Resources and Development 2007-2013.

[**] Beneficiary of the „Doctoral Scholarships for a Sustainable Society" project , project co-financed by the European Union through the European Social Fund, Sectoral Operational Programme Human Resources and Development 2007-2013;(silviugeopolitic@yahoo.com).

all this official documents, the role of norms and shared values is taken into account from the beginning and they are seen as important ways to keep on building and developing the relation: "Respect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement", „India and the EU representing the largest democracies in the world reiterate that their partnership is based on the sound foundation of shared values and beliefs. Our common commitment to democracy, pluralism and rule of law and to multilateralism in international relations, is a factor for global stability and peace", „India and the EU, as the largest democracies in the world, share common values and beliefs that make them natural partners as well as factors of stability in the present world order. We share a common commitment to democracy, pluralism, human rights and the rule of law, to an independent judiciary and media". Therefore, we consider that the theoretical framework that could help us the most to explain the EU-India partnership should the liberal one. Liberalism allows us to introduce individuals, ideas and institutions when analyzing foreign policy and to better explain certain decisions.

Important concepts for the liberal theory are: individualism, freedom, constitutionalism and institutions – whose role is to maintain the order; and even though it appeared as a domestic theory, liberalism has managed to project its domestic quality and values to the international level. The democratic regimes are peaceful towards each other, but are agressive towards non-democratic states. Liberals make hypothesis about each of K. Waltz's three levels when the try to explan what causes wars and M. Doyle identified three types of liberals: first image Lockean, which regards the human nature; second image commercial, also named societal and the third image kantian or republican internationalist. The lockean image, although anarchic is based on states that are representative and had obtained citizens' consent while looking to protect life, liberty and property and can trust in one another; the commercial liberals consider that the markets and the capitalist system together with "democratic majoritarism" will increase the level of peace. The third type of liberals represented by Kant and the republican internationalists consider that the states must agree on three conditions in order for the world to obtain peace. These conditions are: representative, republican government; respect for nondicriminatory rights and social and economic interdependence. All these different liberal assumptions lead to the following conclusions: that liberal democracies will reject the balance of power and will trust the community of liberal states, will have a positive duty - which implies defending the members of the liberal community- , will sustain market economy as well as human rights avoiding the use of force. In an early classification of liberal tradition towards the level of analysis, M. Doyle talks about Kant's liberal internationalism in which citizens apreciate the moral equality of them all, Machiavelli's liberal imperialism where citizens are unequal and seek to rule because they fear to be dominated and Schumpeter's liberal pacifism with rationalized, individualized and democratized.

These three distinctions of liberalism have been reclassified by A. Moravcsik, using the link between social preferences and state behaviour in ideational liberalism –that shows how state behaviour influences conflict and compatibility between collective social values, commercial liberalism – it explains the way in which state behaviour affects gains and losses on individuals and groups in society and republican liberalism – concentrates on who state behaviour is illustrated on different forms of internal representation.

The liberal theory belongs to the bottom-up approaches or actor-based perspective of the foreign policy analysis that consider individuals and societal groups as prior to politics because their interest are defined before the politics and are only using politics to obtain those goals and therefore this kind of analyse includes a includes more that just political or governmental explanaitions. The three core assumptions of the liberal theory are: one- that states are the primal actors in international politics, second – states represent the domestic society and are constantly recreated by new political actors and third that *„interdependent state preferences determines state behavior"* and that the states are trying to realize their preferences – different from other states- but under the constraints imposed

by other states' preferences. The other approach to the foreign policy analysis is the structural perspective (realism, neoliberal institutionalism, organizational behaviour approaches, social constructivism) usually addressing different questions or explaing different things, such as the decision making process or the choice for some actions. In this paper we will explain the focus on some actions rather then the process making, more precisly why has the relation between the EU and India evolved so rapidly and so deepen going from economic cooperation to a political partnership and although our theoretical framework is the liberal one, based on an actor perspective, we consider that the structural dimension of the policy should be also taken into account. By the structural dimension we understand the the economic, social, cultural factors that are perceived by the actors and to whom they react and that influence some types of interaction between them. For example, in this case we consider globalization as one important structural factor that influences EU's policy towards India.

One methodological problem that we want to adress is the way in which we will define the EU. If we can surely say about India that is a state, there are difficulties regarding the way in which EU can be conceptualized. This subject has been discussed also in regard with the sort of authorithy the EU has mainly because it has not replaced the national state but is more than an organization. The way in which its institutional and judicial structure evolved made J. Ruggie name it as the "first truly postmodern international political form" challenging the raltions between territorial space and state. While Duchêne called it the „civilian power Europe" that should avoid military power in order to maintain its influence.

Even if EU's development has lead to a new and difficult to describe political form, its construction and durability are linked and motivated by the need to avoid another war to to stimulate prosperity on the continent. W. Hallstein explains the construction of the European Community as a way to allow "Europe to play its full part in world affairs.. . . [It is] vital for the Community to be able to speak with one voice and to act as one in economic relations with the rest of the world" hence, a coherent foreign policy is vital for streghtening EU's role in the world.

2. EU-India cooperation

Although the European project was also a response to the Soviet Union, its existence continued even after the end of The Cold War, contrary to realists and neorealists prediction and in the 90s took steps to develop a Common Foreign and Security Policy and a European Security and Defence Policy renamed Common Defence and Security Policy after the Treaty of Lisbon. In the security area, the European progress towards a coomon voice in the world evolved much slower than it did in the economic sector. The market policies are governed by the „Community method" described as a set of rules and practices that provide a major role for supranational institutions while on the foreign and security policy the supranational institutions have little or no power. What the member countries found to be a common feature that wish to support in the foreign policy is the soft power of their construction. Looking to have certain identity in the international system, Europe aimed to be, in the word of R. Prodi a global civil power: „We must aim to become a global civil power at the service of sustainable global development. After all, only by ensuring sustainable global development can Europe guarantee its own strategic security". This shows that by spreading its influence EU islooking to ensure its security and to encourage development for its partners. At the base of EU's normative power are five major norms peace, liberty, democracy, rule of law and respect for human rights and four minor norms social solidarity, anti-discrimination, sustainable development and good governance that are spred contagion, informational diffusion, procedural diffusion, transference, overt diffusion and the cultural filter. All this norms can be found in the India-EU partnership as they both recognize the shared values that are at the base of their relation. And EU is still streghtening the normative dimension of the relation by sustaining the

implementation of these norms in the institutional framework between them. If EU apperas more like a normative power looking for its own place, India is considered to be a *status-quo* power which does not wish to expand its power.

An important form of institutional cooperation has been established since the India-EU Summit that took place in 2000 in Lisbon when they reafffirmed that „based on the shared universal values of democracy and the respect for human rights, rule of law and fundamental freedoms, stress our commitment to promote socio-economic development and prosperity, as well as international peace, stability and security" and EU considers India as the „warrant of stability in the chronically unstable South Asian region". The EU-India Joint Action Plan set in 2005 and reviwed in 2008 mentiones the main areas of cooperation for them: promoting peace and comprehensive security, promoting sustainable development, promoting research and technology, promoting people-to-people contacts and cultural exchanges.

The shared values and norms between them and the role of stabilizer that the India has in South-East Asia represent important incentives to keep on developing the partnership. As democracies attached to the the market economiy, they are improving the economic trade by opening in 2007 the disscussions for signing the *Free Trade Agreement.* EU is India's biggest trading partner with a total amount of trade in goods of 86 million euros in 2010 and this sum increased in 2011 with 20%. The biggest exporters were Germany, Belgium and Great Britain with 60% of exports to India. India accounts for 2.6% of the EU's total exports and 2.2% of the EU's total imports and if the trade agreement is signed the trade could double to 155 billion euros by 2015. This means that economic cooperation has developed in a very complex way and that the partners are looking to increase their advantages, but there are also points on which they disagree. According to an analysis on the FTA impact on India published in March 2010, it seems that India is unwilling to include the norms mentioned in the chapter *Trade and Sustainable Development*, the whole chapter more precisely because it requires measures to protect the enviroment and to protect children form labour. The economic relation has a great potential and can became a motivation for continuing to deepen their partnership.

Although India has benefited from aid from the EU, this donor-beneficiary relation has begun to transform to a partership and India's own growing economy will put further demands on the Asian power making it more willing to become independent. Even if we consider India to be a status-quo power, its role is more important now than it was ten years ago. Still India needs to find answers to problems like poverty, access to education and health care. The latest Country Strategy Paper for India 2007-2013 is defined as a transition paper that will move the relation from assitance for development to actors' economic cooperation and to reduce actions while also supporting the implementation of the *Millennium Development Goals* and *the EU-India Action Plan*. At the last EU-India Summit in February 2012, the President of the European Council Herman Van Rompuy mentioned that this Summit will offer the possibility to streghten their relation and to develop the political dimension of their colaboration and that the „increased cooperation between India and the EU can make a difference for the security and the prosperity of our continents". EU and India cooperate on research and inovation programmes and they signed the *EU-India Joint Declaration on Research and Innovation Cooperation* based on the *„Innovation Union"* document for EU and the *„Decade of Innovation"* paper for India. These documents describe the following common threats for which solutions are needed: climate change, energy security, water, resources, demography, security, natural disaster management, sustainable trasnport and mobility, health and combating diseases.

Regarding cooperation on security problems it has been established that at the bilateral level will be held consultations regarding threats like terrorism, cybercrime and piracy, regional issues like the need for a stable Afghanistan, a democratic Pakistan, the importance of regional integration and closer cooperation in South Asia and global issues: the international economic situation, poverty

eradication, the need for sustainable development, climate change, the Iranian nuclear issue. They also sustain multilateral solutions for this problems and a more institutionalized framework for South Asia, although the Security Council Reform is an important topic for India.

EU and India have a commun approach to the world affairs' current status and this has contributed to an increased cooperation in the security sector. As EU is constructing its global image in the international system, its valus and norms are the tools to legitimate to its actions.

What does it takeso long for an EU-India free trade agreement?

In 2010 New Delhi and Brussels agreed to sign a free trade agreement which hailed the promise to boost mutual exchange to over 100 billion dollars/year. We are three years away from 2010 and an FTA is still mirred in the quagmire of diplomatic details. In order to answer this dilemma we must drill deeper into the democratic mechanisms and capture the tangou between politics and economics.

It seems to be a self-evident truth the link between democracy and free-trade. The liberal creed envisages an international environment where both domestic and external relations are regulated by transparent and representative institutions. However reality is heterodox vis-a-vis theory. Many times people demand social safety nets. In response governments issue protectionist regulations designed to foster internal growth and halt foreign business considered toxic to national interest. As an ironic contrast history display several examples of state-led liberalisation measures enacted by authoritarian regimes such as Pinochet's Chile or the postMaoist China.[1] Those sample tend to spurr the idea that sometimes democracy and free-trade collide and only strong leaders can push pro-business disregarding social costs and public protests.

According to Kevin O'Rourke one cannot infer a simple, predictable correlation between democracy and free trade inclinations. Financial power, GDP per capita, the status and solidity of working class are factors moulding the political economy adopted by governments.[2]

Torsten Persson follows a more institutional approach and distinguishes between majoritarian and proportional democracy vis-a-vis trade liberalisation. According to Person in majoritarian regimes public debate colludes to adopting market friendly stances while proportional settings tend to privilege social safety nets and protectionism.[3]

Its is probably fair to say that, regardless of domestic colors or regime, each state purses its interest in a rational manner, aiming to extract the best opportunities from the global economy and at the same time preserving sensitive industries and vulnerable social classes or underachieving branches of economy. In this respect the European Commission warned about a protectionist wave sweeping global economy in 2012. On the other side of the coin, the same European architecture strives to insulate its farmers from cheap competition with developing regions such as Sub-Saharian Africa.[4] To turn the rhetoric the other way around, Zhang Yansheng, Secretary General of the

---

[1] Kevin O'Rourke, "Democracy and Protectionism", *Institute for International Integration Studies*, No.191 (December 2006): 1.

[2] *Ibidem*, 3; 19.

[3] Torsten, Persson "Forms of Democracy, Policy and Economic Development," CEPR Discussion Papers 4938, C.E.P.R. Discussion Papers, (2005).

[4] Alexander de Ville, EU trade plans will increase protectionism and hinder development, Institute of Economic Affairs, 23 August 2012. Accesed 5 January 2013, http://www.iea.org.uk/blog/eu-trade-plans-will-increase-protectionism-and-hinder-development.

EU is not alone in this stance. Across the ocean, United States joins in the belief that economic firewalls are needed to protect national production against foreign competitiros. One of the favorite topics in the last campaign for presdency was China's rogue behavior in property rights. Pundits and politicians alike accuse Beijing for playing an alleged double crossing game: it wants to be a part of WTO but at the same time practices industrial theft.

Apart from governments, several executives have expresse their friendly attitude towards protectionist measure in certain sectors. Rachel King, "GE Survey: Protectionism at Odds with Innovation".

Academic Committee of the National Developmentand Reform Commission advised UE leaders not to compete against China in labor intensive domains like textiles and instead concentrate on improving the high-technology skills indispensable to an information society.[5]

At the other side of Eurasia, India experiment with independence made protectionism a cornerstone of democracy itself. The spinning wheel on the Indian flag did not represent a symbol of industrial modernity as the Soviet sickle&hammer. It was instead a Ghandian icon of an agricultural Weltanshaung which annexed economic needs to spiritual redemption and not material welfare. For decades Indian political economy stubbornly suppressed private initiative. The collapse of Soviet bloc delegitimised socialism in India as well.[6] Facing an overall collapse early 1990s, New Delhi accepted to make a volte face and open its gate to liberalization. Nonetheless, given India's million living undr the poverty line marketisation remains a taboo or even a bete noire in certain areas.

Bellow we have a chart representing the overall globalization index, also known as KOF Globalization Index. It was created in and the research is organised in three different strands: politics; economics; society. Among indices and variables : flows trade (percent of GDP); foreign direct investment, stocks (percent of GDP); portfolio investment (percent of GDP); personal contact telephone traffic; transfers (percent of GDP); international tourism; foreign population (percent of total population); information flows Internet users (per 1000 people) etc.[7]

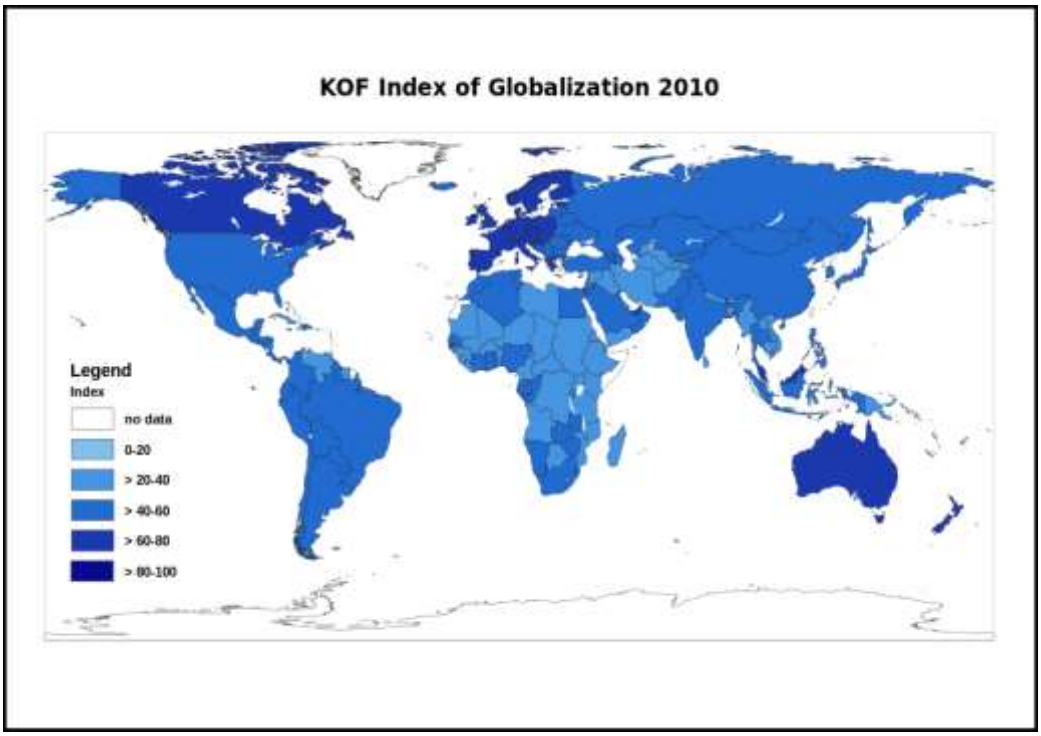
The Wall Street Journal, 2013. Accesed 28 February 2013, http://blogs.wsj.com/cio/2013/01/17/ge-survey-protectionism-at-odds-with-innovation/.

Siobhan Gorman, "China Tech Giant Under Fire. Congressional Probe Says Huawei Poses National-Security Threat to the U.S.", *The Wall Street Journal*, October 8, 2012.

[5] Uking Sun, "China worried about EU trade protectionism", *China Daily*, June 1, 2012. Accesed 5 January 2012, http://www.chinadaily.com.cn/china/2012cneuforum/2012-06/01/content_15452942.htm.

[6] Nandan Nikelani, *Imagining India. Ideas for the New Century*, (London: Penguin Books, 2008).

[7] Axel Dreher,"Does Globalization Affect Growth? Empirical Evidence from a new Index", *Applied Economics* 38, 10 (2006): 1091-1110.



Source: KOF Index of Globalization: http://globalization.kof.ethz.ch/map/#
[Accesed 23 February 2013]

If we count the rankings for 2012 we see that top ten is mostly populated with European countries (and Asian tigers) while India is somewhere bellow the 100th place.[8]

If we take into account another index, namely Open Market Index we notice a more nuanced picture: members of European Union are scattered across the whole list.

(Hong Kong #1; Singapore #2; Luxembourg #3; United Arab Emirates #4; Belgium #5;
The Netherlands #6; Ireland #7; Switzerland #8; Estonia #9; Denmark #10; Sweden #11 Slovak Republic #12;..France #28; Poland #33; Romania #34).

It is true that India's place (ranked #66) reflects the persistence of red tape, but at the same time EU as a whole remains a hotchpotch of richer and poorer regions with different economic needs.[9]

Summing all the things said above, we may coclude that a free trade agreement between EU and India sould be judged on a two level basis. In both entities we have a globalized urban class with higher education, connected to the latest technology sitting above marginal communities for whom globalization remains a possibility more than a reality.

Westphalian paradigms and collective security in Indo-European security designs

As India judges its security interests still within a Westphalian paradigm Brussels does seems to play a role much beyond diplomatic symbolism.[10] Although the European capital is bypassed by

[8] *Idem.*

[9] K. Michael Finger, ICC Open Markets Index 2011, p.17.
Accesed 22 February 2013, http://www.iccrf.org/sites/default/files/docs/2011/12/OpenMarketsIndex_FINAL102711.pdf.

New Delhi one gets a very different picture studying bilateral security cooperation between India and different European countries.

During the Cold War India's defence cooperation towards different nations reflected its position on the Eurasian chessboard as well as its commitment towards Non-Alignment, according to Kanwal Sibal, former Foreign Secretary of India.[11]

Initially crafted for the military needs of the British Empire, the armed forces of an independent India would need foreign equipment. Jawaharlal Nehru's grand vision for his country was a blend of Ghandian anti-modernist pacifism and the craving for mdernity, heavily influenced by the Soviet model. Thus, India's foreign policy, both in Nehru's years and afterwards tried to blend the effort towards strengthening the values of UN Charter, achieving dezarmament, especially at the nuclear level with a more realist back-up plan to have a respected hard power as a bargaining chip. Three were and remain the components of the Indian defence cooperation pattern:

1) indigenization: meaning the aim of Indian industry to achieve technological autarchy;
2) relying on traditional trustworthy partners such as Russia, United Kingdom and France;
3) diversifying the supply horizon with new players according to New Delhi's economic or strategical interests: United States, Israel, Germany, Sweden, Spain, the Czech Republic, Poland.[12]

One supplementary remark has to be noted down: India's cooperation with Western countries has to take into account the deepening and gradual maturing of the Europen Union. Thus one has to talk about a pure bilateral phase prior to 1990 and a composite bilateral phase hailing the birth of a European military industrial complex.

A. Devolution of the British influence and the searching for new partners

Although India gained its independence in 1947 it did not severed the relationship with the British completely. Actually until April 1958 the Indian navy was headed by a British. Overall the Indian armed forces were of British craft: Centurion tanks, Vampires, Canberra, Hunter and Gnat aircraft, and Leander class frigates. However, the enmity with Pakistan as well as Cold War politics widened some distance in the Anglo-Indian relationship.[13]

India's first defence contractors took place in the 1950s but the real military build-up coincided with the end of the non-Alignment honeymoon. Nehruvian diplomacy was based on two premisis: the regional Sino-Indian affinity and, on the broader stage on the syndicalization of Third World's independent states against the superpowers of the North: United States and the Soviet Russia. When China defeated India in 1962 and India won the upper hand against Pakistan in 1965, the political elites from New Delhi realised that multilateralism alone would not suffice.

Apart from Soviet technology, Indians pursued the French connection as Gaullist France was using military diplomacy as a means to make friends in a postcolonial environment. Thus India acquired its French Ouragan, Mystere and Alize[14] fighter jets during the '50 and '60s along with licenses for the Alouette and Lama helicopters during the 1970s.

---

[10] In the words of Rajendra Jain, professor at J.Nehru University: "the post-modern Europe is of marginal importance to us in security issues." Madhavi Basin, The EU-India Partnership: Strategic Alliance or Political Convenience? in Anjali Ghosh,Tridib Chakraborti, Anyndio Jyioti Majumda, Shibashis Chattarjee, *India's Foreign Policy*, (New Delhi: Pearson Education India, 2009), 226-225, esp.218.

[11] Kanwal Sibal, "India's defence ties with Europe", Indian Defence Review, 09 Aug , 2012. Accesed 20 February 2013, http://www.indiandefencereview.com/news/indias-defence-ties-with-europe/.

[12] See also Ambassador Ronen Sen's speech at a gathering of the Institute for Defence Studies and Analyses in April 2011. India's Defence Cooperation with its major traditional & New Strategic Partners, April 1, 2011. Accesed 21 February 2013, http://www.idsa.in/keyspeeches/AmbassadorRonenSen.

"Of defence and defensiveness", *The Indian Express*, Apr 04 2011. Accesd February 21, 2013, http://www.indianexpress.com/news/of-defence-and-defensiveness/771118/0.

[13] Kanwal Sibal, "India's defence ties with Europe".

[14] On 25 June 1953, India ordered 71 Ouragans. They started arriving that year with deliveries being completed in 1954. Another 33 Ouragans have bee ordered in 1957. They were used against anti-government riots in

In 1979, when India ordering around 130 aircraft Anglo-French Jaguar aircraft, with licence production and transfer of technology as part of the package, the British made a sizable come-back into the Indian market.[15]

With the West Germans India managed to complete the acquisiton of Dornier submarines, especially after the 1971 conflict with Pakistan.[16]

The end of the Cold War, late '80s was not quite the finest hour of Indian defence and military history. The overall collapse of the economy, following the overall crisis of the dirijist model,[17] the engagement in Sri Lanka, the death of Indira Ghandi and of her son, Rajiv in 1991 were completed by the Bofors scandal (1987). Early 1980s Indian Army decided to renew its stock of artillery so it launched a bid to which several high profile companies from West along with USSR responded. In 1986 the Swedish Bofors was shortlisted and won the auction along eight a contract 1,25 bld$ worth. A year later, on April 16, 1987 a Swedish radio talked about alleged bribery to Indian officials in order to scheme auction. One name was Wineshvar Nath Chadda, an international peddler for international pharmaceutical firms turned to defence business. It was discovered that Chadda had connections with an Italian firm and an Austrian bank and that his money were filtered through a Ponzi scheme involving Swiss accounts. In India the case was taken up by Chitra Subramaniam, a journalist working for The Hindu.[18] The result was an immense scandal tarnishing the name of Rajiv Ghandi. Although all the suspects were acquitted the event took a heavy toll on Congress' chances in the 1989 national elections.[19]

B. The allurement of the European defence industrial complex

Charles Tilly's dictum that war makes the state and the state makes war is also valid for the post1945 European community. During the Cold War Europe's weary nations relied on American defence while the spectre of mutually assured destruction remained a constant reminder for the heavy price industrial modernity must be willing to pay. As industrial potential reinvigorated itself, European governments rebuilt their security capabilities but with little to moderate success in joint ventures. Whereas the Maastricht and the Amsterdam treaties have set forth a transnational security concern, what really facilitated the birth of a common European military industrial complex was another war, one in their backyard: the Kosovo crisis. It was to be NATO's moral redemption for the failures of the international community as the later had proved idle or ineffective in curbing several genocides during the 1990s.

Assam and Nagaland and in the Sino-India conflict. They were retired in 1965 and replaced with Mystere. Paul Jackson. "Ouragon:Ancestor of Rafale." *Air Enthusiast*, Bromley, Kent, UK: Pilot Press, No. 37, September–December 1988, 15–24, 75–78.

Military Dassault aircraft, MD 450 Ouragan. Accesed 20 February 2013, http://www.dassault-aviation.com/en/passion/aircraft/military-dassault-aircraft/md-450-ouragan.html?L=1.

[15] Kanwal Sibal, "India's defence ties with Europe".

[16] *Ibidem.*

[17] Silviu Petre, "India si noua politica economică- o privire la 20 de ani distanță", *Center for East European and Asian Studies* (CSEEA), April 2011. Accesed 25 februay 2013, http://www.cseea.ro/publicatii/view/brief-analysis/india-si-noua-politica-economica-o-privire-la-20-de-ani-distanta.

[18] Subramaniam's resigning from the Hindu under political pressure was a proof in itself that the whole affair has substance and was more than an artificial media creation. On the other hand, Rajiv Ghandi's statement that Bofors had not paid any commissions had been proved false. **Vir Sanghvi, "**Bofors' ghosts", *Rediff*, September 23, 1999. Accesed 9 December 2012, http://www.rediff.com/news/1999/sep/23vir.htm.

[19] M. L. Ahuja, *Electoral Politics and General Elections in India, 1952-1998***,** (New Delhi**:** Mittal Publications, 1998), 221.

R. T. Naylor, ***Patriots and Profiteers**: **Economic Warfare, Embargo Busting, and State-Sponsored Crime.*** **(Canada, Toronto:** McGill-Queen's Press – MQUP, 2008), 260-262.

Stephen P. Cohen, Sunil Dasgupta, *Arming without Aiming: India's Military Modernization*, (Washington: The Brookings Institution, 2010), 37.

The birth of a European CMI should be seen in double perspective: both as a top-down measure and as a upstream pressure coming from the defence lobby.

A short political history for such process can be abbreviated as follows:

1992- The Petersberg Tasks decides that Western European Union should channel its resources

towards peacekeeping and managing crisis stemming from failing states

1997 (June) Amsterdam Treaty signed, EU military capability to be introduced in

European Security and Defence Policy (ESDP)

1998- The Declaration from Saint Malo authored by British Prime Minister and French

President Jacques Chirac shows the need for an autonomous European defence architecture within NATO

1999 (June) Amsterdam Treaty enters into force

1999 (October) Javier Solana is appointed as the EU's High Representative for common

foreign and security policy (CSFP) and head of the Council of the European Union

1999 (Dec.) EU agrees on creation of 50-60,000 Rapid Reaction Force

2001 (Feb.) Nice Treaty signed, EU "crisis management" capability to be introduced under EDSP

2001 (June) EU Military Staff is declared operational

2001 (July) European Advisory Group on aerospace is created

2002 (July) EU "Strategic Aerospace Review for the 21st century" (the "STAR 21"report) published

2003 (Jan.) First EU crisis management mission, to Bosnia-Herzogovina

2003 (Feb.) Nice Treaty enters into force

2003 (March) First EU military deployment, to Macedonia

2003 (Oct.) EU convenes Group of Personalities (GoP)

2003 (Dec.) EU Security Strategy adopted

2004 (March) GoP report: "Research for a secure Europe" published

2004 (June) EU constitution signed, commits member states to progressive improvements in military

capability

2004 (July) EU Defence Agency agreed with Javier Solana as its first director[20]

2006 (January) The EU Gendarmerie Force (EGF) is launched.[21]

For the worldwide postCold War military industrial complex the peace dividend meant a base figure in business as arms sales begun to fall from 1987 only to start rising again in 1998. In 2004 it was estimated that world military spending accounted for 2,6% of world gross domestic product or 162$ per capita. Late 2000s world wide military spending approached Cold War numbers.[22]

Another factor affecting the dynamics of defence industry is the growing costs of production for military equipment as a function of increasing technological complexitity. It is quite known Norman Augustine's saying that in 2054 United States armed force will be able to maintain only one jet and afterwards, as costs follow their exponential trend the effort to assemble one single plane should consume the entire American bugdet. Whether Augustine's predictions are exaggerate or no, the growing price of defence paraphernalia as become an established fact.[23] In order to cope with

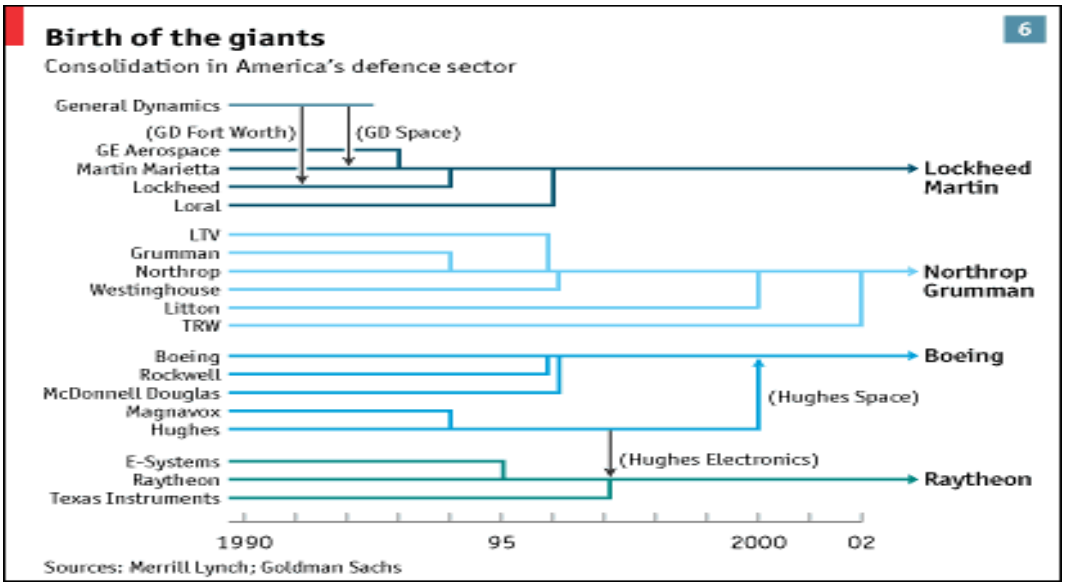
[20] Ben Hayes, Max Rowlands, "Arming Big Brother. The EU's Security Research Programme", Transnational Institute, TNI Briefing Series, No. 2006/1, 5.

[21] *Ibidem*, p.9.

[22] Ben Hayes, Max Rowlands, "Arming Big Brother", 3.

[23] U.S. Congress, Office of Technology Assessment, Holding the Edge: Maintaining the Defense Technology Base, OTA-ISC-420 (Washington, DC: U.S. Government Printing Office, April 1989), 131.

such dynamics American defence market has witnessed wave of successive mergers and acquisitions during the 1990s.[24]



To cope up with the competition the European defence industrial base plunged into realignments similar to Medieval dynastic marriages.

Late '90s, when Tony Blair and Jacques Chirac agreed to the Declaration of Saint Malo, Daimler Chrysler Aerospace (Dasa), British Aerospace (BAE) and Aerospatiale-Matra (Italy) were planned to unite in what should have become European Aerospace and Defence Company (EADC). The blueprint was abandoned and British Aerospace merged with GEC Marconi giving into BAE Systems- today world's second weapons producer. The remaining actors, namely DASA, Aérospatiale-Matra and Construcciones Aeronáuticas SA (CASA) melted into EADS: European Aeronautic Defence and Space Company.[25]

Similar arrangments, but on a smaller scale happened also at the national level. For example in Germany, out of seven important defence players in 1997, only two remained during middle 2000s.

Bridging the gap with private sector

The American security build-up in the aftermath of 9/11 rolled the dice for the European defence complex as well. In july 2002 Javier Solana teamed-up with a series of European Commisars, European MPs and high-profile personalities from industry to write a report called Strategic Aerospace Review for the 21st century, or STAR 21. Seen as controversial by outsiders, the report stressed the importance of purring massive investments in aerospace and security research.

"Defence spending in a time of austerity. The chronic problem of exorbitantly expensive weapons is becoming acute", The Economist, Aug 26th 2010. Accesed 21 February 2013, http://www.economist.com/node/16886851.

[24] *"An industry reinvents itself: America's defence companies are turning dual-purpose", The Economist, July 18th 2002. Accesed 21 February 2013, http://www.economist.com/node/1223580.*

[25] Jürgen Wagner, "The EU As a Driving Force of Armament Pressure In Terms of Arms Build-Up, War Chests, and a Military-Industrial Complex for the World Power Europe", Informationsstelle Militarisierung (IMI), *Politics and Society*, (Nov.2012) 40-45.

Amongst those who served as fulcrum between politics and economics were representatives of the most important European defence companies: Jean-Paul Béchat, Chairman & CEO SNECMA; Manfred Bischoff, Co-chairman EADS; Sir Richard Evans, Chairman BAE Systems; Jean-Luc Lagardère, Co-chairman EADS; Alberto Lina, President & CEO Finmeccanica; Denis Ranque, Chairman & CEO THALES; Sir Ralph Robins, Chairman Rolls-Royce.[26]

Another 2002 document: the Strategic Research Agenda for aeronautics released by the

Advisory Council for Aeronautics in Europe (ACARE) warned about the perils of remaining behind US technological advance.[27] In March 2003 a communique issued by the European Commission: 'Towards an EU Defence Equipment Policy'[28] predated the European Security Strategy as manifest papers in this regard.

A symbiosys between Brussels and defence industry cannot be possible on long term without the lobby agencies.[29] The most important of them is considered to be ASD – the Aerospace and Defence industries Association of Europe created after the merger of the European Defence Industries Group, the European Association of Aerospace Industries and Eurospace, the Association of European Space Industry. ASD's first three chairmen were Mike Turner, a CEO at BAE Systems, Pier FrancescoGuarguaglini, Chairman and CEO of Finmeccanica and the current ASD chair, Thomas Enders, CEO of EADS[30]

Raffale multirol-jet as a litmus test for an (Indo)-European single defence market

In January 2012 it was announced that Raffale-Dasault from France has been shortlisted as the winner of India's bid for a new multirol jet.[31] The process begun in 2007 when India decided to renew its aging fleet of military jets and started an international auction. After several preliminaries the menu was reduced to only a few major players: two American options: -> Boeing F/A-18 Super Hornet and Lokheed Martin's F-18; Dassault Rafale from France; Eurofighter; Swedish Saab and Russian MIG-35 Mikoyan. Rafale's victory was seen with mixed colors. For some American voices such as Admiral Mike Mullen, India's choice was foolish vis-a-vis the Washington-New Delhi strategic partnership. Over the Atlantic, in a crisis ridden European Union Rafale's triumph over Eurofighter Typhoon signaled the preeminence of national solutions over communitarian ones.[32] In France itself, the public opinion backfired against President's Sarkozy scheme to sell a very expensive plane at a dumping price in order to secure the bid and possibly gain for himself another five-year term.

However if one chooses to look beneath the skin of media clichees and judge things in long durée will see a slightly different picture. First of all EADS holds 46% of Dassault action, even

---

[26] Ben Hayes, Max Rowlands, "Arming Big Brother", p.9.

[27] Dr. Jocelyn Mawdsley, towards a merger of the european defence and security markets? In Alyson JK Bailes & Sara Depauw (editors), *The EU defence market: balancing effectiveness with responsibility*, (Brussels: Flemish Peace Institute, 2011), 12.

[28] Idem.

[29] Neculai-Cristian Surubaru, "Machiavelli atotputernic: lobby-ul la Bruxelles şi implicaţiile recentului scandal de corupţie asupra instituţiilor europene", *Contributors*, mai 13, 2011, Accesed January 15 2013, http://www.contributors.ro/advocacy-public-affairs/machiavelli-atotputernic-lobby-ul-la-bruxelles-si-implicatiile-recentului-scandal-de-coruptie-asupra-institutiilor-europene/.

[30] Ben Hayes, Max Rowlands, "Arming Big Brother", p.9.

[31] Hasnain Kazim, "EADS Loses Massive Contract: India Opts For French Fighter Jets", *Spiegel online*, February 01, 2012. Accesed 21 February 2013, http://www.spiegel.de/international/business/eads-loses-massive-contract-india-opts-for-french-fighter-jets-a-812714.html.

"Dassault tops EADS for Indian jet deal", *UPI.com*, Feb. 3, 2012. Accesed 21 February 2013, http://www.upi.com/Business_News/Security-Industry/2012/02/03/Dassault-tops-EADS-for-Indian-jet-deal/UPI-75091328268600/.

[32] Hasnain Kazim, "**EADS Loses Massive Contract: India Opts For French Fighter Jets".**

though it doesn't have the right to vote in the board of directors. Second, the unexpected victory of Dassault against a more predictable Typhoon one generated a snowballing on the European defence market. Late 2012 EADS and Britsh BAE Systems announced their decision to merge in order to better their chances in competing with the American rival Boeing. If the merger would really take place Dassault should find itself marginalised on the European stage.[33] Third- by choosing Rafale over other existing alternatives India does not give up the other European players. As a testimony of its huge appetite for top-notch military technology New Delhi signed a 700 bld$ contract with BAE Systems in July 2010. India will receive 57 Hawk Advanced Jet Trainers to be built under the license of HAL, a subsidiary of a larger state-owned company. The engines for the Hawks will be constructed in Bengalore.[34]

Sealing bonds: Indo-EUropean naval cooperation

Defence cooperation between countries wouldn't be complete if confined only to equipment transfers. Joint exercises facilitate know how and socialize values and mentalities. Using a biological metaphor one can say that while technological transfers are the anatomy of military diplomacy and security cooperation, joint exercises are the physiology of the same phenomenon.

In this respect one event is heavily significant. Middle July 2012 eight of India's most important ships have set sailes circumscribing New Delhi tous les azimuts naval ambition. Four of them headed towards Shanghai covering the Eastern part of the Indian Ocean. The other four, namely INS Mumbai, INS Aditya, INS Trishul şi INS Gomti turned the other way around to cover Africa's eastern troubled water only to pass through the choke point of Aden and meet the warm breeze of the Mediterranean Sea. This western fleet commanded by rear-admiral A.R.Karve arrived in the port of Haifa to celebrate 20 years of naval cooperation between India and Israel. Haifa was to be only the middle of the trip as India's four frigates headed towards Marseille, passed by Gibraltar and circumvented the British Isles.

As the global shift of power goes to Pacific, Mediterranean Sea is reinvested with a new strategic meaning. It ceases to be the trampoline for European nation to project their goals into Eurasia and becomes the meeting point for Asian prowess expanding over West's traditional backyard. In India'scase, experiencing Mediterranean hails the maturing of its blue water Navy and, subsequently, the vector of global prestige.

During the first postIndependence decades, India's defence preparations have been crafted to meet threats flooding from the northern and northeastern borders, namely from Pakistan and China.

---

[33] Daniel Michaels and David Gauthier-Villars, "Defense Merger to Push Rival Deals?", *Wall Street Journal*, September 14, 2012. Accesed 22 February 2013, http://online.wsj.com/article/SB10000872396390444433504577651722973564622.html.

James Boxell, Giulia Segreti, "EADS and Elisée politics threaten Dassault, Aerospace& Defence", *Financial Times*, September 16, 2012. Accesed 22 February 2013, http://www.ft.com/intl/cms/s/0/76e53564-000d-11e2-a30e-00144feabdc0.html#axzz2M2giD4ug.

Andrea Rothman & **Robert Wall** , "Dassault's Victory in India Cornering EADS-BAE Becomes Boomerang" , *Bloomberg*, **Sep 26, 2012, Accesed 22 february 2013, http://www.bloomberg.com/news/2012-09-25/dassault-s-victory-in-india-cornering-eads-bae-becomes-boomerang.html.**

Yves-Marc Le Reour, "La fusion avortée entre EADS et BAE suscitera de nouvelles alliances", *Le Point*, 12/10/2012. Accesed 22 February 2013, http://www.lepoint.fr/economie/la-fusion-avortee-entre-eads-et-bae-suscitera-de-nouvelles-alliances-12-10-2012-1516161_28.php.

Vincent Lamigeon**,** "La fusion EADS-BAE aurait tué Dassault", *Challenges*, 17-10-2012**. Acceed 24 February 2013, http://www.challenges.fr/entreprise/20121017.CHA2026/la-fusion-eads-bae-aurait-tue-dassault.html.**

Cyril Altmeyer avec Elizabeth Pineau et Tim Hepher, édité par Jean-Michel Bélot**, „**DASSAULT AVIATION : EADS remanie son capital et simplifie sa gouvernance", *Tradingsat*, 5 décembre 2012, http://www.tradingsat.com/dassault-aviation-FR0000121725/actualites/dassault-aviation-eads-remanie-son-capital-et-simplifie-sa-gouvernance-421137.html.

[34] Dassault tops EADS for Indian jet deal, UPI.com, Feb. 3, 2012.

Therefore ground troops and aviation received the most attention with Navy being kept at a Cinderella status. A certain wave of build-up followed India's 1971 conflict with Pakistan which had acquired a naval dimension beyond the terrestrial pitched battles. Lesson learned- Indian navy fortified its arsenal with several state of the art pieces: anti-submarines Soviet planes (Tu-142 and Il-38), German Dorniers, British Sea King anti-submarine helicopters along with new German made submarine.[35] Supplementing the policy of acquisition Indian engineers pursued a dual track: 1) fungibility- the adaptation of equipment to accommodate several suppliers such as France, Russia and Israel; 2) indigenization- the ability of fulfilling national needs without any (substantial) external help. As for the latter it was more than technological necessity, but apart of the philosophy of swaraj, self rule. Otherwise put India could not consider itself independent as long as it was at the mercy or the whims of other international actors, in any given field of activity. The Leander frigate programme was the first step of indigenisation, Nilgiri being the first ship of its kind to be launched at sea (October 23 1966) and Vindhyagiri the last (1981). Today it is considered that India's naval indigenization reached 73% of paraphernalia.[36] At the end of 1990s ***Bhāratīya Nau Senā*** was the seventh in the world possessing around 100 battle ships out of which 15 submarines, 2 aircraft carriers and 23 fregates& distroyers. Displaying the confidence given by financial boom, Indian navy emabarcked on an ambitious plan of modernization. The aim is to align three aicraft carriers, 10 distroyers and 24 frigates along with 6 Scorpene submarines by 2020.[37]

The economic liberalisation of 1991 marked the replacement of Nehruvian non-alignment with multilateralism or even omni-alignment.[38] Pragmatism was to be the hype of a globalised India and consequences followed at the tactical and strategical levels.

New Delhi's defence policy embraced partnership with numerous states, big or small. Concerning the military shopping spree India'a behavior envisaged multi-level contacts with its closest costumers:

- With the French Navy *Bhāratīya Nau Senā* shares common events since 1993. In 2001 they pioneered the Varuna naval exercise which celebrated its 12 birthday in 2012. 2009 witnessed perhaps the vastest training of its kind. In 2010 Varuna took place in the port of Mumbai and brought together FNS Dupleix, the frigate INS Brahmaputra and the submarine INS Shankush. In 2011 India was represented by INS Virat, indigenous made frigates Godavari and INSA Ganga along with a class Shishumar submarine- INSA Shalki. In 2012 in was France's turn to host Varuna with the aircraft carrier Charles de Gaulle, the distroyers FNS Forbin and FNS Tourville, tanker FNS Meuse and last but not least FNS Amethyste nuclear submarine. India's voice was articulated by Mumbai distroyer, frigates Trishul and Gomati plus the tanker Aditya. Late October French submarine Dupleix returned the visit and anchored in the port of Mumbai. The last event of the year was given in December by the visit of admiral Bernard Rogel in India.[39]

---

[35] Vice Admiral Gulab Hiranandani, Indian Navy (Retired) The Indian End of the Telescope
India and Its Navy, *Naval War College Review*, LV, No. 2 (2002): 61-72, esp.67-68.

[36] G. M. Hiranandani, *Transition to Guardianship: Indian Navy 1991-2000,* (New Delhi: Lancer Publishers, 2009/ 2012), xxiv and 20.

[37] http://www.globalsecurity.org/military/world/india/in-navy-development.htm [Acccesed 24 Feruary 2012].

[38] Usman Karim uses th word poly-alignment. Usman Karim, "India from nonalignment to polyalignment", *Open Democracy*, 11 November 2009. Accesed 24 February 2013, http://www.opendemocracy.net/forum/thread/india-from-nonalignment-to-poly-alignment.

[39] Angana Guha Roy, "Indian Navy's Anti Piracy Operations", *Voice of India*, 2012. Accesed 2 February 2013, http://voiceof.india.com/in-focus/indian-navys-anti-piracy-operations/538.

G. M. Hiranandani, *Transition to Guardianship: Indian Navy 1991-2000.., .*7

Dr. Vijay Sakhuja, "India, France Strategic Partnership: Nuclear and Maritime Cooperation", *Society for Study of Peace and Conflict*, May 28, 2009. Accesed 15 December 2012, http://www.sspconline.org/opinion/IndiaFranceStrategicPartnership_VijaySakhuja_280509.

"Indian Navy exercises with French and Royal Navies", *Brahmand.com*, Aug 04, 2009, Accesed 15December 2012, http://brahmand.com/news/Indian-Navy-exercises-with-French-and-Royal-Navies/1833/1/11.html.

- The reality of Indo-Spanish defence cooperation was a late comer. New Delhi opened diplomatic relations with Madrid in 1956 and since then their bilateralism was strengthen by several agreement, especially in the fields of taxation, culture, education and environment. Although Spanish-Indian naval joint history does not count memorable events, Spain's and Indian ships have the same goal of liquidating piracy in the Golf of Aden. Moreso, as a fulcrum between American, French and German military equipment Madrid has become interesting for South Asia's defence market. In October 2012 the visit of King Juan Carlos in Delhi proved to be an optimum occasion for signing a defence deal involving submarines. The Iberic company Navantia is among Europe's top brass security providers and has agreed to sell India the S-80 submarine, which is similar to French Scorpene. As Navantia maintains good links with Lockheed Martin the parameters for a longer rendez-vous are set.[40]

- With Germany India found in high-level technology a common idiom. From Berlin's point of view having a performant arms industry and a powerful navy can expand German influence all over the globe. The atavistic Teutonic martial ardour is now hidden under the banner of defence cooperation and diplomacy. Today the German Navy operates two flotillas. The surface fleet commands 15 frigates of three types and more than 200 submarines toping as one of NATO's finest. The German vessel have joined multinational effort of fighting piracy apart from many other kinds of missions.[41]

The first Indo-German defence agreement was signed in 2006. After two years followed the first bilateral naval exercise. In April 2008 Germany a 700 personnel Task Force for a two days training visit at Kochi. The was represented by the Federal German Ship (FGS) Hamburg, an air-defence ship; frigate FGS Koeln; and replenishment tanker FGS Berlin. India placed in line one helicopter and two training ships— INS Tir and INS Krishna.[42]

IDR News Network, "Indo-French bilateral Naval Exercise 'VARUNA 10' gets underway with two aircraft carriers and two submarines", Indian Defence Review,

06 Jan , 2011, http://www.indiandefencereview.com/news/indo-french-bilateral-naval-exercise-varuna-10-gets-underway-with-two-aircraft-carriers-and-two-submarines/

"An Indian Summer on the French Riviera. The "Varuna" naval exercise in Toulon and the Year of India in Saint Tropez", French Embassy in New Delhi, 22.08.2012. Accesed 13 December 2012, http://ambafrance-in.org/New-article,10450

"Indian Navy exercises with French and Royal Navies", *Brahmand.com*, Aug 04, 2009, Accesed 13 Decembe 2012, http://brahmand.com/news/Indian-Navy-exercises-with-French-and-Royal-Navies/1833/1/11.html

IDR News Network, "Indo-French bilateral Naval Exercise 'VARUNA 10' gets underway with two aircraft carriers and two submarines", Indian Defence Review,

06 Jan , 2011. Accesed 19 December 2012, http://www.indiandefencereview.com/news/indo-french-bilateral-naval-exercise-varuna-10-gets-underway-with-two-aircraft-carriers-and-two-submarines/

An Indian Summer on the French Riviera. The "Varuna" naval exercise in Toulon and the Year of India in Saint Tropez, French Embassy in New Delhi, 22.08.2012, http://ambafrance-in.org/New-article,10450

[40] "Somali pirates free Spanish ship", *Al Jazeera*, 17 Nov 2009, http://www.dailynews.lk/2012/04/21/news22.asp

"Spanish navy routs pirate attack in Indian ocean: ministry", *EU Business*,

12 January 2012. Accesed 26 July 2012, http://www.eubusiness.com/news-eu/spain-africa-piracy.eij/

[41] Peter L. Hartley, The German Navy – The Way Forward?, Defence Update, November 29, 2011, http://defense-update.com/20111129_the-german-navy-the-way-forward.html.

[42] "Indo-German naval exercises to begin today", *The Hindu*, Apr 08, 2008. Accesed 21 January 2013, http://www.hindu.com/2008/04/08/stories/2008040854521300.htm.

"India, Germany discuss piracy in Indian Ocean, Gulf of Aden", *The Economic Times*, 21 February, 2012. Accesed 25 February 2013. http://articles.economictimes.indiatimes.com/2012-02-21/news/31082849_1_joint-exercises-navies-piracy.

Mid February 2012 German Naval Chief Vice Admiral Axel Schimpf paid a visit to India where he encountered Prime Minister Manmohan Singh and Defence Minister, K.Anthony. Both sides tackled a various range of issues amongst which the common threat of piracy.[43]

Indo-Polish booming defence encounters[ʃ]

Facilitated by the existence of a Warsaw Pact, New Delhi developed diplomatic and economic relations with East European states. After USSR, India received significant amount of aid from Poland, Yugoslavia and Czechoslovakia. Bellow is a table describing India's aid agreement with USSR and Eastern Europe during Nehru's years and shortly afterwards:

Creditor country	Amount given (millions of rupees)	Amount utilised up to 31 March 1966 (millions of rupees)[44]
URSS	4869,3	2820,8
Poland	413,0	113,4
Yugoslavia	214,3	97
Cechoslovakia	631	126,1
Total	6154,6	3157,4

Defence cooperation between Warsaw and New Delhi dates since 1980s and continued more or less as East European small arms (mostly illegal) production has flooded Asia's hotspots. Polish firms maintained their presence in South Asia selling finished products, spare parts and repair services. The bigger contracts were however those with Southeast Asia, Malaysia and Indonesia. (Malaysian government announced it would buy Polish PT91 main battle tanks).[45] After 9/11, within the context of Bush's war on terrorism, Poland- then an aspiring NATO member- signed a defence memorandum with India during a visit by Polish defence minister Leszek Miller, February 2003. The subsequent contract, 600 mil.$ worth envisaged the modernization of T-72 tanks. One year later, in 2004, as a sign of Polish loyalty towards the Indian partner, Warsaw refused a Pakistani request for armament. Polish deputy-defence minster, Janusz Zemke told his Indian peers that: " *We cannot supply you tanks and then sell anti-tank missiles to Pakistan*" in the context of Pakistani foreign minister, Khurshid Mohammad Kasuri, visiting his country.[46] In 2004 both countries established Joint Group on Defence Cooperation, also. In march 2008 Polish state-owned firm, Bumar (established in 2002) was poised to honour a contract of 809 million euros (1,2 bld$). It is said that the ontract- still on the roll- consisted of 200 WZT-3 armoured cars, 100 PZA Loara mobile anti-aircraft units, 110 self propelled cannons among other things.[47] More recently, in 2010, Polish prime-minister, Donald Tusk was accompanied by a delegation of ministers and businessmen in three day

[43] "India, Germany discuss piracy in Indian Ocean, Gulf of Aden", *The Economic Times*, Feb 21, 2012, http://articles.economictimes.indiatimes.com/2012-02-21/news/31082849_1_joint-exercises-navies-piracy

[ʃ] This part has been published as Silviu Petre, **"Eurasian promontories: India and Poland rediscover each other", *Center for East Europea and Asian Studies*, February 22, 2013, http://www.cseea.ro/publicatii/view/brief-analysis/eurasian-promontories-india-and-poland-rediscover-each-other-1.**

[44] Asha L. Datar , *op.cit.*, p.33.

[45] Arms production, exports and decision making in Central and Eastern Europe, Saferworld's research project on arms and security in EU Associate Countries, Year?, 8. Accesed 25 February 2013, http://www.saferworld.org.uk/downloads/pubdocs/Beast%20Poland.pdf.

[46] C. Raja Mohan, India, "Poland deepen defence ties", *The Hindu*, Saturday, Mar 20, 2004, http://www.hindu.com/2004/03/20/stories/2004032004031400.htm.

[47] Defense Industry Daily staff, "Poland's Bumar: A Major Sale to India?", *Defence Industry Daily*, 11 March 2008, http://www.defenseindustrydaily.com/Polands-Bumar-A-Major-Sale-to-India-04789/.

trip to India. Tusk, the first non-communist Polish premier to visit India went to New Delhi and Bengalore and had discussions with Manmohan Singh. The dialogue bared fruits as India agreed to buy Polish made armoured vehicles. At that time was even the rumor for the establishment of some joint firms but the name of the companies were not released.[48] Further on, Zemke proposed to the Indian delegation upgrading their stock of Pechora missiles. Built in Soviet times they were modernized by Polish engineers in order to fit NATO standards. Their fuelling systems has been upgraded from 25 km range to 100 km range.[49] Also the missiles were calibrated to new radar guidance. In the early 2000s Poland possessed 800 Pechora type rockets envisaged to protect its major cities.[50]

Other common topic is educational and scientific cooperation, with its subspecie: security research. In January 2011 IDSA and the University of Warsaw prepared a meeting to bridge defence matters and academia in one place. IDSA was represented by Shri N.S. Sisodia, Director General, Smita Purushottam, Wing Cdr. V. Krishnappa, Joyce Sabina Lobo, Rajorshi Roy, and Pallav Pal. From the Polish side the delegates were: Professor Edward Halizak, Director of the Institute of International Relations, Dr. Boguslaw Zaleski, former Deputy Minister of Foreign Affairs, Institute of International Relations, and Dr. Jakub Zajarczkowsky, Chairperson of the Centre for Contemporary India Research and Studies, Institute of International Relations, University of Warsaw. The event did not finish without a trace as an Indian Studies Masters programme was started at the University of Warsaw.[51]

Conclusion: non-zero sum game within democratic peace theory

It is widely believed that internal constitutions of regimes shapes diplomatic behavior and facilitates the socialization of interests. A world of democracies should approximate if not fulfil the Kantian dream of an everlasting peace. As representative institution reflect the inner pacifism of human nature, competition between countries shouldn't go beyond economic competition and

---

[48] "India, Poland to Strengthen Strategic, Defence Cooperation", *India Defence*, 6 September 2010, http://www.india-defence.com/reports-4492.

"Polish PM arrives, to hold talks with Singh tomorrow", *The Times of India*, Sep 6, 2010, http://articles.timesofindia.indiatimes.com/2010-09-06/india/28222664_1_india-and-poland-cooperation-trade-and-investment

Sebastian Zukowski, 'Incredible India! Impossible Poland?', *Institute for Foreign Policy Studies*, 1st October 2010. Accesed 28 January 2013, , http://www.caluniv.ac.in/ifps/Sebastian%20Zukowski.pdf.

[49] The Soviet made Pechora Missiles (surface-to-air) have bee none of Kremlin's finest export brands. From Cuba to Egypt, Myanmar and India a great number of countries were equipped with this rockets, mainly Pechora S-125 model . As nowadays Russia embarkes on a program of ballistic expansion , Russian firm Oboronitelnye Sistemy found a new existential reason in upgrading old Pechoras with a younger version: Pechora 2M. However, in 2006 it was announced that Indian staled the modernisation of its Pechora arsenal and refused both Russian and Polish offers. It is very possible that Delhi's refusal was caused by the decision to buy Israeli Spyder SAMs instead of opting for modernizing old gear.

"Modernization will increase service life of "Pechora" air defence system by 10 years, Oboronprom", *ARMS-Tass*, 26 Apr 2006, Accesed 29 January 2013, http://www.oboronprom.ru/en/news/modernization-will-increse-service-life-%E2%80%9Cpechora%E2%80%9D-air-defense-system-10-years

Viktor Litovkin, "Unique Surface-To-Air Missile Baffles Foreign Military Diplomats In Egypt" , *RIA Novosti*, Oct 25, 2006. Accesed 25 January 2013, http://www.spacewar.com/reports/Unique_Surface_To_Air_Missile_Baffles_Foreign_Military_Diplomats_In_Egypt_999.html

IAF orders Israeli Spyder Missile, India Strategic, September 2008. Accesed January 25, 2013, http://www.indiastrategic.in/topstories158.htm

Dr.Sanjay Badri Maharaj, "Ballistic Missile Defence for India", *Bharat Rakhsak*,
02 July 2009, http://www.bharat-rakshak.com/IAF/Today/Contemporary/328-BMD.html

[50] A K Dhar, "Poland offers to upgrade India's mainstay Pechora missiles", *Outlook India*, APR 11, 2004, http://news.outlookindia.com/items.aspx?artid=214062.

[51] Roundtable with Polish delegation, *IDSA*, January 13, 2011, Round table, http://www.idsa.in/event/RoundtablewithPolishdelegation.

institutionalized disputes. Where realism sees a zero-sum game international system, a liberal creed pictures an interdependent society redistributing benefits and expanding the circle of priviledges.

If one looks at the EU-India relations one would see that common values and shared challenges could not forge a warmer relationship, at least untill now. One explanation is India's late economic miracle which was surpassed by China. The second explanation dwells in the realm of narratives. India sees the European Community as the some of its parts, at best. Although Brussels has been added on the agenda of Indian diplomacy it doesn't have much weight, or at least a weight of its own. Beyond diplomatic chit chat and exchange of beautiful polished words a common institutional framework still awaits.

At the Westphalic-national level, a developing India finds many opportunities in Western countries. Especially in defence cooperation- which was one of the main topics of our study- a hungry India completed many contracts with the emerging EU's military industrial complex.

Issues to join efforts exist all over the rainbow of international agenda but the future of Indo-EUropean elationship depends more on the way Europe will acquire one single voice and gain a strong foothold in Asia.

References

- Ahuja, M.L. Electoral Politics and General Elections in India, 1952-1998, (New Delhi: Mittal Publications, 1998).
- Bindi, Federiga. „European Union Foreign Policy: A Historical Overview". In *The Foreign Policy of the European Union*, edited by Federiga Bindi and Angelescu Irina, 11-40. Washington: The Brookings Institution Press, 2010.
- Carlsnaes, Walter. "Actors, structures, and foreign policy analysis,". In *Foreign Policy: Theories, Actors, Cases,* edited by Steve Smith, Amelia Hadfield and Tim Dunne, 85-101,
- New York: Oxford University Press, 2008.
- Cohen, Stephen P., Dasgupta, Sunil, *Arming without Aiming: India's Military Modernization*, (Washington: The Brookings Institution, 2010)
- Doyle, Michael. "Liberalism and foreign policy". In *Foreign Policy: Theories, Actors, Cases,* edited by Steve Smith, Amelia Hadfield and Tim Dunne, 49-71. New York: Oxford University Press, 2008.
- Doyle, Michael. "Liberalism and World Politics." *The American Political Science Review,* 80, (Dec., 1986), 1151-1169.
- Dunne, Tim. "Liberalism". In *The Globalization of World Politics,* edited by John Baylis
- Steve Smith and Patricia Owens, 100-114. New York: Oxford University Press, 2011.
- Koenig-Archibugi, Mathias. "Explaining Government Preferences for Institutional Change in EU Foreign and Security Policy." *International Organization* 58, no. 1 (Winter2004), 137-174.
- Madsen S. T. „EU–India Relations: An Expande Interpretive Framework". In *The Role of the European Union in Asia,* edited by Gaens B., Jokela J. and Limnell E. Surrey, 77-95. Ashgate Publishing Limited, 2009.
- Moravcsik, Andrew, "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organization* 51, no. 4 (September 1997), 513- 553.
- Manners, Ian. „Normative Power Europe: A Contradiction in Terms?", *Journal of Common Market Studies* 40 (2002), 235-258.
- Manners, Ian J., Richard G. Whitman. „Towards identifying the international identity of the European union: A framework for analysis of the Eu's network of relationships", *Journal of European Integration*, 21 (1998), 231-249.
- McNamara, Kathleen R. „Constructing authorithy in European Union,". In *Who governs the globe?* edited by Avant Deborah D., Martha Finnemore, Susan K. Sell, 153-183. Cambridge: Cambridge University Press, 2010.
- Nikelani, Nandan, *Imagining India. Ideas for the New Century*, (London: Penguin Books, 2008)
- Ruggie, John Gerard, „Territoriality and beyond: Problematizing modernity in international relations. (cover story)." *International Organization* 47, no. 1 (Winter 93 1993): 139-174.

- Wagner, Jürgen , "The EU As a Driving Force of Armament Pressure In Terms of Arms Build-Up, War
- Chests, and a Military-Industrial Complex for the World Power Europe", Informationsstelle Militarisierung (IMI), *Politics and Society*, (Nov.2012)
- Documents
- Council of European Union, *„Fifth India-EU Summit The Hague, 8 November 2004, Joint Press Statement",* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/82635.pdf.
- European Community, *„Cooperation Agreement between the European Community and the Republic of India on partnership and development",* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21994A0827%2801%29:EN:NOT
- European External Action Service, *„India Country Strategy Paper 2007-2013"*, http://eeas.europa.eu/india/csp/ 07_13_en.pdf.
- „EU-India Summit Lisbon, 28 June 2000, Joint declaration", accessed at 10.02.2013, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/09552.en0.html
- „India Country Strategy Paper 2007-2013", accessed at 11.02.2013,
- http://eeas.europa.eu/india/csp/07_13_en.pdf
- „The EU-India Joint Action Plan (JAP),", accesed at 05.01.2013,
- http://www.iescp.net/images/stories/pdfs/JAP_document.pdf
- „EU-India free trade deal in final lap, diplomat says", accesed at 12.02.2013,
- http://www.euractiv.com/global-europe/eu-india-free-trade-deal-final-l-news-517147.
- „Commission services position paper on the Trade Sustainability Impact Assessment for the FTA between the EU and the Republic of India" , accessed at 08.02.2013, http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146221.pdf.
- „EU-India summit – A partnership for prosperity", accessed at 15.01.2013,
- http://europa.eu/rapid/press-release_IP-12-118_en.htm?locale=en.
- „EU-India summit – A partnership for prosperity", accessed at 15.01.2013,
- http://europa.eu/rapid/press-release_IP-12-118_en.htm?locale=en.
-
- **Web sources**
- http://eeas.europa.eu
- http://www.indembassy.be

NEW TENDENCIES REGARDING SAME-SEX MARRIAGE IN THE MEMBER STATES OF THE EUROPEAN UNION: – A BRIEF INSIDE AND OUTSIDE PERSPECTIVE –

JONE-ITXARO ELIZONDO[*]
OANA-MARIUCA PETRESCU[**]

Abstract
Sexual orientation discrimination has been recently outlined within the Plenary Session of the European Parliament that took place in Brussels, on 24th May 2012 as a priority in the fight against discrimination of all kind, making a "call on EU member states to consider giving access to cohabitation, registered partnerships or marriage to lesbian, gay, bisexual and transgender (LGBT) people".
Taking this statement as a starting point, this paper aims first to briefly analyse the European Union's legislation defending sexual orientation discrimination and its limits. After that, a comparison between the Spanish and Romanian legislations will be made, choosing thus two countries within the EU that have very different paths and views in this matter, finally assessing the recent Tribunal Constitucional judgment regarding the constitutionality of same-sex marriage. In the same line our analysis will also focus on giving an overview of the EU panorama focusing on those countries that have extreme and opposite views about the matter.
This study would not be complete without taking into account the contrary situation that is taking place in certain non-Member States of EU such as: Ukraine, Russia or Moldova. This fact was also highlighted by the European Parliament in the last Plenary Session saying that "in the European Union [and in other European states, referring to the recent situations occurred in Ukraine, Russian Federation or Moldova], the fundamental rights of LGBT people are not yet fully upheld".

Key words: *European Union, same sex marriage, sexual orientation discrimination, Treaty of Lisbon*

1. Introduction

Same-sex marriage[1] is legal in fourteen countries in the world: Argentina (2010), Belgium (2003), Canada (2005), Iceland (2010), Netherlands (2001), Norway (2008), Portugal (2010), South Africa (2006), Spain (2005), Sweden (2009), Denmark (2012). Uruguay (2013), New Zealand (2013) and France (2013). It is also legal in twelve states of the United States[2], as well as the district of Columbia and the native-American tribes of Coquille, Little Traverse Bay Bands of Odawa Indians and Suquamish; in some of the states in Mexico (Mexico D.F., Oaxaca and Quintana Roo); and in fourteen out of twenty-six Brazilian states[3].

[*] PhD candidate, FPI personnel in the *European Integration* Research Team, Faculty of Law, University of Deusto, Bilbao, Spain (email: jone.elizondo@deusto.es).
[**] PhD, postdoctoral researcher in the *European Integration* Research Team, Faculty of Law, University of Deusto, Bilbao, Spain (email: oana.petrescu@deusto.es).
[1] This term (same sex marriage) will be used regarding lesbian and gay marriages, as is the term used in the global academic world.
[2] Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. GayMarriageProCon, "Should gay marriage be legal?" http://gaymarriage.procon.org/ , accessed 20 May 2013.
[3] EFE Agency, "México DF legaliza el matrimonio homosexual", *El País*, December 22, 2009, accessed March 11 2013, http://elpais.com/diario/2009/12/22/sociedad/1261436409_850215.html

There are also some states that recognize same-sex marriage but do not carry them out, such as: the states of Brazil which do not perform same-sex marriage, Aruba, Curaçao and St Martins (which recognizes marriages carried out in the Netherlands), Israel, Mexico (for marriages taken place in Mexico) and some US states[4]. Outside the European Union (EU), it is being studied in many places such as Colombia[5] or Brazil. In both states right now it is possible to registry same sex marriages in front of a public notary following important sentences in both countries but there is not an approved law allowing it yet. In Nepal remains in agenda but the future of the law remains uncertain.

Meanwhile, in the EU Member States a heterogeneous map is being drawn in the issue of same sex marriage. On one hand, more than a half of the countries that perform same-sex marriage in equality with the heterosexual ones in the world are member states of the EU. On the other hand, there are others that have modified their laws in order to state clearly that marriage can only be performed between a man and a woman.

The EU itself has made, by ways of producing laws (such as 2000/42[6] and 2000/78 Directives[7]) which form part of the *acquis communautaire*, efforts to eradicate sexual orientation discrimination but harmonization of this issue remains undone.

An analytical description of the issue will be offered, describing the efforts made by the EU in this respect via the primary law, secondary law and multiple resolutions from the European Parliament or statements from the heads of the institutions.

Also, an analysis of the Spanish and Romanian situation will be given. The choice of these case-studies was made based in the different situations they are living towards same-sex marriage. Both are Members of the EU, but whereas Spain entered in 1986, Romania joined in 2007. Both have applied the above mentioned Directives in their territory but the outcome of that application has been very different. Spain approved same-sex marriage in 2005, but it was claimed unconstitutional from one of the political parties (the right-winged *Partido Popular*) and its future remained uncertain until the Constitutional Tribunal sentence reaffirmed its constitutionality last November. In Romania same-sex couples do not have the right to marry nor to civil unions.

After the analysis of the two specific cases, an overview of the issue in the EU will be offered, stating which countries have already approved same-sex marriage, which have it in the agenda and which ones have made changes in their constitutions so that heterosexual marriage is reinforced. A look to the Ukrainian, Russian and Moldavian situations will be offered so as to compare the situation inside and outside the borders of the EU, where strong anti-homosexual movements are taking place. Finally, some concluding remarks will be given.

EFE Agency, "Solo en once países del mundo está legalizado el matrimonio homosexual", *Rtve.es*, November 6, 2012, accessed March 11 2013, http://www.rtve.es/noticias/20121106/solo-once-paises-del-mundo-esta-legalizado-matrimonio-homosexual/573157.shtml.

[4] FREEDOM TO MARRY, "The Freedom to Marry Internationally", December 2012, accessed March 11, 2013http://www.freedomtomarry.org/landscape/entry/c/international,; USA Today, "Israeli high court orders gay marriage recognition" November 21, 2006, accessed March 11 2013, http://usatoday30.usatoday.com/news /world/2006-11-21-israel-gay-marriage_x.htm.

[5] As for 25th of April 2013 Colombia's parliament rejected same sex marriage law, although, as stated, in 2007 approved the possibility following a Constitutional Court ruling. It gives same sex marriages similar inheritance, pension and social security rights that heterosexual marriages do.

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in Official Journal of the European Union, L 180 of 19/07/2000.

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, published in Official Journal of the European Union, L 303 of 02/12/2000.

2.Anti-discrimination laws in the EU regarding sexual orientation

The principle of equal treatment constitutes a fundamental value of the European Union, first established as a principle in trade law, specifically in the context of the Economic liberties and clearly protected for first time in the Treaty establishing the European Economic Community (1957), by requiring that men and women should receive equal pay for equivalent work[8].

Regarding the principle of equal treatment, the European Union made in time significant progress in achieving gender equality[9], in recognising the principle of non-discrimination based on sex, race, nationality etc. and in banning these forms of discrimination. In this context, it is worth to mention that former article 13 of the Amsterdam Treaty (1997) represents a milestone and was the first time sexual orientation discrimination was introduced as a protected ground in a EU Treaty[10]. This article was subsequently modified by the Nice Treaty (2001) to allow for the adoption of "stimulus measures" in order to support initiatives of each member state. This way the EU aims to show a coherent and integrated focus in the fight against discrimination, thus recognizing areas in which discrimination is common in order to combat it. In the same way, the wording lets the door open to legislate about situations of multiple discrimination[11].

Discrimination was also taken into account when drafting the European Constitution which finally was rejected, establishing the fight against discrimination (in general, not establishing a list of protected grounds, thus not including sexual orientation specifically) a priority, a fundamental objective in the EU.

In December 2000, the Charter of Fundamental Rights of the European Union was adopted, but won't be enforceable until 2009 along with the Treaty of Lisbon. The 3rd chapter of this document is dedicated to Equality and contains 7 articles (20-27). Article 21st is the one containing specific provisions about discrimination on the ground of sexual orientation discrimination[12]. Much more, according to the Lisbon Treaty, the Union promotes equality (article 3 of TEU) and combats inequalities through the actions it implements (Article 8 of TFEU).

Also in 2000 two important Directives[13] were approved in the area of non-discrimination: Council Directive 2000/78/EC[14] establishing a general framework for equal treatment in employment and occupation (hereinafter the "Employment Equality Directive") and Council Directive 2000/43/EC[15] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in the following fields: employment, education, social security, health care and access to goods and services (Known as "Race Equality Directive").

---

[8] Article 119 of the Rome Treaty, 1957: Sex Equality was regarded as a principle to guide the European Economic Community.

[9] M. Koutselini, S. Savva, And S. Agathangelou, *"Indicators of Gender Mainstreaming in European Union and Comparison with Genders' Depictions in Cyprus Mass Media"*, University of Ciprus (2007) 1, accessed March 11 2013, www2.ucy.ac.cy/~currinst/cur/pdf/.../sinedrio_patra_arthro_final.doc.

[10] *"The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament [to] take appropriate action to combat* ***discrimination based on*** *sex, racial or ethnic origin, religion or belief, disability, age or* ***sexual orientation****"*.

[11] Jone Itxaro Elizondo Urrestarazu, "Discriminación racial y de origen étnico en la Europa de los Derechos", *Revista de Derechos Fundamentales. Universidad Viña del Mar*, no.6, (2011), 90-91.

[12] Article 21 of the Charter of Fundamental Rights of the European Union: *"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited"*.

[13] Report *"Discrimination in the European Union"*, January 2007, accessed March 11 2013, p.4, http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_en.pdf,

[14] See footnote 9.

[15] See footnote 8.

Despite this variety of provisions, only the Employment Equality Directive mentions sexual orientation but focused solely in discrimination in employment and occupation. As a matter of fact, in line with the habitual "prudence" of the EU institutions when sensible matters are being discussed, the preamble of the Directive it is expressly mentioned, that none of the provisions shall be interpreted as to oblige the Member States to change the Civil and Family Law. These two directives were complemented by the creation of a Community action programme to combat discrimination[16] with a budget of 100 million euros between the years 2001-2006 including sexual orientation discrimination.

The European Parliament on the other hand has been much more clear in its approach to this topic and has adopted a great number of resolutions since the '90s regarding sexual orientation discrimination accepting same-sex marriage and encouraging Member States as well as the European institutions to take steps forward the recognition of same-sex unions, including marriage. Although not legally-binding the resolutions from the EU Parliament are seen as a strong political tool.

The first resolution adopted in this regard was the Resolution on equal rights for homosexuals and lesbians in the EC (A3-0028/94) the 8 February 1994[17] which aimed to finish the prohibition on same-sex marriage or provide access to equivalent regimes. It was based in what is known as the "Roth report" and asked for a Directive which should legislate about (among others) marriage equality for same sex couples[18].

The 3rd of July of 1997 a written question was presented to the Commission asking why there was still no Directive on the issue, to which the Commission answered that in the time the Roth report was adopted, the Community Treaties did not "bestow on the institutions any specific powers for tacking discrimination based on sexual orientation"[19]. The answer also stated that the Treaty of Amsterdam was going to give the Community powers in that respect. The Commission did not gave any specifics about a possible Directive in this respect though, and the only Directive approved that tackled sexual orientation discrimination has been 2000/78 so far, which stated, as mentioned before, specifically that "(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon."[20]

Among other resolutions it is remarkable that in December 2008, the European Parliament voted 401 – 220 in favour of a report which calls for same-sex marriage and civil unions to be recognised across all EU states and at the same time, while adopting a Report on the Situation of Fundamental Rights in the EU recommended mutual recognition of same-sex partnerships[21].

---

[16] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), *Official Journal of the European Union* L 303, 2 of December 2000, p. 23–28

[17] Resolution A3-0028/94 of the European Parliament on equal rights for homosexuals and lesbians in the EC, adopted the 8th of February 1994, published in the *Official Journal of the European Communities* C 61/41 of the 24th of February 1994, p.40.

[18] Believes that the Recommendation should, as a minimum, seek to end:

… - all forms of discrimination in labour and public service law and discrimination in criminal, *civil*, contract and commercial law

… - the barring of lesbians and homosexual *couples form marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships,*

.....- any restrictions on the rights of lesbians and homosexuals to *be parents or to adopt or foster children (italics added by author).*

[19] Written question no. 2307/97 by Laura González Álvarez, Angela Sierra González, María Sornosa Martínez, Antoni Gutiérrez Díaz to the Commission. Establishment of a directive on equal rights for homosexuals and lesbians in the EC, made on 3 July 1997, published in the *Official Journal of the European Communities* C 76 of 11March 1998, p. 94.

[20] See note 9, pp. 16 – 22.

[21] Recommendations 75, 76 and 77 of the Report of the 5th December 2008 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)) for the Committee on Civil Liberties, Justice and Home

Plenary Session of the European Parliament that took place in Brussels, on 24th May 2012 outlined as a priority in the fight against discrimination of all kind, making a *"call on EU member states to consider giving access to cohabitation, registered partnerships or marriage to lesbian, gay, bisexual and transgender (LGBT) people"*[22].

3.Situation in the European Union member states

A. Spain

Same sex marriage came as an electoral promise of the socialist government of Jose Luis Rodriguez Zapatero. After winning the elections in 2004 the socialist government passed the law[23] that allowed same-sex marriage in the *Congreso de los Diputados* and in the Senate the 30th of June 2005, making Spain the third country in the EU and the world allowing same-sex marriage.

The socialist group found a lot of opposition (even if a 56.9% of the population approved the policy-change[24]) from social groups linked in their majority to the Catholic Church (Bishops and *Foro de la familia*[25] mostly) and the right-winged party *Partido Popular* (PP). Indeed this last political party filed an appeal claiming the unconstitutionality of the law in September 2005.

There were no political changes until November 2011, moment in which the right-winged Partido Popular won the elections with an absolute majority and fear came that they would overrule directly the law now they were in charge and had the necessary power to do so. Because of that spread fear the new-elected government had to state that they would respect what the Constitutional Court would rule about this issue[26]. Until that moment, 22.442 same-sex weddings were at stake[27].

In the 6th of November 2012, the Sentence of the Constitutional Tribunal[28] came out, rejecting any kind of unconstitutionality in the law. The tree conservative judges out of 8 that voted against the sentence wrote dissenting votes.

Affairs of the European Parliament, http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2008-0479&language=EN, accessed March 11 2013.

[22] "Parliament strongly condemns homophobic laws and violence in Europe" in the Plenary Session Justice and Home Affairs, on 24th of May 2012, accessed March 11 2013, http://www.europarl.europa.eu/news/en/pressroom/content/20120523IPR45696/html/Parliament-strongly-condemns-homophobic-laws-and-violence-in-Europe.

[23] Law 13/2005 of the 1st of July 2005 by which the Civil Code in matters of law to contract marriage is amended, published in the Official Journal (BOE) no. 157 of the 2nd of July 2005, pp. 23632 -23634.

[24] When asked about Civil marriage for same-sex couples by the CIS a 56.9% answered in favour, a 32.3% against and a 10.9% did not respond. Centro de Investigaciones Sociológicas, Study on "Opiniones y actitudes sobre la familia" no.2578 October-November 2004, accessed March 11 2013, p.16, http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2560_2579/2578/Es2578.pdf.

[25] Foro de la Familia is an association self-declared defendant of the family. accessed March 11 2013, http://www.forofamilia.org/nosotros/quienes-somos/spanish-family-forum/.

[26] La Vanguardia, "El Gobierno esperará a la sentencia del TC para decidir sobre el matrimonio homosexual" , November 6, 2012, accessed March 11 2013, http://www.lavanguardia.com/politica/20121106/54354891548/gobierno-fallo-tc-decidir-matrimonio-gay.html.

[27] Javier Garcia Pedraz and Emilio de Benito, "Siete años, 22.442 bodas y un recurso contra el matrimonio gay", *El Pais*, November 6, 2012, accessed March 11, 2013http://sociedad.elpais.com/sociedad/2012/07/13/actualidad/1342215460_536337.html.

[28] Sentence 198/2012 of the 6th of November 2012. Unconstitutionality Appeal 6864-2005. Filed by more than fifty members of the Popular Group of the Congress in relation to Law 13/2005 of July 1, by which the civil code in matters of law to contract marriage is amended. Institutional guarantee of marriage and protection of the family: constitutionality of the legal regulation of marriage between persons of the same sex. Published in the *Official Journal (BOE)*, no. 286, 28 of November 2012, sec. TC., pp. 168-219.

The appeal petition was based in 8 reasons of unconstitutionality[29], the central one being the statement by PP that the wording of article 32 of the Spanish Constitution did not permit such a thing as same-sex marriages[30].

The adoption of the Law meant a change of some of the words used in secondary legislation (man or woman changed by the spouses, for example), that the PP interpreted as by changing some words, a mayor change was taking place including the total change and de-naturalization of the marriage institution.

For proving the law was unconstitutional, they claim a breach in article 32 of the Spanish Constitution of 1978. The article states as follows:

> *1. Man and woman have the right to marry with full legal equality.*
>
> *2. The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects.* [31]

In this respect, the sentence stated that the article permitted a margin for interpretation, and even if it same-sex marriage was not probably what the legislator had in mind at the time of writing it, it provided the necessary margin not to have to change the Constitution for the adoption of same-sex marriage. That is to say that it did not implicitly bring same-sex marriage but neither excluded it of the marriage institution. The article was phrased like that due to the discriminatory situations lived by women during the Franco dictatorship[32], in order to prevent this situation from happening again this was a way of highlighting the equality between man and woman once more in the constitutional text.

At the same time, the Tribunal defended that the law, as well as the society was a "living tree" that required an evolutionary interpretation.

Spain was also the first country in the world permitting adoption in equality to heterosexual couples. In the same sentence we have mentioned in the previous paragraphs, the Tribunal stated that since same-sex marriage was equal to heterosexual marriages they had the same right to access the adoption of children. The Tribunal stated that the child's interest had to prevail at all times, thus every case had to be studied in its own, but that there was no reason of unconstitutionality[33].

Still, there are voices claiming that marriage should only be called like that when it is formed between a man and a woman, the last case being the Minister of Home Affairs (Ministro del Interior) Jorge Fernández Diaz stated in March 2013 that the "survival of the species won't be guaranteed in the case of same-sex marriages", declarations that have been criticised even from his own political party.

---

[29] Breach of articles: 9.3, 10.2, 14 (in relation to articles 1.1 and 9.2), 32, 39.1, 2 and 4. 53.1 (in relation to article 32) and 167 of the Spanish Constitution.

[30] Fundamentos de Derecho (the held, unofficial translation) no.6 of the Sentence 198/2012.

[31] English version of the Spanish Constitution, accessed March 11 2013, available in http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

[32] Elvira Aranda Alvarez, 2Sinopsis del artículo 32 de la Constitución española", updated by Sara Sieira, on January 2011, accessed March 2013, http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=32&tipo=2.

[33] C. Guindal, "El TC legaliza también la adopción de menores por los matrimonios gay", *El Confidencial*, November 6, 2012, accessed March 11 2013, http://www.elconfidencial.com/espana/2012/11/06/el-tc-legaliza-tambien-la-adopcion-de-menores-por-los-matrimonios-gay-108723/# , and Sentence 198/2012…See footnote 30.

B. Romania

According to the European surveys[34] Romania is "guilty" of having one of the strongest negative attitudes towards the Lesbian, Gay, Bisexual and Transsexual (LGTB for now on) community in the European Union. This attitude is contrary to the European values of protecting human rights that include the rights of the LGBT community, values which have been made their own by Romania when it joined the EU in 2007. With this occasion, the country was asked by the European Union legislation to "facilitate" the recognition of the same-sex relationships registered in other EU member states (e.g.: same-sex marriage, civil unions or domestic partnerships) and to eliminate as much as possible the discrimination based on sexual orientation at national level.

There are a range of positive aspects to be mention in which Romania has made significant progress as regards the LGBT rights legislation since 2000 when it fully decriminalised homosexuality: it has introduced and enforced wide-ranging anti-discrimination laws, equalised the age of consent and introduced laws against homophobic hate crimes. Also at the institutional level a new body in charge of analysing all the forms of discrimination has been formed, namely National Council for Combating Discrimination (CNCD). This council has the power to impose fines when discriminatory situations are taken place, both to natural and legal persons and includes the protected ground of sexual orientation[35].

But we should highlight the fact that even after 6 years from the Romanian accession to the EU this topic is still a very sensitive subject to be discussed and analysed either by the NGOs for protection of human rights and in particular of LGBT rights or by the politicians.

The institutional and legislation modifications occurred in the last years have allowed the LGBT community to become more visible, for example by organizing social and cultural events. However, from the legal point of view there are still few achievements in this field, since the Romanian legislation does not recognise yet the partnership or same-sex marriage. Furthermore, in 2009 the Romanian Parliament decided to change the words "between spouses" from the Family Code, considered to be too vague into more concrete terms: *"between a man and a woman"*, banning, least for the next couple of years, the possibility of future same-sex marriages[36].

This rigid attitude of the Romanian authorities and *expressis verbis* provision into the new Civil Code that the marriage will only be that between a man and a woman has been considered to be discriminatory by the national and international NGOs (e.g.: group ACCEPT, the International Gay and Lesbian Human Rights Commission, and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) which required for measures to be taken in order to eliminate this discrimination from the national legislation and harmonizing with the European one in the field[37].

Also, there were three articles of the mentioned new Civil Code that were regarded as discriminatory by the European Network of Legal Experts in the Non-discrimination Field: Article 277 (prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages registered in other countries for Romanians), Article 462 (the

[34] Danish Institute For Human Rights, COWI, *Report: The social situation concerning homophobia and discrimination on grounds of sexual orientation in Romania*, European Union Agency for Fundamental Rights (FRA), March 2009, accessed March 11 2013, p. 11. http://fra.europa.eu/sites/default/files/fra_uploads/389-FRA-hdgso-part2-NR_RO.pdf.

[35] Consiliul National Pentru Combaterea Discriminarii, accessed March 11 2013, http://www.cncd.org.ro/?language=en.

[36] Rex Wockner, "Romania enacts discriminatory laws", *Asylumlaw*, August 10, 2009, accessed March 11 2013, http://www.asylumlaw.org/docs/showDocument.cfm?documentID=7959.

[37] Ibid.

prohibition of adoption by two persons of the same sex), and Article 258 (definition of family as marriage between a man and a woman)[38].

Taking into consideration the above mentioned, a similar situation can be noticed as regards the same-sex partnerships or marriages celebrated abroad by the Romanian citizens, which are not recognised by the Romanian authorities, except for the partnerships or same-sex marriages made abroad where one or both partners are foreigners and have a valid partnership in their Member State of origin. In this context, the couple can be registered as such on the Romanian territory[39].

C. Overview of the situation regarding same-sex marriage in the other Member States of the EU

Referring to same-sex marriages in the EU a really heterogeneous map can be drawn. Out of the 14 states that perform same-sex marriages in the world, 7 are members of the EU. In this part we will have an overview of the situation of same-sex marriage in the EU, showing which states have already approved, in which it is being discuss right now and which states have a constitutional provision stating that marriage is between "a man and a woman" exclusively, what has come to be known as a constitutional ban.

As it has already been mentioned, there are seven EU member states that have approved same-sex marriage: The Netherlands, Belgium, Denmark, Spain, Sweden, Portugal and France. There are other member states which are currently discussing the issue: England and Wales, Ireland, Germany, Luxemburg, Finland or Andorra (even if it is not a member state of the EU it has a very special relationship with the EU).

In Ireland it seems movements in favour of same-sex marriage are driving the incorporation of the issue in the agenda of the government. In the case of Finland, it seems that for the moment there will be no change in the actual law, although it was one if the first states that approved registered partnership. On the other hand there are some states who have recently introduce modifications in their constitutions in order to reinforce the statement that marriage is between a man and a woman, which are Latvia, Lithuania, Poland, Hungary and Bulgaria.

The modification of Family Law contained usually in the Civil Code has been done both by introducing the possibility of different and same-sex marriages or by making the provision gender-neutral, thus not stating the sex of the spouses.

The first EU state member to approve same-sex marriage was The Netherlands[40] in a law passed the 7th of December 2001. This made the Dutch the first ones to have the right to same-sex marriage. Following the conclusions of an special commission created for the study of the issue in 1995, and after approving gay civil-unions in 1998, the final draft of the legislation was presented in September 2000 and was adopted by an overwhelming 107 votes against 33 in the House of Representatives[41].The main article changed in marriage law stated that "A marriage can be contracted by two people of different or the same sex"[42]

Belgium, the second state member to approve same-sex marriage did on the 30th of January 2003.The next state to approve same-sex marriage was Spain in 2005, whose case has been studied

---

[38] Romanita Iordache, "News report from the 28th June 2009", *European Network Of Legal Experts In The Non-Discrimination Field*, June 28 2009, accessed March 11 2013, p.1, http://www.non-discrimination.net/content/media/RO-15-RO-FLASH%20REPORT_New%20Civil%20Code%20adopted.pdf

[39] See note 36, p.10.

[40] The New York Times, "Same-sex Dutch couples gain marriage and adoption rights", December 20 2000, accessed March 11 2013, http://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html.

[41] BBC, "Dutch legalise gay marriage", September 12 2000, accessed March 11 2013, http://news.bbc.co.uk/2/hi/europe/922024.stm.

[42] Article 30 in the marriage law originally: *"Een huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht."* Taken from A. Llanza I Sicart, and S. Navas Navarro, *Matrimonio homosexual y adopción: Perspectiva Nacional e Internacional.* Madrid: Editorial Reus, 2006, p. 298.

in depth in another part of this article. In Sweden, same-sex marriage law passed the 1st of May 2009, followed by the decision of the church of Sweden of also marrying same sex couples the 1st of November 2009 by a 70% of the votes[43].

Portugal passed the Law 119/XI[44] allowing same-sex marriage in January 2012 after an intense social debate. Francisco Assis, socialist member of the Parliament stated that "The living world has defeated the prejudice one"[45].

Denmark adopted legislation allowing same-sex marriage in June 2012, but since 1989 couples of the same sex could access registration as a couple with similar juridical effects as marriage (not in some aspects regarding adoption the parental rights o assisted reproduction). The change in the law has been done by making gender neutral the bill allowing gay marriages (both church and civil registry weddings)[46].

France was the last EU member state to approve same sex marriage. Like in the case of Spain it was an electoral promise of the socialist party, in this case ruled by François Hollande and has been a really controversial law that has moved a great number of French citizens both against and in favour of the law, followed by incidents and violence against the LGTB community. In spite of these attitudes approval rate (in August 2012) was of 65% for same sex marriages and 53% for allowing same sex unions to adopt children[47]. The law passed the 23rd of May 2013 but it was not signed by the President until the Council ruled it was a constitutional the 17 of May 2013[48].

Some other EU member states have the issue on the political and legislative agenda or are working on it. These are: England and Wales (expected this year), Scotland, Germany and Ireland. It is still in Finland's agenda even if it was but put aside the 20th of February 2013th, when the Finnish Parliament's Legal Affairs Committee voted narrowly to reject a gender-neutral marriage bill proposed by National Coalition Party minister Alexander Stubb and others, meaning it will not be brought before the full legislature for consideration. Slovenia asked their citizens via referendum the 25th of March 2012 only a 26% of the population voted and the results where 55% against 45%.[49]

[43] AFP, "Sweden's Lutheran church to celebrate gay weddings", October 23 2009, accessed March 11 2013, http://www.google.com/hostednews/afp/article/ALeqM5gBRXyAD2aAX4i7H5M0LujkDR0RhQ.

[44] Law 119/XI, that creates and gives legal protection to registered civil unions between persons of the same sex. Publicated in the *Official Journal* the 7 of January 2010. Available in http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=35011.

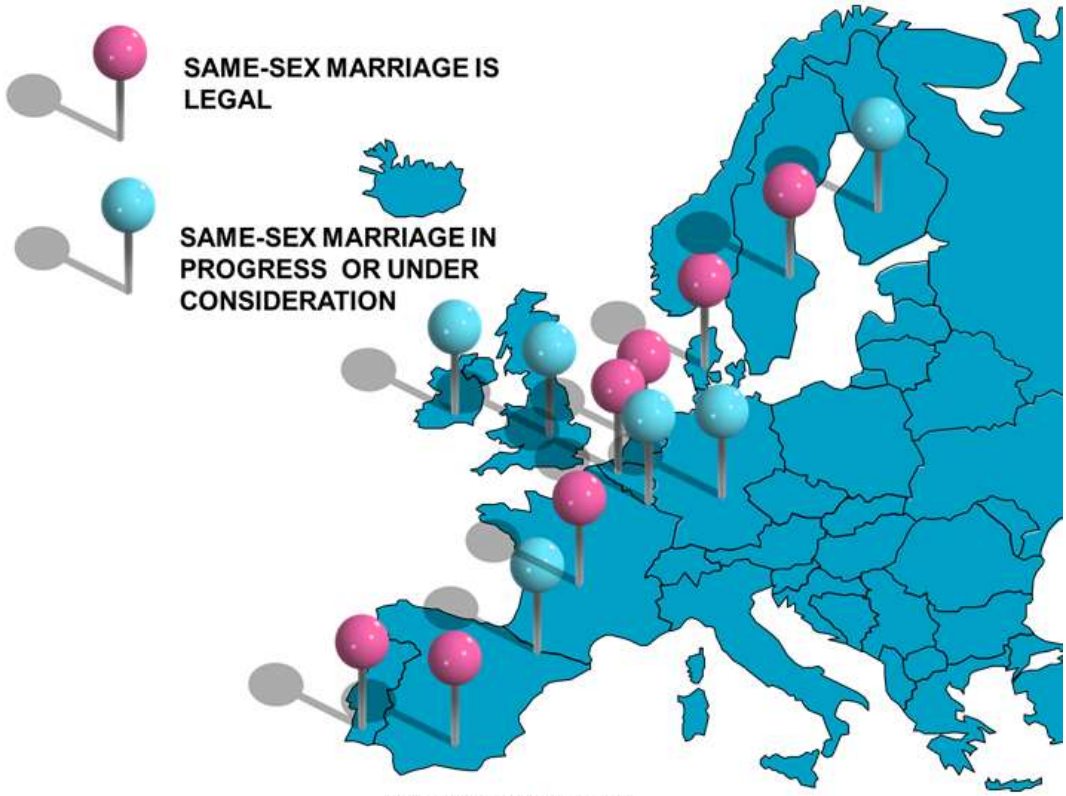
[45] "El mundo de la vida ha vencido al mundo de los prejuicios", stated Francisco Assis in Francesc Relea, "Portugal aprueba el matrimonio homosexual tras un intenso debate", El Pais, January 8 2010, accessed March 11 2013, http://sociedad.elpais.com/sociedad/2010/01/08/actualidad/1262905216_850215.html.

[46] BBC, "Denmark approves same-sex marriage and church weddings", June 7 2012, accessed March 20 2013, http://www.bbc.co.uk/news/world-europe-18363157.

[47] Xavier Heraud, "Sondage: 65% des Français-e-s sont favorables à l'ouverture du mariage pour les homos", August 15 2012, accessed March 20 2013, http://yagg.com/2012/08/15/selon-sondage-ifop-65-des-francais-sont-favorables-a-louverture-du-mariage-pour-les-homosexuels/.

[48] Leigh Thomas, "France's Hollande signs gay marriage law", *Reuters*, May 18 2013, accessed May 18 2013, http://www.reuters.com/article/2013/05/18/us-france-gaymarriage-idUSBRE94G0JH20130518.

[49] ACEPRENSA, "Eslovenia rechaza en referendum el matrimonio gay", March 30 2012, accessed March 11 2013, http://www.aceprensa.com/articles/eslovenia-rechaza-en-referendum-el-matrimonio-gay/.



Map: Made by the author

On the other hand, there are some countries, as explained earlier that had or have recently introduced or modified their constitution in order to expressly state that marriage is a union between a man or a woman: Poland (article 18), Latvia (article 110 changed in 2005), Lithuania (article 38, changed in 2010), Hungary (article L.1., changed in 2012) and Bulgaria (article 46). This movement towards a reinforcement of the heterosexual nature of marriage has been strong in ex-communist countries. In fact, the modification of the constitutions arose many protests from LGTB associations and worried NGOs. Reactions include a European Parliament Resolution[50]on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania.

[50] European Parliament Resolution of 19 January 2011 on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania (2012/C 136 E/10) Published in the *Official Journal of the European Union* C136 E/50 of the 11 of May 2012 http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do ?uri=OJ:C:2012:136E:0050:0052:EN:PDF.

Map: Made by the author

It is also interesting to address the different support rates regarding same-sex marriage in the different Member States. A Eurobarometer Discrimination Survey in 2006 found that existed major differences between EU Member States also exist regarding public opinion towards LGBT people and issues. For instance, the majority of the population in The Netherlands (82%), Sweden (71 %) and Denmark (69 %) was in favour of same-sex marriage, but only a small minority in Romania, (11 %), Latvia (12 %) and Cyprus (14 %). Also, while in the Netherlands 91 per cent of the population was comfortable with having a homosexual as a neighbour, in Romania only 36 per cent was of the same opinion. The Eurobarometer Discrimination Survey in 2008, using a ten point 'comfort scale', produced similar results: Swedes (9.5%), Dutch and Danish respondents (9.3%) were the most 'comfortable' with the idea of having a homosexual as a neighbour, but a much lower 'comfort' level was recorded in Bulgaria (5.3%), Latvia (5.5%) and Lithuania (6.1%)[51].

[51] Data found in Fundamental Rights Agency of the European Union, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member State, Part II: The Social Situation* (2009), pp.9-10.

4. Legal Status in Non-Member States: Ukraine, Moldova and Russia

A. Ukraine

In 1991 Ukraine became one of the first ex-Soviet countries where homosexuality has been decriminalized. This fact permitted the LGTB community to become more visible at the national level, more precisely, by having their own bars, publications, and human rights organizations.

Except the positive part of the visibility and changing the legislation as regards decriminalizing of the homosexuality, there are still problems in recognizing all the rights to this community since the political and social perception is still at a very low level, followed violent attacks on LGBT activists took place during the commemoration March of the international Human Rights Day in 2003 or during other public events, such as "Kiev Pride" in 2012 and 2013.

From the legal point of view, the new Constitution, approved in 1991, apart from mentioning the basic human rights, it does not mention *expressis verbis* the terms of sexual orientation or gender identity. Furthermore, article 51 of the Constitution specifically defines only the marriage as a voluntary union between a man and a woman[52].

In recent years a couple of bills regarding the ban to discuss in public or in media about the homosexuality, bring into Ukraine various videos, photos or audio products or other similar products have been discuss. In fact, both Bill nº0945 (formerly Bill nº8711) and Bill nº1155 are pending second voting in the parliament and if approved it would mean that a person who offers information about LGTB associations (for instance) could face up to 5 or 6 years of prison. According to Human Rights Watch, the approval of these laws would "create an environment of state-promoted discrimination against LGTB people"[53].

This situation has been qualified by the local NGOs, Amnesty International organisation, the European Union, Human Right Watch and the United Nations to be serious "homophobic" actions which means that if the situation remains the same in the next period and no improvements are made in order to eliminate these bans, Ukraine will experience difficulties in the negotiations process to the European Union led under the EU-Ukraine Association Agreement, which entered into force in 1998. In fact, in the context of a Ukraine- EU visa liberalization negotiations the Foreign Minister of Ukraine was obliged in February 2013 to announce the adoption of anti-discrimination laws to reach at least one of the benchmarks for the process to be successful[54].

Moreover, in the opinion of the EU officials, "these homophobic bills are unacceptable for a country that aspires to deeper relations with the European Union"[55] and be part of a Europe of 28 Member States already, taking into account that Croatia will be fully Member states starting with the 1st of July 2013. The same statement has been made during the EU-Ukraine summit that took place in February 2013, where the main goal of the summit was the Ukraine's reform agenda, including the situation of the human rights, linked to the possible signature of the EU-Ukraine Association Agreement.

---

[52] Article 51. *"Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family.*

Parents shall be obliged to sustain their children until they are of full age. Adult children shall be obliged to care for their parents who are incapable to work.

The family, childhood, motherhood, and fatherhood shall be under the protection of the State."

Ukrainian Constitution, accessed March 18 2013, available in: http://www.president.gov.ua/en/content/chapter02.html.

[53] Human Rights Watch, "Ukraine: EU Should Raise LGBT Rights at Summit", February 21 2013, accessed March 1, http://www.hrw.org/news/2013/02/21/ukraine-eu-should-raise-lgbt-rights-summit.

[54] The Guardian, "Ukraine gay pride marchers ready to defy violence", May 18 2013, accessed May 18 2013, http://www.guardian.co.uk/world/2013/may/18/ukraine-gay-pride-marchers-violence.

[55] See note 55.

Nowadays, there are no anti-discrimination laws covering sexual orientation or gender identity in Ukraine. There is though a national hate crime law that could be interpreted as including sexual orientation and gender identity.

It is necessary that Ukraine issues concrete laws in this field in order to eliminate as much as possible all the negative situations in which the LGBT community is put so far, as well as clarify the contradictory laws being discuss right now. In addition, if Ukraine wants to become a full member State of the European Union it will be obliged to align and harmonize its legislation with the European one and also it will have to protect the LGBT citizens from certain forms of discrimination and harassment.

B. Moldova

Starting in 1991, an important moment in the history and evolution of Moldova, several progresses in decriminalizing homosexual relations were made, being in the same line with the general attitude of Moldova to guarantee protection of human rights by laws[56]. Thus, in 1995, homosexuality between consenting adults was legalised[57] while in Transnistria, the self-proclaimed autonomous republic, *"homosexuality is illegal[58]"*.

In addition, in September 2002 new laws were introduced in order to equalise the age of consent. As from January 2003, amongst other things, the position of gays and lesbians in Moldova looks to have improved in a very good manner, especially when nowadays Moldova shows to be very committed to the European values in the field of human rights as well as respecting these.

Nevertheless, nor same-sex marriage nor civil unions are legally recognised since the Constitution of Moldova is banning same-sex marriage[59]. Other laws mention in a general manner the terms of "sexual orientation" or "sexual orientation discrimination" but without defining them, examples are: the Law on Application of Lie Detector /Polygraph no.269 from 12.12.2008; the Law on Asylum no.270 from 18.12.2008 and the Law on Freedom of Expression no.64 from 23.04.2010[60]. That lead to the approval of anti-discrimination Law no.101/2012[61] the 25th of May 2012 that will enter into force this 2013 and even if they don't mention sexual orientation as a protected ground in the first article where a list of general discrimination protected grounds is given (it is important to state that the list is not closed, thus sexual orientation could be interpreted

[56] Vera Turcanu-Spatari, Study *on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Moldova,* CoE, (2011), accessed March 11 2013, p.8, http://www.coe.int/t/Commissioner/Source/LGBT/MoldovaLegal_E.pdf.

[57] Immigration And Refugee Board Of Canada, Moldova: *The situation regarding gay men and lesbians, including the laws on homosexuality, the treatment of gay men and lesbians, protection offered by the State and the existence of support services (2008 - June 2010),* UNHCR, June 30 2010, accessed March 11 2013, http://www.unhcr.org/refworld/publisher,IRBC,,MDA,4e0302912,0.html.

[58] Freedom House, "Transnistria", 2012, accessed March 11 2013, http://www.freedomhouse.org/report/freedom-world/2012/transnistria.

[59] Article 48(2) *The family is founded on the freely consented marriage of husband and wife, on the spouses equality of rights and on the duty of parents to ensure their children's upbringing and education.*

Constitution of the Republic of Moldova, accessed March 11 2013, available in English in: http://www.presedinte.md/const.php?lang=eng.

[60] See footnote 58, pp. 3 and 9.

[61] This law transposed the Council Directive 2000/43/EC and the Council Directive 2000/78/EC into the legislation of Republic of Moldova, accessed March 11 2013, http://lex.justice.md/viewdoc.php?action =view&view=doc&id=343361&lang=1.

to be included in "any other similar ground"), it does mention sexual orientation during the text regarding discrimination protection as regards to employment (article 7)[62].

At the international scene, in 2011 Moldova used its vote in the United Nations Human Rights Council to vote against the first UN resolution condemning discrimination and violence against individuals based on their sexual orientation and gender identity[63], which *"represents a historic moment to highlight the human rights abuses and violations that lesbian, gay, bisexual and transgender people face around the world based solely on who they are and whom they love"* according to the U.S. Secretary of State Hillary Rodham Clinton.

As a final remark, during 2011, Moldova was subjected to the periodic reviewing process in the field of human rights in general and equality and non-discrimination policies in particular, taken by the UN, which final report was published in 2012. One of the recommendations made in the report was to *"intensify efforts to address discrimination against LGBT people; to investigate and prosecute crimes against LGBT community members"* but most of all *"to take action to build broad support for* [their] *rights in the context of the new anti-discrimination law"*[64].

C. Russia

In the Russian Federation, until 1993 homosexual relations made by adult males were punished under the Russian Federation Criminal Code by imprisonment. After this year and under the strong pressure coming from the European community and after the new Criminal Code came into force in 1997, this incrimination was repealed. Presently, the male homosexual acts are decriminalized[65], while the lesbian relations were not criminalised at all. Also, in 2003 the age of consent was modified and established in 16 regardless of sexual orientation.

The Russian Constitution in Article 19.2[66] it is stipulated very clearly the equality of all women and men, including the fact that the state will "*guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin* [...]", stipulating in the same time that "*any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden*". Sexual orientation discrimination is not, hence, protected as a ground of discrimination, nor is it in secondary legislation. This leaves Russia with no general or specific laws that protect against discrimination on the basis of sexual orientation or gender identity. In the same line, there is no recognition of same-sex couples (married or not) by the Russian laws. The family code establishes in its article 1.3 that "Family relations shall be regulated in conformity with the principles of a voluntary conjugal union between a man and a woman"[67], which has been an argument invoked defend the thesis according to which marriage is celebrated only between man and woman by the Constitutional Court of the Russian Federation in a case introduced against

---

[62] ILGA Europe, "Mixed reactions to adoption of Moldova's anti-discrimination law", May 25 2012, accessed March 20 2013, http://www.ilga-europe.org/home/news/for_media/media_releases/moldova_anti_discrimination_law .

[63] AP, "UN backs gay rights for first time ever", *Updated News*, June 17 2011, accessed March 11 2013, http://updatednews.ca/2011/06/17/un-backs-gay-rights-for-first-time-ever/.

Paul Ciocoiu, "Moldova focuses on human rights", *SETimes.com*, February 19 2013, accessed March 11 2013, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2013/02/19/feature-03.

[64] ILGA Europe, "Annual Review" 2011, accessed March 11 2013, p.113, http://www.ilga-europe.org/home/guide_europe/country_by_country/moldova/ilga_europe_annual_review_2011_on_moldova

[65] Immigration And Refugee Board Of Canada, *Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals*, February 29 2000, accessed March 11 2013, http://www.unhcr.org/refworld/docid/3ae6ad788c.html.

[66] The Constitution of the Russian Federation in English, accessed March 11 2013, available on http://www.constitution.ru/en/10003000-03.htm.

[67] Family Code of the Russian Federation, accessed 20 March 2013, available in English in http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf.

the provisions of the Family Code, which considered that "*in order to register a marriage, the mutual free consent of a man and a woman was necessary*" [68].

Also, some laws similar to the Ukrainian under-consideration gay-propaganda laws have been approved in different regions of the Russian Federation, establishing *"administrative punishment for the so-called "promotion of homosexuality among minors[69]"*; as well as bans for the prides[70] in some major cities. The situation is unbearable for the LGTB community since violence from the authorities and ultra-orthodox groups has been increasing.

5. Conclusions

A clear and opposite double movement is taken place in the EU. On one hand, there is the "Western Europe" and on the other the "Eastern" one, formed by the countries that once belonged to the URSS. This is can be seen in the maps incorporated to the present article.

"Western Europe" is clearly working toward marriage equality and has already some kind of Civil Union system established, along with the guidelines of the EU. On the contrary, in "Eastern Europe", although a clear step against sexual orientation discrimination has been made to fulfil the EU's requirements, there is still a long way to go. In the last years many countries have changed their laws (both the Constitutions of Family o Civil Codes) against the recommendations from the European Institutions and NGOs to reinforce the idea of the heterosexuality of marriage. A study should be made to find out the reasons of that rejection to homosexuality in order to fight it from the core. It is senseless to provide a society with legal provisions (such as Directive 2000/43/EC or Directive 2000/78/EC) if social attitude remains archaic.

Another phenomena that requires our attention is that there are many times that society is prepared to make a change and acceptance levels are high but the government rejects to take the necessary measures, for instance in Germany or Finland. The lack of relation and understanding between citizens and the government is also affecting rights.

Moreover one of the main problems same-sex couples find is that even if they get married in a member state that permits it their union won't be recognized in other member states if that legal figure does not exist in that same country. A system of recognition if not performance of same sex marriages is absolutely necessary across EU member states.

In the times there are yet to come, all this has to be beard in mind, since we cannot forget that we are *United in Diversity*[71]; and to be united, we have to be equal both in rights and obligations. This won't happen until the whole society possesses a whole citizenship; something that does not happen in all the Member states of the EU.

As President Mr. Van Rompuy said on the occasion of the International Day against Homophobia, "*Combating homophobia is thus enshrined in the EU's founding act and statement of values. It is something that distinguishes Europe from many other parts of the world".* He also stressed three ideals that in his view represented European values[72]:

---

[68] The Decision of the Constitutional Court of 16 November 2006 No.496; Report on "The Situation of Lesbians, Gays, Bisexuals, and Transgender People in the Russian Federation", *Russian LGBT Network*, 2008, p.8.

[69] Report on The Situation of Lesbian, Gay, Bisexual and Transgender People in the Russian Federation (Last Three Months 2011 – First Half 2012), 2012, accessed March 11 2013, p.4, http://www. civilrightsdefenders.org/ files/Russian-Federation-LGBT-situation.pdf.

[70] Steve Clemons, "Not the Onion: Moscow bans gay pride for next 100 years", *The Atlantic*, June 8 2012, accessed March 11 2013, http://www.theatlantic.com/international/archive/2012/06/not-the-onion-moscow-bans-gay-pride-for-next-100-years/258296.

[71] EU motto since 2000, accessed March 11 2013, http://europa.eu/about-eu/basic-information/ symbols/motto/index_en.htm.

[72] Statement by President Herman Van Rompuy on the International Day Against Homophobia on May 17 2010, PCE 88/10, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114351.pdf, accessed March 11 2013; Statement by President Herman Van Rompuy on the International Day Against Homophobia on May 17

"*European values at their best:*

- accepting difference, not fearing it;

- living with diversity, not fleeing it;

- defending rights and responsibilities, not ignoring them".

2011, PCE 0116/11 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/122014.pdf, accessed March 11 2013.

THE EUROPEAN JUDICIAL COOPERATION IN CRIMINAL MATTERS IN THE LIGHT OF THE LISBON TREATY

OANA-MĂRIUCA PETRESCU*

Abstract

The judicial cooperation in criminal matters together with the police cooperation were mentioned for the first time in a treaty, as a European legal instrument, with legal binding effect, by the Maastricht Treaty in 1993 in Title VI (Provisions on cooperation in the fields of Justice and Home Affairs). In time, taking into account the political and legal realities faced by the European Union, there have been important amendments brought to the contents of the Justice and Home Affairs policy through the Treaty of Amsterdam (1997) and the Treaty of Nice (2001).

Nevertheless, the new amendments brought by the Treaty of Lisbon in 2009 in the field of judicial cooperation have determined the "rethinking" and separating it from the "police cooperation" in two different chapters of Title V of TFEU (dealing with Area of Freedom, Security and Justice) which will be briefly analysed in this paper.

Bearing in mind all mentioned above, the aim of the paper is to analyse, on the one hand, the important amendments brought in the field of judicial cooperation by Lisbon Treaty from the legislative and procedure point of view as well as the new created institutions, highlighting in the same time the relevant principles governing the European judicial cooperation, such as: principle of mutual recognition of judgements and judicial decisions by Member States, mutual assistance in criminal matters etc.

On the other hand, we will be able to devote additional focus to studying the contribution of the Court of Justice of the European Union ("CJEU") to the development of the "Judicial Cooperation in Criminal Matters" since this court has full jurisdiction over this domain by the date of the entry into force of the Lisbon Treaty.

***Key words**: Treaty of Lisbon, criminal matters, judicial cooperation, Court of Justice of the European Union, mutual assistance*

I. General considerations

The globalisation process which started to be visible since the middle of 1980s and especially since the middle of 1990s, involved, among others, the integration of international markets, capital and investment movements, migration and free movement of people for studying, leaving, travelling and the dissemination of knowledge, as the positive meaning of the term of globalisation. Much more, other domains were also linked to the globalisation process, such as climate change, cross-boundary water, air pollution and over-fishing of the ocean.

From the negative perspective, the globalisation process increased the criminal phenomenon which expanded beyond the national borders, at international and European level, representing a major problem. The main reason of this expansion was the incapacity of the national legislations to fight efficiently against the criminal phenomenon and to adopt the appropriate measures to combat it.

The first steps in this direction have been made by the UN Resolution no.808 of 22nd of February 1993, where the International Court[1] was created, with the headquarters in Hague, to trial the people who allegedly violated the provisions of the international humanitarian law on the territory of former Yugoslavia after 1991[2].

* PhD, postdoctoral researcher in the *European Integration* Research Team, Faculty of Law, University of Deusto, Bilbao, Spain (email: oana.petrescu@deusto.es).

[1] This court is also known as the International Criminal Tribunal for the former Yugoslavia.

[2] Vasile Pavaleanu, *The judicial cooperation in criminal matters within the European Union*, The Annals of "Ştefan cel Mare" University Suceava, Fascicle of The Faculty of Economics and Public Administration, Volume 9, No.1(9), 2009, pp.348.

In order to fight against the crime and especially against the transnational organized crime in a efficient manner, and to cooperate in the field of police and judicial matters, the regionalization's idea of international criminal law was mentioned for the first time during the colloquium of the International Criminal Law Association held in September 1992 in Helsinki[3] when it was proposed to create a core of laws at the European level (substantial and procedural), common to the all the EU Member States.

Since its beginning, the judicial cooperation in criminal matters between the EU Member States had experiences many alterations[4] due the different ways to legislate this domain at the national level. For this reason, almost all Western and Central European countries have joined together to form a functional and intergovernmental structure[5] with strict legislation and enforcement rules.

Presently, 27 Member States are acting together to deal with important policy issues that have cross-border implications in the field of judicial cooperation, while the legislative acts adopted by the European institutions concern not only the law enforcement and criminal justice, but also the police issues such as immigration, border control, asylum or visas, etc.

In the following we will analyze the topic from a triple perspective: legislative, institutional and procedural as follows.

II. From the legislative perspective

The beginning of the judicial cooperation in criminal matters between the Member States of the European Union (EU) was modest, with no institutional and legislative force as it is nowadays.

Due to the growing of terrorism danger in Europe – e.g. in Germany with the Red Army Faction terrorist group (RAF[6]) in the 1970s and 1980s, in Italy with the Red Brigades, during the 1970s and early 1980s or in Spain with the Euskadi Ta Askatasuna terrorist group (ETA[7]) between the late of 1970s and 2000s and other terrorist groups - the states started in the middle of 1970s to cooperate in judicial matters on an informal, intergovernmental basis[8].

Later, in the middle of 1980's *"an enforcement of this collaboration became necessary* [which determined the introduction] *of free movement of persons* [in accordance with the conditions stipulated by] *the Schengen Cooperation and Convention*[9] [and] *led to a gradual elimination of the border controls along the common borders"*. In order to balance the new freedom of movement recognized by the Schengen Convention, it was necessary to take a number of compensatory measures including those regarding the coordination and cooperation between the police, customs

---

[3] *Ibid* pp.348.

[4] Webpage: http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Criminal/Paper2_en.asp, accessed March 26, 2013.

[5] Matti Joutsen, *The European Union and Cooperation in Criminal Matters: the Search for Balance*, HEUNI Paper No.25/ 2006, edited by the European Institute for Crime Prevention and Control, affiliated with the United Nations, 2006, pp.7.

[6] Also known as the Baader-Meinhof Gang. In German the name of this group is *Rote Armee Fraktion.*

[7] In English the name of this group is *Basque Homeland and Freedom*.

[8] Niggl Philipp, Speth Maximilian, Zinsmeister Andreas, op. cit., pp.2, webpage: http://www.inm-lex.ro/fisiere/pag_60/det_881/4641.doc, accessed March 26, 2013.

[9] In July 1984 France and Germany signed an agreement in Saarbrucken to lift border controls. In October 1984 Belgium, Luxembourg and the Netherlands joined this Agreement. These five original "Schengen" member states then signed this first Schengen Agreement in June 1985, http://www.statewatch.org/semdoc/assets/files/keytexts/ktch5.pdf, accessed March 26, 2013. A further Convention was drafted and signed on 19 June 1990. In addition, Schengen cooperation has been incorporated into the European Union legal framework by the Treaty of Amsterdam of 1997. The Schengen area gradually expanded to include nearly every Member State. Presently, almost all the EU Member States are part of the Schengen area, except Bulgaria, Cyprus, Romania, United Kingdom and Ireland (webpage: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2802%29:en:HTML, accessed March 26, 2013.

and justice as well as those concerning the principle of *non bis in idem* which is specific in the field of extradition and enforcement of the criminal judgments[10].

During the negotiations for drafting the Maastricht Treaty, the Member States made a list of domains of common interest both for them and for the European Union and defined the intended ways of inter-institutional cooperation, considered to be an important point of common interest[11].

For this reason, the judicial cooperation in criminal matters was mentioned for the first time in a treaty, having legal biding, namely in the Maastricht Treaty (well-known as the Treaty on European Union (TEU)[12] which in former article K1 of Title VI - *"Provisions on cooperation in the fields of Justice and Home Affairs"* stipulated that "*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:* […] *(7)* ***judicial cooperation in criminal matters***".

In another way to say, this topic was part of the Third Pillar of the Treaty called Justice and Home Affairs (JHA), which later was renamed Police and Judicial Cooperation in Criminal Matters (PJCC) in 2003 through the Treaty establishing a Constitution for Europe, which failed being ratified by the Member States because of France and the Netherlands in May and June 2005. The Third Pillar existed between 1993 and 2009, when the Treaty of Lisbon (initially known as the Reform Treaty[13]) entered into force.

The same idea of judicial cooperation was reiterated by the Treaty of Amsterdam[14], in former article 61 letter e.) of Title IV - *"Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons"*. Thus, one of the concrete measures[15] was *"to establish progressively an area of freedom, security and justice* [which] *aimed at a high level of security by preventing and combating crime within the Union* […]*",* by adopting the necessary legislative, institutional and procedural measures in the field of police and **judicial cooperation[16].**

Later, during the Tampere European Council (Finland), on 15th and 16th of October 1999, in the Presidency Conclusions was introduced an important key element which was considered to be the cornerstone of the judicial cooperation between Member States, namely the mutual recognition of the judicial decisions and judgements[17], having three essential and fundamental principles: mutual trust, mutual recognition and direct contact between the Member States. The same principle was also reiterated in the Hague Programme, adopted in November 2004[18] and in the multi-annual programme

---

[10] Coral Arranguena Fanego, Angel Jose Sanz Moran, Montserrat de Hoyos Sancho y Begona Vidal Fernandez, *Cooperación judicial penal en la Unión Europea: la orden europea de detención y entrega,* Instituto de Estudios Europeos, Universidad de Valladolid, editorial Lex Nova, 2005, pp.34.

[11] Niggl Philipp, Speth Maximilian, Zinsmeister Andreas, op. cit., pp.4, http://www.inm-lex.ro/fisiere/pag_60/det_881/4641.doc, accessed March 26, 2013.

[12] The Treaty was signed on 7th of February 1992 and entered into force on 1st of November 1993.

[13] The Lisbon Treaty entered into force on 1st of December 2009.

[14] The Treaty was signed on 2 October 1997, and entered into force on 1st of May 1999; Coral Arranguena Fanego, Angel Jose Sanz Moran, Montserrat de Hoyos Sancho y Begona Vidal Fernandez, op. cit., pp.34.

[15] Steiner and Woods, *EU Law*, eleventh edition, Oxford University Press, 2012, pp.552.

[16] Cyrille Fijnaut and Jannemieke Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, Martinus Nijhoff Publishers, 2010, pp.50.

[17] Webpage: http://www.europarl.europa.eu/summits/tam_en.htm, accessed March 26, 2013. I consider that this principle should apply to the judgments and to other decisions of judicial authorities, to the pre-trial orders, in particular to those which would enable competent authorities to secure evidence and to seize assets which are easily movable. In addition, the evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

[18] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0184:EN:HTML, accessed March 26, 2013.

in the Area of Freedom, Security and Justice for the period 2010-2014, the so-called Stockholm Programme, which was approved by the European Council in December 2009[19].

We can observe, the principle of mutual recognition is a key concept for the European judicial area, because only through it is possible to overcome difficulties created by the differences between the national judicial systems of the EU Member States. This principle can be developed only if a high level of mutual confidence or trust exists between Member States, which depends in particular on the strict upholding, by each national judicial system, of the high standards as regards the protection system ensured to the individual rights. The second key element is the mutual recognition itself, which is very important both at the pre-trial and final judgment stage and it covers the recognition of evidence, non-custodial pre-trial and post-trial supervision measures, disqualifications, enforcement of criminal penalties and decisions as well as the convictions issued in the course of new criminal proceedings in other Member States[20]. The third element is the direct contact that should be established between the Member States in order to take all the measures to harmonize their internal legislation in the field.

In 2001 the Treaty of Nice[21] amended the provisions of the Maastricht Treaty and the Treaty establishing the European Community, reforming the institutional structure of the European Union to withstand eastward expansion and extending the field of Police and Judicial Cooperation in Criminal Matters in former articles 29 – 42 of Title VI of TEU - *"Provisions on Police and Judicial Cooperation in Criminal Matters"*, where one of the objectives was: *"to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field* [...] *of police and* ***judicial cooperation in criminal matters*** [...]*"* (former art.29 paragraph 1 of TEU).

It is worth to mention that the main objective of the European Union in the field of Justice and Home Affairs has changed in only 5 years from the intention *"to establish progressively an area of freedom, security and justice"* for its citizens as it was provided in the Treaty of Amsterdam to the action *"to provide* […] *a high level of safety within the area of freedom, security and justice"* as it was stipulated in the Nice Treaty which represents an important commitment assumed by the European institutions in ensuring a sustainable Area of Freedom, Security and Justice for all Member States, in general and an efficient judicial cooperation in criminal matters in subsidiary.

This ambitious "*goal* [was to be achieved] *by taking the following* [institutional and legislative] *measures* [in accordance with former articles 29 and 31 paragraph 1 of TEU]*: closer cooperation between police forces, customs authorities,* [competent ministries] *and other competent authorities in the Member States, both directly and through the* ***European Police Office (Europol)****; closer cooperation between judicial and other competent authorities of the Member States including cooperation through the* ***European Judicial Cooperation Unit (Eurojust)*** *and approximation, where necessary, of rules on criminal matters in the Member States"* and preventing possible conflicts of jurisdiction between Member States. By "*approximation of rules on criminal matters in the Member States"* we shall understand an adjustment of the national criminal legislations of the Member States to a common minimum standard and not full – scale unification of them, which technically was not possible to be realised taking into account the differences between them. In certain fields of the criminal legislation, such as: organised crime, trafficking in human beings, exploitation of children and child pornography, terrorism, fraud, money laundering, corruption, cyber crime, racism and xenophobia, the legal texts have been adopted or are negotiated to adopt common definitions and harmonise the level of sanctions applicable to these offences[22].

---

[19] Webpages: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf and http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf, accessed March 26, 2013.

[20] Webpage: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf, accessed March 26, 2013.

[21] The Treaty was signed on 26th of February 2001 and came into force on 1st of February 2003.

[22] Webpage: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf, accessed March 26, 2013.

In order to eliminate as much as possible these differences existed in the criminal legislations of the Member States, the Lisbon Treaty foresees that the European Parliament and the Council, through the directives adopted in accordance with the ordinary legislative procedure, *"may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis"* (article 83 of TEU).

Regarding the legal instruments, the Third Pillar has consecrated the following (former article 34 of TEU): **common positions** defining the approach of the European Union to a particular matter; **framework decisions** for the purpose of approximation of the laws and regulations of the Member States; **decisions** for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States and, finally, **conventions** which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements and procedures.

The new amendments brought by the Treaty of Lisbon[23] in the field of judicial cooperation in criminal matters have determined the "rethinking" and separating it from the "police cooperation" in two different chapters of Title V of TFEU (dealing with the Area of Freedom, Security and Justice), namely: in **Chapter 4** on Judicial cooperation in criminal matters (articles 82 – 86 of TFEU) and in **Chapter 5** on Police cooperation (articles 87 - 89 of TFEU), without defining in a way or another these two domains[24]. The only reference to the judicial cooperation in criminal matters is made by article 82 para.1 of TFEU where "[it] *shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of laws and regulations of the Member States in the areas referred to in paragraph 2 and in article 83*" of TFEU.

On the other hand, the doctrine[25] tried to give a concrete definition to the judicial cooperation, considering that there are three criteria to define it, as follows: the inter-state element (in this case, it is about the cooperation between the EU Member States); the degree of the organization of a formal framework or institution building (in this situation, the cooperation is developed by the national judicial authorities of each EU Member States) and the dependence of European Union Law (we can talk about the supremacy of the European Union Law upon the national law).

Under the Treaty of Lisbon, the legal instruments which can be adopted in the field of judicial cooperation in criminal matters are: regulations, directives and decisions, similar to the First Pillar. Furthermore, in accordance with article 82 of TFEU: *"the European Parliament and the Council* [...] *shall adopt* [the necessary] *measures to*: ***lay down rules and procedures*** *for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; prevent and settle conflicts of jurisdiction between Member States; support the training of the judiciary and judicial staff; facilitate* ***cooperation between judicial*** *or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions"*.

As regards the innovations introduced by the Treaty on the Functioning of the European Union in the field of Justice and Home Affairs (JHA), these mainly concern:

- changes in the legal framework and the legislative procedure applicable in several areas. Thus, the legislative proposals will now be adopted by qualified majority voting in the Council in accordance with the procedure set out in article 293 of TFEU, while before the Lisbon Treaty the legislative procedure involved the unanimity voting in accordance with former article 67[26] of TEC. In addition, the European Parliament, as co-legislator, delivers its opinion by the co-decision

[23] The Treaty was signed in 13th of December 2007 and came into force at 1st of December 2009.
[24] Cyrille Fijnaut and Jannemieke Ouwerkerk, op. cit., pp. 26-27.
[25] *Ibid*, pp. 27.
[26] "[...] *The Council shall act unanimously on a proposal from the Commission or on the initiative of a Member States and after consulting the European Parliament"*.

procedure[27] and the European Commission has the right of initiative to propose new legislative acts with respect to the judicial cooperation in criminal matters. Much more, the Lisbon Treaty introduces the possibility that an initiative can also come from a quarter of EU Member States, according to article 76 of TFEU;

- the possibility to create an European Public Prosecutor's Office and the Standing Committee on Operational Cooperation on Internal Security (COSI); the role of the Court of Justice of the European Union (CJUE) is consolidated, being able to trail, without any restriction, the ordinary procedures for preliminary references and infringement proceedings initiated by the European Commission. Nevertheless, for five years following the entry into force of the Lisbon Treaty (during the period 2009 - 2014), acts issued in the field of judicial cooperation in criminal matters adopted under the previous Treaty cannot be the subject of such proceedings[28], being imposed transitional provisions in this field. Regarding this point, the United Kingdom, after long debates, managed to insert the following provision: *"At the latest six months before the end of that transitional period* [in December 2014]*, the United Kingdom can decide still not accept the powers of the EU institutions regarding that part of EU legislation"* (article 10 para.4 of the Lisbon Treaty Protocol no.36)..

As regards the **European legal instruments** adopted in the field of criminal matters, the **most well-known** are as follows:

1.The Convention of 19th of June 1990 applying the Schengen Agreement of 14th of June 1985 on the gradual abolition of checks at common borders (known as Schengen Agreement). Thus, it is possible to create direct contact between judicial authorities under article 53[29] of the Schengen Convention;

2.The Council Act of 29th of May 2000 establishing in accordance with the former article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Protocol of 16th of October 2001 to the said Convention[30]. This convention aims to encourage and modernise cooperation between judicial, police and customs authorities within the European Union by supplementing provisions in existing legal instruments, while also respecting the European Convention for the Protection of Human Rights of 1950[31];

3.**The Council Framework Decision 2002/584/JHA of 13th of June 2002 on the European Arrest Warrant (EAW)[32] and the surrender procedures between the Member States.** According to the said framework decision:

---

[27] Jean-Louis Antoine-Grégoire, AN AREA OF FREEDOM, SECURITY AND JUSTICE: GENERAL ASPECTS, March 2011, pp.1 webpage: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.1.pdf, accessed March 26, 2013.

[28] *Ibid,* pp.1,

[29] According to the said article: The "*requests for assistance may be made directly between legal authorities and returned through the same channels*".

[30] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF, accessed March 26, 2013. The primary aim of the Convention is to improve judicial cooperation by developing and modernizing the existing provisions governing mutual assistance, mainly by extending the range of circumstances in which mutual assistance may be requested and by facilitating assistance, through a whole series of measures, so that it is quicker, more flexible and, as a result, more effective.

[31] The Convention was signed in Rome on 4th of November 1950 and entered into force on 3rd of September 1953; webpage: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf,accessed March 26, 2013.

[32] Webpages: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:en:HTML; http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm and https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do?init=true, accessed March 26, 2013. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State

▪ it replaces the existing texts in this area, including the classic instruments in the field of extradition (bilateral treaties and the multilateral conventions concluded between the states);

▪ it replaces the extradition system by requiring each national judicial authority (the executing judicial authority) to recognise *ipso facto (by the fact itself)* and with a minimum of formalities the requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority);

▪ it simplifies and speeds up the procedures, given that the whole political and administrative phase is replaced by a *judicial mechanism;*

▪ it provides strict time limits as regards the procedure to return a person which is arrested, no later than 90 days since he/she was arrested or 10 days if the person gives his/her consent to the surrender;

▪ it applies in the following cases: where a final sentence of imprisonment or a detention order has been imposed for a period of at least **four months**; for offences punishable by imprisonment or a detention order for a maximum period of at least **one year**;

▪ the European Arrest Warrant must contain information on: the identity of the person concerned; the issuing judicial authority; the final judgment; the nature of the offence; the penalty etc. In this context, a specimen form is attached to the framework decision and includes all the information mentioned already;

▪ the EU countries can no longer refuse to surrender, to another EU country, their own citizens who have committed a serious crime or are suspected of having committed such a crime in another EU country, on the grounds that they are nationals;

▪ it stipulates simpler procedures for 32 categories of serious offences, where the dual criminality principle is abolished. These serious offences are: terrorism, trafficking in human beings, corruption, participation in a criminal organisation, counterfeiting currency, murder, racism and xenophobia, rape, trafficking in stolen vehicles, and fraud, including that affecting the financial interests of the Communities etc.;

▪ the Member States and the national courts have to respect the provisions of the European Convention on Human Rights as well. Anyone arrested under an EAW may have a lawyer, and if necessary an interpreter, as provided by the law of the country where he/she has been arrested.

4. The Council Framework Decision no. 2002/465/JHA of 13th of June 2002 on Joint Investigation Teams (JIT)[33]. The relevant provisions of the said framework decision are:

▪ it was adopted with a view to combating trafficking in drugs and human beings, as well as terrorism;

▪ at least two or more Member States may set up a Joint Investigation Team by entering into an mutual agreement, which may also include experts of Europol, Eurojust, and European Anti-Fraud Office (OLAF). In addition, the representatives from other EU Members States can be seconded experts within the Joint Investigation Team if they are interested in participating in such team. Non-EU Member States may also participate in the activities of a Joint Investigation Team with the agreement of all other parties;

▪ each Joint Investigation Team involves direct exchange of information when it is necessary between the members of the team without any other formalities. Also, it works for a specific purpose

---

of a person being sought for a criminal prosecution or a custodial sentence. It is a tool designed to strengthen the cooperation between the national judicial authorities of the Member States by eliminating the use of extradition. The framework decision was implemented into the national legislation by mid of 2005.

[33] Webpages: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:162:0001:0003:EN:PDF and http://www.europol.europa.eu/sites/default/files/council_rec_on_jit_agreement___march_2010.pdf, accessed March 26, 2013.

and a limited period, which may be extended by *mutus consensus*, while the composition of the team shall be set out in the agreement;

- so far, this instrument has not been fully developed by all the Member States and has already encountered implementation difficulties due to the different criminal procedure codes existing in the Member States; the evidence which might be administrated because is formally classified while the exchange and admissibility of such evidence can be problematic, especially if no bilateral or multilateral agreement is in place to allow for the exchange of classified information etc.

Since the 1950s, in the field of judicial cooperation in criminal matters have been concluded many **international conventions** and other legal instruments, which have been signed and ratified by the majority of the EU Member States, among which we can mention:

1.The European Convention of 20th of April 1959 on Mutual Assistance in Criminal Matters (also known as the "mother" Convention). This legal instrument served as legal tool for issuing the Council Act of 29th of May 2000 on mutual assistance in criminal matters between the Member States of EU;

2.The additional Protocol of 17th of March 1978 to the European Convention on Mutual Assistance in Criminal Matters;

3.The Council of Europe Convention of 8th of November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;

4.The United Nations Convention of 19th of December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

III. From the institutional perspective

In last 20 years, the EU Justice and Home Affair field was *"subject to a complex institutional evolution, culminating in the application of the Community' approach to the decision-making process, to the legal instruments and to the jurisdiction of the Court of Justice[34]"*, especially after entering into force of the Lisbon Treaty in December 2009.

In the following we will make a brief presentation of the institutional evolution of the issue, pointing out the most relevant moments, as well as the important amendments brought by the Lisbon Treaty.

Thus, before entering into force of the Treaty of Maastricht in November 1993, at the international level was developed only an *"informal and intergovernmental[35]"* cooperation where certain international treaties were concluded between the Member States, mostly in the field of criminal law issues, such as: asylum, visas, immigration policy etc. Unfortunately, this cooperation proved to be ineffective since many of these treaties were not ratified, except the Dublin Convention for asylum requests[36] and the civil law Conventions which were linked to the legal order of the former European Community[37], presently European Union. In this phase, we can notice that the Member States could not establish a common cooperation in this field because of the lack of internal legislative and institutional provisions that could facilitate developing of such cooperation in a more concrete and sustainable manner.

---

[34] Paul Graig and Grainne de Burca, *The evolution of the EU law*, Oxford University Press, 2011, pp.269.

[35] *Ibid*, pp.269.

[36] The Dublin Convention was signed in June 1990 in conjunction with the Schengen Implementation Convention – webpage: http://www.fdcw.unimaas.nl/staff/files/users/215/Dublin%20System_EGHM.pdf, accessed March 26, 2013.

[37] Paul Graig and Grainne de Burca, op.cit., pp.270.

The period of 1993 – 1999 is described in the doctrine[38] as *"formal intergovernmentalism"*, where specific tools and rules related to the former Title VI - *"Justice and Home Affairs"* have been adopted by the Treaty on European Union. So, these tools and rules represent an important step in the intergovernmental process, while the Council "*may* [...] *draw up conventions* [...][39]*"* or other acts in this field, without clarifying which are these *"other acts"*, such as: Joint Actions, Joint Positions or Common Positions[40].

During the same period, another stone in constructing the intergovernmental process was assigning the role to the Court of Justice to have the jurisdiction over the dispute settlements or preliminary references coming from the national courts of the EU Member States as regards each Convention signed in the framework of the Third Pillar, in accordance with the provisions of former article K.3 para.2 of TEU[41]. In practice, this jurisdiction of the Court was exercised only as regards the civil law Conventions while concerning those signed in the field of criminal law and policing, the Member States could not reach a common agreement because of their different national systems but also because of their "egos" regarding the totally independence to decide in the field of Conventions, as part of the International Public law. The only thing that Member States could agree was to give to the Court of Justice the jurisdiction over the preliminary references coming from their national courts, including those who are having the status as final courts in accordance with the domestic provisions in the field[42].

From my point of view, this phase had certain gaps since, on the one hand, the European Parliament had only the right to be informed and consulted by the Member States holding the rotating Council Presidency on the "principals aspects" of debates in the field of the Third Pillar, and, on the other side, the European Commission was refused to have joint right of initiative with the Member States in specified areas, especially in the policing and criminal law[43]. To all these, we can add the fact that this phase was hampered because of the maximum control shown by the Member States' governments and their desire to transfer as little powers as possible to the European level, which imposed eventually significant limits on the effectiveness of the EU action in this field[44].

Between 1999 and 2005, the doctrine[45] argued that in the institutional evolution process occurred another phase - "*modified intergovernmentalism*" - which consisted of retaining the key features of the intergovernmental approach with certain and modest concessions to the Community method, where few issues of the EU Justice and Home Affairs domain related to the immigration and asylum law have been transferred to the First Pillar, through the Treaty of Amsterdam (1997), domain which has been communitarised step by step, by adopting special transitional rules for a five-year period with respect to the application of the European Union law to the former Title IV of TEC. On the other hand, the issues remaining from the initial Third Pillar, namely criminal law and policing, were still subjected to even fewer elements of the European Union's legal order.

As regards the legal instruments which have been used in the remaining Third Pillar, significant changes took place during the period 1999 - 2005, which means that the conventions and common positions from the previous period were kept, while new types of measures have been introduced and used by the Council on a regular basis during its decision-making process, such as: framework decisions and decisions, taking into consideration that these instruments should not be

[38] *Ibid* pp.270; webpage: http://www.eurotreaties.com/maastrichteu.pdf, accessed March 26, 2013.
[39] Former article K.3 of TEU.
[40] Paul Graig and Grainne de Burca, op.cit., pp.270.
[41] According to the article: *"such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down"*.
[42] Paul Graig and Grainne de Burca, op.cit., pp.271.
[43] *Ibid* pp.271.
[44] *Ibid* pp.271
[45] *Ibid* pp.272.

ratified by the national parliaments according to their internal constitutional rules in order to take effect. In order to eliminate as much as possible the problems raised by the ratifying of the conventions by the Member States, a number of pre-Amsterdam Joint Actions and conventions have been replaced by framework decisions and decisions, as new legal instruments[46]. Furthermore, the Treaty of Nice amended the decision-making rules on asylum, being also added a Protocol to the Treaty in order to clarify the modality to adopt the decisions under the former Title IV of TEC[47].

"A number of developments which altered the institutional framework", also known as the *"residual intergovernmental"* period[48], took place during 2005 and 2009 when significant changes have been made in the field of immigration and asylum law[49]. On the other side, no changes have been brought to the Court of Justice's jurisdiction, although several preliminary references have been received by the Court of Justice in accordance with the former article 234 of TEC and other infringement actions against Member States have been introduced by the European Commission under the former article 226 of TEC[50]. In the same line, we should mention that the roles of the European Parliament and the European Commission were not transformed into competitive ones, adapted to the realities of the middle of 2000s while *de facto* changes of the institutional framework in the field of EU Justice and Home Affairs had a limited impact on the evolution of policy as regards the adoption of legislation[51].

As for the Third Pillar, it is worth to highlight two important changes: one of them is represented by shifting the criminal law and policing policy to the First Pillar, especially as concern the competence of the EU to adopt criminal sanctions and rules on cooperation between law enforcement and the private sector, and the second change is represented by infiltrating the principles of the First Pillar into the Third Pillar, in particular as regards indirect effect, the scope of the Court's jurisdiction and the autonomous interpretation of the measures provided for in the Third Pillar[52].

Finally, the Treaty of Lisbon (2009) marks an important moment in the institutional evolution of the EU Justice and Home Affairs, representing in the same time a triumph of the EU law in this area. The relevant changes introduced by the Lisbon Treaty are: qualified majority vote applicable to: the legal migration, the most part of the criminal law and policing issues, the visa lists and visa formats; full jurisdiction of the Court of Justice in all JHA areas; the application of the regulations and directives to policing and criminal law matters; extensive revision of most competences in this area, and in particularly regarding the immigration, asylum etc. In this moment, apart from all the changes occurred, the Court of Justice still have a five-year transitional period over the Third Pillar measures adopted before the entry into force of the Lisbon Treaty, according to the provisions provided for in article 10 of Title VII of the Protocol no.36 attached to the Treaty of Lisbon[53].

As regards the judicial cooperation in criminal matters between the Member States, according to the doctrine[54] it can be grouped, as follows:

- traditional cooperation based on mutual assistance in the special fields as extradition;

---

[46] *Ibid*, pp.273-274.

[47] According to the Protocol on Article 67 of the Treaty establishing the European Community said that: "[...] *From 1 May 2004, **the Council shall act by a qualified majority**, on a proposal from the Commission and after consulting the European Parliament, in order to adopt the measures referred to in Article 66 of the Treaty establishing the European Community"*.

[48] Paul Graig and Grainne de Burca, op.cit., pp.274.

[49] In this case, after the initial five-year transitional period ended en 1st of May 2004, the European Commission automatically gained its right of initiative, and the co-decision procedure with qualified majority vote.

[50] Paul Graig and Grainne de Burca, op.cit., pp.275.

[51] *Ibid*, pp. 275.

[52] *Ibid*, pp. 277.

[53] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0201:0330:EN:PDF, accessed March 26, 2013.

[54] Cyrille Fijnaut and Jannemieke Ouwerkerk, op.cit., pp.29-30.

▪ networking cooperation based on a formal way, as it is the case of European Judicial Network, Liaison Magistrates or on *ad-hoc* basis, represented by the contact point networks etc.;

▪ co-active cooperation, represented by the setting-up of the Joint Investigation Teams, or other teams created *ad-hoc* in order to deal with the crisis situations, which can be intervention units of the Member States;

▪ trans - border cooperation, which can be represented by the surveillance, cross-border data sharing or cross-border cooperation teams in the combat against terrorism or organised crime etc.

Related to the institutions created and developed during this complex institutional evolution that took place in the last 20 years in the field of Justice and Home Affairs, and bearing in mind the classification of the judicial cooperation, in the following we will briefly analyse few of the networks and institutions created before and after the entry into force of the Lisbon Treaty, as follows:

1. European Judicial Network (EJN)[55] is a network of national contact points for the facilitation of judicial cooperation in criminal matters. It was created by the Joint Action 98/428 JHA of 29th of June 1998[56] in order to fulfil Recommendation no.21 of the Action Plan to combat organised crime adopted by the Council on 28th of April 1997[57] upon the Belgian initiative and it was officially inaugurated on 25th of September 1998 by the Austrian Minister of Justice acting as the Presidency of the Council of the European Union.

The EJN is composed of the representatives of the European Commission and the National Contact Points of the Member States designated by each Member State, coming from the public authorities, the judicial authorities and other competent authorities having specific responsibilities in the field of international judicial cooperation, both in general and for certain forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism, while its Secretariat is based in Hague, the Netherlands.

As the national contact points are concern, they are judges, prosecutors, representatives of the Ministries of Justice, strongly committed to put their experience in the benefit of the European judicial cooperation in criminal matters. In order to be appointed in accordance with the domestic rules, legal traditions and internal structure of each country, the only condition is to provide effective coverage for all forms of crimes throughout the country. Presently, there are more than 300 national contact points throughout the 27 Member States. It is expected that the number of the national contact points to increase in the next period due to the Croatia accession to the EU, starting with 1st July 2013.

The EJN's purpose is to create more effective judicial cooperation, particularly in combating serious crimes, by means of: providing legal and practical information to competent local authorities; providing support with requests for judicial cooperation; creating a European Union judicial culture; cooperating with other Judicial Networks, third countries and judicial partners[58] etc.

Finally, according to Point V of the Madeira Declaration[59] *"the work done by the EJN in partnership with other networks, not just at the European level* […] *but also within an international framework involving the other existing judicial networks, will promote a European and international*

[55] Webpage: http://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx, accessed March 26, 2013.

[56] Joint Action 98/428 JHA of 29 June 1998 was modified by Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0130:0134:EN:PDF, accessed March 26, 2013.

[57] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51997XG0815:EN:HTML, accessed March 26, 2013.

[58] Webpage: http://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx, accessed March 26, 2013.

[59] Madeira Declaration is the final act of the "Madeira Meeting: celebration of the EJN's 10th Anniversary" which took place in Madeira, Portugal on October 13, 2008.

judicial culture founded on the shared values affirmed by the [former] *Treaty on the European Union"* and presently Lisbon Treaty.

2. The establishment of **EUROPOL**[60] was agreed in former article K1 paragraph 9[61] of the Treaty of Maastricht. The agency started limited operations on 3rd of January 1994 as the Europol Drugs Unit (EDU) and in 1998 the Council Act 95/C 316/01 of 26th of July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention)[62] was ratified by all the Member States of that time and came into force in October 1998. Europol commenced its full activities on 1st of July 1999. In 2009, the Europol Convention has been replaced by the Council Decision 2009/371/JHA of 6th of April 2009 establishing the European Police Office (EUROPOL)[63] starting with 1st of January 2010. Europol has more than 700 staff in the Hague headquarters, the Netherlands, which are coming from different kinds of law enforcement agencies, including regular police, border police, customs and security services.

Europol represents the European law enforcement agency aiming to make Europe safer by assisting the Member States in their fight against serious international crime and terrorism, international drug trafficking and money laundering, organised fraud, counterfeiting of the euro currency etc. It works closely with the law enforcement agencies in the 27 EU Member States, including with Croatia, the newest EU Member State and in other non-EU partner states such as: Australia, Canada, US and Norway to whom Europol develops cooperation arrangements. All these law enforcement authorities rely on the intelligence work and the services of Europol's operational coordination centre and secure information network.

3. Eurojust[64] or the *"European Union's Judicial Cooperation Unit"* was set-up by the Council Decision 2002/187/JHA of 27th of February 2002[65] to reinforce the fight against serious crime, with the premises in Hague, the Netherlands. The discussions on establishing a judicial cooperation unit started in 1999, during the European Council Meeting in Tampere, Finland on 15th and 16th of October 1999 and ended during the Spanish Presidency of the European Union[66] when the Eurojust Decision was published on 28th of February 2002, while its budget was released in May of the same year, and the Rules of Procedure were agreed in June 2002.

Eurojust fulfils its tasks through the College which nowadays is composed of 27 National Members, one from each Member States, which can be seconded by the national members. These members are judges, prosecutors or police officers of equivalent competence, appointed and detached to Eurojust in accordance with their national legal systems. Taking into account the fact that Croatia will be part of the European Union starting with 1st of July 2013, the provisions regarding the

---

[60] Webpage: https://www.europol.europa.eu/content/page/about-europol-17, accessed March 26, 2013.

[61] According to this article: "*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:* [...] *police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)*".

[62] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1995:316:0001:0032:EN:PDF, accessed March 26, 2013.

[63] Webpage: https://www.europol.europa.eu/sites/default/files/council_decision.pdf, accessed March 26, 2013.

[64] In April 2012, the College elected Michèle Coninsx, National Member for Belgium, as its President. The National Members for Estonia and Luxembourg, Raivo Sepp and Carlos Zeyen, currently serve as its Vice-Presidents.

[65] Webpage: www.eurojust.europa.eu, accessed March 26, 2013. The Decision was subsequently amended by the Council Decision 2003/659/JHA of 18 June 2003 and the Council Decision 2009/426/JHA of 16th of December 2008 on the strengthening of Eurojust. The new Decision's purpose is to enhance the operational capabilities of Eurojust to fight transnational organised crime, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust.

[66] Between January and June 2002.

appointment of the national member within the College as well as the seconded national members to the Eurojust will be applicable in the same manner as for the rest of 27 Member States.

As the mission of Eurojust is concern, according to article 85 of TFEU it *"support*[s] *and strengthen*[s] *the coordination and cooperation between national* [competent] *investigating and prosecuting authorities in relation to serious crime*[s][67] *affecting two or more Member States* […]*"* by: facilitating the execution of international mutual legal assistance and the implementation of extradition requests; improving rendering of their investigations and prosecutions more effective when dealing with cross-border crime and assisting, upon the request of a Member State, the investigations and prosecutions concerning that particular Member State and a non-Member State if a cooperation agreement has been concluded or if an essential interest in providing such assistance is demonstrated.

In order to carry out its tasks in the best conditions, collaboration agreements were concluded by Eurojust with other European institutions, such as: the European Judicial Network, Europol, OLAF and Liaison Magistrates, including with non-Member States (e.g.: Norway, Iceland[68], Switzerland and the Former Yugoslav Republic of Macedonia), with US and Croatia[69], as well as with international organisations[70] for the exchange of information and personal data or the secondment of officers.

Furthermore, "*in order to combat crimes affecting the financial interests of the* [European] *Union, the Council, by means of regulations* [....] *may establish a European Public Prosecutor's Office from Eurojust"* (article 86 of TFEU).

As regards the main goals of Eurojust, these are: to stimulate and improve the coordination between the national authorities in which scope it works closely with EU partners such as the European Judicial Network, Europol, and OLAF where appropriate; to improve cooperation between the national competent authorities, in particular by facilitating mutual legal assistance and the execution of mutual recognition instruments such as the European Arrest Warrant, the European Evidence Warrant[71]; and finally to support competent authorities in improving the effectiveness of their investigations and prosecutions by seeking solutions to recurring problems in judicial cooperation. On the other hand, in non-operational strategic matters, Eurojust works closely with European institutions such as the European Parliament, the Council and the European Commission as well as with the national parliaments.

4. In conjunction with the previous point, in article 86 of TFEU is stipulated the possibility, but not the obligation, as well as the conditions to create "*the* ***European Public Prosecutor's Office (EPPO)***[72] *from Eurojust"* by adopting a series of regulations following a special procedure in order

[67] Eurojust's competence covers the following types of crimes and offences such as: terrorism, drug trafficking, trafficking in human beings, drugs and arms, counterfeiting, the sexual exploitation of women and children, cybercrime, money laundering, computer crime, crime against property or public goods including fraud and corruption, criminal offences affecting the European Community's financial interests, environmental crime and participation in a criminal organization. For other types of offences, Eurojust may assist in investigations and prosecutions at the request of a Member State.

[68] This agreement concluded on 15th of November 2005 can be seen on the webpage: http://eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20Eurojust-Iceland%20%282005%29/Eurojust-Iceland-2005-12-02-EN.pdf, accessed March 26, 2013.

[69] Croatia is set to become the 28th Member State of the European Union on 1st of July 2013.

[70] One of these international organizations is International Criminal Police Organisation (Interpol).

[71] The European Evidence Warrant (EEW) replaces the system of mutual assistance in criminal matters between Member States for obtaining objects, documents and data for use in criminal proceedings, webpage: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl0015_en.htm, accessed March 26, 2013.

[72] Webpages: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm and http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=73791, accessed March 26, 2013.

"to investigat[e], to *prosecut*[e] *and bring to judgment* [...] *the perpetrators of, and accomplices in, offences against the Union's financial interests*[73]*"* and providing an adequate protection in this field.

If such Office will be created, in liaison with Eurojust, it shall exercise the functions of prosecutor in relation to such offences. The European Council may adopt a decision by acting unanimously after obtaining the consent of the European Parliament and consulting the European Commission to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension, if the case may be.

As we can notice, the establishment of the European Public Prosecutor's Office has a unique regime, with a special procedure taking into account the following reasons:

a.The treaty is establishing the general framework for setting up such office, as a possibility and not as an obligation, while the detailed arrangements related to its nature and operation of the office, its statute and competences, the rules of procedure applicable to its activities[74], and other rules will be determinate by the regulations;

b.This office will not be created under the ordinary legislative procedure. A special legislative procedure will be used instead. Thus, the Council is in charge to act unanimously after obtaining the consent of the European Parliament. If the unanimity cannot be reached, a group of at least nine EU Member States may refer a proposal to the European Council, in the framework of enhanced cooperation, based on articles 82 and 329 para.1 of TFEU.

In practice, the first debates regarding this project took place during the Spain's Presidency of the EU, in the first half of 2010[75]. In parallel, three projects conducted by the University of Luxembourg with the financial support of the European Commission have been drafted since 2010, having unique purpose to realize a comparative analysis of the 27 different national legal systems of investigation and prosecution, serving as a principle source of reference for the European model rules of criminal procedure for the EPPO. The comparative analysis included, among others, studies of vertical cooperation in administrative investigations in subsidy and competition cases, the accession of the EU to the European Convention on Human Rights, judicial control in cooperation in criminal matters, mutual recognition etc.

Apart from these three projects, a group of 160 European criminal law experts, practitioners, academics and policy makers[76] has examined during 2010-2012, in detail, the public prosecution systems in the 27 Member States and has scrutinised proposals for a procedural framework for the EPPO[77], while a concrete proposal to establish the European Public Prosecutor's Office is expected to be sent by the European Commission to the European Parliament in June 2013, based on *"commitment to uphold the rule of law"*.

5. Back in history, the first mention on the establishment of **Standing Committee on Operational Cooperation on Internal Security (COSI)**[78] has been made by the Stockholm Programme[79] which called for development of a comprehensive European internal security strategy, knowing that this objective is difficult to be realised since the internal security is still a national responsibility. According to the said Program, this new Committee is in charge with *"developing,*

---

[73] Webpage: http://www.eppo-project.eu/, accessed March 26, 2013.

[74] The document EUROPEAN PUBLIC PROSECUTOR WORKING GROUP CONCLUSIONS, issued following the Reunion that took place in Madrid from 29th of June to 1st of July 2009, pp.4.

[75] *Ibid* pp.4.

[76] Webpage: http://wwwde.uni.lu/fdef/actualites/a_blueprint_for_the_european_public_prosecutor_s_office3, accessed March 26, 2013.

[77] Webpage: http://www.eppo-project.eu/, accessed March 26, 2013.

[78] Webpages: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/internal-security/cosi/index_en.htm and http://europa.eu/legislation_summaries/glossary/internal_security_committee_en.htm, accessed March 26, 2013.

[79] *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, Council Document 16484/1/09, point 4.1., pp.35 and the following, webpage: http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf, accessed March 26, 2013.

monitoring and implementing the internal security strategy" of the European Union. In addition, *"in order to ensure the effective enforcement of the internal security strategy* [COSI] *shall also cover* [...] *judicial cooperation in criminal matters relevant to operational cooperation in the field of internal security"*. In the same time, the European Commission supports the COSI' activities to strengthen operational cooperation and coordination of actions between the EU Member States competent authorities.

Thus, the **Standing Committee on Operational Cooperation on Internal Security** was established by the Council Decision 2010/131/EU of 25th of February 2010 on setting up the Standing Committee on operational cooperation on internal security[80], which represents another innovation brought by the Lisbon Treaty. This body is composed of members of the competent national ministries of interior who will be assisted by permanent representatives of the Member States within the European Union in Brussels (Belgium) and by the Secretariat of the Council. Eurojust, Europol, European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) and other relevant bodies may be invited to attend meetings of COSI as observers, while the European Parliament and the national Parliaments will constantly be informed of the proceedings.

According to the Council Decision setting up COSI[81], the Committee shall have the following tasks:

- to facilitate, to promote and to ensure effective operational cooperation and coordination in the field of EU internal security[82], in accordance with article 71 of TFEU, having no legislative role and no involvement in conducting these operations. In this capacity, it will act in a number of different areas including police and customs cooperation, the protection of external borders and judicial cooperation in criminal matters;
- to evaluate the general direction and efficiency of the operational cooperation;
- to assist the Council in reacting to terrorist attacks or natural or man-made disasters or the solidarity clause stipulated in article 222 of TFEU as it is well-known[83];
- finally, COSI will submit a regular report on its activities to the Council, who will then inform the European Parliament and the national Parliaments.

Except the Council Decision mentioned above, another document entitled "**The Internal Security Strategy for the European Union:** "*Towards a European Security Model"* was adopted by the Justice and Home Affairs Council on 25th of February 2010 and approved by the European Council in its meeting held on 26th of March 2010. According to the common threats for the internal security of the European Union are: terrorism, organised crime, cyber-crime, cross-border crime, natural and man-made disasters and other such threats, while "*an EU-wide approach*" capable to

[80] Webpages: http://europa.eu/legislation_summaries/glossary/internal_security_committee_en.htm and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:052:0050:0050:EN:PDF, accessed March 26, 2013.

[81] Webpage: http://register.consilium.europa.eu/pdf/en/09/st16/st16515.en09.pdf, accessed March 26, 2013.

[82] Jorrit Jelle Rijpma, *Agencies in the Area of Freedom, Security and Justice*, 2010, pp.4, webpage: http://www.jhubc.it/ecpr-porto/virtualpaperroom/145.pdf, accessed March 26, 2013.

[83] The European Union mobilises all the instruments, including the military resources, to prevent the terrorist threat in the territory of the Member States and to protect the democratic institutions and the civilian population from any terrorist attack. The Member State concerned, at the request of its political authorities, is assisted by the other Member States. In all the case, when we are talking about the application of the solidarity clause to the terrorist attacks we are talking about *"The Musketeer's Cloak"* which is a provision taken over for the first time in the Lisbon Treaty from article 51 of the Charter of the United Nations, where the main principle is *"all for one, and one for all"* (<<Tous pour un, un pour tous>>), which means that if a Member State is under a terrorist attack the rest of the Member States can intervene in order to help the Member State under siege and to eliminate as much as possible the terrorist attack and its effects; webpages: http://www.statewatch.org/news/2013/feb/eu-solidarity-clause-austria-10956-12.pdf and http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0#Chapter7, accessed March 26, 2013.

respond to all these challenges in an efficient manner has been formulated[84]. This strategy will be developed and implemented by the COSI in the coming years, without being designed yet a strict schedule.

IV. From the procedural perspective

The provisions regarding the Court of Justice's jurisdiction in point of the Justice and Home Affairs before the Lisbon Treaty, including judicial cooperation in criminal matters, are complex and purposively restrictive[85]. Thus, the Treaty of Maastricht excluded in former article L any Court's jurisdiction over the JHA[86] while the Treaty of Amsterdam provided for a limited jurisdiction as regards the cases lodged before it and formulated on the grounds of former article 35 of TEU, which established three exhaustive categories[87] of the Court's jurisdiction over the measures in the field of Justice and Home Affairs, and article 68 of TEC. These categories are, as follows:

- article 35 para.1 established an optional preliminary reference procedure on the validity and interpretation of framework decisions, decisions and conventions established under the former Title VI of TEU as well as of the measures implementing them, only if the Member States made a declaration to accept the Court's jurisdiction in accordance with former article 35 para.2 of TEU;
- article 35 para.6 established a limited judicial review procedure concerning the legality of framework decisions and decisions in actions brought by a Member State or by the European Commission in the conditions stipulated by the Treaty;
- and finally article 35 para.7 stipulated a procedure for solving Member State and institutional disputes regarding the interpretation or the application of conventions established under former article 34 para.2 letter d. of TEU. However, this article does not confer jurisdiction on the Court to rule on the validity of the measures adopted in the field of JHA including in the field of judicial cooperation in criminal matters.

In order to eliminate the deficiencies in the Court's jurisdiction and to improve its competence in the field of Justice and Home Affairs including in the field of judicial cooperation of criminal matters, it was established a Working Group X (WGX) on "Freedom, Security and Justice" to work on various procedural aspects even though its mandate did not specifically refer to reform of the judicial architecture. One of the conclusions of this group was that a fundamental reform of the Court's jurisdiction was necessary and *"the limited jurisdiction of the Court is no longer acceptable concerning acts adopted in areas as police cooperation or* ***judicial cooperation in criminal matters,*** *which directly affect fundamental rights of the individuals*[88]". In addition, *"specific mechanisms stipulated in* [former] *article 35 of TEU and article 68 of TEC should be abolished and that the general system of jurisdiction of the Court should be extended to the area of freedom, security and justice, including action by Union bodies in this field*[89] *"*.

Treaty of Lisbon was a very good occasion to include all the recommendations made by the Working Group X in the final report on judicial control of the Justice and Home Affairs. Thus, the special jurisdictional rules stipulated in former articles 35 of TEU and 68 of TEC have been abolished, being extended in the same time the jurisdiction of the Court by adding the expedited procedure as regards the Title V of TFEU – *"Area of Freedom, Security and Justice"*. According to the said procedure, the Court of Justice can give its rulings quickly in very urgent cases by reducing

---

[84] Webpage: http://www.europeanfoundation.org/my_weblog/2011/03/the-eu-internal-security-strategy-promoting-more-eu-integration-rather-than-cooperation.html, accessed March 26, 2013.

[85] Stephen Carruthers, op.cit., pp.6.

[86] *Ibid,* pp.7.

[87] *Ibid,* pp.12 and the following.

[88] *Ibid,*pp.31.

[89] *Ibid,*pp.32.

the time-limits as far as possible and giving such cases absolute priority[90]. Such a procedure can also be used for references for preliminary rulings, in which situation the application is made by the national court and must set out in the application the reasons and the circumstances establishing that a ruling on the question put to the Court under discussion is a matter of exceptional urgency.

A special situation is related to article 10 of the Treaty of Lisbon Protocol on Transitional Provisions which preserves the jurisdictional powers obtained by the Court of Justice under the former Title VI of TEU in respect of the Justice and Home Affairs acts issued, including those drafted in the field of judicial cooperation in criminal matters, before the entry into force of the Lisbon Treaty with one mention that these. This transitional provision will cease in five years after the entry into force of the Treaty. As a result, the scope of the Court's jurisdiction will depend on whether an act in the field of judicial cooperation in criminal matters was adopted before or after the Lisbon Treaty effective date and, if adopted before that date, whether or not it has been amended[91].

As regards the visas, asylum, immigration and other policies related to free movement of persons (e.g.: judicial cooperation in civil matters, recognition and enforcement, which is the former Title IV TEC and the current Title V - Chapter 3 of TFEU), the Court can be notified by all the national courts, no matter the level and not only the supreme courts, having the competence to take measures which are justified on grounds of public policy having a cross-border dimension. Therefore, in this matter the Court acquires general jurisdiction, right in the moment of the entry into force of the Treaty of Lisbon.

V. Conclusions

The criminal phenomenon as the negative result of the globalization process involves, on the one hand, finding the best solutions to fight against the crime and especially against the transnational organised crime, and, on the other side, taking the necessary legislative and institutional measures even though the judicial responses to all the threats are still not enough to keep up with the development of the organized crime, which became a sophisticated and international phenomenon, especially in the last 20 years.

For this reason, we need to develop a common European criminal justice area by ensuring an effective cooperation in the field of criminal matters, by supporting the national law enforcement authorities of the Member States in taking all the appropriate measures, and by developing a very good cooperation with the European institutions, organs, offices and bodies in the field, such as: the European Commission and the European Parliament, as the key institutions in drafting the legislation; Eurojust, Europol or European Judicial Network as the key enforcement bodies etc. The starting point is the respect of one of the most crucial principles: the mutual recognition of judicial decisions in all EU Member States.

In order to achieve the main goal, the Lisbon Treaty provides a stronger basis for strengthening the legislative framework and the institutional capacity of the criminal justice area, while foreseeing new powers for the European Parliament and expending the jurisdiction of the Court of Justice of the European Union.

Nevertheless, there remain serious concerns as regards the availability of access to justice for individuals and an effective judicial control over the Justice and Home Affairs measures taken in this field before entering into force of the Lisbon Treaty.

I believe that the new European offices that will be created, EPPO and COSI, in accordance with the provisions of the Lisbon Treaty will contribute effectively in developing the judicial cooperation in criminal matters, in designing the legal framework necessary to contribute to establishing a level of common rules in this field within the European Union in fighting efficiency

[90] Webpage: http://curia.europa.eu/jcms/jcms/Jo2_7024/, accessed March 26, 2013.
[91] Stephen Carruthers, op.cit., pp.37.

against the offences in general and financial crimes in particular and in improving the collaboration with other European institutions, bodies or organs, such as: OLAF, Eurojust or FRONTEX, but not only.

References

Books and articles:

- Coral Arranguena Fanego, Angel Jose Sanz Moran, Montserrat de Hoyos Sancho y Begona Vidal Fernandez, *Cooperación judicial penal en la Unión Europea: la orden europea de detención y entrega,* Instituto de Estudios Europeos, Universidad de Valladolid, editorial Lex Nova, 2005.
- Cyrille Fijnaut and Jannemieke Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, Martinus Nijhoff Publishers, 2010.
- Jean-Louis Antoine-Grégoire, *An Area Of Freedom, Security And Justice: General Aspects*, March 2011.
- Jorrit Jelle Rijpma*, Agencies in the Area of Freedom, Security and Justice*, 2010.
- Matti Joutsen, *The European Union and Cooperation in Criminal Matters: the Search for Balance*, HEUNI Paper No.25/ 2006, edited by the European Institute for Crime Prevention and Control, affiliated with the United Nations, 2006.
- Niggl Philipp, Speth Maximilian, Zinsmeister Andreas, *International Cooperation in Criminal Matters, The historical development of the judicial cooperation in criminal matters between the member states,* 2009.
- Paul Graig and Grainne de Burca, *The evolution of the EU law*, Oxford University Press, 2011.
- Steiner and Woods, *EU Law*, eleventh edition, Oxford University Press, 2012.
- Stephen Carruthers, *The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs*, Dublin Institute of Technology, 2009.
- Vasile Pavaleanu, *The judicial cooperation in criminal matters within the European Union*, The Annals of "Ştefan cel Mare" University Suceava, Fascicle of The Faculty of Economics and Public Administration, Volume 9, No.1(9), 2009.

European Union Legislation

- Council Act 95/C 316/01 of 26th of July 1995.
- Council Decision 2002/187/JHA of 27th of February 2002 .
- Council Decision 2010/131/EU of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security.
- Hague Programme of 2004.
- Joint Action 98/428 JHA of 29 June 1998 was modified by Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.
- Joint Action 98/428 JHA of 29th of June 1998.
- Madeira Declaration of 2008.
- Report "EUROPEAN PUBLIC PROSECUTOR WORKING GROUP CONCLUSIONS", following the reunion that took place in Madrid from 29th June to 1st July, 2009
- Schengen Agreement.
- Stockholm Programme of 2009 - Council Document 16484/1/09.
- Treaty of Amsterdam of 1999.
- Treaty of Lisbon of 2009.
- Treaty of Nice of 2003.
- Treaty on European Union of 1993.

Webpages:

- http://curia.europa.eu/jcms/jcms/Jo2_7024/.
- http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/internal-security/cosi/index_en.htm.
- http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:en:HTML.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2802%29:en:HTML.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51997XG0815:EN:HTML.

- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0184:EN:HTML.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1995:316:0001:0032:EN:PDF.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0201:0330:EN:PDF.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:162:0001:0003:EN:PDF.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0130:0134:EN:PDF.
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:052:0050:0050:EN:PDF.
- http://europa.eu/legislation_summaries/glossary/internal_security_committee_en.htm.
- http://europa.eu/legislation_summaries/glossary/internal_security_committee_en.htm.
- http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm.
- http://register.consilium.europa.eu/pdf/en/09/st16/st16515.en09.pdf.
- http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf.
- http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf.
- http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Criminal/Paper2_en.asp.
- http://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx.
- http://www.eppo-project.eu/.
- http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=73791.
- http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf.
- http://www.europarl.europa.eu/summits/tam_en.htm.
- http://www.europeanfoundation.org/my_weblog/2011/03/the-eu-internal-security-strategy-promoting-more-eu-integration-rather-than-cooperation.html.
- http://www.europol.europa.eu/sites/default/files/council_rec_on_jit_agreement___march_2010.pdf.
- http://www.eurotreaties.com/maastrichteu.pdf.
- http://www.fdcw.unimaas.nl/staff/files/users/215/Dublin%20System_EGHM.pdf.
- http://www.inm-lex.ro/fisiere/pag_60/det_881/4641.doc.
- http://www.jhubc.it/ecpr-porto/virtualpaperroom/145.pdf.
- http://www.statewatch.org/news/2013/feb/eu-solidarity-clause-austria-10956-12.pdf.
- http://www.statewatch.org/semdoc/assets/files/keytexts/ktch5.pdf.
- http://wwwde.uni.lu/fdef/actualites/a_blueprint_for_the_european_public_prosecutor_s_office3.
- https://www.europol.europa.eu/content/page/about-europol-17.
- https://www.europol.europa.eu/sites/default/files/council_decision.pdf.
- www.eurojust.europa.eu.
- http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0#Chapter7.

EXPORTING ECONOMIC SECURITY TOWARDS THE EUROPEAN UNION: EASTERN NEIGHBORHOOD IN CONTRAST TO SOUTHERN MEDITERRANEAN

OXANA SOIMU[*]

Abstract
A prosperous neighbourhood for a developing country is an undeniable fact. Among most eloquent examples serves the European Neighbourhood Policy (ENP) that is subject of large debates. In this context, we are used to get knowledge about the benefits that the ENP brings to Eastern and Southern Mediterranean partners. On the other hand, many studies criticize the European Union (EU) foreign policy as presenting weak incentives and conditionality. Nevertheless, this situation requires from our point of view a thorough analysis about the share of economic security that is "imported" by the EU due to the ENP implementation in its immediate vicinity. Thereby, an empirical analysis is going to be carried out in this article where the manoeuvre with some statistic data and macroeconomic indicators within economic security typologies is expected to generate useful insights in order to identify: Who generates more economic security gains for the EU? In more details, tracing the analytic parallel between economic measures within the European Neighbourhood Policy and contemporary approach to economic security, namely according to the European vision of security it enables the author to reach conclusions which of the EU's neighbours show more economic certainty and security. If this correlation generates positive results, then the author will assert that the EU offer regarding the Neighbourhood Policy is prospective for recipients but also for the EU in terms of economic security "import".

Keywords: *European Neighbourhood Policy, economic security, Eastern partners, Southern Mediterranean partners*

I. Introduction

The main scope of this study is to exhibit at some extent how much economic security the Southern and Eastern ENP partners export towards the EU (the author will interpret results obtained via the quantitative method of research and security itself is difficult to quantify). This in fact could resolve a number of questions related to "prosperity generating"[1] in the European surroundings.[2]

Taking it step by step, firstly, the author chooses to work more on economic dimension of the ENP because from the very beginning and namely from the origins of the ENP, "interconnecting the neighbourhood in terms of trade and political relations, energy, infrastructure, and telecommunication networks" was somehow left on the second plan[3].

In this vain, regarding the economic policy coordination, the EU tends to be honest and fair to all its partners in the neighbourhood, but it is quite complicated to equally provide incentives and economic security techniques to all. Among others, Delcour concludes about EU's difficult ability to respond to several challenges from the neighbourhood that differently perceives the EU foreign policy intentions and neighbour countries necessarily have their own preferences for cooperation and foreign policy[4]. In addition, Delcour mentions about some actions at regional level (in its work –

[*] PhD in International and Intercultural Studies of University of Deusto, Spain (oxana.soimu@gmail.com).

[1] Christopher M. Dent, "Economic Security," in *Contemporary Security Studies*, ed. Alan Collins (New York: Oxford University Press, 2007), 204-221.

[2] Having the ENP agenda and neighbourhood economic and political realities, the whole process looks like the proverb:"And the wolf replete and the sheep unharmed ".

[3] Raffaella A. Del Sarto and Tobias Schumacher, "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" *European Foreign Affairs Review* 10 (2005): 26.

[4] Laure Delcour, "The European Union, a security provider in the Eastern neighbourhood?" *European Security* 19:4 (December 2010): 545.

Eastern ENP partners) concerning the achievement of the security objectives to / from the neighbourhood[5]. Thus, in the present article it is focused on the economic security that can be provided by the ENP partners at least at regional level, author working by contrast.

Generally, this study will be performed by quantitative and qualitative research methods. Therefore, to argue what neighbourhood is more secure for the EU and presents more economic security prospects in general, the author will manoeuvre with statistical data and here the interpretation of result will be performed in qualitative terms. Besides, in order to find *Quo Vadis* the EU – Neighbourhood "marriage", the present study will provide a snapshot of economic security in the neighbourhood not at individual level but at regional level, connecting the retrospective aspects related to the EU security with some prospects. In addition, working with macroeconomic indicators (retrieved from the World Bank (WB) database) and data from international rankings it will be calculated a regional average value that will illustrate by contrast the regional economic capacity, the state of economic security and chances to penetrate one of the largest global markets – the EU market.

Speaking about qualitative method, two important moments the author highlights: firstly, by revealing the economic difference between these two camps (Eastern and Southern ENP partners) it will explain the result of this research purpose; secondly, it has to be established towards what the EU aspires in its surroundings. Thus for this purpose, to "play" with retrospective/prospective objectives it will be used a method of analysis (a schematic representation) not very common for the literature body on European Studies, this in turn injects novelty in this analysis. The TRIZ (Theory of inventive problem solving) theory[6] will be used.

In order to clarify the reader, an important remark follows: the author is not actually going to start with the economic security conceptualisation because "definitions of economic security are in themselves dependent on perceptions and values" [7].

One can be concluded that this comparative analysis is one more contribution to put in light the EU's external policy vectors and assistance trajectory towards its neighbourhood.

II. Two camps: different approaches and different interests

Whereas the EU external actions and foreign policy is mainly based on security purposes in its surroundings, therefore it could be reiterated that the security and the ENP go in pair[8]. Besides, the economic dimension of the ENP and of security is also strongly interconnected mainly from the retrospective point of view – among main cornerstones of the Union's formation are economic interferences. In this context, for the EU neighbourhood, a real boom was the widening good vicinity's relations and the launch of the ENP among "different countries" and "common interests"[9]. Therefore, above everything, there were created two trajectories of economic policy coordination in the South and in the East: each of them benefiting of Barcelona Process[10] (which shortcomings

[5] Ibid., 535-49.

[6] See Michael A. Orloff, *Inventive Thinking Through TRIZ: A Practical Guide.* Second Edition (London: Springer, 2006) and *Open Source TRIZ,* accessed January 12, 2013.
http://www.opensourcetriz.com/main/page_collaborators.html.

[7] Wolfgang Hager, "Defining Economic Security," in *National economic security: perceptions, threats and policies*, ed. Frans Alphons Maria Alting Von Geusau and Gunnar Adler-Karlsson (Tilburg: Transaction Publishers, 1982), 21.

[8] See Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, "Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Brussels, 11.3.2003, COM(2003) 104 final.

[9] Ibid, 4.

[10] European Union. *European Union External Action. The Barcelona Process,* accessed February 10, 2013, http://www.eeas.europa.eu/euromed/barcelona_en.htm.

related to economic reform winnow the connection between economic measures for the partners and economic domestic interests of the EU[11]) or Partnership and Cooperation Agreement (PCA)[12]. And in this context, the author agrees with the fact that "the ENP corrects a number of deficiencies of the Euro-Mediterranean Partnership" [13] and also asserts that it is without any doubt that at the same extent the ENP also „corrects" the PCA.

Turning to the significant body of literature, the „contrast" between the South and Eastern partners was obvious from the very beginning. For instance, Del Sarto and Schumacher consider that Eastern partners were sceptical concerning the new ENP because the last considered this new foreign EU policy as a delay regarding the EU membership, instead of Mediterranean Southern partners that were much enthusiastic about the ENP[14].

Taking the other side of the coin and namely the EU interest, Marchetti underlines the EU "preference" rather towards the Eastern neighbours instead of Mediterranean.[15] In reality, the EU entered into dalogue with two different camps where some of them are strained by frozen conflicts and others strungled by "political and religious extremism"[16] but the both present weak capacity for democracy building. For this reason, the EU could fall in a kind of foreign policy hysteresis because it is difficult to maintain the "balanced approach" in these conditions of continous economic and political challenges. Besides, EU member states and espeacially those that border the Southern and Eastern vecinity present very different economic and political interests[17].

Regarding the financial assitance, Longhurts has calculated and resumed that the Southern ENP partners beneficiate and "consume" more than the Eastern in a ratio of 2 : 1[18]. Same author identified that "the top recipients are Palestinian Authority, Republic of Moldova (henceforth: Moldova) and Lebanon"[19]. Regarding the "EU's principal method" and "long - term vision of relationships", Longhurts exhaustively draws a comparative table and delimitates that for the South, the EU undertakes a regional approach in contrast to the East that takes advantage of a bilateral approach "with small elements of sub-regionalism"[20]. In economic prospects, the EU – Southern ENP equation of economic relations look for deep relations in comparison with the EU – Eastern ENP that tends to deep free trade[21]. Is it the problem in the geo-economic organisation of these two neighbourhoods? Among others, Missiroli proposed their regrupation in "(sub-) regional "clusters""[22].

---

[11] Diana Hunt, "Development Economics, The Washington Consensus and the Euro-Mediterranean Partnership Initiative," in *Perspectives on Development: The Euro-Mediterranean Partnership*, ed. George Joffe (London: Frank Cass, 1999), 16-7.

[12] *Europa,* Summaries of EU legislation*, "Partnership and Cooperation Agreements (PCAs): Russia, Eastern Europe, the Southern Caucasus and Central Asia" accessed February 4, 2013, http://europa.eu/legislation_ summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm.*

[13] Del Sarto and Schumacher, "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" 28.

[14] Del Sarto and Schumacher, "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" 30.

[15] Andreas Marchetti, "Consolidation in Times of Crisis: The European Neighbourhood Policy as Chance for Neighbours?" *European Political Economy Review* 7 (Summer 2007): 9 – 23.

[16] Kerry Longhurts, "Injecting More Differentiation in European Neighbourhood Policy: What Consequences for Ukraine?" *Institut francais des relations internationales.* July 2008, accessed March 1, 2013, www.ifri.org, 5.

[17] Barbara Lippert, "The Discussion on EU Neighborhood Policy – Concepts, Reform Proposals and National Positions," *International Policy Analysis,* ed. Friedrich Ebert Stiftung, July 2007, accessed: 28 February 2013, http://library.fes.de/pdf-files/id/04737.pdf.

[18] Longhurts "Injecting More Differentiation in European Neighbourhood Policy: What Consequences for Ukraine?" 10.

[19] Ibid.

[20] Ibid., 14.

[21] See Longhurts´ compilation of information into Table 3, "Injecting More Differentiation in European Neighbourhood Policy: What Consequences for Ukraine?" 14.

[22] Antonio Missiroli, "The EU and its Changing Neighbourhood: Stabilization, Integration and Partnership," in *European Union Foreign and Security Policy: Towards a Neighbourhood Strategy*, ed. Roland Dannreuther. (London: Routledge, 2004), 6.

Regarding the participation into European Single Market (ESM), Escribano identifies that most difficult is for the Southern Mediterranean[23] but meantime they accept to carry this cargo of the EU economic directives "partly in pure pragmatism"[24] and because the EU is "major source of economic aid"[25]. For a holistic justification and additional conclusions, the author of this study concentrates regional macroeconomic average data in the Chart that follow, thus a comparative analysis is conducted. On the other side, some EU member states that "run the risk of losing their comparative advantages in certain economic sectors"[26] look rather to increase the aid instead of deep trade relations[27]. This is a kind of safeguarding the domestic market from the part of the EU members that share borders with its Southern and Eastern partners. For the last both actors this is a threat because they easily become "good consumers of foreign aids" and do not develop the capacity for self-development and export-oriented economic growth.

Another token that divides the EU from its neighbourhood it is the real interest. Therefore, "the EU is obviously first and foremost interested in securing *itself*"[28] By constrast, the neighbourhood look for more aid and market integration. Besides, the Eastern group has as declared objective the EU memebership[29]. In addition to the last, the author would like to exemplify by Moldova. Thus, mass media often vehiculates with the idea that moldovan citizens and decision and policy – makers wants to "fall into the EU canvas" mainly for visa liberalization. Contrary to the above said, the author considers that this is thought by people that many years ago emmigrated to the EU instead of people who remained in Moldova, those who have a pro-European vision and who in economic terms look for European standards, quality and capabilities to protect their markets and values.

Missiroli points that the EU through Partnership and Cooperation Agreement (PCA) had more economic interest towards Eastern partners in contrast to the Mediterranean[30]. Nevertheless in order to reduce economic disparities at regional level it is difficult to find one general aplicable formula for all economies and meanwhile respect the principle of differentiation.

Table 1 illustrates the following situation: the ENP seems to be dissonant with economic realities of EU neighbours. Apart from the case that both Southern and Eastern ENP partners in average terms are "Partly Free"[31] they also do not enjoy too much perception of corruption. Only Israel and Georgia present capacity to fight againts corruption (Table 1). For the rest of partners as well as for the EU this is a threat to internal market and affect the cooperation with prospective trade partners. The Human Development Index (HDI) however reflects that the Southern and Eastern ENP partners present capacity for development and modernisation and a relative good life quality. On the other hand, according to the Failed State Index 2012 the EU member states are positioned in the categories of "Moderate" and "Sustainable" states while its neighbourhood really presents worrying signs[32]. For instance, in "Alert" are Syria and Egypt and the rest of Mediterranean and Eastern

[23] Gonzalo Escribano, "Europeanisation without Europe? The Mediterranean and the Neighbourhood Policy". European University Institute, Robert Schuman Centre for Advanced Studies. Mediterranean Programme Series, 2006, accessed January 12, 2013, http://www.eui.eu/RSCAS/WP-Texts/06_19.pdf, 15.

[24] Hunt, " Development Economics, The Washington Consensus and the Euro-Mediterranean Partnership Initiative," 16.

[25] Ibid.

[26] Del Sarto and Schumacher, "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" 32.

[27] Ibid.

[28] Del Sarto and Schumacher, "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" 28.

[29] Adept and Expert-Grup, *EU-Republic of Moldova Action Plan: Guide* (Chisinau: Guvina Press, 2006).

[30] Missiroli, "The EU and its Changing Neighbourhood: Stabilization, Integration and Partnership".

[31] Freedom House, *Freedom in the World 2012*. 2012, accessed March 2, 2013, http://www.freedomhouse.org/report-types/freedom-world.

[32] Foreign Policy and Fund for Peace, *Failed States Index 2012,* accessed March 4, 2013, http://www.foreignpolicy.com/failed_states_index_2012_interactive.

partners are in "Warning" situation meeting issues related to "economic decline", "uneven development" and "weak security apparatus"[33]. Hereby, towards EU, both partners "export" rather insecurity than security and for this reason EU emphasize the cross-border cooperation and developed the new principle-incentive of "more for more"[34]. Nevertheless, the European Commission reached the conclusion that "despite a difficult context, the EU has been able to establish a partnership for reform with its neighbours"[35]. This is the EU modality of securitisation because "economic security requires more than just maximizing current economic prosperity"[36] it exits its capabilities, models of governance and assistance outside its borders thinking on stable economic surroundings. Therefore, the author believes that the EU at least has the moral right to establish the rules of economic integration in its surrounding even risking with internal disputes among Member States and despite present conditions of financial crisis it continues assisting the neighbourhood's impoverished economies.

Table 1: Southern and Eastern ENP partners in the global ranking.

Index/ Country[37]	Failed State Index		Global Competitiveness Report 2012-2013[38]		Freedom Report 2012[39]		Transparency International Corruption Perception Index 2012[40]		Human Development Index (HDI) 2011[41]	
	Rank	Score	Rank	Score	Freedom Rating	Status	Rank	Score	Index	Category
EU's Southern Partners										
Algeria	77	78.1	110	3.72	5.5	Not free	105	34	0.696	Medium
Egypt	31	90.4	107	3.73	5.5	Not free	118	32	0.644	Medium
Israel	61	82.2	26	5.02	1.5	Free	39	60	0.888	Very High
Jordan	90	74.8	64	4.23	5.5	Not free	58	48	0.698	Medium
Lebanon	45	85.8	91	3.88	4.5	Partly free	128	30	0.739	High
Libya	50	84.9	113	3.68	6.5	Not free	160	21	0.760	High
Morocco	87	76.1	70	4.15	4.5	Partly free	88	37	0.582	Medium

[33] Ibid.

[34] European Commission, "Delivering on a new European Neighbourhood Policy" *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee anmd the Committee of the Regions,* Brussels, 15. 5. 2012, JOIN(2012) 14 final.

[35] European Commission, Communication from the Commision to the European Parliament and the Council. *Tacking stock of European Neighbourhood Policy*, Brussels, 12. 5. 2010. COM (2010) 207, 14.

[36] Carl R. Neu and Charles Wolf Jr., *The Economic Dimensions of National Security* (Santa Monica: RAND, 1994), xii.

[37] There are no data available for the Palestinian Authority.

[38] Klaus Schwab, *Global Competitiveness Report 2012-2013, a*ccessed March 4, 2013, http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf.

[39] Freedom House, *Freedom in the World 2012.*

[40] Transparency International, *Corruption Perception Index 2012,* accessed March 4, 2013, http://www.transparency.org/cpi2012/results.

[41] UNDP, *Human Development Index* 2011, accessed March 4, 2013, http://hdr.undp.org/en/statistics/

Occupied Palestinian territory	-	-	-	-	-	-	-	-	0.641	Medium
Syria[42]	23	94.5	-	-	7	Not free	144	26	0.632	Medium
Tunisia[43]	94	74.2	-	-	3.5	Partly free	75	41	0.698	High
Average score	**-**	**82.3**		**4,06**	**4.8**	**Partly Free**	**-**	**36.5**		**Predominantly Medium**
EU's Eastern Partners										
Armenia	102	72.2	82	4.02	5	Partly Free	105	34	0.716	High
Azerbaijan	68	79.8	46	4.41	5.5	Not free	139	27	0.731	High
Belarus	85	76.6	-	-	6.5	Not free	123	31	0.756	High
Georgia	51	84.8	77	4.07	3.5	Partly free	51	52	0.733	High
Moldova	73	78.7	87	3.94	3	Partly free	94	36	0.649	Medium
Ukraine	113	67.2	73	4.14	3.5	Partly free	144	26	0.729	High
Average score	-	76.5		**4.12**	**4.5**	**Partly free**		**34.3**		**Predominantly High**

The average score at regional level is calculated by author according to the data retrieved from the international rankings

Source: Data retrieved from Freedom House, Foreign Policy and Fund for Peace, Schwab, Transparency International, UNDP and WB

III. Eastern and Southern Mediterranean: harmony or discord with the EU (in macroeconomic trends)?

Contemporary security studies broaden foreign policy implications into security analysis and securitisation[44] whilst "the economics-security nexus"[45] receives new insights. For this study, the author is going to put face to face the cause that is designated to be the ENP and the effect which is security - the EU's main objective (author analyses the economic dimension[46]). Thereby, matching the cause with the effect is going to be done upon the two camps (Eastern and Southern ENP

[42] No data related to *Global Competitiveness Report 2012- 2013* because of security issues. See Klaus Schwab, *Global Competitiveness Report 2012-2013.*

[43] No data related to *Global Competitiveness Report 2012- 2013* because of "structural break in the data". See Klaus Schwab, *Global Competitiveness Report 2012-2013.*

[44] Alan Collins, *Contemporary Security Studies* (New York: Oxford University Press, 2007).

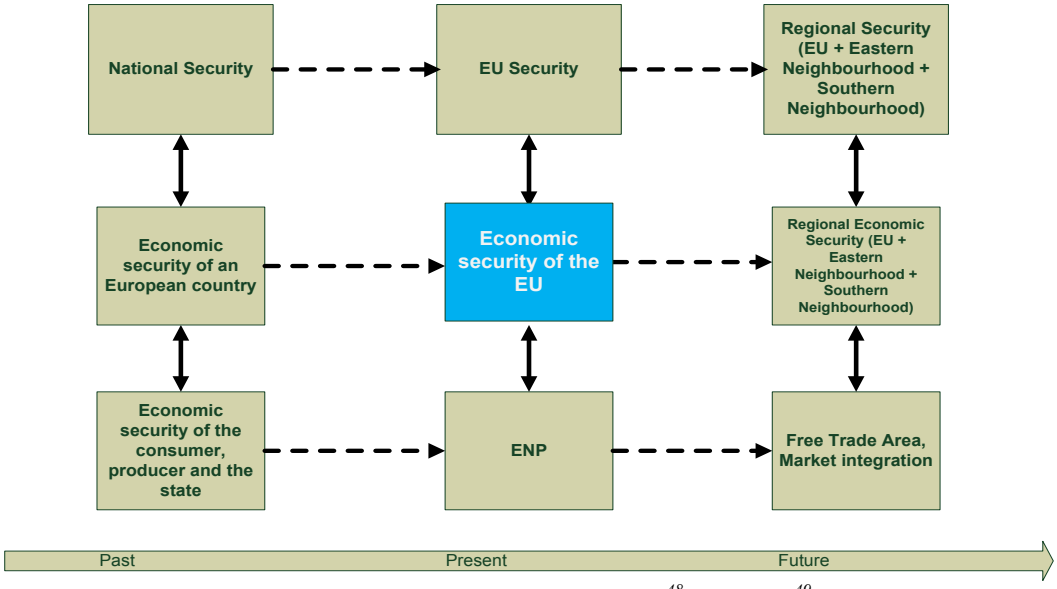
[45] Dent, "Economic Security", 206-207.

[46] See Michaela Dodini and Marco Fantini, "The EU Neighbourhood Policy: Implications for economic growth and stability," *Journal of Common Market Studies* 44:3 (2006): 507-32 and Commission of the European Communities, *European Neighbourhood Strategy Paper*, *Communication from the Commision,* Brussels, 12. 5. 2004, COM (2004) 373 final, 2-35.

partners). In this order of ideas, if the ENP could be considered as "Foreign Economic Policy (FEP) power", thus in perspective it should make the neighbours sustainable exporters of economic security ensuring both (EU and its Neighbourhood) "supply security", "market access security", "finance-credit security", "techno-industrial capability security", "socio-economic paradigm security", "transborder community security", "systemic security" and "alliance security"[47].

Before starting the analysis it should be clarified towards what tends the EU. Thus, just to recapitulate the evolution of economic security on the European continent from cornerstones until present realities when we already speak about EU and its neighbourhood, author compiled the information in the Fig. 1, showing that the EU's main objective of all times is security. Besides, as it was mentioned in the Introduction, this representation was performed according to the TRIZ method of problem solving because the author finds it is simple and easy to understand.

Fig 1: The economic security of the EU with ENP implications



Source: Author's elaboration relying on the TRIZ theory[48] and Buzan[49]

Thereby, according to the Fig. 1 it can be observed a shift from European security retrospectives towards the prospects of Regional Economic Security (involving the EU economic security and the Neighbourhood Security). Likewise, the economic security of the EU is one central system that on the one hand it is the result of a "super-system" (EU security) and on the other hand, the ENP (with a sustainable economic mechanism) is the foreign policy that contributes to the EU

[47] Christopher M. Dent, "The state and transnational capital in adaptive partnership Singapore, Korea and Taiwan," in *Handbook of Reaserch on Asian Business,* ed. Henry Wai - Chung Yeung (Cheltenham: Edward Elgar, 2007), 228-229.

[48] This figure was performed according to Orloff´s explanation regarding the "Strategy of Inventing", in Michael A. Orloff, *Inventive Thinking Through TRIZ: A Practical Guide,* Second Edition (London: Springer, 2006), 210. See also *Open Source TRIZ,* accessed January 12, 2013, http://www.opensourcetriz.com/main/page_ collaborators.html.

[49] When mentioning about "consumer, producer and state security" see Barry Buzan, *People State and Fear: an agenda for international security studies in the post-Cold War era (*New York: Harvester Wheatsheaf, 1991).

economic security. In perspective, the ENP will contribute to the market integration and the Free Trade Area and this in turn will be one of the factors that will contribute to the overall regional security, involving the EU security and the Southern and Eastern ENP partners' security.

At present, we can observe that foreign policy (above all the economic dimension) implications are broadened and this contributes to the EU economic security's objective achievements. Many years ago, great intention marked the security objective and namely the change of "the politics of exclusion" by "the politics of inclusion"[50] and then following deep transformations by replacing the "inside" with the "outside", the "self" with the "other" and "boundaries" with "borderlands", emphasising the "exchange" and the "interaction" and generating more dynamism for the Union[51]. In the future, it is aimed a secure area of economic integration and possibly with new designs of foreign economic policy.

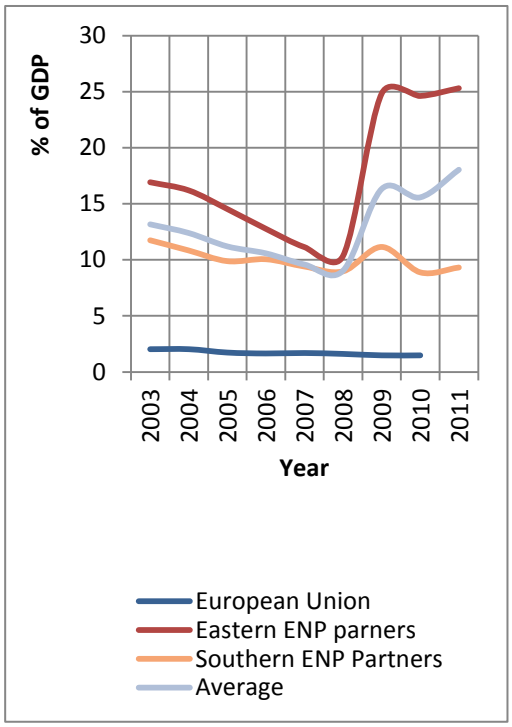
Likewise, author believes that the formula EU economic security + Neighbourhood economic security is achievable if the EU and its neighbourhood economic efforts will be symmetric and honest.

For the last years, the experience of the ENP implementation showed that this policy brings noticeable benefits of economic nature and amongst them the wider access for products to the EU market through the Autonomous Trade Preferences (ATP). In economic security terms this is a form of economic safeguarding for both the EU and its partners from the neighbourhood.

[50] Michael Smith, "The European Union and a changing Europe: Establishing the Boundaries of Order," *Journal of Common Market Studies* 34:1 (1996): 5-28.

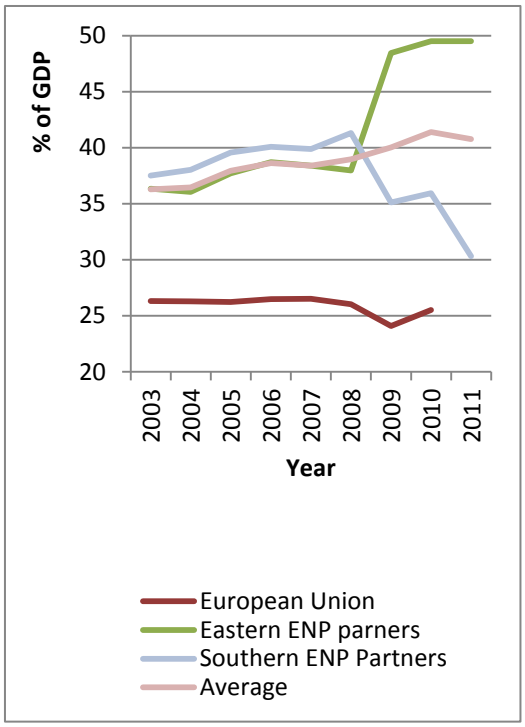
[51] Michele Comelli, Ettore Greco and Nathalie Tocci, *Working Paper: From Boundary to Borderland: Transforming the Meaning of Borders in Europe through the European Neighbourhood Policy.* draft version. EU-CONSENT, July 31, 2006, accessed February 12, 2013, http://www.eu-consent.net/content.asp?contentid=1095, 3-19.

Chart 1: Regional average values of the agriculture, values added (% of GDP).



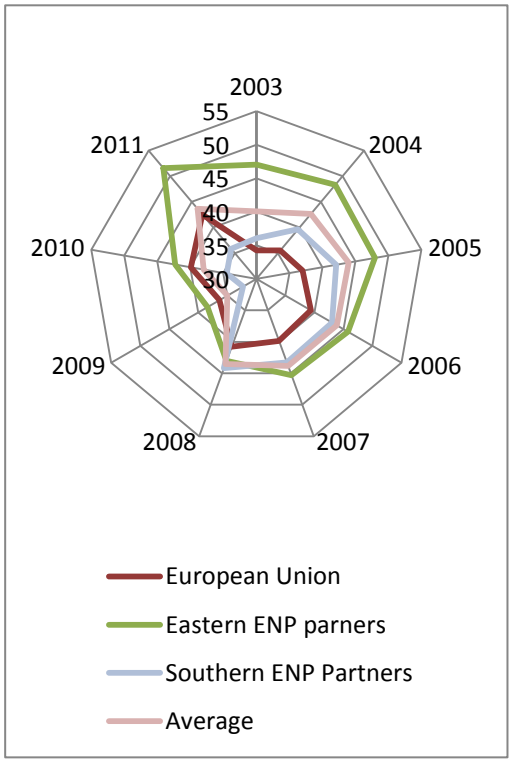
Source: Author's elaboration. Data retrieved from the WB

Chart 2: Regional average values of the industry, values added (% of GDP).



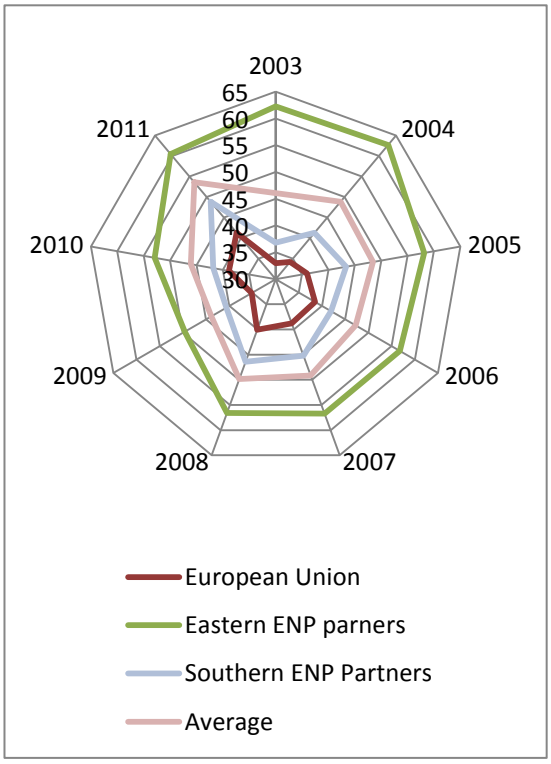
Source: Author's elaboration. Data retrieved from the WB

Chart 3: Regional average values of the export of goods (% of GDP).



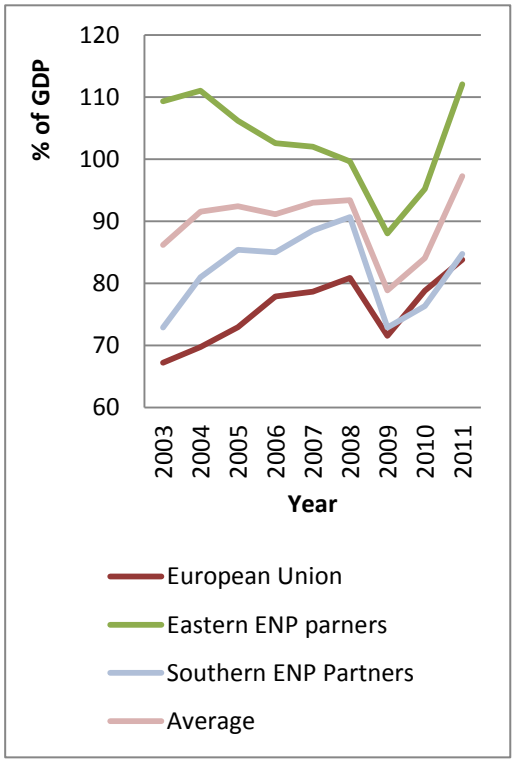
Source: Author's elaboration. Data retrieved from the WB

Chart 4: Regional average values of the import of goods (% of GDP).



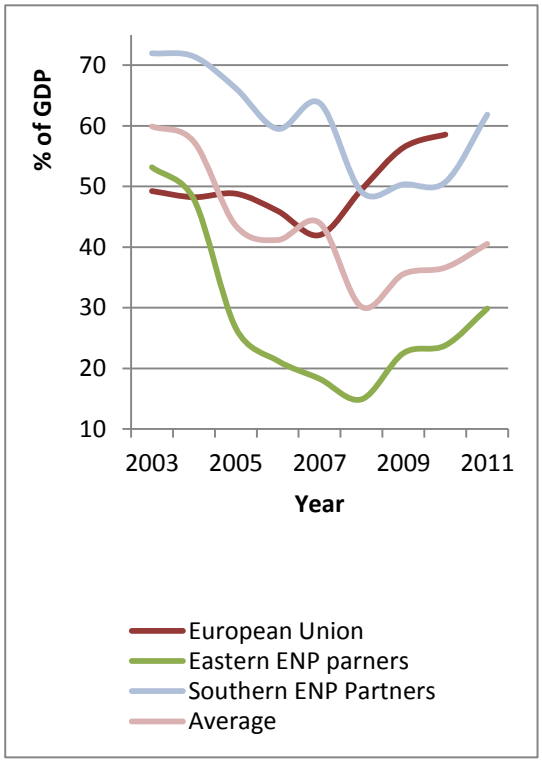
Source: Author's elaboration. Data retrieved from the WB

Chart 5: Regional average values of the trade (% of GDP).



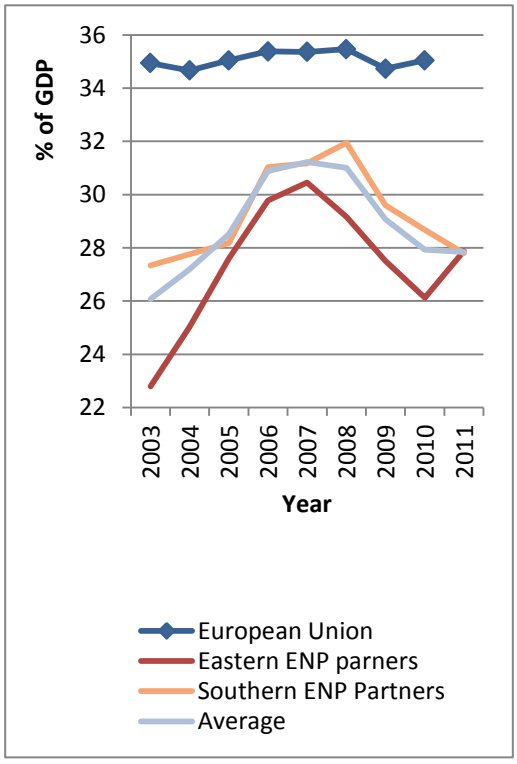
Source: Author's elaboration. Data retrieved from the WB

Chart 6: Regional average values of the central government debt (% of GDP).



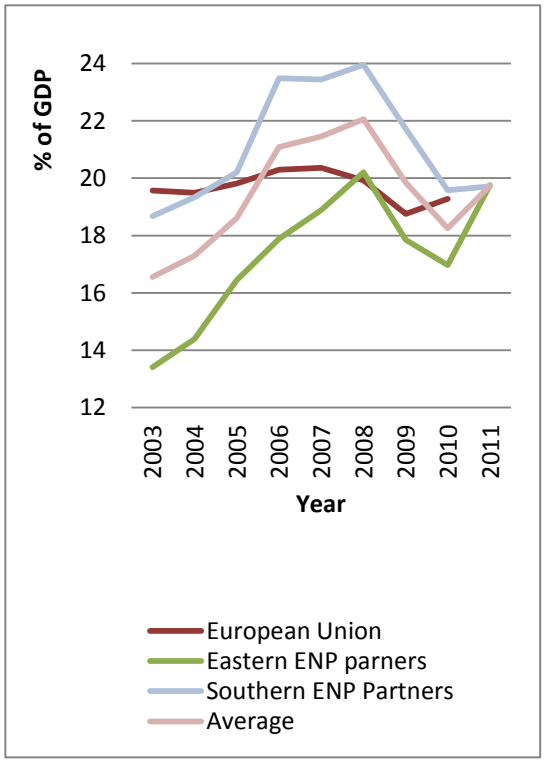
Source: Author's elaboration. Data retrieved from the WB

Chart 7: Regional average values of the revenue, excluding grants (% of GDP).



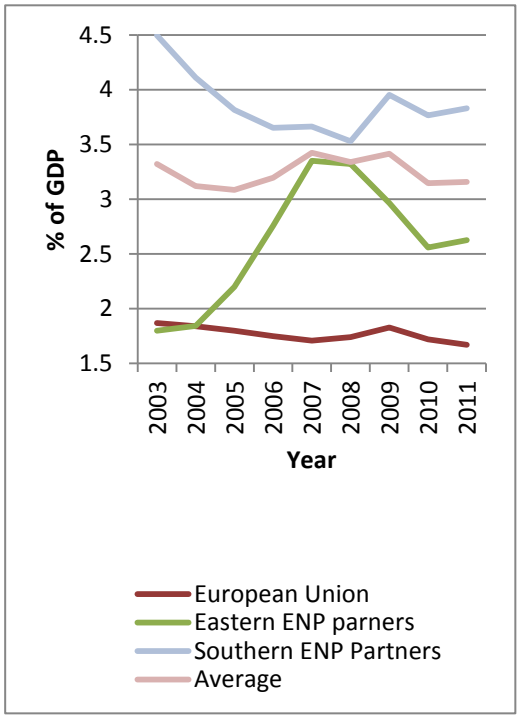
Source: Author's elaboration. Data retrieved from the WB

Chart 8: Regional average values of the tax revenue (% of GDP).



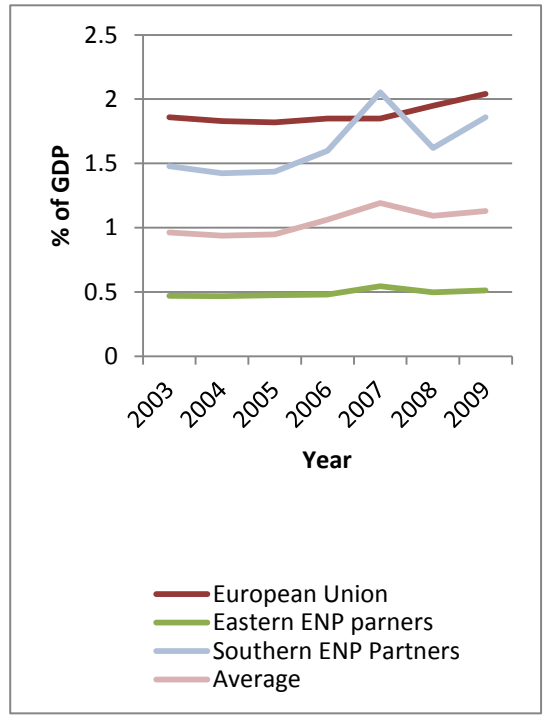
Source: Author's elaboration. Data retrieved from the WB

Chart 9: Regional average values of the military expenditures (% of GDP).



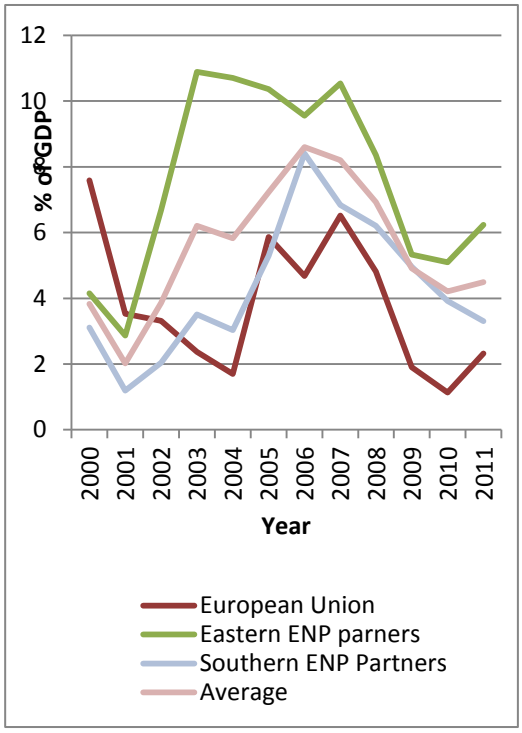
Source: Author's elaboration. Data retrieved from the WB

Chart 10: Regional average values of the research and development (% of GDP).



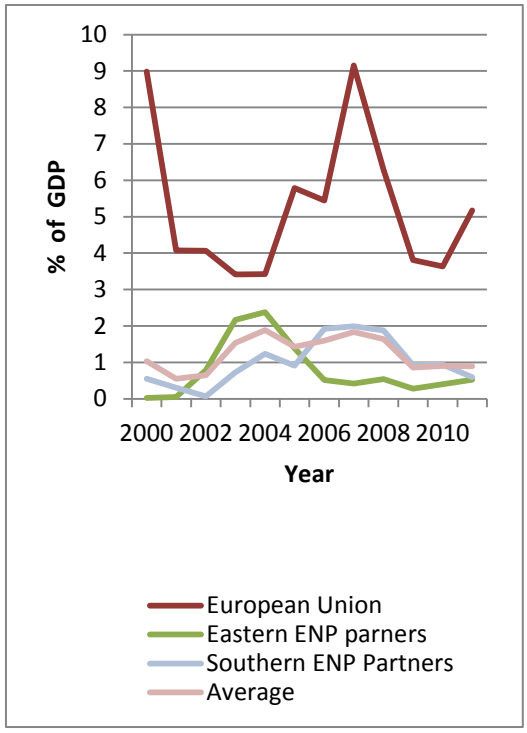
Source: Author's elaboration. Data retrieved from the WB

Chart 11: Regional average values of the Foreign Direct Investment (FDI), net inflows (% of GDP).



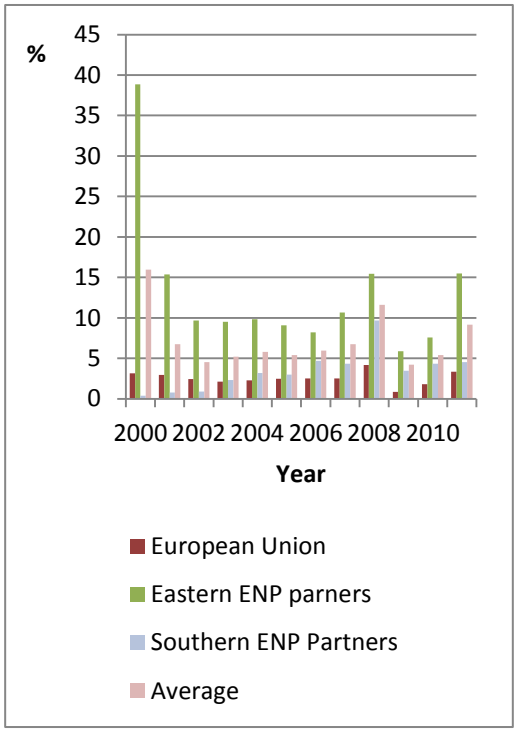
Source: Author's elaboration. Data retrieved from the WB

Chart 12: Regional average values of the Foreign Direct Investment (FDI), net outflows (% of GDP).



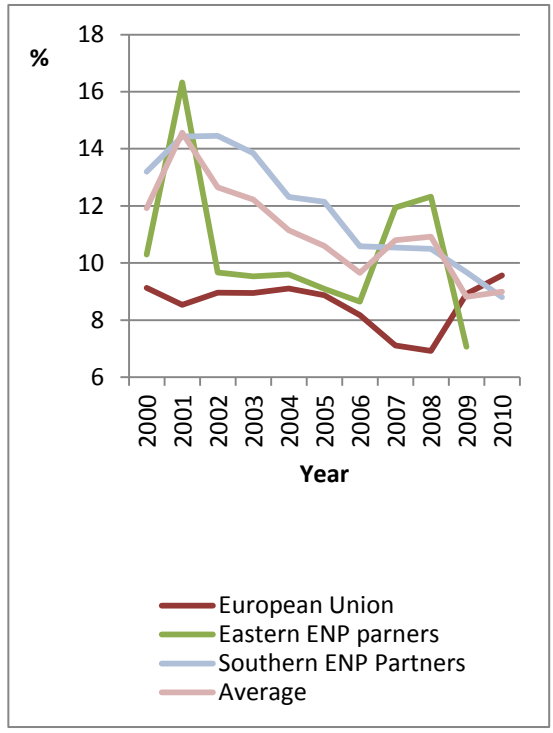
Source: Author's elaboration. Data retrieved from the WB

Chart 13: Regional average values of the inflation, consumer prices (% annual).



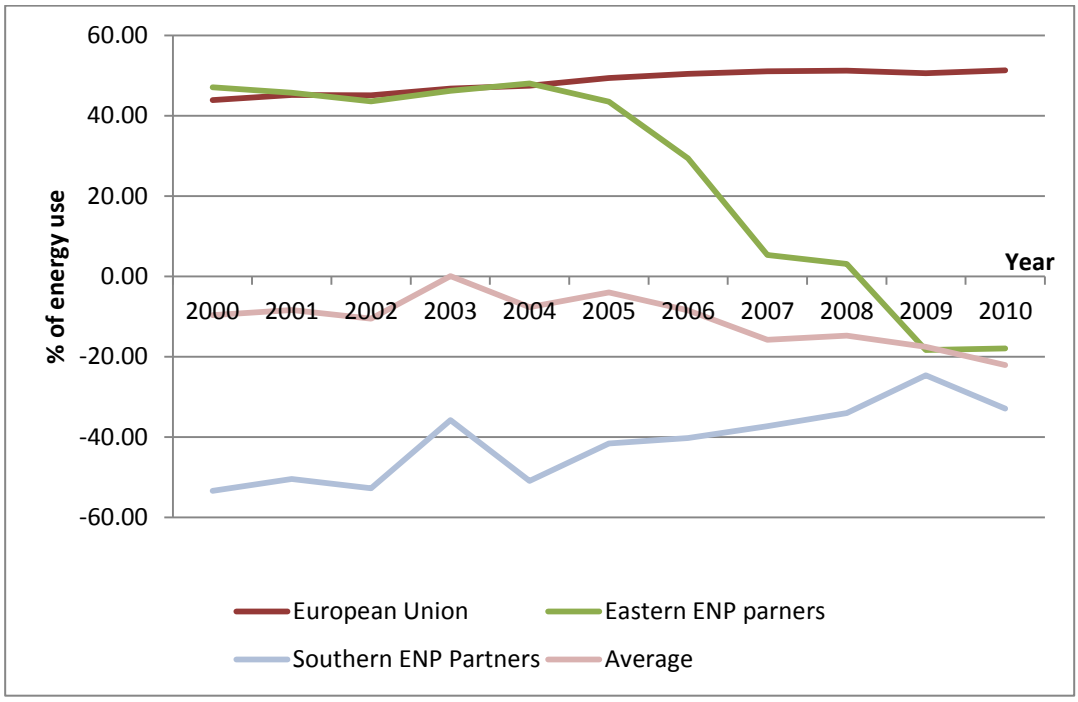
Source: Author's elaboration. Data retrieved from the WB

Chart 14: Regional average values of the unemployment, total (% of total labour force).



Source: Author's elaboration. Data retrieved from the WB

Chart 13: Regional average values of the energy imports, net (% of energy use).



Source: Author's elaboration. Data retrieved from the WB

The first four charts (Chart 1, Chart 2, Chart 3 and Chart 4) are interrelated and portray the following situation: the most important contribution regarding the agriculture, value added as % of GDP has Eastern ENP partners whilst in industry until 2008 the Southern ENP partners enjoyed success, but from 2009 predominate the Eastern ENP partners. According to WB data, it seems that in export terms the East enjoys more success in contrast to the South, excluding the year 2008 when the global financial crisis seriously affected the East and gave green light to the South due to Jordan, Libya and Tunisia, recording more than 50% of exports as % of GDP (Chart 3). However, it is difficult to say that the economic growth of the Eastern ENP partners is due to export – led model because the Chart 4 exhibits the following situations: the East overrun the South regarding the imports as % of GDP where the biggest share occupies Belarus and Moldova and Jordan and Lebanon.

With regard to the Chart 5 it can be deduced that for the period 2003-2008 the EU and its Southern ENP partners are on the same wavelength regarding trade and this denote a good cooperation between them as well as interdependence. Besides, it demonstrates at some extent that the Barcelona Process generated economic added values. Unfortunately, once with the global financial crisis, it is obvious that the EU economic decline pulled down its Southern partners as well as Eastern. For the last, situation in the East worsened and the trade decreased more.

Overall, such situation explains the fact that the EU economic security depends on its partners and vice versa. So far, both Southern and Eastern ENP partners need a cost-effective strategy for the economy. This is because a paradoxical situation occurs if we look at the Chart 6 that shows the central government trends as % of GDP and the Chart 4 related to imports. It seems that EU partners from the neighbourhood ask for more aid to import and not to developed domestic capabilities to generate an export-led economic growth. Fortunately, for import-oriented countries, a solution could

be that the production possibilities can be developed in services or technology and communications, it means that the import of the last should be transformed into productive means[52]. Probably such situation is also interconnected to the Chart 10, where for instance the Eastern ENP partners spent very few money for research and development being less competitive in comparison with Southern ENP partners. In addition, Mediterranean partners, record more revenues, excluding grants (as % of GDP) in contrast to the East that record less revenues (Chart 7).

Regarding the tax revenue (Chart 8), for the Eastern ENP partners the value preponderantly increased in order to cover the budget deficit.

Finally, the Chart 9 reflects that the military expenditures (% of GDP) in the East boosted for 2004-2007 because of the conflict in Georgia and in the South because of increased military expenditures in Jordan and Israel. Unfortunately, the increasing trends of military expenditures affected the economic growth in the region. Or, it means that the given economy intents to prevent some prospective threats of political order and invest in researches for military purposes as well as uses the labour force that could occupy other economic sector with more added value.

Generally, in trade terms, one can be asserted with certitude that both the Eastern and Southern ENP partners still are at the stage of gaining trust in front of the EU. Both regions do not present too much economic security level; thereby they still need aid from EU. Nevertheless, according to EUROSTAT[53] data regarding trading with the EU it can be mentioned that there are some successes of acquis adoption, but in economic security terms this approximation must not be perceived as "a panacea for economic and trade shortcomings"[54] like it is for Moldova. Undoubtedly, the EU and neighbour countries have learned lessons from the previous experiences of Action Plan's implementation. Likewise it is obvious that for the last period the ENP improved in conditionality and consistency[55]. On the other hand, the FDI inflows shown in the Chart 11 designate the East (mainly due to Georgia and Moldova) as being more attractive in contrast to the South (mainly due to Jordan and Lebanon) and even the EU. This is a good opportunity for the EU partners and it means that this region presents more prospects of cooperation and the economies tend to the functioning on a capitalist basis. However, a lot has to be done concerning the regulatory reform and fight against corruption (Table 1). Regarding the FDI outflows (Chart 12) the EU hold supremacy and is main investor in both regions. Likewise, the Eastern and Southern ENP partners present weak capacity for FDI outflow (Chart 12).

Consequently, the bureaucratic approach to doing business, former legacies of trading (mostly in the East and including the partners' behaviour), institutional low capacity and flexibility to adapt to new norms and issues related to FDI flows that could contribute to economic growth, all of them explain the incapability to ensure "alliance security"[56].

In terms of inflation (Chart 13), both regions present weak capacity for stabilisation. For instance in the East, the inflation rate increases because of boosted prices for the consumption on domestic and global market. In addition, it is a worrying sign that the prices of the minimum consumption basket are often dictated by the prices of petroleum products. The South is mainly affected by Egypt with almost 10 % of inflation[57].

---

[52] Ganesh Wignaraja, Marlon Lezama and David Joiner, *Small states in transition. From vulnerability to competitiveness*. The Commonwealth Secretariat (London: Marlborough House, 2004).

[53] EUROSTAT, accessed March 2, 2013.
http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=teiis540.

[54] Oxana Gutu, "Moldova's Convergence with the acquis. A Pro-Growth and Pro-Integration Strategy." *CEPS Working Document* 238 (March 2006): 5.

[55] European Commission, JOINT STAFF WORKING DOCUMENT. *Implementation of the European Neighbourhood Policy in 2011. Statistical Annex. Delivering on a new European Neighbourhood Policy,* Brussels, 15.5. 2012, SWD (2012) 122 final.

[56] Dent, "Economic Security," 218.

[57] WB data, www.worldbank.org .

In terms of unemployment, situation remains critical in both regions as well as in the EU. Losing the agriculture and industry value added (% of GDP) have negative impact upon the labour force and as a result it increases the unemployment rate (Chart 1, Chart 2 and Chart 14). In addition, like Moldova, the rest of the ENP partners do not present efforts in area of labour standards and institutional mechanisms are not cost-effective[58].

In terms of energy imports (Chart 15), the EU could receive important gains from East and South taking into consideration that overall, both regions import less energy than EU, except Moldova, Belarus, Israel, Jordan, Lebanon and Morocco that are almost totally dependent on energy imports. As stabilising factor regarding energy export and production for the East are Azerbaijan and less Ukraine and Georgia. In the South the added value in energy production and export is due to Libya and Algeria overrunning the EU and the East.

In the end, all actions related to trade and tariffs' barriers, prevention of economic crime and trafficking, illegal migration, custom modernisation and close economic relations among EU member states and the immediate vicinity in border areas are subject for deep Cross-Border Cooperation (CBC) which is "a key priority of the European Neighbourhood and Partnership Instrument (ENPI)"[59]. This is the first step in exporting security to the EU and importing security from the EU to neighbour partners. Indeed, it is not easy to "promote economic and social development in border areas", "address common challenges", "ensure efficient and secure borders" and "promote people-to-people cooperation"[60]. For this reason in the following table (Table 2) the author intends to organize possibilities of achieving the above objectives and in addition shows the situations when there are risks of failure and insecurity.

Table 2: Cooperation or defective relation between the EU and the ENP partners

Situation	Circumstances and results
EU and ENP partner cooperate	- Low transition costs; - Compromise fulfilled; - Foreign policy successfully implemented; - Strong incentives; - Conditionality respected; - Acquis adopted with success;
EU assisted and the ENP partner did not fulfilled	- EU financial and technical assistance was not used according to initial purposes; - The ENP partner did not fully use the foreseen budget.
EU review its directives towards the neighbourhood	- EU fulfilled the compromise but the ENP partner did not; - EU capitalizes but the ENP partner looses the opportunity.
Lack of control, monitoring and credibility; incapability for regulatory approximation.	- Lack of coherence and dialogue; - Weak institutional incentives; - Interests other than those supposed to generate positive outcomes above all security.

Source: Author's elaboration

[58] European Commission, JOINT STAFF WORKING DOCUMENT *Implementation of the European Neighbourhood Policy in the Republic of Moldova. Progress in 2011 and recommendations for action*, Brussels, 15. 5. 2012, SWD(2012) 118 final.

[59] EUROPEAID. "The ENPI Cross - Border Cooperation Strategy Paper 2007-2013 and the Indicative Program 2007-2010," November 2006, Accessed March 10, 2013.
http://ec.europa.eu/europeaid/where/neighbourhood/regional-cooperation/enpi-cross-border/index_en.htm.

[60] Ibid.

Overall, it is even difficult for the EU to achieve a "systemic security"[61] taking into consideration the "inside" diversity as well as the "outside" diversity in interests, economic models and values.

IV. Conclusions

This article is not about dividing the East from the South but rather to find where (in which region) the EU should take more advantage of security without the fear of losing something and where the EU and its neighbourhood should improve regarding the CBC in order to create a secure zone of cooperation. Yet, the President of the European Commission Barroso declared: "There are as many variations of ENP as there are partners."[62] From here follows the constant need to revitalize the fundamental principle of the ENP – the differentiation. Hopefully, the ENP is open for improvements and more security and prosperity achievements.

The intent of contrasting Southern Mediterranean with the Eastern neighbours can be made with reservation because both vicinities of the EU differ concerning the democracy perception, the "substance" and interests of the cooperation EU – Neighbourhood, economic values and forms of trading. However, regarding the contribution in macroeconomic terms to average results of each country in the region, author agrees that "Mediterranean countries that, despite internal differences, presents a higher degree of homogeneity"[63].

The common point for both the EU and its Neighbour Partnets is that "security depends equally on reality and perception"[64]. It can occur that what for the EU presents economic security, for the partner country could represent insecurity or even an economic threat. Thus, it is not surprisingly that "security ... strongly depends on others and not only on oneself"[65].

In this article, author has clarified to what the EU tends instead of the ENP partners that still are at the stage of deciding about what they really want.

In the context of this study, the insecurity issues are also the result of low effort of local governments for the approximation. Besides, the administrative command control (specifically for the Eastern ENP partners), pronounced asymmetries between the domestic policy and foreign policy objectives, discrimination of foreign investors, high level of corruption and regulatory issues prevent the deeper market integration.

Relying on the analysis of macroeconomic indicators as regional average value, author reaches the following conclusions:

- In empirical terms, the two regions are separated by concrete interests, but both Eastern and the Southern ENP partners meet difficulties in ensuring "finance-credit" and "market-access" and even "supply" security;
- The EU would benefit more in terms of energy security in the South than in the East (if we exclude Russia);
- The Eastern ENP partner would bring benefits for the European market regarding the food security, fertile soils and ecologic products. The real problem is that even though the EU intensely assured the East with technical and financial assistance, the Eastern ENP partners have many times neglected the core objectives of the ENP and focused more on EU membership, however;

---

[61] Dent, "Economic Security," 217.

[62] José Manuel Durão Barroso, "Shared challenges, shared futures: Taking the neighbourhood policy forward." *European Neighbourhood Policy Conference*, Brussels, September 3, 2007, SPEECH/07/502, 3.

[63] Manuella Moschella, "EU's Regional Approach Towards Its Neighbours: the ENP vis a vis the EMP," Jean Monnet Centre "Euro-Med", University of Catania. 2004, Accessed February 22, 2013, http://www.fscpo.unict.it/EuroMed/moschella.pdf, 5.

[64] Marjan Svetlicic and Matija Rojec, "The global economy, security, and small states aspiring for NATO membership," in *Small states in the Post-Cold war world: Slovenia and NATO enlargement*, ed. Sabic Zlatko and Charles Bukowski (London: Praeger, 2002), 34.

[65] Ibid.

Undoubtedly internal security issues, especially the economic issues arise from the state's incapacity to prevent and face unpredictable risks. What however distinguishes the EU from its neighbour partners is the fact that Member States are based on the rule of law and namely the law has supremacy. Unfortunately, the EU's neighbours including Moldova and Ukraine have not made changes in the legal framework therefore they strive to rather bypass the law than to respect it, yet.

To end this study, Kratochvil mentioned about the ENP that a lot could be said not only in positive terms[66] and this in fact could explain the existent constraints in economic terms.

Thereby, the author believes that there is much more to say about economic security at the EU level and its surroundings. Each macroeconomic indicator and policy involved require a separate empirical analysis for at least some EU member states that share same border with immediate neighbourhood in the East as well as in the South, in order to find out where is that point that strangles the economic security purposes.

References

Books and articles:

- Adept and Expert-Grup. *EU-Republic of Moldova Action Plan: Guide*. Chisinau: Guvina Press, 2006.
- Balfour, Rosa and Antonio Missiroli. "Reassessing the European Neighbourhood Policy." *EPC Issue Papers* 54 (June 2007): 5-37.
- Barroso, José Manuel Durão. "Shared challenges, shared futures: Taking the neighbourhood policy forward." *European Neighbourhood Policy Conference*. Brussels, September 3, 2007. SPEECH/07/502.
- Buzan, Barry. *People State and Fear: an agenda for international security studies in the post-Cold War era.* New York: Harvester Wheatsheaf, 1991.
- Collins, Alan. *Contemporary Security Studies.* New York: Oxford University Press, 2007.
- Comelli, Michele, Ettore Greco and Nathalie Tocci. *Working Paper: From Boundary to Borderland: Transforming the Meaning of Borders in Europe through the European Neighbourhood Policy.* draft version. EU-CONSENT, July 31, 2006. Accessed February 12, 2013. http://www.eu-consent.net/content.asp?contentid=1095.
- Del Sarto, Raffaella, A. and Tobias Schumacher. "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" *European Foreign Affairs Review* 10 (2005): 17 – 38.
- Delcour, Laure. "The European Union, a security provider in the Eastern neighbourhood?" *European Security* 19:4 (December 2010): 535-549.
- Dent, Christopher, M. "Economic Security". In *Contemporary Security Studies*, edited by Alan Collins, 204-221. New York: Oxford University Press, 2007.
- Dent, Christopher, M. "The state and transnational capital in adaptive partnership Singapore, Korea and Taiwan". In *Handbook of Reaserch on Asian Business,* edited by Henry Wai - Chung Yeung, 223-249. Cheltenham: Edward Elgar, 2007.
- Dodini, Michaela and Marco Fantini. "The EU Neighbourhood Policy: Implications for economic growth and stability." *Journal of Common Market Studies* 44:3 (2006): 507-532.
- Escribano, Gonzalo. "Europeanisation without Europe? The Mediterranean and the Neighbourhood Policy". European University Institute. Robert Schuman Centre for Advanced Studies. Mediterranean Programme Series, 2006. Accessed January 12, 2013 http://www.eui.eu/RSCAS/WP-Texts/06_19.pdf.
- Gutu, Oxana. "Moldova's Convergence with the acquis. A Pro-Growth and Pro-Integration Strategy." *CEPS Working Document* 238 (March 2006): 1-45.
- Hager, Wolfgang. "Defining Economic Security." In *National economic security: perceptions, threats and policies*, edited by Frans Alphons Maria Alting Von Geusau and Gunnar Adler-Karlsson, 19-34. Tilburg: Transaction Publishers, 1982.
- Hunt, Diana. "Development Economics, The Washington Consensus and the Euro-Mediterranean

[66] Petr Kratochvil, "Introduction," in *The European Union and Its Neighbourhood: Policies, Problems and Priorities*, ed. Petr Kratochvil (Prague: Institute of International Relations, 2006), 7.

Partnership Initiative." In *Perspectives on Development: The Euro-Mediterranean Partnership*, edirted by George Joffe, 16-39. London: Frank Cass, 1999.

- Kratochvil, Petr. "Introduction". In *The European Union and Its Neighbourhood: Policies, Problems and Priorities*, edited by Petr Kratochvil, 7-11. Prague: Institute of International Relations, 2006.
- Lippert, Barbara. "The Discussion on EU Neighborhood Policy – Concepts, Reform Proposals and National Positions." *International Policy Analysis, edited by* Friedrich Ebert Stiftung. July 2007. Accessed February 28, 2013. http://library.fes.de/pdf-files/id/04737.pdf.
- Longhurts, Kerry. "Injecting More Differentiation in European Neighbourhood Policy: What Consequences for Ukraine?" *Institut francais des relations internationales.* July 2008. Accessed March 1, 2013. www.ifri.org.
- Marchetti, Andreas. "Consolidation in Times of Crisis: The European Neighbourhood Policy as Chance for Neighbours?" *European Political Economy Review* 7 (Summer 2007): 9 – 23.
- Missiroli, Antonio. "The EU and its Changing Neighbourhood: Stabilization, Integration and Partnership." In *European Union Foreign and Security Policy: Towards a Neighbourhood Strategy*, edited by Roland Dannreuther, 12-26. London: Routledge, 2004.
- Moschella, Manuella. "EU's Regional Approach Towards Its Neighbours: the ENP vis a vis the EMP." Jean Monnet Centre "Euro-Med". University of Catania, 2004. Accessed February 22, 2013. http://www.fscpo.unict.it/EuroMed/moschella.pdf.
- Neu, Carl, R. and Charles Wolf Jr. *The Economic Dimensions of National Security.* Santa Monica: RAND, 1994.
- Orloff, Michael A. *Inventive Thinking Through TRIZ: A Practical Guide.* Second Edition. London: Springer, 2006.
- Schwab, Klaus. *Global Competitiveness Report 2012-2013*. Accessed March 4, 2013. http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf.
- Smith, Michael. "The European Union and a changing Europe: Establishing the Boundaries of Order". *Journal of Common Market Studies* 34:1 (1996): 5-28.
- Svetlicic, Marjan and Matija Rojec. "The global economy, security, and small states aspiring for NATO membership." In *Small states in the Post-Cold war world: Slovenia and NATO enlargement*, edited by Sabic Zlatko and Charles Bukowski, 129-145. London: Praeger, 2002.
- Wignaraja, Ganesh, Marlon Lezama and David Joiner. *Small states in transition. From vulnerability to competitiveness.* The Commonwealth Secretariat. London: Marlborough House, 2004.

Reports and other web pages:

- Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, "Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Brussels, 11.3.2003, COM(2003) 104 final.
- Commission of the European Communities. *European Neighbourhood Strategy Paper*. *Communication from the Commision,* Brussels, 12. 5. 2004. COM(2004) 373 final.
- Europa. *Summaries of EU legislation*. "Partnership and Cooperation Agreements (PCAs): Russia, Eastern Europe, the Southern Caucasus and Central Asia". Accessed February 4, 2013..
  - http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm.
- EUROPEAID. "The ENPI Cross - Border Cooperation Strategy Paper 2007-2013 and the Indicative Program 2007-2010." November 2006. Accessed March 10, 2013 http://ec.europa.eu/europeaid/where/neighbourhood/regional-cooperation/enpi-cross-border/index_en.htm .
- European Commission. "Delivering on a new European Neighbourhood Policy" *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee anmd the Committee of the Regions.* Brussels, 15. 5. 2012. JOIN(2012) 14 final.
- European Commission. Communication from the Commision to the European Parliament and the Council. *Tacking stock of European Neighbourhood Policy*. Brussels, 12. 5. 2010. COM (2010) 207.
- European Commission. JOINT STAFF WORKING DOCUMENT *Implementation of the European Neighbourhood Policy in the Republic of Moldova. Progress in 2011 and recommendations for action*. Brussels, 15. 5. 2012. SWD(2012) 118 final.
- European Commission. JOINT STAFF WORKING DOCUMENT. *Implementation of the European*

Neighbourhood Policy in 2011. Statistical Annex. Delivering on a new European Neighbourhood Policy. Brussels, 15.5. 2012. SWD (2012) 122 final.

- EUROSTAT. Accessed March 2, 2013 http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=teiis540.
- European Union. *European Union External Action. The Barcelona Process.* Accessed February 10, 2013. http://www.eeas.europa.eu/euromed/barcelona_en.htm.
- Foreign Policy and Fund for Peace. *Failed States Index 2012.* Accessed March 4, 2013 http://www.foreignpolicy.com/failed_states_index_2012_interactive.
- Freedom House. *Freedom in the World 2012.* 2012. Accessed March 2, 2013 http://www.freedomhouse.org/report-types/freedom-world.
- *Open Source TRIZ.* Accessed January 12, 2013. http://www.opensourcetriz.com/main/page_collaborators.html.
- Transparency, International. *Corruption Perception Index 2012.* Accessed March 4, 2013. http://www.transparency.org/cpi2012/results.
- UNDP. *Human Development Index* 2011. Accessed March 4, 2013. http://hdr.undp.org/en/statistics/.

TOURISM AND LOCAL DEVELOPMENT IN VAMA VECHE AND 2 MAI

MIROSLAV TAŞCU-STAVRE[*]

Abstract
The touristic attractiveness of the southern Black Sea seaside has determined a chaotic urban development of the area in the last 20 years. Nonetheless, the development of the two sites, located less than 5 kilometers away one from the other, recorded significant differences. In this analysis, using the Bloomington School system of analysis, developed by Elinor Ostrom, one tries to explain the mechanisms that have determined the adoption of different development strategies in the settlements. The key for understanding the strategies chosen by the two communities will be the history of the specific institutional restraints, which will further determine the manner of referring to the seasonal tourists in the area.

Key words: *local development, neo-institutionalism, transition, tourism, urbanism.*

Introduction

The objective of this paper is understanding the way in which the changes that have occurred after 1989 determined the development of the southern Romanian seaside, in a relatively short period of time, in an unique manner. The dramatic change recorded especially in Vama Veche, as one will further see, can be accounted for by the different institutional structures[1] in the two examined places and the influence the institutional structures had when it comes to further development, especially in the field of building areas.

In the given context, one of the goals of this analysis will be to evaluate the conditions of the institutional changes in 2 Mai and Vama Veche and the impact these particular conditions have on the ways of changing.

The methodological option is centered on the analysis framework developed by "the Bloomington School", the creation of Elinor Ostrom (1985, 1986, 1990[2007]) and we consider it offers an useful instrument for understanding and solving *collective action* problems. Based upon the Ostrom-model, the paper wishes to highlight the methods chosen by the two communities (2 Mai and Vama Veche) in the case of self-organizing and self-governing, in the context of common resource dependency, so later on will be able to explain the different state of development in the two coastal villages (Taşcu-Stavre, 2011 : p 10).

The prime merit of the initiative is considered to be that it has reached the profound symptomatology of the *Romanian transition,* with its acute dilemmas. In this context intuition was that Vama Veche provides fertile ground for the elucidation of post-communist transition's devious trail through the chance to have a relevant point of comparison at hand: 2 Mai, having, by 1990, a similar profile in the data's essential.

Main Content

As is shown, different *history* of reporting to *tourists* influenced by specific institutional context, will be key to understanding the different developmental trajectories in similar environmental conditions (both communities are beachfront). Basically, our analysis will follow chronologically how certain institutional features determine specific strategies of actors, and how institutional change occurs. At the end of this work we hope to cover a period of time sufficient to elucidate the mechanisms that develop in the southern part of the Romanian seaside. Analysis is not

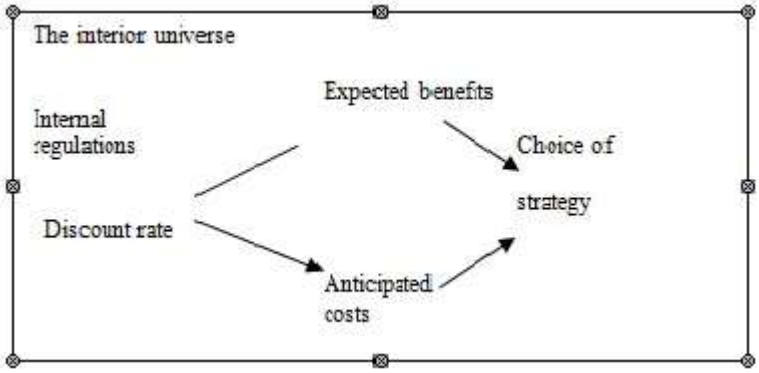
[*] Lecturer, PhD, Faculty of Letters, Cultural Studies, University of Bucharest (m_tascu@yahoo.com).

[1] In the present demarche, following the outline traced by Ostrom (2007) and North (2003), I will consider the institutions as the formal and informal rules that the actors follow, the rules that restrain and regulate people's behavior.

an exhaustive one but is rather a summary of the findings of an approach that has spanned almost eight years of field research and concluded with a Phd thesis entitled *Approaches institutional transition in Romania. An analysis of institutional change in Vama Veche and 2 Mai*[2].

Methodological options for rational choice- type neo-institutional approaches takes into account the following considerations: it offers a broader conception of rational action, trying to explain the change in objective and subjective factors and rejects determined character of the society's becoming.

The exterior universe



Interior universe of individual choice (adapted from Ostrom, 2007: 51)

This diagram will help us understand why the strategies chosen by individuals belonging to the two communities are so different. Evaluating various parameters in the two communities, we can understand the influence of these factors for the election of different strategies that in turn will generate different future developments.

A key aspect for increasing overall benefits is the problem of organization. Moving from a situation in which the actors act independently, to one adopting common strategies is not easy to achieve. Choosing an effective method to solve this situation is not so easy to achieve. It remains to highlight what the chosen solutions are in the two communities together with the changes from 1989. We find that the two communities resort to a series of solutions (from privatization up to intervention of a third party state or other actor) and we can hardly say that the one of these solutions is better than another. Regardless, however, the solution chosen, privatization and free market or government intervention, we find that both in institutional terms concerns the establishment and use of institutions. This implies, according to Ostrom (2007: 55), credible commitments and monitoring. In our approach we will follow what institutions will change and what institutions will be preserved along with the changes from 1989. Analyzing this process I can draw some conclusions about the meaning of changes in Romania and to see how effective these changes prove to be.

Not always the solutions found are more effective in the use of common goods. Whether excessive use can lead to depletion of that resource or that only certain people benefit from a resource and manage to exclude others from accessing it, both are two examples of inefficiency. My study will examine, in a comparative approach, the solutions adopted and will try to highlight the differences between the two communities, following that the results offer a support for the area's future development policies. We are interested in how the two communities have solved the problem of the collective action and what types of institutions have offered the best solution to the dilemma of cooperation.

[2] The PhD thesis was presented at SNSPA (NSPSPA) in 2011 and is being published.

Up Until 1989

Following how the institutions will change after 1989 in the 2 villages by the sea, it is important to make a quick list of rules and norms existent in the two communities up until 1989. In our opinion, two types of restraints will influence the actor's strategies until 1898. It's about, on one hand, *constraints and natural particularities* regarding the access to the area, and on the other hand, it's about a series of *administrative constraints* that, as we are about to demonstrate, will lead to the adoption of different strategies regarding the reference to tourists in the case of the two communities (Taşcu-Stavre, 2011: p 134-139). For a detailed description of the history of tourism in the area I recommend the works of Maria Tirca (2004) and Simina Guga (2006) that have taken a series of interviews in the two communities.

First of all thanks to the *constraints and the features of the environment* we can appreciate that the *access in the area* is a *difficult* one. Situated at the southern extremity of the Romanian coast, at the border with Bulgaria, the access to 2 Mai and Vama Veche is difficult both in terms of *infrastructure* and *logistics*. In the absence of proper means of travel, the road to 2 Mai or Vama Veche constitutes a true adventure, requiring changing between different modes of transportation. The access to Mangalia can be achieved by train or by car. To reach the destination, the connection between Mangalia and 2 Mai was provided by buses with a relatively reduced frequency. In addition, it traversed a mobile bridge in the naval port of Mangalia, which could take a long while. In addition, in the '80s the access through the port was restricted and the access to the 2 villages was done by a road approximately 10 km long, which detoured around Limanu Lake, through Limanu village. The same treatment was applied to private cars which were going to 2 Mai or Vama Veche. The bridge that crosses Limanu lake today, and shortens the road by a few kilometers was built in the second half of the 1980s, being basically a simplification of means of transport in the area[4].

On second hand, the *management constraints*, as we are about to demonstrate, will lead to the adoption of different strategies regarding bringing tourists into the two villages. Thus, in terms of *access* and *temporary residence* in the two villages: we can assess that access was virtually restrained to Vama Veche. Invoking the fact that the village is a border community, access and temporary residence in Vama Veche were restricted. There was a law[5] stating that non-residents of the border villages must announce to the local authorities the purpose of stay[6] and to the location where they can be found during their stay. Basically, with few exceptions, Vama Veche was inaccessible to non-residents. The law, although not restricting the locals the right to host non-local resident, by the requirement to announce the presence of strangers in their households will make impossible the development of tourist-host relationships similar to those of 2 Mai.

In conclusion, the options available residents of the two communities up until 1989 focused on the following activities:

- agriculture
- tourism

We consider that the two options are not exclusive, but alternatives that will complement traditional preoccupations specific to activities within rural areas and that aim to improve quality of life. Agriculture remains the dominant occupation, but with time, tourism will become *a source of additional income* obtained *seasonally*, especially in 2 Mai. On the other hand, in Vama Veche main occupation will remain *agriculture*.

---

[4] From the discussions with local authorities, the link achieved by constructing a bridge over Lake Limanu aimed the route that was to link Mangalia to Vama Veche and had no easier access to the south coast in the area.

[5] Decree 678 of 10.07.1969 concerning the regime of security of the state border Socialist Republic of Romania.

[6] Generally were allowed visits from relatives or justified for job responsibilities (for work).

As we can see a number of differences between the two localities take form as follows:

• In 2 Mai – allowed access and residence → will lead to a relatively constant flow of tourists in the area → the beach will represent an attraction point and will be used for purposes of tourism.

• In Vama Veche – limited access and restricted residence → will lead to a poor and limited flow of tourists.

The Period between 1990 and 1996

With the summer of 1990, access to the two villages will no longer be restricted. This will open a number of opportunities for Vama Veche, which was practically deprived of receiving flows of tourists. If up until 1989, tourists had access only to 2 Mai, after 1990 they will gradually discover Vama Veche. The impact made by the changes in 1989 was captured and research by Miruna Tirca (2004) at the community level of 2 Mai. She makes the following observations on the changing flow of tourists from the two localities as follows:

"There existed the period of the first years after the revolution, gained by considerable popularity marked the place (2 Mai), which led to the inevitable attraction of new categories of tourists and visitors. There followed a period, up to the second half of 90s, when things seemed to follow the starting direction tourists continue to flow and expand the village buildings. But then the crowds followed the exodus into Vama Veche, starting with them the second half of the 90s, then an unprecedented development of this place. In 2 Mai, things have shifted, probably as a result of said exodus... " (Tîrcă, 2004: 89).

Regarding the life strategies, starting with the first years after 1990 can see a dependency of the 2Mai locals on the resources from tourism. During this period there is the "discovery" and "conquest" by tourists of Vama Veche with tents and continuing a tradition of accommodation hosted in 2 Mai. Strategies to attract tourists from 2 Mai, respectively the lack of a strategy from the locals in Vama Veche will lead to the following typology (Mihăilescu, 2005):

• "*backyard tourism*" - in 2 Mai - based on the hosts and the host's backyard where the yard plays an important role of social space between tourists or tourists and hosts.

• "*beach tourism*" - in Vama Veche - especially camping, based on self-management of resources needed for spending the holiday.

During 1990-1996, despite the fundamental institutional changes at the constitutional level, it will not substantially affect the life strategies of local people in the two villages from the waterfront. However, we can consider that, at least with regards to 2 Mai, *tourism* becomes *an important source of income* (even if seasonal), compared to resources gained from agriculture. In Vama Veche, *agriculture* will remain main trade and revenues from agriculture as a joint venture. Nevertheless, due to migration of a large number of tourists towards Vama Veche, tourism will be *an additional source of income* for a minority of residents. In the coming period however, significant changes occur in the context of increasing numbers of tourists in the area. (Taşcu-Stavre, 2011: p 167-170).

Planning the differences due to institutional changes, especially in terms of *access* and *residence*, we find that hosts are a preference for accommodations in 2 Mai and options for camping on the beach in Vama Veche (self-management – self-organization):

• In 2 Mai - access and residence is allowed → will determine an increased flow of tourists in the area → increase dependence on tourism during the summer season.

• In Vama Veche - access and residence is allowed → will lead to the discovery of the area by tourists → tourism takes place independent of local infrastructure and local people ("beach tourism").

The Period between 1996 and 2003

The period between 1996 and 2003 is not chosen randomly, but represents period of radical changes starting with the exponential growth in the number of tourists, chaotic urban development,

multiplication local stakeholders and the transition to a phase of conflict between them, especially in Vama Veche. This period can be considered to be one of spontaneous development. Through a *spontaneous development*, we refer primarily to changes in the structure and typology of housing and spatial growth of settlements, in the absence of urban regulations and constraints from local authorities (Taşcu-Stavre, 2011: p 170).

Amid the increased number of tourists both in 2 Mai and in Vama Veche, problems of housing and adequate tourist infrastructure development becomes a priority. The way to solve this differs in the two localities. In 2 Mai development occurs in a rather *incremental (through continuous adjustment of supply and demand)*, i.e the intensive use of existing space within the boundaries of the village followed by an extensive moderate development. In Vama Veche, however, there is a rather *chaotic development (extensive / intensive due to a uncovered request)* by extending the village borders and an intensive use of land plots for construction. The extension is done in successive waves which increase the surface area of the village a couple of times (see Annex I. 1). In 2 Mai, with the exception of the area from the southern end, towards Vama Veche and the areas close to the beach, the development is done mainly by the use of space in their yards, be it renovation and / or addition of one or more rooms, whether about building a new wing. In Vama Veche the situation is totally different: buildings are erected more and more, the most popular areas being near the beach. An important role is played by local authorities through a series of administrative measures, expanding Vama Veche village in successive waves, currently between 2 Mai and Vama Veche, the seafront being completely built-up area (see Annex I.1). Instead of measures and planning which takes into account local specifics which will pursue development in the interests of the local community, we will reach a emergence of urban infrastructure unspecific to the area (buildings with function, aspect and height different then that of the local one). Starting with '95-'96, it became increasingly clear that the accommodation infrastructure becomes unresponsive to the increasing flow of tourists in the area. If in 2 Mai both the local infrastructure and local practices have made the impact of changes to be a manageable one, in Vama Veche new wave of tourists coming in a relatively short period will cause an unplanned reaction and a chaotic development of the urban infrastructure. The increase in housing throughout the community can be seen in the statistics of Limanu

Years	1992	1996	2003
Housing from private funds	1180	1256	1620

(See Taşcu-Stavre, 2011 : p 174).

Thus, if between 1992 and 1996 the number of dwellings increased by 76 units, between 1997 and 2003 the increase is by 364 units. To a number of 1620 houses this represents an increase of 29%. Considering that housing increase in Hagieni is almost nil and that Limanu's growth was moderate, we can say that in 2 Mai and Vama Veche there have been the largest growth rates. The most spectacular impact will be recorded in Vama Veche, where the number of households will be in the 90s around 50 and increases about three times, recorded in 2001 a total of 155 dwellings. In 2 Mai, even though the increase was one just as spectacular as the large number of buildings emerged, the impact remains a lesser one by the fact that this village already had the highest number of houses before (Taşcu-Stavre, 2011: p 174-175).

The way to achieve this growth of housing was done as follows:

- *extensive* - by extending the buildable areas (increasing city limits sequentially);
- *intensive* - by intensive use of land (the advent of multi-level construction and occupancy of buildings obf larger land).

Development of the two villages was made possible by the ease with which building permits were issued by local authorities and the lack of regulation appropriate for urban development needs. Basically, the two communities, but especially Vama Veche, "grew" horizontally (expanding built-up) and vertical (high density construction and high level). Horizontal growth was possible because

of the council's decisions to successively expand the limits of the two villages, while high density vertical increase of buildings has been possible due to individual initiatives to increase accommodation. In the absence of regulations to determine what and how to build (for almost 10 years), we are witnessing a radical change in the appearance of the two villages.

If some communities which are having a moderate development a number of issues concerning the use of outdated urban regulations appear, in the two villages, 2 Mai and Vama Veche, this situation has determined a chaotic development of the area, especially in Vama Veche. Urban regulations that operated until 1999 (the date on which the City Council will approve a new General Urban Plan) dates from the 80s[7]. Thus, instead of a development that would start with a General Urban Plan (GUP) and including a number of regulations that take into account local specifics, leading to sustainable development of the village, we had a situation in which the process that made possible the development of housing typically included the following steps:

- granting of land respectively restoration of property rights,
- remove land plots from agricultural purposes and passing them for use in expanding the city limits;
- issuing of construction permits based on existing regulations
- eventually developing a G.U.P. to legitimize changes and local urban organization.

Even if the changes produced in a relatively short period of time will affect both seaside towns, in Vama Veche the impact will be more pronounced. Here the number of new buildings will exceed that of the existing buildings, the percentage of buildings that do not comply with local specifics being higher than in 2 Mai, and the number of residents who have bought and built in the area by 2003 will exceed the number of remaining locals. Gradually, in Vama Veche accommodation offers will exceed demand and will lead to a conflict due to competition for attracting a larger number of tourists. The intensive development of the villages can be seen in the Limanu village's statistics showing how built surfaces look in the village.

Year	1992	1996	2003
Habitable area - mp	47.000	50.474	77.961

(See Taşcu-Stavre, 2011 : p 185).

We thus find that, during 1996 - 2003, built area increases by 65% for the whole village. But if we take into account that Hagieni and Limanu built area remains at a moderate increase, we estimate that 2 Mai and Vama Veche will focus all of this new added area. Considering that, as shown above a number of newly bult houses from 1996-2003 represents 29% of the total, we have basically a situation where about 30% of the new buildings occupy 65% of the total built up area in 2003.

Summarizing, we find some elements that led to all this. First, the regulations from the past, particularly before 1990, did not allow the local community to benefit from tourism in the area similar to the locals from 2 Mai. As we have seen, even after the 90s, tourism in the area insignificantly influenced the community here. Second, many locals choose to sell land acquired or, moreover, found that restoration of property rights and land reform will benefit a lot of nonresidents (some from other villages in the commune, some not). Third, the expansion of the village will be in successive waves, resulting in increasing the surface area several times. In Appendix I.1 can can see the old hearth of the village as well as its size compared to the current situation. To all this is added the way the local authority has responded. The absence of a local development plan, combined with old and outdated urban regulations will lead to an accommodation infrastructure and services that do not comply with local specifics and that destroy the image of the village. The City Council's position, through taken administrative measures, in particular by extending the buildable areas, and by

[7] It is about the *systematic outline of Limanu pr.295/1980* document prepared by IJP Constanţa.

releasing a large number of building permits, will favor this process of sub-urbanization. The fact that the vision of local development does not seem take into account the locals interests also results from following interview: *"The idea is that we should go ahead and organize Vama Veche as well as possible. Tourism goes on and life goes on. And those that do not like this place, I suggest you go to an island or somewhere else. "*(the mayor apud. Guga, 2006: 79).

Synthesizing the institutional context in a comparative way, we find the following:

▪ in 2 Mai – the increasing flow of tourists ("backyard tourism") → liberalization of urban regulations and the possibility of private initiative → modernization of households will consider tourists demands → new buildings appear not complying with local specifics → determine extra revenue from tourism especially for locals

▪ in Vama Veche – the increasing flow of tourists → liberalization of urban regulations and the possibility of private initiative → massive investments among residents in land acquisition and new constructions → reduced earnings from tourism among the locals → new constructions appear not meeting local specifics and destructive the village image → determine earnings from tourism for nonresidents

The Period after 2003

Although a necessary step, the G.U.P. elaboration of the Limanu village started in 1999, which followed to evaluate the stage of development of the 4 localities and come up with propositions for urban organization with the goal of resolving existing dysfunctions; this in turn will constitute the source of new tensions.

On one hand, the proposed plan implemented in 1999 is inconsistent with the specific architectural aspects and local maximum height levels of buildings[8], density or existent building topology. This plan not only legitimized the chaotic development up until then, but opened the possibility of continuing this situation in the future. The problem of the maximum height and density of buildings is not only an aesthetic issue, but raises more serious functional problems (overcrowding and "sub-urbanization").In the absence of municipal infrastructure (roads, water, sewer, etc.), especially in Vama Veche, construction continued at the same rate would affect both tourism and the environment. It's mainly about the ability of the beach to receive far too many tourists[9], but also the effects that the new buildings have on the environment in general and the natural reserve in the immediate vicinity in particular, given the lack of sewage (Taşcu-Stavre, 2011 : p 194).

On the other hand, the new G.U.P. not until the summer of 2003 obtained all necessary approvals to enter in effect[10]. Under these circumstances, the rules of local urban development dating from 1980, are included in the *Systematic Outline of Limanu Village pr.295/1980* prepared by IJP Constanta. Not only did 23-year-old regulations could not be a basis for local development, but they clashed with the recent legal provisions Law. 350 of July 6, 2001 concerning zoning and urban planning, which in art. 65 states that: "In the absence of approved county land management plans and general urban plans for territories, one cannot invest in construction, engineering works and utilities, as well as other urban investment.". Basically, the application of these rules condition local development of rational land use management measures contained in the PUG. Unfortunately, not only in Limanu, until such legislation of urban development, there were no coordination of various policies in an integrated framework. This process, in which they distributed land, they built houses after which the utilities issue is resolved , finally led to a series of failures as we detailed in the

[8] For example, the ability to build in the area of the seafront on 5-6 levels.

[9] Tourism Ministerial Order no. 485 on 15.05.2009 on the use of beaches for tourism purposes states that it is necessary to ensure a 5 mp of beach per person.

[10] Not incidentally was missing even the environmental permit.

previous chapter. This is the reason why in September 2003 "Mişcarea Salvaţi Vama Veche"[11] notifies the Prime Minister's Control Department for violation of legislation in the field of urbanism. Following a review of the State Construction Inspectorate in November the same year, we obtain the annulment of using PUG Limanu and suspension of the right to issue building permits to develop a new plan. In April 2004 will be held and will be financed by the Ministry of Public Works and Housing an auction to develop a new G.U.P. plan that would take into account the specifics of the four localities (Limanu Hagieni, 2 Mai and Vama Veche) and which for the first time in Romania, contains a sociological study and recommendations on the sustainable development of area[12]. Although the urban plan was developed in 2005, is not in use even today, as it covered all administrative steps necessary for it's entry into effect[13]. Under these conditions, the urban development of the village continues, without taking into account the legal regulations, in the area being constructed over the last years just as much as until now. Thus, both on the number of emerging households and built area, there are recorded significant increases according to statistics

Year	1992	1996	2003	2007
Number of houses from private funds	1180	1256	1620	1826

Year	1992	1996	2003	2007
Habitable area – sq.m	47.000	50.474	77.961	97.223

(See Taşcu-Stavre, 2011 : p 206).

Basically, between 2003 - 2007, when issuing building licenses was prohibited, there are still about 200 new homes, built areas (after new construction or enlargement of existing ones) increasing by approximately 20,000 square meters. Compared to 1992, the village's built living space is doubled, rising from 47,000 to 97,000 square meters. The spectacular development of built space is recorded in Vama Veche, where we recorded the largest number of new construction.

Synthesizing the institutional context in a comparative way, we find the following:

- in 2 Mai - stabilization the flow of tourists ("backyard tourism") → regulations governing administration of the beach and the natural reserve → ban issuance of building permits → development of a new G.U.P. → moderate development of new buildings → growth of the locals dependency of the tourist season;
- In Vama Veche - increasing flow of tourists ("bedroom tourism") → intervention of "Salvaţi Vama Veche" → new regulations concerning the management the nature reserve → ban on issuing construction permits → development of a new G.U.P. → explosive development of new buildings → increasing the number of locals offering rooms for rent and therefore the dependency on the tourist season (Taşcu-Stavre, 2011 : p 210).

Conclusions

As I was mentioning in the introductory chapter, the key to understanding the different ways of growth is constituted by the institutional context specific to the two localities. This way, the differences recorded in the context of certain formal and informal rules have had a decisive influence in gaining benefits from tourism in the two communities. Practically, even before 1989, the life

[11] The establishment of the Protected Areas Association for Bio-Cultural Conservation will be in November 2003.

[12] More on www.salvativamaveche.ro.

[13] It's about procedures covering of the approval of in City Council to the approval from many ministries and Constanta County Council.

strategies of the locals for the two coastal village (having similar conditions) were different. If in 2 Mai more and more locals begin or continue a tradition of renting out rooms, during the holiday season, in Vama Veche, with the exception of the camp organized by the University of Cluj, this type of practices would be lacking.

From here on a whole chain will determine/ limit the strategies for those from Vama Veche after 1990, because not being ready to offer conditions similar to those from 2 Mai, will miss the opportunity to obtain additional income from tourism. In Vama Veche a "beach tourism" is evolving (see Mihailescu, 2005) based on self-management of holiday resources. The beach becomes the center around which the village grows. But, in time, based on the growing numbers of tourists, come the first entrepreneurs. And this time we see a difference from 2 Mai, the local community missing the start in the race for "foreigners". The explanation of the fact that the locals of Vama Veche don't manage to benefit from toursist has at it's basis the following mechanism: the constraints that have existed since 1989 have prevented tourists from coming, in other words, the demand for accommodation practically being nil has determined the offer for accommodation to go towards zero as well (exception being of course the camp organized by Cluj).

In these conditions, even if after 1990 a demand for accommodation appears, it will not be satisfied, the built land, even the facilities being inferior to those from 2 Mai. This thing will influence the topography of the public that will choose to come to Vama Veche, acting as a filter. Thus, tourists from the early 90 choose to "occupy" the beach area with tents. Just as North (2003), we can confirm that history matters, in the sense that the constraints from Vama Veche (existent up until 1989) will block certain individual actions, that in turn will hinder the appearance of relations similar to those in 2 Mai. In the end, the local's strategies, as well as the topography of the tourism practiced in the two communities will differ as I have shown above.

A conclusion to these steps would be that current work highlights the opportunity of utilizing a series of elements in the study of transition. Maybe the most important contribution comes from the methodological approach option of a rational type of neo-institutional choice, which is being verified by the following arguments.

This approach offers a systematical method to study the effects of institutions over behaviors. As I have shown, the model named situation of individual choice (Ostrom: 1990) offers a realistic vision of individual behavior in choosing a strategy. The analysis at this (operational) level presumes the understanding of the way the process of choosing a strategy takes place by an individual, starting from the premiss that the individual choices depend on the structure of the given incentives in the given context. To analyze the transition processes, the theoretical neo-institutional view offers in this way advantages in understanding how a series of institutions influence individual behaviors and strategies, as well as in equal measure helps in understanding how the changes in the institutions take place.

The presupposition to this approach to development, be it economic or political, are specific to particular institutional context, which has the property to vary according to the historical time and the geographical space (national). As a result, *there cannot be a universal development model, but only alternative specific institutional model.*

References

Books and articles:

- Guga, Simina. 2006. "*Impactul turismului asupra populaţiei gazda. Studiu la nivelul comunităţii locale din satul Vama Veche"*, BA diss., University of Bucharest.
- Mihăilescu, Vintilă. 2005. "*Limanu. Spaţii sociale şi dezvoltare locală"*, Societatea reală, nr.3/2005.
- North, Douglass C. 2003. *Instituţii, schimbare instituţională şi performanţă economică*, Chişinău: Ştiinţa:
- Ostrom Elinor. 1985, *Formulating the elements of institutional Analysis*, paper presented at a conference on institutional analysis and development, DC, May, 21-22.

- Ostrom E. (1986), *An Agenda For the Study of Institution*, Public Choice 48, 3-25
- Ostrom, Elinor. 2007. *Guvernarea bunurilor comune*, Iasi: Polirom.
- Tascu- Stavre, Miroslav. 2011. "*Abordări instituţionale ale tranziţiei din România O analiză a schimbării instituţionale din Vama Veche şi 2 Mai"*. Phd diss., NSPSPA
- Tîrcă, Miruna Maria .2004. *Poveşti de la 2 Mai.*

Studies and reports:

- Analiza potenţialului şi a disfuncţiilor în mediul natural şi antropic, elaborat de SC Planwerk SRL – Cluj-Napoca.
- Planul Urbanistic General al Comunei Limanu, elaborat de SC Planwerk SRL – Cluj-Napoca.

Internet sources:

- www.planwerk.org
- www.salvativamaveche.ro
- www.stufstock.com

Legislative sources:

- Decretul 678 din 7 octombrie 1969 privind regimul de pază al frontierei de stat a Republicii Socialiste România
- Schiţa de sistematizare a comunei Limanu pr.295/1980
- Legea nr. 350 din 6 iulie 2001 privind amenajarea teritoriului şi urbanismul

ANNEX I.1

THE ROLE OF EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT IN PROMOTING ENVIRONMENTALLY SOUND AND SUSTAINABLE DEVELOPMENT

CONSTANTIN BRĂGARU[*]

Abstract
One of the most important development banks which finances private initiatives in the Central and Eastern Europe countries is the European Bank for Reconstruction and Development (EBRD). EBRD as international financial institution plays a very important role in the development of many sectors such as agribusiness, energy efficiency, financial institutions, manufacturing, municipal and environmental infrastructure, natural resources, power and energy, property and tourism, telecommunications, information technology and media, transport.
Its objectives aim to promote transition to market economies by investing mainly in the private sector, to mobilize significant foreign direct investment, to support privatization, restructuring and better municipal services to improve people's lives and to encourage environmentally sound and sustainable development.
The present scientific article focuses on the last objective respectively ***the bank commitment to promote environmentally sound and sustainable development*** *and shortly presents EBRD environmental policy because EBRD, unlike other development banks, has strong and imperative regulations regarding this issue. This is why all the EBRD potential beneficiaries must prove that their projects are environmentally sound.*

Keywords*: business management, environment, policy, requirements, sustainable development*

ERBD Environmental Policy

The purpose of EBRD is to promote "environmentally sound and sustainable development" in the full range of its investment and technical cooperation activities pursuant to its constituent treaty, the Agreement Establishing the EBRD[1]. The Bank believes that sustainable development is a fundamental aspect of sound business management.

The EBRD commitment envisages that the projects it finances:

- are socially and environmentally sustainable;
- respect the rights of affected workers and communities and
- are designed and operated in compliance with applicable regulatory requirements and good international practice.

In order to translate this objective into successful practical outcomes, the Bank has adopted a comprehensive set of specific Performance Requirements ("PRs") that clients are expected to meet, covering key areas of environmental and social impacts and issues. The Bank is committed to promoting European Union (EU) environmental standards as well as the European Principles for the Environment, to which it is a signatory, which is reflected in the PRs.

The Bank expects clients to assess and manage the environmental and social issues associated with their projects so that projects meet the PRs. The Bank's role is:

- to review the clients' assessment;
- to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimise, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs;
- to help identify opportunities for additional environmental or social benefits; and

[*] Associate Professor, PhD, "Nicolae Titulescu" University of Bucharest (costin_bragaru@yahoo.com).

[1] Article 2.1 of the Agreement Establishing EBRD, European Bank for Reconstruction and Development, *Basic Documents of the European Bank for Reconstruction and Development,* November 2006.

• to monitor the projects' compliance with its environmental and social covenants as long as the Bank maintains a financial interest in the project[2].

As we mentioned before, bank-financed projects are expected to meet good international practice related to sustainable development. To help clients and/or their projects achieve this, the Bank has defined specific PRs for key areas of environmental and social issues and impacts as listed below[3]:

PR 1: Environmental and Social Appraisal and Management
PR 2: Labour and Working Conditions
PR 3: Pollution Prevention and Abatement
PR 4: Community Health, Safety and Security
PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement
PR 6: Biodiversity Conservation and Sustainable Natural Resource Management
PR 7: Indigenous Peoples
PR 8: Cultural Heritage
PR 9: Financial Intermediaries
PR 10: Information Disclosure and Stakeholder Engagement.

Each PR defines, in its objectives, the desired outcomes, followed by specific requirements for clients to help them achieve these outcomes:

PR 1: Environmental and Social Appraisal and Management

The Bank requires clients to develop a systematic approach, tailored to the nature of their activities or projects, to managing environmental and social risks and opportunities that will enable the client to comply with the Bank's Environmental and Social Policy throughout the life of the Bank's involvement with the project.

This Performance Requirement ("PR") 1 outlines the client's responsibilities in the process of appraising, managing and monitoring environmental and social issues associated with projects proposed for EBRD financing. Environmental and social impacts and issues will be appraised in the context of the project's area of influence. This area of influence may include one or more of the following, as appropriate:

• The assets and facilities directly owned or managed by the client that relate to the project activities to be financed (such as production plant, power transmission corridors, pipelines, canals, ports, access roads and construction camps).

• Supporting/enabling activities, assets and facilities owned or under the control of parties contracted for the operation of the clients business or for the completion of the project (such as contractors).

• Associated facilities or businesses that are not funded by the EBRD as part of the project and may be separate legal entities yet whose viability and existence depend exclusively on the project and whose goods and services are essential for the successful operation of the project.

• Facilities, operations, and services owned or managed by the client which are part of the security package committed to the EBRD as collateral.

• Areas and communities potentially impacted by: cumulative impacts from further planned development of the project or other sources of similar impacts in the geographical area, any existing project or condition, and other project-related developments that can realistically be expected at the time due diligence is undertaken.

---

[2] European Bank for Reconstruction and Development, *Environmental and Social Policy*, November 2008.
[3] Idem 2.

- Areas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location. The area of influence does not include potential impacts that would occur without the project or independently of the project.

Environmental and social impacts and issues will be appraised in the context of the project's area of influence. This area of influence may include one or more of the following, as appropriate:

- The assets and facilities directly owned (i) or managed by the client that relate to the project activities to be financed (such as production plant, power transmission corridors, pipelines, canals, ports, access roads and construction camps).
- Supporting/enabling activities, assets (ii) and facilities owned or under the control of parties contracted for the operation of the clients business or for the completion of the project (such as contractors).
- Associated facilities or businesses that are (iii) not funded by the EBRD as part of the project and may be separate legal entities yet whose viability and existence depend exclusively on the project and whose goods and services are essential for the successful operation of the project.
- Facilities, operations, and services owned (iv) or managed by the client which are part of the security package committed to the EBRD as collateral.
- Areas and communities potentially impacted (v) by: cumulative impacts from further planned development of the project or other sources of similar impacts in the geographical area, any existing project or condition, and other project-related developments that can realistically be expected at the time due diligence is undertaken.
- Areas and communities potentially affected (vi) by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location. The area of influence does not include potential impacts that would occur without the project or independently of the project.

PR 2: Labour and Working Conditions

EBRD believes that for any business, the workforce is a valuable asset, and that good human resources management and a sound worker-management relationship based on respect for workers' rights, including freedom of association and right to collective bar gaining, are key ingredients to the sustainability of the enterprise.

EBRD will seek to support, though its operations, the initiatives of other institutions such as the ILO (International Labour Organization) and the EU to promote the decent work agenda. At a minimum, the client's human resources policies, procedures and standards shall be designed to:

- establish and maintain a sound worker-management relationship
- promote the fair treatment, non-discrimination and equal opportunity of workers
- promote compliance with any collective agreements to which the client is a party, national labour and employment laws, and the fundamental principles and key regulatory standards embodied in the ILO conventions that are central to this relationship
- protect and promote the health of workers, especially by promoting safe and healthy working conditions.

The next working conditions and terms of employment must be followed:

General

Projects are required to comply, at a minimum, with: national labour, social security and occupational health and safety laws, and the principles and standards embodied in the ILO[4]

[4] International Labour Organiyations (ILO) conventions 29 and 105 (forced and bonded labour), 87 (freedom of association), 98 (right to collective bargaining), 100 and 111 (discrimination), 138 (minimum age) 182 (worst forms of child labour).

conventions related to: the abolition of child labour, the elimination of forced labour, the elimination of discrimination related to employment the freedom of association and collective bargaining.

Child labour

The client will comply with all relevant national laws provisions related to the employment of minors. In any event, the client will not employ children in a manner that is economically exploitative, or is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development. Young people below the age of 18 years will not be employed in hazardous work and all work of persons under the age of 18 shall be subject to an appropriate risk assessment.

Forced labour

The client will not employ forced labour, which consists of any work or service not voluntarily performed that is exacted from an individual under threat of force or penalty. This covers any kind of involuntary or compulsory labour, such as indentured labour, bonded labour or similar labour-contracting arrangements.

Non-discrimination and equal opportunity

Projects will comply with EU requirements on non-discrimination related to employment. In particular, the client will:

- not make employment decisions on the basis of personal characteristics, such as gender, race, nationality, ethnic origin, religion or belief, disability, age or sexual orientation, unrelated to inherent job requirements;
- base the employment relationship on the principle of equal opportunity and fair treatment, and will not discriminate with respect to all aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and discipline.

Special measures of protection or assistance to remedy past discrimination or promote local employment opportunities or selection for a particular job based on the inherent requirements of the job, which are in accordance with national law, will not be deemed discrimination.

Workers' organisations

The client will not discourage workers from forming or joining workers' organisations of their choosing or from bargaining collectively, and will not discriminate or retaliate against workers who participate, or seek to participate, in such organisations or bargain collectively.

In accordance with national law, the client will engage with such workers' organisations and provide them with information needed for meaningful negotiation in a timely manner. Where national law substantially restricts the establishment or functioning of workers' organisations, the client will enable means for workers to express their grievances and protect their rights regarding working conditions and terms of employment. These means should not be under the influence or control of the client.

Wages, benefits and conditions of work

Wages, benefits and conditions of work offered should, overall, be comparable to those offered by equivalent employers in the relevant region of that country/region and sector concerned. Where the client is a party to a collective bargaining agreement or is otherwise bound by it, such agreement will be respected.

Occupational Health and Safety (OHS)

The client will provide the workers with a safe and healthy work environment, taking into account inherent risks in its particular sector and specific classes of hazards in the client's work areas, including physical, chemical, biological, and radiological hazards.

The client will take steps to prevent accidents, injury, and disease arising from, associated with, or occurring in the course of work by:

- identifying and minimising, so far as reasonably practicable, the causes of potential hazards to workers
- provision of preventive and protective measures, including modification, substitution, or elimination of hazardous conditions or substances
- provision of appropriate equipment to minimise risks, and requiring and enforcing its use
- training of workers, and provision of appropriate incentives for them to use and comply with health and safety procedures and protective equipment
- documentation and reporting of occupational accidents, diseases and incidents
- emergency prevention, preparedness and response arrangements.

Projects will comply with relevant EU OHS requirements and, where such requirements do not exist, relevant IFC OHS guidelines.

Grievance mechanism

The client will provide a grievance mechanism for workers (and their organisations, where they exist) to raise reasonable workplace concerns. The client will inform the workers of the grievance mechanism at the time of hiring, and make it easily accessible to them. The mechanism should involve an appropriate level of management and address concerns promptly, using an understandable and transparent process that provides feedback to those concerned, without any retribution. The mechanism should not impede access to other judicial or administrative remedies that might be available under law or through existing arbitration procedures, or substitute for grievance mechanisms provided through collective agreements.

Non-employee workers

In the case of non-employee workers engaged by the client through contractors or other intermediaries to work on project sites or perform work directly related to the core functions of the project, the client will ascertain that these contractors or intermediaries are reputable and legitimate enterprises.

Supply chain

The adverse impacts associated with supply chains will be considered where low labour cost is a material factor in the competitiveness of the item supplied. In such circumstances, the client will take reasonable steps to inquire about the use of child labour and forced labour 4 in its supply chain in relation to goods and materials which are central to the core functions of the project.

If the client learns that child labour or forced labour in contravention with ILO standards are apparent in the supply chain and the goods or materials contribute materially to the core functions of the EBRD-funded activities, the client will take all reasonable steps to address this in accordance with the following requirements:

- In relation to child labour, the client should only continue to procure such goods or materials having received satisfactory undertakings or evidence that the supplier is committed to implementing a programme in line with good international practice to eliminate such practices within a reasonable time frame. The client will report on progress with the implementation of such programme to the EBRD on a regular basis.

- In relation to forced labour, the client should only continue to procure such goods or materials having received satisfactory undertakings or evidence that the supplier has taken appropriate steps to eliminate the conditions that constitute forced labour.

PR 3: Pollution Prevention and Abatement

The EBRD recognizes that sustainable development is a fundamental aspect of sound business management and that the pursuit of economic growth and a healthy environment are inextricably linked. Pollution prevention and abatement are key ingredients of a sustainable development agenda and EBRD-financed projects must meet good international practice in this regard.

The objectives of this Performance Requirement (PR) are:

- to avoid or, where avoidance is not possible, minimise adverse impacts on human health and the environment by avoiding or minimising pollution directly arising from projects
- to assist clients in identifying project-related opportunities for energy and resource efficiency improvements and waste reduction
- to promote the reduction of project-related greenhouse gas emissions.

Requirements

General

It is acknowledged that EU environmental requirements for the pollution prevention and abatement measures are based on the best available techniques, without prescribing the use of any technique or specific technology, but taking into consideration the technical characteristics of the installation concerned, its geographical location and local environmental conditions so as to ensure a high level of protection for the environment as a whole. ESAP provisions to achieve compliance with these requirements should take into account any nationally agreed time frame to bring about compliance with EU legislation (for example, in EU candidate countries). For projects in countries other than EU members, candidate and potential candidate countries, the time frame set in the ESAP for achieving compliance with EU environmental requirements should be consistent with any bilateral agreements or action plans agreed between the EU and the relevant country, but may take into account the cost of application and the local conditions that prevail.

Where EU environmental requirements do not exist, the client will apply other good international practice such as the World Bank Group Environmental Health and Safety Guidelines. In such cases the Bank will agree the applicable requirements with the client on a project by project basis.

For each project, the Bank will identify and agree with the client the relevant applicable environmental requirements and guidelines.

Pollution prevention, resource conservation and energy efficiency

During the design, construction, operation and decommissioning of the project (the project lifecycle) the client will consider technical characteristics of the installation concerned, its geographical location and local/ambient environmental conditions and apply pollution prevention and control technologies and practices (techniques) that are best suited to avoid or, where avoidance is not feasible, minimise or reduce adverse impacts on human health and the environment while remaining technically and financially feasible and cost-effective.

The client will avoid the release of pollutants or, when avoidance is not feasible, minimise or control their release. This applies to the release of pollutants due to routine, non-routine or accidental circumstances with the potential for local, regional, or transboundary impacts. In addition, the client should examine and incorporate in its operations, energy efficiency measures and measures to conserve water and other resources, consistent with the principles of cleaner production.

Wastes

The client will avoid or minimise the generation of hazardous and non-hazardous waste materials and reduce its harmfulness as far as practicable. Where waste generation cannot be avoided but has been minimised, the client will reuse, recycle or recover waste, or use it as a source of energy; where waste cannot be recovered or reused, the client will treat, destroy, and dispose of it in an environmentally sound manner. If the generated waste is considered hazardous, the client will explore commercially reasonable alternatives for its environmentally sound disposal considering the limitations applicable to its transboundary movement.

When waste disposal is conducted by third parties, the client will use contractors that are reputable and legitimate enterprises licensed by the relevant regulatory agencies.

Safe use and management of hazardous substances and materials

The client will seek to avoid, reduce or eliminate the use of hazardous substances and materials, and consider the use of less hazardous substitutes for such substances and materials so as to protect human health and the environment from their potential harmful impacts. Where avoidance is not feasible, the client will consider the safety of their uses and apply appropriate risk management measures in order to minimise or control the release of such substances/materials into air, water and/or land resulting from their production, transportation, handling, storage, use and disposal relating to project activities. The client will avoid the manufacture, trade, and use of hazardous substances and materials subject to international bans or phase-outs due to their high toxicity to living organisms, environmental persistence, potential for bio-accumulation, or potential for depletion of the ozone layer.

Emergency preparedness and response

The client will be prepared to respond to process upset, accidental, and emergency situations in a manner appropriate to the operational risks and the need to prevent their potential negative consequences.

Industrial production

The client will put in place processes to ensure that all emissions and effluents and wastes are inventoried and monitored on an ongoing basis. Clients required to report project-related releases of pollutants to the European Pollutant Release and Transfer Register (E-PRTR)[5] will also report these data to the EBRD.

Ambient considerations

To address adverse project impacts on existing ambient conditions, the client will:

- consider a number of factors, including the finite assimilative capacity of the environment, existing and future land use, existing ambient conditions, the project's proximity to ecologically sensitive or protected areas, and the potential for cumulative impacts with uncertain and irreversible consequences; and
- promote strategies that avoid or, where avoidance is not feasible, minimise or reduce the release of pollutants, including strategies that contribute to the improvement of ambient conditions when the project has the potential to constitute a significant source of emissions in an already degraded area. These strategies include, but are not limited to, evaluation of project location alternatives and emissions' offsets.

[5] Companies located in the EU and EU candidate countries which release pollutants into air, water and/or land above specified thresholds are required to monitor and report the release quantities to the E-PRTR (The European Pollutant Release and Transfer Register). E-PRTR was adopted by EU Regulation 166/2006 and will succeed the current European Pollutant Emission Register. See www.eper.ec.europa.eu/eper.

Greenhouse gas emissions

The client will promote the reduction of project-related greenhouse gas (GHG) emissions in a manner appropriate to the nature and scale of project operations and impacts.

During the development of projects that are expected to or currently produce significant quantities of GHGs[6], the client will procure and report the data necessary to enable both an assessment of baseline (pre-investment) GHG emissions and an estimate of post-implementation GHG emissions. Guidance on data requirements should be sought from the Bank. The GHG assessment will cover direct emissions from the facilities owned or controlled within the physical project boundary, together with those from any external operations on which the project is dependent, including indirect emissions associated with the off-site production of power used by the project.

Guidance on the definition of project boundary should also be sought from the Bank. Quantification and monitoring of the parameters needed to evaluate GHG emissions will be conducted annually during the life of the project.

In addition, the client will assess technically and financially feasible and cost-effective options to reduce its carbon intensity during the design and operation of the project, and pursue appropriate options.

Pesticide use and management

The client will formulate and implement an integrated pest management (IPM) and/or integrated vector management (IVM) approach for pest management activities. The client's IPM and IVM programme will entail coordinated use of pest and environmental information along with available pest control methods, including cultural practices, biological, genetic and, as a last resort, chemical means to prevent unacceptable levels of pest damage. When pest management activities include the use of pesticides, the client will strive to reduce the impacts of pesticides on human health and the environment and, more generally, to achieve a more sustainable use of pesticides as well as a significant overall reduction in the risks and uses of pesticides consistent with the necessary crop protection.

The sustainable use of pesticides shall include:

- minimising or, where possible, elimination of the use of pesticides minimising the hazards and risks to health and environment from the use of pesticides
- reducing the levels of harmful active substances by replacing the most dangerous with safer (including non-chemical) alternatives
- selecting pesticides that are low in human toxicity, known to be effective against the target species, and have minimal effects on non-target species and the environment
- using low-input or pesticide-free crop farming
- minimising damage to natural enemies and preventing the development of resistancein pests.

The client will handle, store, apply and dispose of pesticides in accordance with good international industry practice such as the Food and Agriculture Organization (FAO) International Code of Conduct on the Distribution and Use of Pesticides.

---

[6] The significance of a project's contribution to GHG emissions varies between industry sectors. Guidance on the amounts of GHG emissions likely to be associated with projects in different sectors is given in *EBRD Methodology for Assessment of Greenhouse Gas Emissions – Guidance for consultants working on EBRD – financed projects (GN0)*. The significance threshold for this Performance Requirement is generally 100,000 tonnes CO2 equivalent per year for the aggregate emissions of direct sources and indirect sources associated with purchased electricity for own consumption. However, a lower emission threshold may be appropriate where a project aims to bring about large improvements in production efficiency. Clients are encouraged to consult with the Bank in such cases on whether data procurement for GHG assessment will be required.

PR 4: Community Health, Safety and Security

The EBRD recognises that project activities, equipment, and infrastructure often bring benefits to communities including employment, services, and opportunities for economic development. However, projects can also increase the potential for community exposure to risks and impacts arising from temporary or permanent changes in population; transport of raw and finished materials; construction, operations and decommissioning; accidents, structural failures, and releases of hazardous materials. So, the clients policies has:

- to avoid or minimise risks to and impacts on the health and safety of the local community during the project life cycle from both routine and non-routine circumstances;
- to ensure that the safeguarding of project-related personnel and property is carried out in a legitimate manner that avoids or minimises risks to the community's safety and security.

Requirements

Community health and safety requirements

General requirements

The client will identify and evaluate the risks and potential impacts to the health and safety of the affected community during the design, construction, operation, and decommissioning of the project and will establish preventive measures and plans to address them in a manner commensurate with the identified risks and impacts. These measures will favour the prevention or avoidance of risks and impacts over minimisation and reduction.

Where the project or stage of the project poses material risks to or potential adverse impacts on the health and safety of affected communities, the client will disclose relevant project-related information to enable the affected communities and relevant government agencies to understand these risks and potential impacts, as well as the client's proposed prevention, mitigation and emergency response measures, as appropriate. The client will consult with affected communities and relevant government agencies about the proposed measures before they are finalised and take their concerns and comments into account. The client will review the measures regularly, and engage the affected communities and agencies on an ongoing basis, informing them on the status of implementation of plans and commitments, results, and discussing with them any material changes needed to the plans, in advance of changes. Information disclosed may be summarised (maintaining a sufficient level of detail to allow stakeholders to fully understand the risks, potential impacts and measures to be taken) and/or redacted to remove confidential information.

Infrastructure and equipment safety

The client will design, construct, operate and decommission the structural elements or components of the project in accordance with good international industry practice, and will give particular consideration to potential exposure to natural hazards, especially where the structural elements are accessible to members of the affected community or where their failure could result in direct or indirect injury to the community. Structural elements will be designed and constructed by qualified and experienced professionals, and certified or approved by competent authorities or professionals.

When structural elements or components, such as dams, tailings dams or ash ponds, are situated in high-risk locations and their failure or malfunction may threaten the safety of communities, the client will engage one or more qualified experts with relevant and recognized experience in similar projects, separate from those responsible for the design and construction, to conduct a review as early as possible in project development and throughout the stages of project design, construction, and commissioning. For projects that operate moving equipment on public roads and other forms of infrastructure, the client will seek to prevent the occurrence of incidents and accidents associated with the operation of such equipment.

Hazardous materials safety

The client will prevent or minimise the potential for community exposure to hazardous materials that may be released by the project. Where there is a potential for the community (including workers and their families) to be exposed to hazards, particularly those that may be life-threatening, the client will exercise special care to avoid or minimise their exposure by modifying, substituting or eliminating the condition or substance causing the hazards.

Where hazardous materials are part of existing project infrastructure or components, the client will exercise special care when conducting start-up and decommissioning activities in order to prevent exposure to the community. The client will liaise with the competent authorities to obtain available information on exposure levels of those materials which are known to cause non-communicable disease, such as cancer or lung disease.

Environmental and natural resource issues

The client will prevent and avoid or minimise the exacerbation of impacts caused by natural hazards, such as landslides or floods, that could arise from land use changes due toproject activities.

The client will also avoid or minimise adverse impacts due to project activities on air, soil, water, vegetation and fauna and other natural resources in use by the affected communities.

Community exposure to disease

The client will identify those communicable diseases that can be transmitted by the project components or its workforce (including contractors). Action plans should be developed, where appropriate, to prevent or minimise the potential for worker and community exposure to vector-borne and other communicable diseases that could result from project activities. Where specific diseases are endemic in communities in the project area of influence, the client is encouraged to explore opportunities during the project life cycle to improve environmental conditions that could help reduce their incidence, both among the workforce and locally.

Emergency preparedness and response

The client will be prepared to respond to process upset, accidental, and emergency situations in a manner appropriate to the operational risks and the need to prevent their potential negative consequences.

As part of the client's assessment of public health, safety and security risks and potential impacts from project-related activities, the client will identify major-accident hazards, and will take all measures necessary to prevent major accidents and to limit their consequences for humans and the environment, with a view to ensuring high levels of protection to humans and the environment in a consistent and effective manner. Such measures will be identified in a major-accident prevention/emergency preparedness policy and an appropriate management system including organisational structures, responsibilities, procedures, communication, training, resources and other

aspects required to implement such policy and to respond effectively to emergencies associated with project hazards. The management system will include an internal and an external emergency plan. External emergency plans will be established with the objectives of:

- containing and controlling incidents so as to minimise the effects, and to limit damage to humans, the environment and property
- implementing measures necessary to protect humans and the environment from the effects of major accidents
- communicating the necessary information to the public and to the emergency services or public authorities concerned in the area
- providing for the restoration and clean-up of the environment following a major accident.

The client will assist and collaborate with the community and the local government agencies in their preparations to respond effectively to emergency situations, especially when their participation and collaboration are necessary to respond to such emergency situations. If local government agencies have little or no capacity to respond effectively, the client will play an active role in preparing for and responding to emergencies associated with the project, and will demonstrate capacity to respond to reasonably predictable incidents, either directly or indirectly (for example, with the assistance of emergency responders, third party contracted responders, insurance).

The client will exercise prevention and response plans on a schedule appropriate to the sector and risk associated with the project, but at least on an annual basis. The client will update local authorities and communities regularly as plans change or have to be tested.

Security personnel requirements

When the client directly retains employees or contractors to provide security to safeguard its personnel and property, it will assess risks to those within and outside the project site or facilities posed by its security arrangements. In making such arrangements, the client will be guided by the principles of proportionality, good international practices in terms of hiring, rules of conduct, training, equipping and monitoring of such personnel, and applicable law. The client will make reasonable inquiries to satisfy itself that those providing security are not implicated in past abuses, will ensure they are trained adequately in the use of force (and where applicable, firearms) and appropriate conduct toward workers and the local community, and require them to act within the applicable law. The client will not sanction any use of force except when used for preventive and defensive purposes in proportion to the nature and extent of the threat.

PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement

Involuntary resettlement refers both to physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or means of livelihood) as a result of project-related land acquisition 1 or restriction of access to natural resources

The objectives of this PR are:

- to avoid or, at least minimise, involuntary resettlement wherever feasible by exploring alternative project designs;
- to mitigate adverse social and economic impacts from land acquisition or restrictions on affected persons' use of and access to land by: providing compensation for loss of assets at replacement cost and ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected;
- to improve or, at a minimum, restore the livelihoods and standards of living of displaced persons to pre-project levels, through measures that can be enterprise-based, wage-based and/or enterprise based, so as to facilitate sustainable improvements to their socio-economic status;
- to improve living conditions among displaced persons through provision of adequate housing with security of tenure at resettlement sites.

PR 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources

The EBRD recognises the need for the protection and conservation of biodiversity in the context of projects in which it invests. The term 'biodiversity' (or biological diversity) is defined in the Convention on Biological Diversity (CBD) as the '*variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, between species and of ecosystems*'. The Bank supports a precautionary approach to the conservation and sustainable use of biodiversity and the management of impacts upon it in line with the Rio Declaration and the CBD.

The targets of this Performance Requirement ("PR") are:

- to protect and conserve biodiversity;
- to avoid, minimise and mitigate impacts on biodiversity and offset significant residual impacts, where appropriate, with the aim of achieving no net loss or a net gain of biodiversity;
- to promote the sustainable management and use of natural resources;
- to ensure that Indigenous Peoples and local communities participate appropriately in decision-making;
- to provide for fair and equitable sharing of the benefits from project development and arising out of the utilisation of genetic resources;
- to strengthen companies' license to operate, reputation and competitive advantage through best practice management of biodiversity as a business risk and opportunity;
- to foster the development of pro-biodiversity business that offers alternative livelihoods in place of unsustainable exploitation of the natural environment.

Requirements

Habitat protection and conservation

General

All habitats (whether modified, natural or of critical conservation value) support complexities of living organisms which vary in terms of species diversity, abundance and ecosystem and economic value. For this reason, due diligence undertaken by the client should include consideration not only of natural undisturbed habitat, including that of critical conservation value, which may be affected by the project, but also of habitat which has been disturbed or degraded by human activity, and new manmade habitat areas such as reservoirs and grasslands. Such due diligence should include an assessment of any mitigation measures to be applied to the proposed development.

Modified habitats

Modified habitats are those where there has been apparent alteration of the natural habitat, often with the introduction of alien species of plants and animals, such as agricultural areas. Where modified or newly-created habitats may be impacted, the client should aim to minimise any further degradation or conversion of habitat. Where there is merit on conservation grounds and depending upon the nature and scale of the project, the client should identify opportunities to enhance habitats, protect and conserve biodiversity or encourage sustainable harvesting/management of the area in question. This might include foraging, bee keeping, bird watching, etc.

Natural habitats

Natural habitats are land and water areas where the biological communities are formed largely by native plant and animal species, and where human activity has not essentially modified the area's primary ecological functions. In areas of natural habitat, there must be no significant degradation or conversion of the habitat to the extent that

(i) the ecological integrity and functioning of the ecosystem is compromised or

(ii) the habitat is depleted to the extent that it could no longer support viable populations of its native species, unless:

- there are no technically and economically feasible alternatives
- the overall benefits of the project outweigh the costs, including those to the environment and biodiversity
- appropriate mitigation measures are put in place to ensure no net loss and preferably a net gain of biodiversity value in the habitat concerned, or, where appropriate, a habitat of greater conservation value.

Critical habitat

Irrespective of whether it is natural or modified, some habitat may be considered to be critical by virtue of:

- its high biodiversity value;
- its importance to the survival of endangered or critically endangered species;
- its importance to endemic or geographically restricted species and sub-species;
- its importance to migratory or congregatory species;
- its role in supporting assemblages of species associated with key evolutionary processes;
- its role in supporting biodiversity of significant social, economical or cultural importance to local communities; or
- its importance to species that are vital to the ecosystem as a whole (keystone species).

Critical habitat must not be converted or degraded. Consequently, in areas of critical habitat, the client will not implement any project activities unless the following conditions are met:

- Compliance with any due process required under international obligations or domestic law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with.
- There are no measurable adverse impacts, or likelihood of such, on the critical habitat which could impair its ability to function in the way(s) outlined in paragraph .
- Taking a precautionary perspective, the project is not anticipated to lead to a reduction in the population of any endangered or critically endangered species or a loss in area of the habitat concerned such that the persistence of a viable and representative host ecosystem be compromised.
- Notwithstanding the above, all other impacts are mitigated in accordance with the mitigation hierarchy.

Protected and designated areas

Areas may be designated by government agencies as protected for a variety of purposes, including to meet country obligations under international conventions. Within defined criteria, legislation may permit development in or adjacent to protected areas. In addition to the applicable requirements of this paragraph, the client will:

- consult protected area sponsors and managers, local communities and other key stakeholders on the proposed project ;
- demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client; and that the development follows the mitigation hierarchy (avoid, minimise, mitigate, offset) appropriately; and
- implement additional programmes, as appropriate, to promote and enhance the conservation aims of the protected area.

Invasive alien species

The accidental or deliberate release or introduction of alien species into native habitats can have significant adverse impacts on biodiversity:

- Clients will not intentionally introduce alien or non-native species into areas where they are not normally found unless this is carried out in accordance with the regulatory framework governing such introduction. Under no circumstances must species known to be invasive be introduced into new environments.
- During due diligence, clients will assess the possibility of accidental transfer and release of alien species (for example, through risk analysis) and identify measures to minimise the potential for release, if any.

• With respect to the international shipping of goods and services, the Bank is guided by the International Convention for the Control and Management of Ship's Ballast Water and Sediments. Clients are expected to comply with appropriate obligations developed in the framework of this Convention.

Genetically Modified Organisms (GMOs)

There are a number of EU Directives which cover the deliberate release of GMOs into the environment (EU Directive 2001/18/EC), the placement on the market of food or feed products containing or consisting of GMOs (EU Regulation 1829/2003), export of GMOs or unintentional transboundary movement of GMOs, contained use of GMOs (in research for example (Directive 98/81/EC)) and labelling and traceability (for example, Regulation 1829/2003, 1830/2003). Within EU Member States and candidate countries clients are required to comply with applicable national and local requirements and policy. Thus, no GMOs should be used or released to the environment without approval being given by the competent authorities, or where the relevant local authority has declared itself as GMO free. In other EBRD countries of operation, clients must adopt the precautionary approach and conduct risk assessment in line with EU requirements and this PR. The Bank will also take these elements into account during its own due diligence.

Sustainable management and use of living resources

Clients will manage living resources in a sustainable manner. Clients seeking finance for projects involving the use of living resources will conduct due diligence to assess the sustainability of the resource use, taking into account the following principles:

• The use of any resource needs to be considered in the light of the functions it plays within the ecosystem. For example, clear felling of forests may have adverse impacts on soil erosion, watershed hydrology and fisheries. Similarly overfishing of one species may affect the ecological balance and long-term integrity of ecosystems.

• A precautionary approach should be taken, and aggregate and cumulative impacts should be considered.

• Users of living resources shall seek to minimise waste and adverse environmental impacts and optimise benefits from uses.

• Plantation or farming of species or populations that are not natural to the location and not tested for their invasiveness and or dominance over local species should be restricted or subject to adequate studies and approval prior to utilisation.

• The needs of indigenous and local communities who live in or around the development area or whose use of biodiversity resources may be affected by the development must be considered as well as their potential positive role in conservation and sustainable ecosystem use.

Natural and plantation forestry

The conversion of disturbed land or natural habitats to forestry shall be subject to due diligence as outlined above. Critical habitat must not be converted or degraded. Clients in the forestry sector will ensure that all natural forests and plantations over which they have management control are independently certified to internationally accepted principles such as those of the Forest Stewardship Council. Where due diligence reveals that forest management practice does not meet such standards, clients will develop a management plan to allow for compliance to be attained within a time frame considered reasonable by the Bank. The harvesting of forest products must be undertaken in a sustainable way.

Fisheries

Clients involved in the harvesting of fish or other aquatic species must be able to demonstrate to the Bank that all their activities (from harvesting through to processing) are being undertaken in a

sustainable way. This can achieved through attaining independent certification (where such exists) or through studies undertaken as part of due diligence. Fishery activities are not necessarily limited to harvesting. Re-population or introduction of different species or populations (especially in closed environments such as lakes) must ensure that the new stock does not destroy or displace existing local fish species.

Supply chain

Where the project uses external suppliers of living resources (hereafter: "resources") over which the client does not have management control and these resources are central to the project's core functions, the client will adopt and implement a sustainable resources procurement policy, procedures and action plan to ensure that:

- only resources of a legal and sustainable origin are purchased
- the origin of the resources is monitored
- the resources do not originate from protected areas or from areas recognised as having high ecological value, and that the biodiversity and the functions of the affected ecosystem are maintained in accordance with internationally and nationally approved principles.

Clients should give preference to purchasing resources certified to internationally accepted principles of sustainable management, where available.

Biodiversity and tourism

Environmental and social impact assessments of new or significantly expanding tourism activities and infrastructure will be consistent with the *Guidelines on Biodiversity and Tourism Development*. These outline the nature of baseline information needed, the range of issues that should be considered, as well as the nature of impact mitigation and appropriate monitoring and reporting that should be included in the subsequent action plan for the project.

PR 7: Indigenous Peoples

Private sector projects can create opportunities for Indigenous Peoples to participate in, and benefit from project-related activities that may help them fulfill their aspiration for economic and social development. This Performance Requirement ("PR") recognises that Indigenous Peoples may play a role in the process of transition towards open-market economies by promoting and managing activities and enterprises as partners in development alongside the private sector and their governmental representatives. Specific objectives are as follows:

- to ensure that the transition process fosters full respect for the dignity, rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples;
- to avoid adverse impacts of projects on the lives and livelihoods of Indigenous Peoples' communities, or when avoidance is not feasible, to minimise, mitigate, or compensate for such impacts;
- to enable Indigenous Peoples to benefit from projects in a culturally appropriate manner;
- to support the client to establish and maintain an ongoing relationship with the Indigenous Peoples affected by a project throughout the life of the project
- to foster good faith negotiation of the client with, and the informed participation of, Indigenous Peoples when projects are to be located on traditional or customary lands used by the Indigenous Peoples, when customary or non-traditional livelihoods will be affected by the project, or in the case of commercial exploitation of the Indigenous Peoples' cultural resources
- to recognise and respect the customary laws and customs of Indigenous Peoples and to take these into full consideration;
- to respect and preserve the culture, knowledge and practices of Indigenous Peoples in accordance with their wishes.

PR 8: Cultural Heritage

The EBRD recognises the importance of cultural heritage for present and future generations. Consistent with the Convention Concerning the Protection of the World Cultural and Natural Heritage and the Convention for the Safeguarding of Intangible Heritage, this Performance Requirement aims to protect irreplaceable cultural heritage and to guide clients to avoid or mitigate adverse impacts on cultural heritage in the course of their business operations. In addition, the requirements of this Performance Requirement related to a project's use of cultural heritage are based in part on standards set by the Convention on Biological Diversity, namely:

- to support the conservation of cultural heritage in the context of EBRD-financed projects;
- to protect cultural heritage from adverse impacts of project activities;
- to promote the equitable sharing of benefits from the use of cultural heritage in business activities;
- to promote the awareness of and appreciation of cultural heritage where possible.

PR 9: Financial Intermediaries

Financial Intermediaries (FIs) are a key instrument for the EBRD to promote sustainable financial markets and provide a vehicle to channel EBRD funding to the micro, small and medium-sized enterprise (SME) sector. Through its network of partner FIs, the EBRD can support economic development at a scale of enterprise that is smaller than would be possible through direct EBRD investment. The EBRD supports a variety of financial service providers including among others, private equity funds, banks, leasing companies, insurance companies and pension funds.

The objectives of this Performance Requirement (PR) are:

- to establish a practical way in which the Bank's mandate to promote sustainable development can be implemented in its FI investments, in line with best international practice in the commercial financial sector;
- to enable FIs to manage environmental and social risks associated with their business activities and to promote good environmental and social business practices amongst their clients;
- to promote good environmental and human resource management within FIs.

PR 10: Information Disclosure and Stakeholder Engagement

The EBRD considers stakeholder engagement as an essential part of good business practices and corporate citizenship, and a way of improving the quality of projects.

This Performance Requirement ("PR") outlines a systematic approach to stakeholder engagement that will help clients build and maintain over time a constructive relationship with their stakeholders, in particular the locally affected communities. The process of stakeholder engagement is an essential component of the appraisal, management and monitoring of environmental and social issues associated with the client's investments.

Conclusions

We may conclude that EBRD allocates a great importance on environmental protection. It seeks to ensure that the projects that finances are socially and environmentally sustainable, respect the rights of affected workers and communities and are designed and operated in compliance with EU applicable regulatory requirements and good international practices.

Romania is one of the countries from Eastern Europe who benefits from EBRD financial support. This is why, on 28th February 2012, the EBRD Board of Directors aproved a financing strategy for our country. The strategy underlines that *The Bank's Environmental and Social Policy applies to all projects carried out in Romania*. *It will be important to identify any vulnerable*

populations that may be disproportionately affected by the projects and to ensure that stakeholder engagement activities include any marginalised groups. Health and safety is also an important consideration for all projects and the Bank will work with clients and sponsors to promote the development of an appropriate safety culture[7].

References

- European Bank for Reconstruction and Development, *Basic Documents of the European Bank for Reconstruction and Development,* November 2006.
- European Bank for Reconstruction and Development, *Environmental and Social Policy*, November 2008.
- European Bank for Reconstruction and Development, *Strategy for Romania*, February 2012.
- http://www.ebrd.com.

[7] European Bank for Reconstruction and Development, *Strategy for Romania*, February 2012.

LINK BETWEEN SUSTAINABLE DEVELOPMENT AND EFFECTIVENESS IN REGIONAL GOVERNMENT[1]

JAN ZÁVODNÝ POSPÍŠIL*

Abstract

The paper describes relationship between sustainable development and regional government efficiency. Author defines first sustainable development, its principles and relationship to the public administration area. With usage of systematic review is later defined efficiency in public administration. Based on this information is analyzed relationship between sustainable development and the effectiveness of the management system of regional government.

***Keywords**: Sustainable Development, Public Administration, Regional Government, Effectiveness, Local Agenda 21.*

Introduction

This paper deals with the issue of sustainable development in the field of public administration quality, respectively efficiency of regional government. Sustainable development is an important factor in the process of the gradual penetration of all areas of modern society at all levels (macro, meso and micro level) and all areas (environmental, economic and social) with regard to future generations and the environment.[2] The principle of sustainability is practically applicable to all fields of human activities. It just must be always adapted to the certain field. From definitions of the term is recognizable what is the goal of sustainability. The achievement of this goal must be done through a series of phases, which respect the essence of the field. Public administration is one of the most important institutions that can assist through its process to meet the objectives of sustainable development of the company.

This is the reason this article was written. The author tries to gain insight on the issues of sustainable development of the whole society, which plays an important role in public administrations. Specifically, the process of regional government as a meso-level implementation of the concept of sustainable development. The regional government is so very important to the fulfillment of the aims of sustainable development. At the same time the performance of regional governments is specific. This is an area where its status, functions and principles are often subject to numerous changes and reforms primarily motivated by political influence. It is possible to say that in a society there is an effort to continuously improve the current state of public administration - the effort to achieve maximum efficiency. (Broad) It follows also need for evaluating of quality and efficiency.

However, for evaluating quality of public administration (or regional government itself) it is necessary to develop methodologies and standards that make it possible. Currently there are a number of methods that can be used for quality measurement, respectively effectiveness of public government. However, existing methods generally do not take into account the concept of sustainability. Author of this article attempts to look at the regional government evaluation issue with the view of the concept of sustainability. In this point of view he is using the Local Agenda 21 document, which can be considered as the starting point for evaluating the effectiveness of regional

[1] The article is a part of the work on the grant of the Czech Science Foundation no. P408/11/1929 – Regions in the Czech Republic: a model of efficiency.

* Assistant Professor, PhD, Moravian University College Olomouc, Olomouc, Czech Republic (email: jan.pospisil@mvso.cz).

[2] Martin Zielina, "Veřejná správa jako jeden z aktérů regionálního trvale udržitelného rozvoje podle konceptu Triple Helix" (paper presented at the Conference Our Common Present: Changing Society?, Prag, March 23rd, 2012).

Governments in view of the objectives of sustainable development. By an analysis of this document is possible to answer the question of what it needs to be measured in order to regional administration be assessed in the scope of the sustainable development concept.

In the processing of this paper, author used specialized literature concerning the issue of the concept of sustainability and efficiency in the performance of regional governments. This paper is a synthesis of published knowledge on various topics. Its aim is to bring more information to the issue of measuring the effectiveness of regional governments in relation to sustainable development.

Definition of Sustainable Development

Sustainable development is a term which has recently been studied in environmental area, where he originally belonged to. It is possible to meet him in almost all possible fields of human activity. At present, it is possible meet this term in many areas such as the social, economic, natural,... Despite, or perhaps because of it, his interpretation is very diverse, and it is very difficult to precisely define.

Original understanding of sustainability as such represents the development of human society, ensuring a consistent economic and social progress, together with full preservation of the environment.

The concept of sustainability, which in Bramwell and Lane[3] was first mentioned in 1973. In the forefront, however, came only after 1980. Important role in formulating sustainable development played a WTO (World Tourism Organisation). The first milestone represented Manila Declaration (1980), which pointed out that the sources cannot remain unchecked and it is important to realize that all resources in the future may be lost or destroyed.

International Commission for the UN Environment issued in 1987 a report entitled Our Common Future.[4] This was the result of careful exploration of the environment and pointed to the need to make fundamental changes that are necessary for sustainable development. The continuous development in this report is defined as: "*... a method of development that meets the needs of the present without compromising the ability of future generations to meet their own needs*".[5] The report presents the most important issues affecting the human civilization and you need to seriously consider them.

As one of the most serious problems stated in the report is the population growth. According to the report is the need for action, the result should be to stabilize the population. A related problem is the population growth in large cities and especially their suburbs. Another report mentions the need to improve health care, social security, population, and improving access to education. It also mentioned the need to ensure food security for a broad population groups, provided stability of natural resources.[6]

Already at the time of the report inform about the very actual problem that represent increasing requirements for energy and increasing consumption. The report stresses the need to increase the production of renewable energy sources and thereby reduce air pollution and greenhouse gas emissions from the use of fossil fuels. It takes into account also industrial production and poisons, which are spreaded in the environment. This type of waste has to be eliminated as much as possible. It is closely related to environmental pollution and production of chemical substances, which according to the proposals of the UN should not be placed on the market before they have

[3] David Weaver, *Sustainable Tourism: Theory and Practice* (Oxford: Elsevier, 2006).

[4] World Commission On Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987).

[5] World Commission On Environment and Development*, Our Common Future* (New York: Oxford University Press, 1987) 47.

[6] World Commission On Environment and Development*, Our Common Future* (New York: Oxford University Press, 1987).

been tested. It has to be assessed their potential impact on human health and the impact on the environment.[7]

The original definition was later identified as inadequate as it does not take into account all the factors affecting the development of the company and it's mostly very anthropocentric.

Therefore, later was formed another definition that attempted to describe sustainability with several factors. For example, Eber[8] states that sustainable development advocates widespread use and maintain resources to obtain their durability. Sustainable development represents the possibility of continuous economic development, which seeks to maintain the environmental, socio-cultural and economic resources of the country for future generations.[9]

One of the most accurate definition is a synthesis of the previous definitions. This definition is currently being used in the training process of environmental education at universities. The definition says: "*Sustainable development is a complex set of strategies that allows usage of economic tools and technologies to meet the social, material and spiritual needs of people while fully respecting environmental limits"*[10]

This definition can include a wide range of factors, which are also important for understanding and application of sustainable development. As Ivan Rynda[11] stated, the individual components of sustainability are in the intersection. For the concept to work it is necessary that these elements together helped to create a single common area of the world.

Principles of Sustainable Development

The concept of sustainability is based on the integration of the three areas - social, environmental and economic. Sustainability in one of these areas should not negatively affect other areas. The main principle of sustainability is to achieve balance between these three dimensions in order to achieve long-term effect.

Other principles of sustainability are based on the definitions of the term. By using systematic review of definitions and documents relating to sustainable development, can be determined other principles of sustainable development. These principles are focus on the future and future generations, the responsible use of resources and equity. All these categories are present in all of the three areas of sustainable development.

For example, Eber[12] states that sustainable development advocates widespread use and maintain resources to obtain their durability. Sustainable development represents the possibility of continuous economic development. It seeks to maintain the environmental, socio-cultural and economic resources of the country for future generations.

Besides the general principles of sustainable development, based on the very essence of the concept, it is possible to define the basic principles of sustainable development in specific areas. In this case, the general principles are applied to the specific conditions of the existing sector.

Relationship to the Public Administration Area

In terms of the specific application of the sustainability concept into the field of public administration, it is very important to mention a conference which was held in Rio de Janeiro in June 1992. At the conference the representatives of the participating countries adopted several important

---

[7] dtto.

[8] Shirley Eber, *Beyond the green horizon: principles for sustainable tourism* (Weyside Park, Godalming, Surrey [U.K.]: WWF UK, 1992).

[9] David Weaver, *Sustainable Tourism: Theory and Practice* (Oxford: Elsevier, 2006).

[10] Ivan Rynda, "Trvale udržitelný rozvoj," *Geografické rozhledy* (10)1 (2000): 2.

[11] Ivan Rynda, "Trvale udržitelný rozvoj," *Geografické rozhledy* (10)1 (2000).

[12] Shirley Eber, *Beyond the green horizon: principles for sustainable tourism* (Weyside Park, Godalming, Surrey [U.K.]: WWF UK, 1992).

documents to guide the implementation of the principles of sustainable development in the countries, at all levels of government and in all sectors. They are the following documents:

• Rio Declaration On Environment and Development: the most comprehensive set of principles of sustainability

• United Nations Framework Convention on Climate Change

• The Convention on Biological Diversity: The Cartagena Protocol on Biosafety entered into force in September 2003

• Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests

• Agenda 21: a comprehensive guide of global actions which may affect or observe the transition to the sustainable development concept

New document called Local Agenda 21 is based on Agenda 21 requirements. Local Agenda 21 is a tool for applying the principles of sustainable development at local and regional level. It is a process which through improvements in governance, strategic planning (management), public participation and the use of all acquired knowledge of sustainable development in individual areas, improves the quality of life in all its aspects and points to the responsibility of citizens for their lives and the lives of other beings in space and time.

Local Agenda 21 (LA21) is a program for towns, cities and regions, that introduces the principles of sustainable development into practice taking into account the local problems. It is formed in the presence of and in cooperation with citizens and organizations. Its objective is to provide long-term high quality of life and environment in a specific place.

Local Agenda 21 is a time consuming process which, through improvements in governance, strategic planning (management), involving the public and the use of all acquired knowledge of sustainable development, enhances the quality of life in all its directions and leads to the citizens responsibility for their lives and the lives of others.[13]

LA21 is a progressive method of improving the quality of public administration, leading to the practical application of the principles of sustainable development at local and regional level. Unlike other methods LA21 offers, in addition to quality and efficient work of the public administration, a number of added values, such as satisfaction of the population, their active participation in public life and in decisions on public matters.

LA21 is part of a broader effort to good governance, which is included in the term "good governance". From the perspective of the UN and the EU the good governance must be open, transparent and accountable to the public, effective for public participation in decision-making and planning based on partnership with other social sectors, and respecting the professional point of view. Only such governance can lead to long-term sustainable development of the municipality or region. LA21 is a process that is fundamental to sustainable development. An essential part of a working MA21 are undoubtedly: strategic planning and quality management system including funding system, ongoing and active communication with the public - building partnerships, systematic and measurable approach to sustainable development.[14]

Efficiency in Public Administration

Public administration in democratic economies should work in accordance with applicable legislation. Not only transparently, ethically and professionally, but also economically, efficiently and effectively. Within the meaning of the concept of Good Governance it means, that public administration is actively associated with citizens and meet the public interest.

---

[13] "O místní Agendě 21," CENIA, accessed February 19, 2013, http://www1.cenia.cz/www/node/304.

[14] United Nations Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development* (New York: United Nations, 1993).

From the analysis of available documents ensues that the definition of quality regional government is not clear. Professional literature does not offer an adequate and universal answer to this question. Mostly is the problem of quality of regional government associated with the administration processes, resources, staff, partnerships and performance of the government.[15] In contrast to this notion is efficiency which is usually expressed as the difference between inputs and outputs.[16] The efficiency can be viewed from two perspectives - from an internal and external perspective.

Currently the evaluation process of regional government is based on key requirements that are required by the performance of public administration. This is called the principle of "3E", which consists of three components - Economy, Efficiency and Effectiveness. Sometimes it is supplemented by a fourth "E" which is in this case an Equality.[17]

Relationship between Sustainable Development and the Effectiveness

In fact objective indicators for measuring the quality and effectiveness of public administration do not exist. It is mainly about the essence. Particular solution may be to achieve the concept of sustainable development. Thanks to its essence - combination of three areas - economic, environmental and social - can be achieved by its applying the effective functioning of the regional government. Therefore more important is the need to constantly look for opportunities fulfillment of the concept of sustainable development, the search for indicators and evaluate the implementation of the concept.

Instructions for implementing the principles of sustainable development in the Local Agenda 21 can also be a starting point for the development of indicators for measuring the effectiveness of regional government.

LA 21 monitors and describes the setting of key governance processes that are necessary for the implementation of Agenda 21 at the local or regional level. Also anticipates a further essential aspect - by using indicators of sustainable development monitors the real impact of various aspects on the locality development. Indicators of sustainable development are a practical tool to measure the progression of the Local Agenda 21. It is a set of information that shows whether the goals set are closer or they are moving away. They make it possible to see whether the used activities have a positive impact on the area.

Indicators are chosen not only for the overall process, but also for partial projects. Always they must have three aspects - quantity, quality and time. For each level of targets are selected appropriate indicators - strategic (regional governments by them can monitor the achievement of strategic targets - such as citizens' satisfaction), managerial (as we will check that the system works well) and implementation. Indicators at each level must be linked.

Commonly used indicators of society development (such as gross domestic product) do not provide adequate and comprehensive data that are needed to assess the sustainability of development. Therefore there is need for look for new indicators. Nowadays there are a set of recommended indicators at the international level. At the same time there is already developed a system of indicators for sustainable development at the national level.

In relation to public, indicators are being used as a tool by which can easily inform about the changes that take place based on the LA21 process. In this respect, the well presented indicator can lead to the involvement of other people in the process of LA21. It depends on the creative approach of those who are presenting the indicators.

The starting point for setting the LA21 bases for measuring the effectiveness can be the document: European Common Indicators of sustainable development at the local level. It is an

[15] Iveta Vrábková, "Vyjádření efektivity a kvality ve veřejné správě," *Acta Academia Karviniensia* 1 (2010).
[16] Dušan Hendrych, *Správní věda: Teorie veřejné správy* (Praha: ASPI, 2007).
[17] Norman Flynn, *Public sector management* (Los Angeles: Sage, 2007).

initiative that aims to encourage European local communities in the establishment of common indicators that allow to monitoring and measure the progress recorded to local sustainability and efficiency simultaneously.

The document includes the following areas, from which it is possible to create specific benchmarks:

1.Citizen´s satisfaction with life in the community (general satisfaction with various aspects of life in the community).

2.Local contribution to global climate change (CO_2 emissions expressed as ecological footprint).

3.Local transportation and passenger transportation (daily travel distances and modes of transportation).

4.Availability of public green spaces and local services (availability of the nearest public green area for local residents and affordability of basic services).

5.Ambient air quality (number of days with good and wholesome air quality).

6.Children´s traveling to and from school (means of transport that children use to travel between home and school)

7.Sustainable management of the municipality and local businesses (the proportion of public and private organizations that have adopted and use of environmental and social management methods)

8.Noise pollution (the proportion of the population exposed to harmful levels of noise)

9.Sustainable land-use (sustainable development, restoration and protection of areas and lands within the municipality/city)

10. Sustainable Products (share of environmentally friendly certified)

Based on these areas, for the future there is necessary to set common standards which can be used by regional governments to measure the level of implementation of the sustainable development concept in the region. At the same time they will also talk about the effectiveness of regional governments from the perspective of sustainable development.

Conclusions

This paper provides the basic insight into the problems of sustainable development in the field of public administration and the effect on its efficiency. Using analysis of available documents author defines the concept of sustainable development and the effectiveness of regional government. Thereafter author dealt with the issue of measuring the implementation of the concept in public administration sphere.

The concept of sustainable development has become one of the solutions of contemporary postmodern era.[18] Institutions across the social spectrum are aware of the importance of this concept. The basic principles of the implementation of the concept include: the focus on long-term goals, the voluntary implementation of the objectives, the need for partnerships between different implementers and many possible targets in the implementation of the concept.[19] Under these conditions is the public administration area which can be suitable for controlled introduction of the concept in to the society.

At the same time there is need for measuring of the outputs and efficiency in public government. Paper tried to answer the question whether it is possible to use information about the implementation of sustainable development concept as a means of measuring the regional government effectiveness.

[18] Martin Zielina, "Veřejná správa jako jeden z aktérů regionálního trvale udržitelného rozvoje podle konceptu Triple Helix" (paper presented at the Conference Our Common Present: Changing Society?, Prag, March 23rd, 2012).

[19] Slavoj Czesaný, *Koncepty a měření udržitelného rozvoje* (Praha: Český statistický úřad, 2007).

In this case author chose for this purpose a document named Local Agenda 21. It is the practical application of the principles of the Agenda 21 document at the local (municipal, community) practice. Local Agenda 21 is a practical implementation of local projects in collaboration widest interest groups that leads to sustainable development and maintain the quality of life at local level. Based on the analysis of this document, the author determined the method of creating standards, which are intended for measuring the sustainability and efficiency of regional government.

This paper primarily aims to be information platform for the introduction of the concept of sustainable development in the regional government. It may be usable for regional government´s decision makers as well as the basis for further research in the area.

This paper is part of a much larger project, which deals with the issue of measuring the effectiveness of the regions. Therefore in the future research will continue in the searching possibilities of measuring the effectiveness of public governments and the entire regions. The project is focused on research of the functioning of regional self-government and of regional authorities (thereinafter the regions) in the Czech Republic. As a primary research in the field of public administration, the project should contribute to gain knowledge on the activities of the regions, the research of which has still been neglected.

Acknowledgement

This paper was produced with the support of the research project: The Czech Science Foundation P408/11/1929 "*Regions in the Czech Republic: creating model of efficiency*".

References

- CENIA. "O místní Agendě 21." Accessed February 19, 2013. http://www1.cenia.cz/www/node/304.
- Czesaný, Slavoj. *Koncepty a měření udržitelného rozvoje*. Praha: Český statistický úřad, 2007.
- Eber, Shirley. *Beyond the green horizon: principles for sustainable tourism*. Weyside Park, Godalming, Surrey [U.K.]: WWF UK, 1992.
- Flynn, Norman. *Public sector management*. Los Angeles: Sage, 2007.
- Hendrych, Dušan. *Správní věda: Teorie veřejné správy*. Praha: ASPI, 2007.
- Rynda, Ivan. "Trvale udržitelný rozvoj." *Geografické rozhledy* (10)1 (2000): 10-11.
- United Nations Conference on Environment and Development. *Agenda 21: Programme of Action for Sustainable Development*. New York: United Nations, 1993.
- Vrábková, Iveta. "Vyjádření efektivity a kvality ve veřejné správě." *Acta Academia Karviniensia* 1 (2010): 57-68.
- Weaver, David. *Sustainable Tourism: Theory and Practice*. Oxford: Elsevier, 2006.
- World Commission On Environment and Development. *Our Common Future*. New York: Oxford University Press, 1987.
- Zielina, Martin. "Veřejná správa jako jeden z aktérů regionálního trvale udržitelného rozvoje podle konceptu Triple Helix." Paper presented at the Conference Our Common Present: Changing Society?, Prag, March 23rd, 2012.

FOOD CRISIS OVERLAPPING THE ECONOMIC CRISIS

CARMEN RADU[*]
LIVIU RADU[**]

Abstract
The present paper seeks to find some answers regarding the existent causality between the economic, financial, demographic and food crises. Crises are interrelated, thus one crisis cannot be analyzed without the other, as the effects of one crisis are or may represent causes for another crisis. The current food crisis translates today in food price increases, in the health of the population that does not have enough resources for a balanced diet and in obesity problems of the young generation (Romania ranks third among European countries). All these issues with immediate and direct effects over the population in our country determined us to conduct a rigorous and careful observation on the development of the phenomenon of food crisis.
Food crisis, its causes and consequences – aging population, the migration of the active population to other countries (especially from the rural areas) and the agglomeration of the disadvantaged population in certain geographical areas, can cause social and economic imbalances.

Keywords*: food crisis, obesity, malnutrition, subnutrition, aging population, sustainable development, economic growth.*

Introduction

Crises are interconnected, one without the other cannot be analyzed, since the effects of one crisis are or may be one cause for other crises. This is the reason why Gilles Bonafi (2010), like other authors, believes that the issue of the crises should be analysed both globally and on different levels. Among these, the most important levels are the following:

- the financial or the monetary system, whose pillar is the dollar;
- the adaptation of the economic system to the new information technologies that determines the destroying of millions of places of work;
- the energy crisis; the danger that lurks democracies and freedom, because the real power is held by a handful of people through capital accumulation. (Momcilo Luburici, 2010).

In 2005, the famous economist John Kenneth Galbraith pointed out that all it takes is "a few strong and convincing enough sellers to determine what people buy, eat and drink"; the ecocide[1] determined by the current economic system. Reality shows that the risk lies in the disastrous effects caused by the food crisis degenerated from the economic crisis, the crisis itself actually being a greenhouse effect, meaning a disaster caused by disasters and, in its turn, a generator of other disasters. One of the reasons why the food crisis is not treated with the attention that is was once given, is that the notion of famine has been redefined. A couple of years ago, the famine was located strictly geographically[2], while today it affects the whole planet. Lester Brown [3], the American author who published a manifest-book translated into 35 languages "Full Planet, Empty Plates: The New Geopolitics of Food Scarcity" points out in the subtitle of his aforementioned book "The New Geopolitics of Food Scarcity" the acute problem of the least developed countries which are

[*] Lecturer, PhD, "Nicolae Titulescu" University of Bucharest, Romania (cradu@univnt.ro).
[**] Lecturer, PhD, "Nicolae Titulescu" University of Bucharest, Romania (lgradu2005@yahoo.co.uk).

[1] The ecocide represents the act of destruction of an ecosystem, especially through excessive exploitation.

[2] Blanchet, J., and Lefebvre, D. (1995). *PAC, GATT, OMC*. Le grand Chambardement, Paris, Edition France Agricole.

[3] Lester R. Brown is the president of Earth Policy Institute, a neoliberal environmental research institution based in Washington DC, and one of the best known researchers in the field of global environmental issues, sustainable development and environment protection (the work *Outgrowing the Earth: The Food Security Challenge in an Age of Falling Water Tables and Rising Temperatures,* Tehnica Publishing House, Bucharest, 2005).

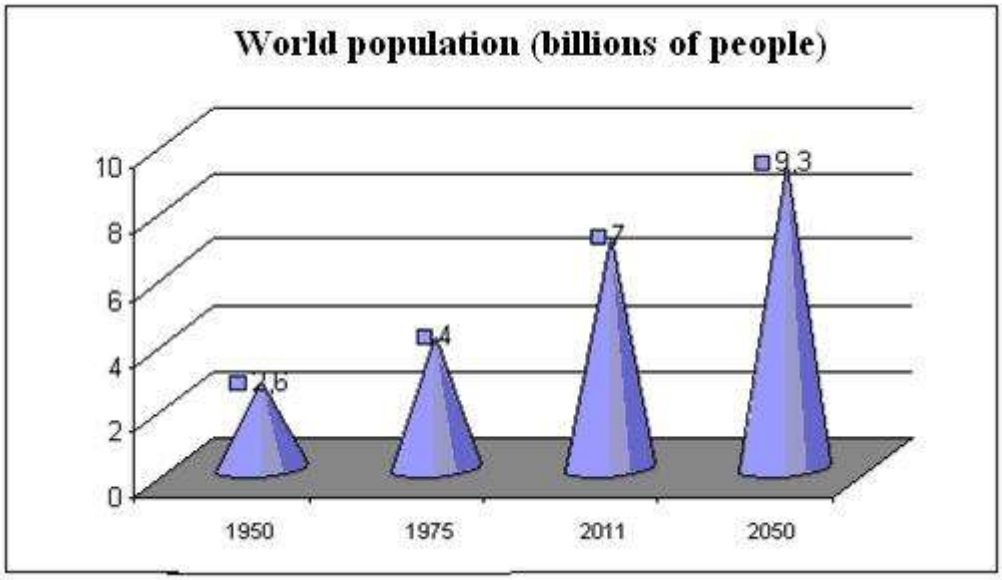
experiencing a sustained population growth and for which providing food becomes one of the most serious contemporary problem. Stating from the beginning of the book that "Food is the weak link in our modern civilization", Lester Brown starts from the observation that over the last decade, world grain reserves have fallen by one third and the world food prices have more than doubled, triggering "a worldwide land rush and ushering in a new geopolitics of food."

Taking into consideration the globalization of the grain market and the ability to transport them, famine is less concentrated in certain geographic regions and more in low-income groups. At present, the food crisis translates in rising prices globally, growth that is affecting low-income populations, forcing many to end up even below the limit of subsistence. Thus, we start wondering today whether the current world economic crisis is either cause or effect of deepening the demographic, financial, food, energy resources and other crises.

Nowadays it is believed that the causes of the food crisis could be linked to:

1. Population growth[4], population growth on Earth. If in 1950 there were about 2.6 billion people, in 1975 their number reached over 4 billion, while in October 2011 their number reached 7 billion. According to demographic forecasts for 2050, the Earth's population will exceed 9.3 billion people.

Figure no. 1: Population growth between 1950 and 2050



Source: Gabriela Molanescu – The Bucharest University of Economic Studies, Theoretical and Applied Economics, Volume XIX (2012), No. 4(569), page 57-69 Contributions to the Substantiation of the National, Original and Coherent Strategy of Interruption of the Involution of Romania's Agriculture

2. The insufficient production of agricultural goods worldwide. It is estimated that at present over 1.2 billion people are facing hunger. Therefore it will be necessary to obtain increases of

[4] Gabriela Molanescu – The Bucharest University of Economic Studies, Theoretical and Applied Economics, Volume XIX (2012), No. 4(569), page 57-69 Contributions to the Substantiation of the National, Original and Coherent Strategy of Interruption of the Involution of Romania's Agriculture.

agricultural food production to ensure and provide food for 2.3 billion people in addition to the current population.

3. Climate changes. Summers are becoming drier and winters frostier but without significant precipitation which will destroy crops.

4. Bio-fuels. It is impossible for the agriculture from the European Union to produce as much wheat so that to be used as bio-fuel without affecting the agricultural products market.

5. Speculators. The speculation on the financial market led to price increases that cannot be explained. Thus, the price of wheat and rice increased by 30% in one day, which inevitably caused the emergence of speculators.

6. Changing consumption habits. About 40 years ago meat was considered to be a luxury food, but nowadays people eat meat in large and exaggerated quantities.

Theoretical background

According to an international study conducted once in two years (the last one is dated 2012) by World Wildlife Fund (WWF) the Zoological Society of London and the Global Footprint Network [5], humans will need two Earths to support our lifestyles by 2030 because we are draining the world's resources so quickly and only another planet in addition will be able to cover our demand for natural resources. According to the same study, if people continue with the same lifestyle, three planets will soon be needed just to cover the survival needs of the human civilization. Qatar, Kuwait, United Arab Emirates, Denmark, the United States of America and Belgium are countries considered to be currently large consumers of natural resources. In the first half of this classification, Italy and the Russian Federation are ranked as countries with a moderate consumption of natural resources. Romania is ranking 60 and the list of large consumers closes with the poorest countries of the world, such as Afghanistan, Congo, Burundi, Eritrea or Sudan which are countries that are still facing malnutrition and subnutrition. There are currently 850 million people malnourished in the world, of which 200 million are children.[6]

"The massive loss of biodiversity and habitats undermines the natural systems upon which we depend for the food we eat, the air we breathe and the stable climate we need. The depletion of natural resources caused by human consumption also poses risks to our economic security: for instance, scarcity of resources and degraded natural systems will increase the price of food, raw materials and other commodities" declared David Nussbaum, one of the WWF specialists involved in the project. The study suggests that if the expected global population of 9.2 billion people in 2050 were to eat a typical Malaysian diet, we would need 1.3 planets to sustain us. The situation changes radically if everyone were to eat an Italian diet, humanity would need closer to two planets in order to survive.

Also, the reports provided by the FAO (Food and Agriculture Organization of the United Nations) believe the currently a billion people worldwide suffer from hunger. The current food crisis that emerged in 2010 can rival that of 2007-2008.

These are observations that can only lead to the following questions: is there a connection between the great economic crisis of 1929-1933, also known as the Great Depression, and the current economic crisis or their causes are radically different? Is there a link between the commencement of the previous food crisis (2007-2008) and the commencement of the current economic world crisis? What do we know until now?

The Great Depression was caused by overproduction, took place between 1929-1933 and was characterized by a dramatic drop in global economic activity. The first signs of the crisis occurred in

[5] Produced by WWF in collaboration with Global Footprint Network and the Zoological Society of London, the report examines the state of our natural world, and our impacts upon it.

[6] According to *the Food and Agriculture Organization of the United Nations*.

1928. The commencement of the Great Depression in the United States is usually attributed to the sudden devastating collapse of US stock market prices on October 29, 1929. The Great Depression had devastating effects in both industrialized countries, as well as in less developed countries whose economies were depending mostly on exports of raw materials. The level of global trade decreased rapidly, as personal income, tax revenue, profits and prices dropped also. Cities all around the world were severely affected, especially those dependent on heavy industry. Construction activity was virtually halted in many countries. Farming and rural areas suffered as crop prices and agricultural commodities fell by approximately 40-60%.[7] Mining and logging had perhaps the most dramatic decline as demand plummeted and re-employment alternatives for miners or forest workers in other sectors were the lowest. The Great Depression in different countries of the world ended at different times. In most countries recovery programs were designed and most of them have gone through various political transformations that have driven them towards left or right extremes. Societies based on liberal democracy were very weak because of the crisis and dictators, such as Adolf Hitler came to lead some of the most powerful states and prepared the political and military conditions to trigger the Second World War in 1939. He who learns from past mistakes can avoid repeating them in the future.

The experts of the International Monetary Fund (IMF) revised radically the economic growth forecasted for 2009 estimating that, globally, the advance shall not exceed 3%. Strongly affected by the financial crisis, the situation for industrialized countries is even worse: only a maximum of 0.5% growth. Reports from the Fund warned gradually on the delicate situation in which the world economy finds itself, perhaps the most serious in the last eight decades. The experts' thought are once again populated by the recession from the early '30s, given the fact that the events seem to unfold exactly the same: stocks fall, companies go bankrupt, and banks face liquidity shortages. Even the chief economist of the International Monetary Fund, Olivier Blanchard, has called for urgent fiscal interventions designed to rebalance the market, especially to avoid feelings of panic. In harsh times, the global economy needs consumer confidence.

Analyzing the situation detachedly it is impossible not to wonder: are we already in an economic crisis comparable to that of 1929-1933? At that time, Wall Street had become for years the financial centre of the Western world, and in 1929 it was considered that America already has a decade of prosperity. Only a few economists warned of imminent decline that was to come. The market simply could not sustain such rhythm. In the days before "Black Thursday", as the day of October 24, 1929 remained and accepted in history as triggering moment for the Recession of the early '30s, the stock market was highly volatile. The investors' main worry was not the accelerated decline of the stock market indexes, but rather the large volume of shares traded, which was perceived as a sign of latent distrust. The stock market crash of 1929 was, in fact, more complex than it has been traditionally spread. Suddenly, the shares value began to decline, investors began to sell and panic took over the global finances. On October 24, 1929, nearly 13 million shares were traded. On October 28, the most important stock index lost 13% in one day. The next day, the threat becomes a reality: 16 million shares were traded, causing stock prices to decrease to minimum rates. Wall Street ceased to be an indestructible legend. The major American financial companies have tried to remedy the situation by buying large quantities of shares as a sign of confidence that they still have and invest in the "market reason".

What do we know today? On February 1, 2007 a law to increase the minimum wage was enacted (Fair Minimum Wage Act of 2007), law which has blocked investments and, implicitly, the crediting process. It has also reduced drastically the efficiency of U.S. companies that were competing with emerging economies, especially China. On February 17, 2007 the British bank

[7] Willard W. Cochrane, *Farm Prices, Myth and Reality* (1958), page 15; World Economic Survey 1932–33, League of Nations, page 43.

Northern Rock was nationalized by the British Government. After one month, JPMorgan Chase & Co Bank bought the investment bank Bear Stearns at a very low price, with the help of the U.S. central bank (Federal Reserve) and on September 7, 2008 the largest mortgage banks in the United States (Freddie Mac and Fannie Mae) were placed under federal supervision. After a week, the company Merrill Lynch (the third largest investment bank in the world) is taken over by Bank of America and Lehman Brothers (the fourth largest investment bank in the world) declared bankruptcy. On September 16, 2008, the United States Federal Reserve Bank and the U.S. government nationalized the largest insurance group in the world, American International Group (AIG) which was threatened by bankruptcy, and led to a rescue agreement with the Federal Reserve Bank for a US$85 billion dollar secured loan facility.

The United States of America announces the recession, and from that moment chaos begins. But a close analysis of economic history shows us that periods of economic depression have usually followed a pattern that was not so little predictable. Almost without exception, major economic crises in history, had similar developments[8]. Of course, each crisis has its own specificity, but there are some key similarities in the sequence of stages that all these crises have gone through.

The first common feature we observe when we analyze the way most economic crises unfold relates to the periods that precede such crises. Thus economic crises are usually preceded by a period of sustained economic growth. But if this economic growth is initially a healthy one, as the population's optimism in general and entrepreneurs' in particular increase, an "overheating of the economy" takes place. That economic growth which was initially healthy is becoming more and more one built more on speculative grounds, and one can easily observe an increasingly pronounced distance of the economic growth from the real economic basic rules.

The thinking trends of Keynesian inspiration, as well as the institutionalist ones, consider that there has been a overproduction phenomenon combined with a lack of aggregate demand in the period before the crisis, while monetarists believe that a determining cause of the Great Depression was the application of bad monetary policy by the U.S. authorities, which led to an unfortunate restriction of the money supply in circulation, that turned an ordinary recession into the worst and bleakest economic depression the world economy would face. The severe drought period in the Mississippi River basin in 1930, caused great difficulties to the U.S. farmers. Many of them were forced to sell their properties just to be able to pay their taxes or debts accumulated. Such circumstances led to the significant decrease in aggregate demand for all social categories. It also determined the decrease in the production of goods, and also, people's income. They were about to face bigger and bigger difficulties in paying their rates on already purchased goods. Are we somehow in a similar stage of unprecedented development of the consumption?

China is more and more taking into account the process of controlling the commodity prices so that to decrease inflation. The Russian Federation has suspended external deliveries of wheat because of the danger of insufficient supplies of wheat to meet the domestic demand of the country. The United Nations Organization warns of the situation in North Korea, a country that is headed towards a new stage of "chronic" food crisis. As we already showed at the beginning of this paper, a classification of the high risk countries ranks among the first 5 positions countries such as Afghanistan, Congo, Burundi, Eritrea and Sudan. At the opposite end are countries such as Qatar, Kuwait, United Arab Emirates, Denmark, the United States of America and Belgium. A global food crisis is imminent! This warning which is released periodically by competent experts and specialized institutions, should normally compel countries to a more rational attitude and behaviour to food consumption. Especially since, according to experts of the United Nations (UN), one billion people

[8] Alexandru Asavoaei "The economic crisis - a predictable phenomenon", the Faculty of Economics and Business Administration, July 18, 2012.

worldwide suffer from hunger and food prices will remain high on a medium term. Nevertheless, according to a study conducted by the Swedish Institute for Food and Biotechnology, an estimated one-third of food produced for human consumption is lost or wasted globally, amounting to 1.3 billion tonnes per year, namely 33% of everything that it is produced worldwide. Such reality represents a paradox, given that nearly one billion people worldwide suffer from hunger. In the same vein, the experts of the Food and Agriculture Organization of the United Nations warn that we are approaching a crisis of food prices. It seems that there is food, but many countries (especially those who were "richer" after the economic crisis - an example could be the BRIC group - Brazil, Russia, India and China) have decided to make supplies of domestic production but at the same time, they are buying goods in large quantities from anyone selling.

The UN Food and Agriculture Organization (FAO) foresees that the grain offer of the Asia-Pacific region will decrease considerably in 2050, so it will not be able to meet the growing demand. Consequently, investments in agriculture aimed at expanding productivity represent a priority for all countries. The agriculture, a sector highly dependent on climatic conditions and human factors, is conducted under the global impact of climate change. According to some market reports, if the current global warming continues, the productivity of major crop yields in tropical countries could decrease by 20 to 30%. On the other hand, the process of supplementing new farmlands was minimal and was done by tropical deforestation which, in turn, involves substantial environmental costs. In many countries, primary agricultural lands are restricted in favour of industrial and residential constructions. Moreover, the insufficient water resources and the underdeveloped irrigation systems affect the development of agriculture. Most food markets face major challenges arising from the growing demand, the changes in climate, the increase of production costs and commodity prices and poor crops, based on the diminishing of food reserves and agricultural areas. As we already mentioned, the main causes are the decrease of grain reserves because of unprecedented weather and hydrological conditions, the restriction on exports and a low dollar that has favoured the inflation. In 2011, the price of butter has reached the highest price in history; the price of sugar is hit a record of the last 30 years, while the price of wheat and corn increased by 40%.

But let us see how much the prices increased in reality. The price of wheat increased by 91% since the beginning of 2010 until the end of 2011, and the causes for such price increase are, among others, the extreme weather events in 2010: the Russian heat wave, fires in Israel, flooding in Pakistan and Australia, landslides in China, snowfall in the U.S. and the 12 hurricanes in the Atlantic Ocean[9]. To all these causes we can add up the protectionist measures of countries such as the Russian Federation and Ukraine, measures that, in the fall of 2010, limited grain exports because of low production and fears that they will not meet internal needs.

The quotations for corn increased by 57% over the same period, because crops were fewer, but surprisingly, the demand continued to go up, especially in China. In fact, grain consumption increased most in East Asia, the region becoming at present the largest consumer of grain. Oilseed consumption recorded an increase of over 1000% in East, South, and Southeast Asia. Sugar consumption has gone up exceptionally in South Asia since 1960 with a compounded annual growth rate of over 12%, more than four times the global growth rate. Livestock, the most expensive of the analyzed food commodities, saw demand move up without precedent over the past five decades in East Asia, with China accounting for almost 90% of the consumption. Note that sugar reached the maximum peak of the last 30 years. The general food price index for December 2010 was one percent higher than in June 2008, but cereal prices were still 13% below the level reached in 2008.

[9] University Professor, PhD Marian Ianculescu – *The global warming and the food crisis – challenges that can be reduced by foresters*.

Figure no. 1: The evolution of the FAO Food Price Index

Source: http://www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/

Man "consumes" on average 4.1 liters of diesel oil, 29 kilograms of soil and 2.2 tonnes of fresh water per day. "These are the resources consumed to feed one person. Multiply this number by 7 billion people and you will realize that all this huge amount of resources consumed is almost impossible to replace", said researcher Julian Cribb[10] at a conference of the Academy of Science in Canberra. In his paper entitled "The coming famine. The global food crisis and what we can do to avoid it" Julian Cribb says that the biggest personal impact of humans on the planet is how they consume food. He argues that most people do not realize what impact has such consumption for the planet. The reasearcher warns that in less than half a century the global food system will reach "points of no-return" unless there is radical change to farming systems, cities and the world diet.

"Take soil for instance. According to the Food and Agriculture Organization of the United Nations, the planet is deteriorating at a rapid pace, and we're losing up to 100 billion tonnes of topsoil a year, mostly into the oceans. Soil takes thousands of years to form, so it is not going to be replaced any time soon. Despite progress in countries like Australia, soil degradation is getting worse, not better. Some scientists say we will face a shortage of good farming soils within 70 years" argues the same Julian Cribb.

The situation is similar in the case of water. Over 4,000 cubic kilometers of water are extracted from the soil each year, the extraction being mostly unsustainable. Regions of the planet such as China or the Middle East will face a severe water crisis by 2030. However, the researcher says, what most governments and authorities on food security have failed to admit publicly is the scarcities of resources such as water and arable lands.

The reasearcher warns that "There is still time to act – but the action must be fast and it must be universal. Julian Cribb also says there are opportunities for major new developments in food production. "There are also 25,000 edible plants on Earth, 99% of them unfamiliar to most people.

[10] Julian Cribb is a science communicator and author of *The Coming Famine: the global food crisis and what we can do to avoid it*. He is a member of *On Line Opinion's* Editorial Advisory Board. Source Article from http://www.jurnal.md/ro/news/criza-alimentara-mondiala-ameninta-omenirea-707756/.

So we have not yet begun to explore the culinary potential of our home planet. For example, Australia alone has 6,100 edible plants of which we currently eat just five or six!" explains the researcher.

In the same context, Professor Alyson Warhurst, chief executive of Maplecroft, points out the importance of food: "Food security is a critical geopolitical issue and an important factor for investors concerned with sovereign risk, food and agricultural business with respect to supply chain integrity and foreign direct investments." Lester Brown also, in the aforementioned paper "Full Planet, Empty Plates: The New Geopolitics of Food Scarcity" starts from the observation that over the last decade, world grain reserves have fallen by one third, and the world food prices have more than doubled, triggering "a worldwide land rush and ushering in a new geopolitics of food."

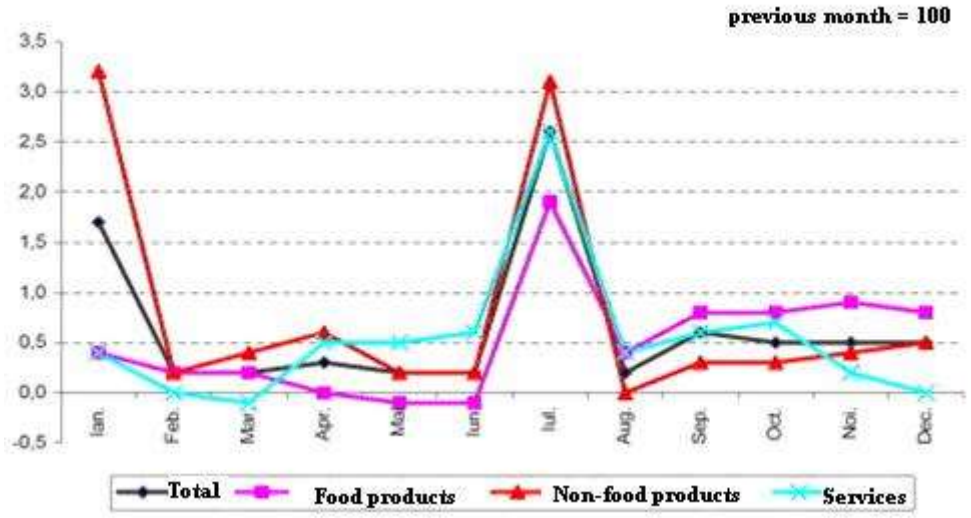
Conclusions

In line with the increase in household income levels, food expenditure patterns have also undergone changes[11]. Generally, in countries with lower income, food takes a much bigger share in the total household expenditures than in the higher income countries. Thus statistics show that a level of a Gross Domestic Product (GDP) per capita of less than USD 5,000 usually implied at least 30% of consumer expenses went toward food. This percent can reach even 50% for a number of countries with the lowest GDP per capita levels. Thus, the share of food in total expenditures tends to decline as a country's per capita income moves up. In high-income countries the share of food in total expenditures had an average share of 10.9%. Similarly, the composition of the food basket has also changed in tandem with the income increase. A larger share of food expenditure is allocated to higher value products such as meat or sugar and confectionery, leaving a lesser percent for basic commodities like bread and rice. However, the analysis of expenditure may not always be accurate. For instance, the breads and cereals category has a similar contribution to the total of food budgets. However, the number of calories derriving from this category account for 57% of total calories consumed in low-income countries and only 36% in high-income countries. This indicates that low-income countries consume larger amounts of simple breads and cereals (corn, rice) compared to other food categories. On the other hand, higher-income countries buy smaller amounts of more expensive products (packaged and processed cereals like breakfast cereals), which explains their relatively high share in total food expenditure. Therefore, in order to get a reasonably clear picture of the basket's composition, the analysis needs to cross-reference and collate data related to the share of individual food groups and the calories/nutritional value derived from them. Furthermore, product prices need to be considered too, since some more expensive products in lower-income countries can have a similar contribution to household expenditures despite much lower consumption volume.

Low-income countries will experience most severely the food crisis because in such countries population growth is sustained. One can consider that, at the same time with the unfolding of the financial crisis, we are also in a powerful food crisis and Romania is seen among the vulnerable countries being ranked 12th in the world within a classification of vulnerability to food price increases. Our country imports too much food not be affected by what happens on the international market. Moreover, in the last couple of years, Romania has faced dry and very warm summers. According to the National Institute of Statistics, in 2010, Romania had the highest inflation in the last five years. Among the products whose prices gone up the most we mention vegetables, cigarettes, canned food, as well as some service or administered prices.

[11] Blominvest Bank – F&B in the MENA Region Marie Dumitrescu, Romanian Center for Trade and Investment (CRPCIS).

Figure no. 3: Monthly increase in prices for 2010 (overall and by categories of goods and services)



Sorce: The National Institute of Statistics

Following the analysis made by experts according to some generally accepted criteria, it was concluded that Romania meets all the requirements to qualify among the countries with poor food security. This result is supported by the following aspects: low agricultural production, vast areas of uncultivated land or lands worked rudimentary, food price explosion superimposed over a continuously lower purchasing power because of the economic crisis. This situation determines large segments of the population to no longer afford to provide their food needs from their monthly income. The seriousness of the situation also lies in the fact that a food crisis may become a succession of crises at any time should the market imbalances persist, and the competition for energy sources will continue to affect the production and the commodity market. The causes of the food crisis in Romania may be grouped as follows[12]:

1. About half the food products consumed in our country is imported, which means that any price increase on the international market will affect immediately our domestic market.

2. A large part of the domestic food production is exported, which means that we cannot trust the assumption that the domestic production will save us from the food crisis. Should the prices rise all over the world, then all the Romanian wheat will be exported as before to Europe.

3. Romania's population spends more than 50% of their income for purchasing food products, which means that the limit of endurance has either already been reached or exceeded. The consumer cannot afford and support new price increases because he simply does not have the money needed to purchase expensive product.

4. The speculative factor on the food supply chain is very long, with an endless string of intermediaries who will take advantage of the occasion to obtain greater profit on the consumers' expense.

[12] "The food crisis and the possible repercussions on Romania" - Assoc. Professor PhD, Rabontu Cecilia Irina, Professor PhD, Niculescu George, Constantin Brâncuşi University of Tg-Jiu.

Price increases affect mostly people with medium and below-medium income who limit their consumption in return as a reaction to the price increase. Another direct effect is the deterioration of the quality of life due to the fact that people cease to invest anymore in their own comfort and wellbeing.

From the data and observations presented within this paper, it is evident that a food crisis overlapping the global economic crisis will seriously affect household budgets and, implicitly, the food consumption. As a solution we can argue that: the lack of food products on the market could be resolved by motivating the domestic producers and by targeting the domestic market. Also, another controversial solution would be a larger production of genetically modified foods that have adverse effects on human health, but that might solve the problem of food scarcity. Therefore, public policies ought to consider encouraging the domestic production, the increase of foreign investment in agriculture, the increase of the levels of leasing and alienation of land, the increase of technology and invariably the reduction of prices.

References

- Aguilera, Jose Miguel and David W. Stanley (1999), *Microstructural Principles of Food Processing and Engineering*, Springer.
- Davidson, Alan (2006), *The Oxford Companion to Food,* 2nd ed. UK: Oxford University Press.
- Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World 2005*. (http://www.fao.org/docrep/008/a0200e/a0200e00.htm)
- Hannaford, Steve, *Oligopoly Watch: Top 20 world food companies*. (http://www.oligopolywatch.com/2005/10/06.html)
- Howe, P. and S. Devereux (2004), *Famine Intensity and Magnitude Scales: A Proposal for an Instrumental Definition of Famine*.
- Humphery, Kim (1998), *Shelf Life: Supermarkets and the Changing Cultures of Consumption*, Cambridge University Press.
- Jango-Cohen, Judith (2005), *The History Of Food*, Twenty-First Century Books.
- National Institute of Health, *Food poisoning*, MedlinePlus Medical Encyclopedia F., May 11, 2006. Obtained from http://www.niaid.nih.gov/publications/pdf/foodallergy.pdf on 2006-09-29.
- Smith, Andrew (Editor) (2007), "*Food Marketing*" in Oxford Encyclopedia of American Food and Drink, New York: Oxford University Press.
- Van den Bossche, Peter (2005), *The Law and Policy of the bosanac Trade Organization: Text, Cases and Materials*, UK: Cambridge University Press.
- Alexandru, Asavoaei, "*The economic crisis - a predictable phenomenon*", Al. I. Cuza University, the Faculty of Economics and Business Administration, July 18, 2012.
- www.fao.org/worldfoodsituation

THE DEMOGRAPHIC CRISIS AND ITS CONSEQUENCES

LIVIU RADU[*]
CARMEN RADU[**]

Abstract
The demographic decline can create major dysfunctionalities not only on a social level but also from the perspective of the economic-financial evolution of the world's states. The obvious aging of the industrialized states' population overlapping the import of cheap workforce in the developing countries can start mutations whose consequences are somewhat predictable but discouraging. First, an accelerated urbanization of the states is foreseen, second, the decrease of birthrates, negative external migration, increase of mortality and its stagnation in a larger value than that of the birthrate, and not least the population's aging will hinder a part of the developing countries to sustain a high rhythm of long-term economic increase. The social-economic consequences will be reflected in the labor market, the householders' amount of income as well as in the education's level. All these impose a rethinking of the public politics, especially of the social insurance's system and of the education, a reorientation of the economy based on the increase of specializing in production and productivity, as well as a financial stability unburdened by the politics' interference in the business environment.

Key words*: demographic decline, population aging, migration, urbanization, public politics, economic growth.*

Introduction

The demography represents the science which studies the human population's dynamics. It contains the size, structure and territory repartition of the population as well as the method in which this population evolves in time for the births, deceases, migrations and aging. We can demographically analyze societies' basics or we can refer only to groups defined after certain criteria: the level of culture and civilization, nationality, standard of living, religion etc.

Demography emerged at the same time with statistics (in the XIX century) and eventually separated from this last one in order to become an independent science with a distinctive domain of research and analysis. Demography represents an interference, frontier discipline. Through its research processes, demography belongs to mathematics, however through the analysis of the investigations' results it belongs to the field of social-economic and political sciences. At present, on an European and global level, demography records the most rapid progresses within the field of social sciences.

In 1878 within the second International Congress of hygiene, Emile Levasseur proposes the term of "demography" to designate a distinctive science. This term will replace the already acknowledged theories regarding social statistics, social physics or theories of the population. It was only after four years after this proposition that the term "demography" was officially included during the international Congress of hygiene and demography by describing the new science of population.

In the demographic study, quantitative and qualitative numerical data are used, which are gathered through censuses, questionnaires or through the mean of governmental institutions which offer statistical data regarding the population's changes (births, deaths, marriages, etc.). The demographic data can also result from media surveys carried out with a commercial purpose and based on methods of indirect estimation. The first modern census is considered to be the performance one that took place in 1790 in the United States.

The specialized literature has beneficiated throughout time of prestigious authors' theories and analyses: John Graunt (considered to be the first statistician and demographer through his work „Natural and political observations upon the bills of mortality chiefly with reference to the

[*] Lecturer, PhD, "Nicolae Titulescu" University of Bucharest, Romania (lgradu2005@yahoo.co.uk).
[**] Lecturer, PhD, "Nicolae Titulescu" University of Bucharest, Romania (cradu@univnt.ro).

government, religion, trade, growth, air, diseases etc., of the City of London" from 1662), Thomas Robert Malthus (the founder of the theory which carries his name, according to which the population is growing in a geometrical progression, while the sustenance means are growing in an arithmetical progression – as a consequence of this relation between the population and the economic state, Malthus considers poverty, diseases, epidemics and wars to be positive factors for humanity, given the fact that they insure the equilibrium between the population's number and the quantity of sustenance), Achille Guillard (defined demography as "the mathematical knowledge of the populations, their general moves and physical, civil, intellectual and moral states" – 1885).

The demographic studies do not have only one self-purpose, that of knowing the demographic evolution of a certain zone, country or even an entire terrestrial civilization, they are, however, mainly useful from the economic and political environment point of view, because the reports between the population and human groups and the production, repartition and consumption of natural resources and treasures can be tracked. These sorts of demographical analyses are also required from the social and economic politics point of view, for the knowledge of the tax payer population or from the perspective of the economic capacity and military potential of a country. The public politics of a government, including those regarding medical assistance, insurance system and pensions, increase their consideration for the demographical analyses, evolutions and prognoses.

The demographical changes from the last years have multiple consequences under an economic, social, political and durable development aspect. This study is aimed at emphasizing a part of these consequences and their implications on the governmental politics and strategies.

Theoretical background

In the year 1999, the UNO announced the birth of the 6th billion person on this planet (Adnan Nevic, born in Sarajevo). After only 12 years, on October the 31st 2011, the planet's population reached 7 billion inhabitants. In only 12 years[1] the globe's population increased with 16,66%. If we take in account the fact that the evaluations of the UNO statistics Committee's secretariat show that throughout approximately 70 years, from 1930 until 2000, the globe's population had tripled by gradually rising from 2 billion to 2,518 billion in the year 1950, followed by 3,024 billion in 1960 and at the end of the year 2000 exceeding 6 billion inhabitants[2]. The population's projection made by UNO's demographic division in 1958 proved to be a realistic one for the year 2000, being placed between the estimation limits of 4,88 and 6,9 billion inhabitants.

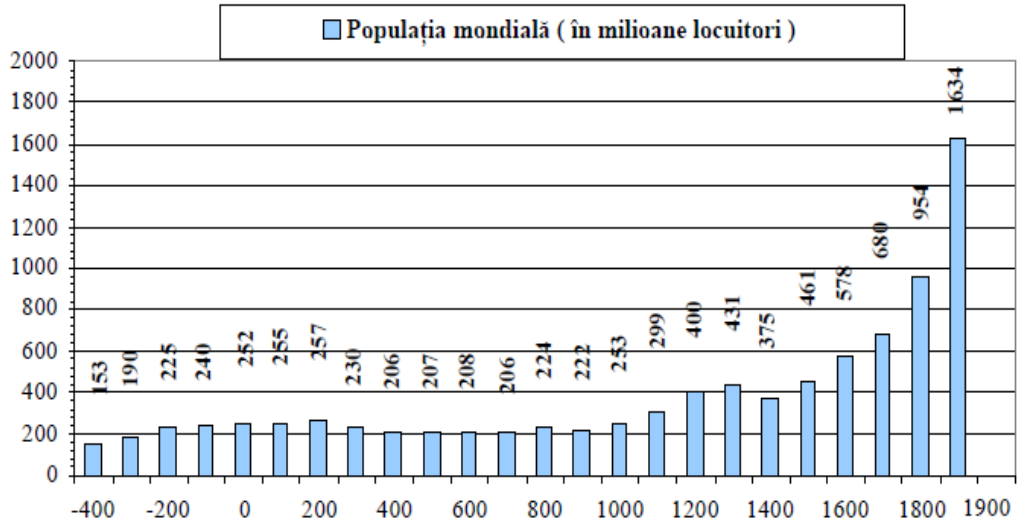
Furthermore, according to statistics, the globe's population will increase towards reaching nine billion around the year 2050 even in the situation in which the birth rate will follow the descending course foreseen by the UNO's specialists. They estimate a 50% decrease of the global population's growth rate, in relation to the one recorded between 1959 and 1999.

This growth is not equally distributed (figure 2) since it requires totally different approaches regarding the public politics aimed at all the aspects of economic and social life influenced by these demographic evolutions.

The global economy has been based until now on a growing population and this trend will continue in the developing states and only in a small matter in the industrialized states. Out of the strongly industrialized countries, it is only for the United States of America (312 million inhabitants in the 2010 census) that the specialists have a significant positive prognosis for the year 2050. On the other hand, the risks of overpopulation are real and much more serious than those of under-population.

[1] Revista Ştiinţă & Tehnică - numărul 6, septembrie 2011.
[2] http://store.ectap.ro/articole/212.pdf.

Figure 1 : The population's evolution on a global level until the beginning of the XXth century



Sursa: Gheorghe Sãvoiu, Numărul populaţiei, o sinteză statistică şi economică a evoluţiei alternative către explozie sau implozie demografică (2006) **apud** Vladimir Trebici (1991), Populaţia Terrei. Demografie mondialã, Editura Ştiinţifică, Bucureşti, p. 54.

Source: Gheorghe Sãvoiu, The number of population, a statistical and economic synthesis of the alternative evolution towards demographic explosion or implosion (2006) **apud** Vladimir Trebici (1991), Earth's population.

The specialists from the "Vladimir Trebici" Demographic Research Center contend that the decrease of birthrates, negative external migration, increase of general mortality and its stagnation on a larger value than that of the birthrate are the main causes that lead to demographic aging. These tendencies are more accentuated in Europe especially.

Figure 2: The population's medium protection on continents for the 2010-2050 period

- milioane locuitori -

Anul	Totalul populației mondiale	din care în:					
		Africa	America de Nord	America de Sud	Asia	Europa	Oceania şi Australia
2010	6 843	1 007	346	599	4 130	726	35
2015	7 219	1 115	361	634	4 351	721	37
2020	7 578	1 228	375	667	4 554	715	39
2025	7 905	1 344	388	697	4 728	707	41
2030	8 199	1 463	401	722	4 872	698	43
2035	8 463	1 584	411	744	4 992	688	44
2040	8 701	1 705	421	761	5 092	677	45
2045	8 907	1 823	429	774	5 168	666	47
2050	9 076	1 937	438	783	5 217	653	48

Sursa: World Urbanization Prospects: The 2005 Revision, Population Division of the Departament of Economic and Social Affairs of the United Nations Secretariat.

Image – from left to right: Year, Total of world population, Millions of inhabitants out of which Africa, North America, South America, Asia, Europe, Oceania and Australia

The demographic evolution's main consequences are:

A. On a social plan:

1.The birthrate's increase in certain geographical zones and its decrease in other areas;
2.The birthrate's decrease in the strongly industrialized countries;
3.Infantile mortality;
4.Emigration and immigration;
5.The changes of consumption tendencies;
6.The population's aging;
7.The extending age of retirement;
8.The rethinking of social politics.

B. On an economic plan:

1.Substantial changes of production in certain branches and under-branches of activity;
2.Negative evolutions and tendencies of labor productivity in certain domains;
3.The need to adapt to consumption needs;
4.Changes in the technology of exploiting resources;
5.Differences related to the way of satisfying necessities.

C. On a political plan:

1.The changes of industrial power poles;
2.Conquering new areas of influence.

A. The consequences of demographic evolution on a social plan

The demographic decline and emigration

When confronted with a scarring demographic decline during the second half of the XX century, many strongly industrialized states in Western Europe tried to substitute the labor force

deficit by importing cheap workforce from poorly industrialized countries, especially from the Middle East. Consequently, large ethnical minorities were constituted and were unable of becoming socially and culturally integrated, a problem which still exists today, as it is shown by the tensions existing in the French society, for example. Although it is not a viable long-term solution, soon Romania will become an attraction point for immigrants from poorer countries that will try to occupy the niches left open in the labor market by the Romanian people that left. This is what happened in countries such as Italy and Portugal, which constituted for a long time sources of emigration and which have now become points of attraction for the Romanians on the lookout of winning opportunities. For the time being, the number of immigrants in Romania remains reduced (10 000 people in 2008, 5% more that in the previous year). The total number of labor permits released to foreigners was of 76,700 in 2008, with 30% more than in 2007. Out of these, one third represents citizens of countries part of the EU, 24 percent being from Italy and 18% from Germany, however the main origin country of immigrants in Romania remains the Republic of Moldova.

The most chosen destinations by Romanian emigrants are Italy, Spain and France, perhaps because of the similar and easy to learn languages. Romania is becoming more deserted and mediocre, thus reaching the point of losing its elites, which leave to continue their studies in greater universities such as Harvard or Cambridge. Romanians' migration is a phenomenon which no government can keep under control because of the lack of competitiveness. Hence, the labor force's migrations were and continue to be one of the main preoccupations of the Romanian government but without any efficient measures taken in order to combat this problem. Simultaneously, the migrations have a negative impact on the business environment, to this extent losing money along with the loss of people. Romania's population, estimated in 2002 at 21,680,968 inhabitants, will decrease down to 19.433.700 in 2022, and eventually will reach 18.136.724 in 2032. Romania's population has already reduced with more than 2,6 million since 2001, presently being represented by 19 million inhabitants, as shown in the latest census. The officials placed this accelerated decrease of population next to the reason that many have left the country in order to find a job in European countries such as Spain, Italy and France. The number of Romanian emigrants in the year 2009 (at the beginning of the economic crisis) was of 2769 million, which represented 13,1% of the total population. The money sums send in the country, in 2009, by the workers hired outside the country's borders, represented 4,4% of the GDP. When it comes to the deliveries during 2008 and 2009, Romania was surpassed only by Ukraine. The sums sent home by the Ukrainians throughout the two-year period exceeded 5 billion dollars a year. According to the data published by the World Bank, over 6,5 million Ukrainians live in foreign countries.

We are currently facing two problems. The first: Romanians are migrating from poor areas in the country to the big cities. Second: Romanians are leaving the country to find work places in other states of the European Union. Both migration trends provoke an enormous demographic erosion in the rural areas because those who leave are young, educated and professionally prepared. Those who remain in the country are either old, or without any training or talent. These cannot determine the Romanian economy's success. Referring to those who do return, however, in the country, they return from Spain and Italy, where the economy in recession, especially in constructions, is causing people to lose their jobs. As soon as the conditions will change, we will assist to their new departure from this country. Nonetheless, we must consider that most Romanians have accommodated in the countries they work in, their families are already there and returning in the country is not a solution for them.

For example, at the beginning of the year 2010, 439 people, young and old (48% of which were older), came back to 1000 adults, as opposed to 509 young and old people, as it was recorded in 1992 when the older population represented only 33 percent. The researchers from the "Vladimir Trebici" Demographic Research Center admit that the 65 years old population share…..(Cercetătorii de la Centrul de Cercetări Demografice "Vladimir Trebici" susţin că ponderea populaţiei de 65 de ani şi peste va creşte numeric până în anul 2015) a mancat cuvinte..And the results of the population's

projection confirm the continuation of the demographic aging process in the following decades, through the numerical and proportional decrease of the young people under 15 years old and the increase of the mature population.

The result of an analysis made by the European Committee, Romania's population has reduced with over one million people from 1992 and the prognoses indicate a decrease of approximately 2 million until 2020, especially for the young people with ages between 0 and 24, as shown by the experts from the Romanian administration. The birthrate has reduced, the number of young people with ages between 0 and 14 has dropped from 22,7 percent in 1992 to 15,9% in 2005, and that of old people over 65 years old has risen from 11 percent to 14,7 percent in the same time interval. The Romanian administration experts admit that the decreasing tendency of birthrates and the population's aging process will continue. The total number of live-births has drastically and continuously dropped from 1987 to 1995, when it stabilized for a while but restarted a new decrease from the year 2000 and lasted until 2002. According to studies made by the "Vladimir Trebici" Demographic Research Center, the number of live-births was with 40 percentages lower than in 1985. Starting with 1992, the deceases number constantly surpassed the live-births, thus contributing to the population's numeric decline. As far as the demographic aging is concerned, the specialists sustain that in less than two decades, every five Romanian inhabitant will enter the "elder" category.

The demographic aging

The demographic aging is a phenomenon that has been affecting modern states for several decades. The modernization has produced marking changes in the family structure, with significant demographic implications. As a result of the increasingly higher level of participation of women on the labor market and of the usage on a large scale of contraceptive methods, the number of births has significantly dropped and the family model that included a family with many children and fertility close to the natural one, has been replaced with the model that includes one or two children. On the other hand, the technological development has lead to new medical treatments accessible to the entire population. This matter, combined with the significant life quality improvement, has lead to the increase of the average life expectancy. In other words, in the industrialized states, people have begun to live longer than 50 years ago, but fewer and fewer children are being born, paradoxically, within the wealthy families.

The aging phenomenon is especially present in Europe and Japan. It is estimated that Europe has already reached a critical state: after one century of natural demographic growth, the perspective for this century is, on the contrary, a natural decline and an excessive aging of the population. A large part of the eastern European countries are already experiencing the demographic decline and numerous western countries will do so too in the near future. According to the UNO's demographic projection, the diminution of the population's effective will reach southern Europe in a couple of years, followed by Western Europe after 2010 and northern Europe after 2030[3]. The decline will be very scarring in Federal Russia, Eastern and middle Europe and more moderate in western and Northern Europe[4]. Some countries will be in advance or late towards one of the demographic processes. For instance, Western and Eastern Germany have already known a population decline in the mid '80s, as opposed to Ireland which, thanks to its high fertility, will experience the continuous growth of its population in the first half of this century as well. Despite the intensity and rhythm differences that will persist between various countries, all European societies have or will have to mainly face the same tendencies of demographic decline and aging. As far as longevity is concerned, everyone aspires to live a long life and in good health, but society has to provide a favorable environment for the old people, by continuing to ensure an intergenerational equity in all the social

[3] Les Tendances en matière de population en Europe et leur sensibilité aux mésures, des pouvoirs publics, Asamblée parlamentaire, mai 2004.

[4] Europa septentrională reprezintă Europa de nord şi cuprinde ţările scandinave şi baltice.

life's domains[5]. The population's tendency to age has a profound impact on all generations and on the highest parts of the economical and social domains: labor force, social protection, education, culture and politics.

Out of all the demographic evolutions, the increased 80+ age segment is also the most intense and most rapid one. Regarding this tendency, one might say that the various regions of Europe are not affected in the same way. The asymmetrical demographic impact represents by itself a challenge since it implies the politics' need to adapt to the regional realities. In some countries, such as Italy for instance, the overrepresentation of very old people is the result of the accumulation of the effects of high fertility between the two wars and the massive decrease of birthrates in the '80s. Given the life expectancy increase as well, we will assist in most part of the countries to a strong increase of the age 80+ group after 2025. It is also expected that the very elderly people (80+) will be part of the group that will experience the fastest growth. In the first half of the XXI century their number will practically triple, thus reaching 65 million, as opposed to the present 22 million. The highest increase rate is foreseen for the period between the years 2000 and 2015. According to UNO's medium projection version, in 2050 the very old people will represent 7% of Eastern Europe, 10% in Northern Europe and 12% in the south and west.

The implications are major for the society's functioning method in its ensemble. A first consequence resides in the fact that the dependent population, mainly composed of retired people and of children, numerically surpasses the active population and can lead in the future to society's incapacity to insure incomes for the inactive. To this extent, the first ones aiming towards a potentially collapse are the pension systems and the medical assistance, both large resource consumers and dependent on the active population's incomes. The population's aging process has been for several decades in the political agenda of all powerfully industrialized states, and the solutions adopted vary from keeping those that reach their retirement age as long as possible in activity, to stimulating fertility through the work program's flexibility and offering public children-care facilities.

Romania: demographic aging or demographic decline?

The demographic aging phenomenon is more accentuated in the rural environment than in urban areas, approximately 19 percent of the rural population surpassing the age of 65. The aging process will have negative effects in time. On January the 1st, Romania's population was of 21658,5 thousand inhabitants, out of which 48,8 percent were men. Romania's actual demographic situation is not an isolated case in the European context. The entire Europe has known evolutions similar to the one in Romania, however the decrease of fertility is more accentuated in the ex-socialist countries. At the end of the previous year, it was estimated that the global population surpassed 7 billion inhabitants and specialist considered that in the year 2050 the level of 9 billion inhabitants will be exceeded. According the specialists' expectancies, in the XXI century the world population will continue to grow but in a slow rhythm, after which, in the last decades, it has experienced an exponential increase.

Last studies confirm the scarring demographic decrease that our country is experiencing. Relieving the restrictions imposed by the communist regime regarding the family planning and contraception, as well the economical decrease through which the Romanian society has passed in the first years of transition, have led to the drastic decrease of birthrates. The fertility rate is part of the most reduced in Europe, even if from the beginning of the year 2003 a slight increase was felt, mainly in the urban areas. Demographic studies show that in Romania the number of children that are born is a lot under the one required for replacing generations. Unlike the strongly industrialized European countries, in Romania people are living less, the medium life expectancy being more

[5] Les tendances en matière de population en Europe et leur sensibilité aux mésures des pouvoirs publics, Asamblée parlamentaire, mai 2004.

reduced in comparison to states such as Sweden or Holland. Poverty, low access to medical services and lack of sanitary education represent only a part of the factors that explain this situation. Nevertheless, the number of children that are born does not insure the replacement of generations. Furthermore, it is expected that the economic and social development will raise the medium life expectancy. All these will aggravate the population's aging process. Beyond the population's "universal" aging process, Romania has been confronting in the last years with a powerful external migration. Although there are no official data referring to this phenomenon, the unofficial estimations mention almost one million Romanians that are working in Italy and another one in Spain. You can hear the Romanian language spoken everywhere in many European countries, which thus shows that the migration phenomenon for finding jobs in foreign countries is indeed a massive one. Those who leave are in general part of the active population, adult people with a qualification.

All these aggravate the country's demographic decline. The predictions made in this context by demographers are worrying. According to the United Nations Population Fund's estimations, Romania's population will reach 16 million inhabitants until 2050 if long term measures will not be taken. Practically, in 40 years the dependency rate will be of 1 to 9, meaning that one adult will have to support the vulnerable age groups (children and elders). This is the gloomiest scenario imagined; nevertheless it represents an alarm signal to which the required attention must be paid.

Romania's National Bank economists estimate that the demographic problems (the population decrease and aging process and the labor force migration) will hinder Romania from sustaining a high rhythm of long-term economic growth, the migration's demographic shock could be reversible but the birthrates' decrease, which began in 1992, cannot be compensated and will be reflected in the labor market starting with the year 2010. Moreover, the "demographic time bomb" concept is not a new one, as it is the main factor which determined the states to launch private pension systems in order to overcome the pressures which the population's decrease and aging will have on a global level on the public pension budgets.

Only seven countries could manage to reach economical growths above 5% for more than 20 years, among which are China, Ireland and Macau, but none of them had demographic problems. Romania cannot hope, because of the demographic problems, that it will reach such growth rhythms for a medium or long term. According to a study presented by Bianca PAUNA, representative of the Economic Research National Institute, the external migration represents in Romania's case 10% of the total population and almost 25% of the active population. As we previously emphasized, migration has as a main disadvantage the emergence of labor force deficit, which presently mostly affects the big cities in Romania. In accordance to the Eurostate data, the statistical division of the European Union, Romania will suffer until the year 2060 a dramatic loss of population – which will affect the public pension system and which will make private economy absolutely necessary. According to the same data published by Eurostate, Eastern Europe's population is aging more rapidly than the Western one. Consequently, the eastern migration will decrease and the ex-communist countries will have to find in the next decade new solutions for maintaining the rhythm of development.

Eastern Europe also has the most decrease rates of participation in the labor force by young people, women and elderly.

If the actual migration and demographic trends will be maintained, and the economy will not offer stimulants to investors and autochthonous labor force in order to remain in the country, Romania will not have the possibility to recover the economic discrepancies that separate it from the civilized world. According to a study made by the Institute for Population and Demography in Berlin, the most unattractive regions in Europe, from an economic and standard of living point of view, are in the rural areas in Romania, Poland, Bulgaria, Italy and Greece. The qualificative expresses a complex of factors taken in consideration for the study's elaboration: birthrate, economic development, population income, level of education, living conditions, migration etc. In three decades, a decent life, if not a prosperous one, and functional economies will be present in countries

such as Switzerland, Sweden, France, Great Britain, Austria and Germany. While countries like the Czech Republic, Slovakia, Slovenia and Hungary will be, in their turn, places with a certain degree of economic development. Even if they are facing the same problems, specific to their ex socialist camp, they have started the reforms early, are decisive towards their objectives and have allocated the resources necessary to reaching them. Dr Reiner Klingholz[6] - one of the authors of the German study, considered that the low score obtained by Romania, which placed it among the countries with an uncertain economic and demographic future, was calculated based on the indicators that quantify economy in general, labor market, housekeepers incomes, level of education etc. Even if the Romanian economy also recorded growth rhythms superior to European developed economies, the statute of a country that recently entered the European Union is noticeable since high development differences exist towards the old member states, as well as towards other ex-communist countries.

Depending on the human resources' dimension, four of the fifteen countries members of the European Union, such as Germany, France, Great Britain and Italy are large countries, two are part of the middle countries group (Spain and Holland) and the others are considered small countries.

Also, the diminishing active population also attracts the drastic decrease of labor productivity in economy. The specialists believe in the existence of methods through which the economic growth cannot be affected by this situation, such as the development of modern industry and services sector, simultaneous with the education's level improvement. Thus, the following question arises: how fast and especially how efficient can Romania invest in competitive education, service and industries, in order to insure decent living conditions for the aging population?

B. Romania's case regarding the demographic evolution's consequences on an economic plan

Eight, nine years ago, some authors[7] considered that the demographic crisis manifestation and the labor force's migration towards countries of the European Union represented a positive process through which national product can be formed, money can be brought in the country, a new culture and civilization model can be implemented or a business can be set on the basis of the accumulated incomes. Also, from a macroeconomic point of view, the migration's effects were beneficial because the small investors started and coordinated business in the country, created working places without private or public investing support from the national economy. The incomes created by this sector joined the internal consume fund, funds destined for development and, on some measure, for economy's budgetary resources. Also, the money transfers, with powerful implication on a microeconomic level as well as macroeconomic, were considered another positive effect of migration[8]. Regarding these transfers, Romania's National Bank's estimations reached 1.753,5 billion USA dollars in 2004 and 4.440,9 million USD in 2005(4), which represents 4,51% of Romania's GDP for the year 2005. The effects of the money transfer on a macroeconomic level are difficult enough to be measured because of the multiple interactions on the macroeconomic variables level. These transfers have visible effects on investments and economies. The most visible impact of these transfers is recorded on the home's expenditures, which is highly important on a macroeconomic level, being recorded in the internal aggregated demand, part of the GDP. The money transfers towards homes represent direct sources of income increase, which leads to the

[6] Dr. Reiner Klingholz, director al Institutului din Berlin pentru Populaţie şi Dezvoltare, a descris provocările cu care se confruntă sistemele sociale datorate natalităţii în scădere şi creşterea numărului de persoane care sunt în vârsta de pensionare la Diplomatenkolleg - 16 februarie 2012.

[7] Valeriu Coste „Efectele migraţiei asupra economiei naţionale" Analele ştiinţifice ale universităţii "Alexandru Ioan Cuza"din Iaşi 2004-2005.

[8] Monica Roman şi Cristina Voicu " Câteva efecte socioeconomice ale migraţiei forţei de muncă asupra ţărilor de emigraţie. Cazul României" Economie teoretică şi aplicată Volumul XVII (2010), No. 7(548).

growth of consumption and implicitly to the temporary reduction of poverty. These sums have the capacity to reduce the social polarization through their redistribution effects.

After a while it was considered that that category of Romanian people existed that left the country to work, people disappointed by the lack of opportunities in this country, the poor living conditions and the low degree of civilization. The most often encountered economic motives are related to the low salaries as well as the lack of working places. Another complaint is related to the number and level of imposed taxes, which do nothing more than deepen the citizens' level of frustration and the business environment. The minimum economy wage, unemployment aid and social services do not compare to their level offered in other countries. The politicians that gained power in the last period have not managed at all to change the situation. Everybody considers that the educational system must be strongly improved so that the Romanian elite will not leave the country but in spite of this, nothing is happening. More and more young, well-educate people but members of separated families or with reduced incomes, choose from more and more younger ages to leave in foreign countries.

At the present we can notice the dramatic potential of the well qualified labor force that Romania has to generously offer to foreigners. The Romanian state spends approximately 10.000 Euros for every citizen before hiring him, for those that stay in school until the age of 18. Among others, the money is spent for education, transport and social services. In addition, the sum spent for those that finish university studies is almost doubled. This is why when a qualified worked leaves, a corresponding restitution of the investments made for his professional training is less likely.

Today, Romania's labor market[9] is characterized by a rate of relatively low activity compared to the EU's medium, high rates of unemployment for the group ages of 15-19 and 20-24, a high percentage of early retirement from the formal labor market and a significant degree of occupation in the agricultural sector characterized by the lack of taxpaying. Also, in the occupied population's structure split into sectors, a few negative tendencies manifest[10]:

- the increase of the population working in agriculture, associated with the emphasized demographic aging process and the feminization of this branch and the rural environment;
- the decrease of the population involved in industry and agriculture, with direct effects on the ensemble economic results, on the human factor quality, labor motivation, economic and social efficiency;
- the extremely slow evolution in proportion and rhythm, unequal on branches, of the population occupied with services;
- the exports decrease (as a result of the internal production decrease), the artificial support of the national currency.

This evolution was the result of the simultaneous action of numerous economic, demographic and social factors. Between these, the highest share is represented by the economic factors and, above everything, by the economic organism's restructuring, which led to an accentuated economic decline. In consequence, in Romania's labor market more types of unemployment exist (conjectural, frictional, as well as other types that, naturally, are present in a "settled" market economy), but the most predominant is the structural one. In this context we must not forget the influence of a demographic factor. The unemployment, as a result of the game between labor force supply and demand has risen, on one hand through the compressing of the first, and on the other hand through increasing the second one through: a) *the massive redundancies* of the occupied labor force (over

[9] Programul de convergenţă pe 2008-2011 elaborat de Guvernul României în mai 2009.

[10] DIAGNOZA SCHIMBĂRILOR STRUCTURALE DEMO-ECONOMICE ŞI SOCIALE ALE POPULAŢIEI ROMÂNIEI – NIVEL NAŢIONAL ŞI REGIONAL Conf. univ. dr. Constanţa Mihăescu, Prof. univ. dr. Virgil Sora, Prof. univ. dr. Christina Marta Suciu, Lect. univ. dr. Miruna Hurduzeu, Lect. univ. dr. Diana Hristache, Lect. univ. dr. Dorina Poanta, Lect. univ. dr. Aniela Danciu, Lect. univ. dr. Ileana Niculescu-Aron, Expert I A Marcela Postelnicu, Expert I A Adriana Cozma.

60% of the unemployed people number); b) *the new presence* on the labor market of some labor force contingencies – graduates of the secondary and superior school system and, in addition, of other categories of unoccupied population.

C. The demographic evolution's consequences on a political plan

On a global level, the demographic situation is in full evolution. This phenomenon is reaching all states of the world. If in order to reach 2 billion inhabitants, 130 years were required for the world's population (1880-1930), in order to surpass from 6 billion (1999) to 7 billion (2011), only 12 years were required. This evolution is different from one state to another, from one region to the next. In the last decades, the world's population has known an accelerated growth, especially in the developed states. In Europe a great demographic tendencies diversity is observed, which is characterized by a diminished population in Germany and Russia and, on the other hand, a rapid increase in France and Great Britain, mainly caused by migrations. To this extent, it is important for the demographic challenges to be transformed into opportunities of such matter that guarantee a durable economic growth and international security. The population's scheme of growth is very different in the developing countries or underdeveloped and developed countries. In the first case, demography is characterized by a strong proportion of young people that represent more than half of the population. The enormous proportion of young people in these underdeveloped regions, often instable, imposes a great social burden and serious problems of the governments' infrastructure that have no means of offering them education, social services, homes and lasting work possibilities. On the other hand, if the young ones do not find a working place in their country they tend to emigrate, heading for Europe or North America, where they hope to be able to work and be better paid than in their natal country.

Simultaneous with the numerical growth, the global population is aging. According to projections, until 2050, the number of people over 60 years old will triple on a global level, thus reaching 2 billion individuals. Europe, according to the same source, will have a larger number of elderly people, which will maintain for several decades. Indeed until 2050 more than one third of the European population should surpass the age of 60. This situation will impose major changes in politics and the attitude towards age. We are talking about the social protection and the medical assistance which these people over 60 years old regularly require more. The developed countries are facing the aging of their populations. The rate of births is a lot under the developed countries. UNO foresees that the number of 60 year old people and higher, in the developed regions of the world, will increase from 245 million, in 2005, to 406 million, in 2050, while the number of those younger than 60 will diminish from 971 million, in 2005, to 839 million in 2050[11].

A special place among the demographic phenomena is occupied by the urbanization. According to the UNO reports, 60% of the world's inhabitants will be living in cities by 2030 (70% in 2050)[12]. In 2008, the global urban population equaled the rural population level. It is foreseen that due to the demographic growth, the majority of the population will be in urban areas. The demographic projections presume that the number of townsmen will reach 4,9 billion near 2030 and the number could reach 9,2 billion in 2050. The cities will totally absorb this increase and will continue to attract people from the rural environment in search of a better and well paid working

---

[11] Organisation des Nations Unies, *Perspectives de la population mondiale: la Révision de 2006*, New York, Nations Unies, 2007, http://www.un.org/esa/population/publications/wpp2006/français.pdf.

[12] *L'environnement de la sécurité future 2008-2030,* http://publications.gc. ca/collections/collection_2011/dn-nd/D4-8-1-2010-fra.pdf, p. 23.

[13] *Nations Unies, Perspectives d'urbanisation mondiale: révision de 2007*, New York, Nations Unies, 2008, pp. 1, 2, 4; *Gouvernement des Etats-Unis, Joint Operating Environment Trends and Challenges* for the Future Joint Force Through 2030, Norfolk, United States Joint Forces Command, décembre 2007, p. 15.

place. This demographic growth will be concentrated in the urban areas in less developed countries, especially in Asia, Africa, Latin America and Caribbean[13].

In parallel with the globally urbanization, we are assisting to the expansion of cities with more than 10 million inhabitants. In 2007, 19 such cities existed, number which should increase to 27 until 2025; 80% of these cities are situated in developing countries. These already huge cities, which will literally be taken by assault by a multitude of new residents during the next decades, will suffer various calamities such as poverty, road block and pollution, as well as critical transport services and questionable living conditions. As a result, the poor townsmen will often live in insanitary homes, without water, electricity or sewerage. Uncontrolled urbanization and growth of megalopolises will generate security problems. The large cities expansion will basically reach the shore regions situated at less than 100 km of coast.

At the present, 60% of the world's inhabitants live at less than 100 km off shore and 70% at 320 km from the sea. These regions are exposed to environment threats such as hurricanes and floods. Taking in consideration that the majority of large cities are in developing countries, they will lack infrastructures and sanitary homes. The development of these countries will put pressure on the municipal installations and state institutions. The competent governments that have sufficient resources will probably manage to insure a good management, but the townsmen from poorly developed states and fragile countries will probably suffer repercussions because of the absence of financial means and of adequate infrastructures. The global urbanization will continue. The big cities' deficiencies in underdeveloped countries will increase the risks of diseases, pandemy and humanitarian crises, thus emphasizing the more and more urbanized character.

Conclusions

The measures that the EU expects in order to support the defiance of the population's aging are circumscribed in mainly general frame, out of which components we mention[14]:

- The population's aging requires a complex political approach, by also including the aspects related to economy, occupation, social problems. Societies must not only guarantee the supply of an adequate frame for elderly people, but also economic and social viability in an old world. The politics related to this domain must take in consideration the entire complexity of interactions between demography and society. The EU's responses to the aging population's challenges are part of the global strategy launched by the European council in Lisbon and confirmed afterwards by the councils in Nisa, Stockholm, Götteborg, Laecken;
- States must act now in order to resolve problems because later on the solutions will complicate. The cost of corrective measures is higher;
- Adaptation politics are required as much as change politics. The reactive type of politics tend to adapt society's structures to the demographic evolution, the politics based on change aim at modifying the demographic factors in order to obtain the effectives wanted by the population and a composition of equilibrated ages. They do not exclude each other, instead they can be integrated in various combinations;
- Substantiating politics in regard to aging must be based on the course of the entire life and on society's ensemble. Adapting to the population's aging concerns people of all ages, thus increasing the politics' degree of adequacy through including measures that take in consideration the requirements of people from all age groups. All generations will have to contribute to finding solutions and means of adaptation. The objective must be "a society for all ages";

---

[15] *Nations Unies, Perspectives d'urbanisation mondiale: révision de 2007*, New York, Nations Unies, 2008, pp. 1, 2, 4; *Gouvernement des États-Unis, Joint Operating Environment Trends and Challenges* for the Future Joint Force Through 2030, Norfolk, United States Joint Forces Command, décembre 2007, p. 15.

[14] Ana Bălaşa " Îmbătrânirea populaţiei: provocări şi răspunsuri ale europei interesul uniunii europene pentru îmbătrânirea populaţiei. Scurt istoric".

▪ The politics and practices are based on what is called active aging (oldness), which involves the education and shaping throughout the entire life, the later and progressive withdrawal from activities, the practice of activities that preserve capacities and health. This also implies reducing dependency and just as well reducing the costs of withdrawing from activities and those of health care;

▪ Integrating the dimension of equality between men and women. Aging is a phenomenon characterized by important differences between men and women.

Taking in consideration the long-term demographical hypotheses, the increased fertility rate is essential for ameliorating the scenery which, in the actual given conditions, includes a rapid aging rhythm of the population. To this extent, Romania's government adopted the 396/2006 Law regarding the offer of financial support for constituting a family, which includes the offering of 200 Euros for every family with the condition that both partners are at their first marriage. Furthermore, with the purpose of increasing the birthrate, the no. 148/2005 OUG (the government's emergency ordinance) was modified so that families will receive support for raising their children, by introducing the option with which the monthly allowance of raising the children is 85% part of the monthly average of the professional incomes from the last 12 months (but 4000 lei maximum) or 600 lei and an additional monthly stimulant of 100 lei. Also, mothers beneficiate of maternity vacation for raising the brat for two years or, in the case of a child with disabilities, up to three years[15]

The main objectives of the health system's reform are:

▪ insuring an adequate financing of the sanitary system so that the population's needs are fulfilled as much as possible;

▪ decreasing costs for hospital medical assistance by improving the management of the hospitals that function on the principle of financial autonomy;

▪ increasing the ambulatory medical assistance's capacity to resolve the population's health problems, inclusively by insuring family medical cabinets with computing technique, computational programs and communication services;

▪ creating and consolidating the national system of urgency medical assistance and qualified first-aid.

On behalf of insuring the financial resources, the following measures have been or will be adopted:

▪ multiplying resources in order to increase the tax payers number;

▪ regulating the performance of the private (additional) health insurance system in order to diversify the resource base and increase the competitiveness within the system;

▪ introducing and completing the concept of co-payment and minimal health services package.

The additional implication of the private sector in providing medical services is essential for reducing the pressure wielded on public resources and for improving the medical services' quality. An additional source for investments was insured by introducing in 2006 the vice tax, with the purpose of combating the excessive consumption of tobacco products and alcoholic drinks, improving the infrastructure of the health public system and by financing health programs.

Other economic measures for overcoming the demographical crisis can involve reorienting the economy towards unique services and products with global impact, increasing productivity, encouraging the development of industries that can create a high added value, increasing specialization in production.

[15] Programul de convergenţă pe 2008-2011 elaborat de Guvernul României în mai 2009.

References

- Constantin Vert (2001), Geografia populaţiei- teorie şi metodologie, Editura Mirton, Timişoara.
- R.Malthus (traducere de Victor Vasiloiu şi Elena Angelescu). Eseu asupra principiului populaţiei. Bucureşti, Editura Ştiinţifică, 1992.
- Traian Rotariu (2003), Demografie şi sociologia populaţiei, fenomene demografice, Editura Polirom, Iaşi.
- Constanţa Mihăescu, Giani Grădinaru, (2000) Demografie, elemente de bază şi docimologie, Editura A.S.E., Bucureşti.
- Marin Băbeanu, Alexandra Moldoveanu, (2004) Sănătatea populaţiei, capitalul uman şi dezvoltarea durabilă în România, Editura Universitaria Craiova.
- Kritz, M., Lim, L., Zlotnik, H. (1992). International migration systems – a global approach, Clarendon Press, Oxford.
- Taylor, E., J. (1998). Worlds in motion. Understanding international migration at the end of the millennium, Clarendon Press, Oxford.
- Revista Ştiinţă & Tehnică - numărul 6, septembrie 2011.
- http://store.ectap.ro/articole/212.pdf.
- World Urbanization Prospects: The 2005 Revision, Population Division of the Departament of Economic and Social Affairs of the United Nations Secretariat.
- Gheorghe Săvoiu, (2006) Numărul populaţiei, o sinteză statistică şi economică a evoluţieialternative către explozie sau implozie demografică.
- Les tendances en matière de population en Europe et leur sensibilité aux mésures des pouvoirs publics, Asamblée parlamentaire, mai 2004.
- Valeriu Coste „efectele migraţiei asupra economiei naţionale" Analele ştiinţifice ale universităţii "Alexandru Ioan Cuza"din Iaşi 2004-2005.
- Monica Roman şi Cristina Voicu " Câteva efecte socioeconomice ale migraţiei forţei de muncă asupra ţărilor de emigraţie. Cazul României" Economie teoretică şi aplicată Volumul XVII (2010), No. 7(548).
- Programul de convergenţă pe 2008-2011 elaborat de Guvernul României - mai 2009.
- Organisation des Nations Unies, Perspectives de la population mondiale: la Révision de 2006, New York, Nations Unies, 2007, http://www.un.org/esa/population/publications/wpp2006/français.pdf.
- L'environnement de la sécurité future 2008-2030, http://publications.gc. ca/collections/collection_2011/dn-nd/D4-8-1-2010-fra.pdf.
- Nations Unies, Perspectives d'urbanisation mondiale: révision de 2007, New York, Nations Unies, 2008.
- Gouvernement des États-Unis, Joint Operating Environment Trends and Challenges for the Future Joint Force Through 2030, Norfolk, United States Joint Forces Command, décembre 2007.

GOOD GOVERNANCE AND ECONOMIC DEVELOPMENT IN THE XXI CENTURY

EMILIA CORNELIA STOICA[*]
ANDREI CRISTIAN STOICA[**]

Abstract
Nowadays, information, goods, people circulate and brew. The evolution of science and technology, market and capital dynamics, the generalization of models of development and living, these changes affect the relationship with the biosphere and threaten its balance at the same time the one becomes aware of the complexity and probably their fragility. Governance, from local to global, is at the heart of those quantitative but also qualitative changes. Governance is the complex regulator system of the human society which manages both the internal and relations with the outside world, which at the same time guarantees the stability and allows adaptation. Governance is an architecture, a set of practices born of practical challenges that societies face, forming a system that allows to formulate general principles. Stating general principles of good governance will help to build a stable and sustainable society, the common frame of reference against which one can lie and act within and outside the public service. Thus, the governance is based on a territorial approach and the principle of active subsidiarity. Governance been based on a universal ethic of responsibility, it puts the economy in its place and defines what is the market and what does not belong, defines the cycle of development, implementation and monitoring of public policies, organizes cooperation and synergies between actors.

Keywords*: good governance, public management, sustainable development, democracy, budget, public authorities*

1. Introduction

Nowadays, the level and extent of interdependence between human beings, between companies, between humanity and the biosphere have radically profoundly changed and to meet new economic, social, cultural challenges, public authorities need to think a new state management architecture.

With globalization, information, goods, people circulate and brew. In addition, technological advance, opening markets, capital flows, the adopting models of economic and social development lead to the establishment of new relationships within society and the natural environment.

Public management is a system which regulates the life of a complex society, both within the country and in its external relations, guaranteeing stability and allowing them to adapt to international changes.

In the capitalist system, governance shows four major components: the corporate, the market, the central public authority and the political system of representative democracy, each of these components having a specific role. The primary role of corporations is to produce goods and services, organizing and utilized labor, technology, capital and information. The market is the place where is facing supply and demand of goods, labor, capital. Public authorities have the responsibility to manage the public sector to provide public services for a decent living for the population, to implement appropriate economic and social policies, while a representative democracy defines the rules establishing and implementation of the will of people.

On the other hand, the extension of what referred to as globalization can exacerbate social inequalities and increase the risk of damage to the natural environment. Consequently, the four components of the governance - corporate, market, public authorities and representative democracy –

[*] Associate Professor, PhD, "Nicolae Titulescu" University of Bucharest (liastoica@gmail.com).
[**] Associated Professor, PhD, "Nicolae Titulescu" University of Bucharest; PhD, Ministry of Finance (andrei.cristian.stoica@gmail.com).

there are not enough to meet an environment conducive to the development of emerging and developing countries.

Therefore, at the beginning of the XXI century it is necessary to develop a new vision of governance, to be able to balance economic activities, human resources and environmental protection.

1. Governance and democracy

Globalization offers new opportunities for all countries to benefit effectively from the liberalization of trade, investment, capital flows and technological change, to engage in the dynamics of global economic integration. However, it submits the majority of developing countries, constraints and challenges mainly due to obvious gaps in governance that prevent them from enjoying full and equal opportunities.

We can define the governance as a process where a board of individuals works to assure the legal and moral health of an organization. Governance is the set of rules and procedures organizing reflection, decision and the enforcement of decisions within a social body.

Nowadays, governance has come in force as a vitally problem in developing countries both for foreign investments and for official development assistance providers. Essential element of a sound management, the good governance based on the principles of transparency, participatory democracy, consolidation of civil society, the elimination of corruption, and capacity building. Democratic governance is a key to development. The major role played by institutions, rules and political processes in economic growth and human development are now recognized.

Governance is an area where nobody has a recipe or methodology defined. Beyond universal principles, each country is engaged in a specific process, both the result of a particular history and a set of equilibria, and issues of power relations between actors in constant evolution. Separation of powers and the independence of the judiciary are among the pillars of any democracy. The system needs to ensure equitable access of litigants to its services but should also contribute, through impartial and neutral justice, to create a climate of confidence conducive to political openness, economic, cultural and social. Recruitment of professional civil servants on the basis of objective criteria, the development of systems and legislation to fight against corruption, the training of officials on best practices for efficient provision of public services.

There is a close correlation between governance and development, and an international consensus on the need to improve the overall level of governance as the ultimate end and the principal means for sustainable development.

Democracy is directly related to the idea of the governance that must comply with the needs of individuals and not the reverse. The principle of election, and therefore the responsibility punishable, is a fundamental element of democratic governance. But elections do not feel enough, democratic governance also requires a legislative body that represents the people. It requires an independent judiciary capable of enforcing the rule of law equally to all citizens. It requires professional security forces and politically neutral and serve the people. It implies that accessible media are free, independent and impartial. And finally, it relies on an active civil society, able to challenge the government and offer different modes of political participation.

2. Good governance – pillars and shortcomings

Good governance rests on several pillars, but also faces some shortcomings and risks that can significantly impact negative social and economic life of society

- Integrity as a system of rules and values governing the responsibility of safeguarding resources and public assets and ensure their efficient use. Speaking of the bill requiring that we accept the principle of separation between the public authority and administration, it can both rebuild a government on principles of good governance and preservation of the leeway of politicians. The

fundamental problem is indeed the delegation of powers to avoid any risk of political interference in administrative decisions.

- Transparency, essential to ensure public access to accurate and up to date with the possibility of diffusion. Respect for human rights, particularly of national laws, is a sine qua non of a state of law. Every citizen must feel safe in society. If intimidation, threats, the culture of impunity is excluded, then everyone will assume his role at best civic and democratic. The organization of security through a police efficient and integrated is not so much a matter of public policy a necessary step towards effective democracy. It guarantees peace and rule of law.

- Integrability as collective commitment to ensure broad participation of all actors in society in the preparation and implementation of public policies. Administrative decentralization is to recognize people the freedom to manage their own affairs, clearly refers to the idea of the local democracy. It implies a radical revolution in the mode of administration of the territory. Decentralization represents one of the pillars of the democratization process in creating space taking into account local principles of participation, transparency, pluralism, separation of powers, fair and transparent management of resources and state of law.

- Empowerment and accountability in order to ensure optimal management of human, material and, of course, financial resources and link achievements with the objectives set. No country in the world can sit a public authority without credible set up a public finance system efficient and effective. Proper management of public funds is part of responsible and democratic governance. Ideally, the public policy of a government is reflected in strategic plans and then reflects a budget. Budget preparation, execution, and monitoring are therefore important actions to ensure the quality of public management. A government must have a complete view of its revenues to allocate its resources well, ensuring efficient management of cash flow and improve control systems and audit. A system of public finance more efficient is also an important factor to increase aid donor countries. In addition, it allows the help to better integrate into government systems rather than through parallel systems.

Of all the aspects of good governance, improving efficiency and increasing financial responsibility (accountability) in the public sector are considered essential elements of a framework for economies to prosper. Since the mid-1990s, the role played by systems of public expenditure management has benefited increasing attention as a tool of governance. At present, good governance is primarily gauged in terms of the degree of transparency in decision making and implementation of policy and through the communication mechanisms of financial responsibility of governments and their proper functioning.

Several shortcomings and failures taint governance in a country and at all system levels, including:

- Lack of participation and integration of all components of society and territorial spaces in the path of development. No effective democratic governance cannot do without half the world's population. The principle of equality between men and women is rooted in each legislative defines international human rights. Yet, access to different levers institutional, economic or political is more difficult for a woman than for a man. They are more exposed to poverty and human rights violations while hitting discrimination in education, at work or in social relations, undermining the democratic principles that should guide the rule of law. However, their contribution is essential in the development and democracy.

Certainly, to ensure an optimal allocation of the aid, recipient countries must have mechanisms fiables and democratic structures to manage these financial supports. But this requirement applies to all players support, i.e. also donor countries. Harmonizing their practices by aligning local strategies, they participate in the democratic governance of development aid.

- Lack of responsibility and accountability on the part of managers of public affairs. The weaknesses in internal controls and audits increase the risk of misuse and misappropriation of funds. This then leads to risk the loss of confidence placed both in the state and in the public services.

Approximations and poor management of all public funds available also to a large extent, influence the attitudes of external partners. Management disorder finances no incentive to increase the volume of aid, or simplified procedures for granting his first.

- Failure to mark the judicial system. The legislative omissions, absences of normative standards or deficiencies normative standards under the requirements of the Constitution were not considered as such by the Constitution or by organic legislation can cause great damage to civil society.

- Corruption as one of the manifestations of bad governance. Corruption in government can be a major obstacle to economic growth in that it discourages investment. The financial cost of corruption is clearly felt and recognized by service users. Shortcomings in the practices of the public sector create entry points for corruption and are a key factor to the lack of integrity of public agencies. Even if the information gathered reveals major problems of governance, the overall diagnostic investigation indicates that the government agencies maintain procedures and controls relatively strict decisions about staffing and budget.

Good governance requires a systematic approach to improve the functioning of public institutions. Although the results of the diagnostic survey highlight the weaknesses within the state structure, it should be noted that to improve performance, reforms are needed at both utility providers and users. In general perceptions, households classified government and themselves, citizens, as two agents contributing to corruption.

The performance of the public service in terms of quality of service and integrity of institutions, are determined in part by the procedures governing the activities of officials. They relate to operations concerning the budget and staff, recognition of merit in recruitment and promotion, oversight mechanisms and channels raise reactions (feedback) of service users.

Service quality has a direct link with poverty reduction. The availability of efficient public services, good quality, reliable and accessible is a key element of improving the living conditions of the poor. If households believe that public services are inadequate, unreliable or corrupt efforts against poverty suffer.

Transparent and regular budget resources are a key indicator of good governance. The application of good independent audit mechanisms to monitor the process of budgetary decisions is essential to ensure transparency and proper management of public funds.

How public sector institutions manage tenders, contracts and acquisitions is an important aspect which provides an indication of the level of efficiency and transparency.

As part of an evaluation of the quality of a public service, it is important to know whether the service providers consider citizens as users or clients of the service. It is useful to define as citizens to instill an ethic of public service based on the needs of citizens as users of a service.

Poor governance and corruption contribute to increasing the problem of citizen security. The poor performance of the justice system and the lack of public confidence in the ability of law enforcement, are forced high.

Private companies can be affected in many ways by the activities of governance and regulation. Regulations and policies are necessary but can often become unnecessary barriers. The lack of transparency can help to create confusion and distortion, while corruption at government level can distort markets.

Misunderstood regulations, misapplied or poorly designed ones can create difficulties for companies and, therefore, affect the growth and economic development. So that regulations become too cumbersome and unsuitable for businesses, a regular process of consultation between the persons and entities affected by the policies and regulations and those who write is desirable. This can be used not only in the preparation of better regulations but also to corporate information on changes in future regulations that might affect their products or production methods to enable them to make the necessary adjustments to comply .

Clarity and transparency of government actions are not only important for consultation and information on regulations and policies, but also to the process of advertisement and public procurement.

Regular and independent auditing procedures and administrative decisions concerning the budget is one of the hallmarks of good governance.

Transparent and regular consultations between users and providers of these services, or between regulators and objects of regulation and populations concerned, are another feature of good governance. Careful governance and integral implies that a citizen would want to complain or make suggestions regarding the provision of a particular public service.

To implement the principles of good governance have been issued several rules in legal and regulatory framework of each country, such as:

- Public services are organized on the basis of equal access of citizens of fair coverage of the national territory and continuity of services. They are subject to quality standards, transparency, accountability and responsibility, and are governed by the democratic values and principles enshrined in the national legislation.

- Agencies responsible for achieving and / or distributing public services perform their duties according to the principles of rule of law, neutrality, transparency, probity, and general interest. They monitor comments, suggestions and complaints of citizens.

- They reflect the management of public funds in accordance with the legislation in force and shall be subject, in this respect, the obligations of monitoring and evaluation.

- A charter utilities fixed all the rules of good governance on the functioning of government, regional and local authorities and other public bodies.

- Any person elected or appointed, exercising a public office shall establish, in accordance with the procedure established by law, a written statement of assets and assets held by it, directly or indirectly, upon taking office, during activity and upon termination thereof.

- The authorities in charge of good governance are independent. They have the support of state bodies. The law may, if necessary, create other regulatory bodies and good governance.

Conclusions on good governance and sustainable development

The concept of good governance has two terms: the adjective "good" and the noun "governance", which means the way of managing public affairs. When this management is done well, we talk about good governance, in the opposite case, we speak of bad governance. Regarding the specific content of this good management and public affairs in question, that is to say, therefore, the concept of good governance itself is the subject of two designs. The first design is the fact that the very institution that has designed, birth, and promoted the concept of good governance, that is to say the World Bank (WB), which brings good governance simply economically sound management, transparent and effective of public funds.

This design known as technical manager, because highlighting the sole criterion for effectiveness of methods of economic management without any consideration of the socio-political environment within which these management methods, is thus reduced to an exclusively accounting and financial good governance: managed economically sound, transparent and efficient, and that public money available to the states by bilateral donors and multilateral agencies should initiate a process of growth and development . Adjustment that WB advocates in this context is, therefore, a purely economic adjustment. Of course good governance is under good economic governance, but economic issues, as they are culturally, socially, and especially politically located, cannot be treated ex nihilo, that is to say, without consideration of the context and environment in which they bathe and with which they have dialectical relationship positive or negative

The last two decades democratic demands have taken their account and popularized the concept of good governance in the context of a new design that transcends that of WB. According to this second design, good governance is not only a question of economic management, it also assumes above all a political system based on liberal democracy and the rule of law. In other words, it

assumes ideological pluralism, multiparty, separation of powers, universal suffrage, the legal equality of citizens, respect for human rights, an independent judiciary, a liberal state, the possibility legal certainty for citizens to attack the state and its agencies to justice, transparency in the management of public affairs, the association of this population management, in particular by means of consultation and administrative decentralization, accountability, the fight against corruption. This second design devotes a broadening of the concept of good governance, and this expansion is in line with the politicization of the concept. Good governance sought here is good democratic governance, which is at the political level. In short, with this design, policy adjustment is added to the economic adjustment to complete and ensure success.

Turning now to the notion of development, it is often perceived as the situation in a country where economic growth is faster than population growth. The link established between economic growth and development that today it is generally equated with that one measured in terms of Gross Domestic Product (GDP), and in fact, it is generally considered nowadays as developed countries are those whose GNP per capita exceeds $ 5,000. But economic growth and development do not necessarily coincide. We talk about economic growth when there is an increase over a long period, the real GDP per capita. Growth appears as a quantitative concept because to evaluate in terms of GDP. It differs development, which is a qualitative concept, although it is are two interrelated phenomena. The qualitative nature of the development means that it boils, specifically, a qualitative improvement in the level and living conditions of the vast majority, at least, of the population in the areas of food, housing, transport , communications, education, health, leisure, freedom, employment, etc. Development, in the full sense of the term, is not only the economy, it is a global phenomenon because concerns areas as diverse as the cultural, social, political, economic, technical, the individual rights and freedoms and collective, etc. In conclusion, we can say that the true development means the development of the population of a given society, and that the intellectual, cultural, social, political, economic, material, etc.

References

- GAO, United States General Accountability Office (2005): Managing for Results. Enhancing Agencies Use of Performance Information for Decision Making. GAO-05-927. (Washington, D.C., GAO).
- Ove Kaj Pedersen, Professeur et directeur de l'International Center for Business and Politics, Copenhagen Business School (2008) – La gouvernance évolutive, le système danois d'économie négociée, (Institut D'Administration Publique de Québec).
- Vincent Simoulin (2003) - La gouvernance et l'action publique : le succès d'une forme simmélienne, (LEREPS, Université des Sciences sociales, Place Anatole France, F-31042 Toulouse cedex).

THE RECEPTION OF A CONTROVERSIAL PLAY – *EVANGHELISTII* – IN POST-COMMUNIST ROMANIAN SOCIETY

CARMEN D. CARAIMAN, LECTURER, PHD*

Abstract

In this paper we intend to present the reception of the play Evangheliştii [The Evangelists] (published in volume in 1993 and represented on stage in 2005) written by Alina Mungiu Pippidi in post-communist Romanian society. In the interpretation of this topic we have considered the author's artistic goals in relation to the "horizon of expectation" of the Romanian theatre public, as well as to the reaction that critics and institutions outside the world of theatre, such as the Orthodox and Catholic Churches, and local public institutions, had as regards its publication and stage representation.

Thus, we have pointed out the clash and the gap that exist between the author's postmodernist approach to religious faith (i.e. the deconstruction of the Christian ideology) and the often wrong reception of the play's topic coming basically from the Church and in part from the theatre audience. The reception of this play in post-communist Romania is analysed in relation to the rigid, formalist perspective on art shared by an important part of the theatre audience.

One of the main conclusions we have drawn is that the openness degree of our society members to the freedom of artistic creation illustrates, in fact, the degree of civilization and, implicitly, of tolerance which we have acquired up to a certain point in time as a society, especially that today our country is no longer totalitarian and, in consequence, no artistic manifestation can be censored by any ideologies coming from the public space.

Key words: *deconstruction of religious ideology, agnostic dramatic discourse, post-communist Romanian theatre audience, "horizons of expectation", aesthetic freedom vs. religious ideologies.*

Introduction

Alina Mungiu-Pippidi[1] has an international reputation as a Romanian academic, and is one of the most prominent voices of Romanian civic society. Her literary activity dates back in the 1980s. As a prose writer and playwright she has enjoyed favourable critical receptions coming basically from renowned critics, a fact that is true including for her most controversial literary work, i.e. the play *The Evangelists*, which, however, confronted with harsh criticism coming basically from church representatives, local public institutions, and rarely from writers and critics[2].

So far Alina Mungiu-Pippidi has published two volumes of theatre (*The Death of Ariel*[3] and *The Evangelists*[4]). In 1992 the play *Evangheliştii [The Evangelists]* was awarded the distinction of "the best Romanian play of the year". Four years later, in 1996, the play was published by Modern International Drama in New York and later on it was represented on stage at Tătăraşi Athenaeum in Iaşi on 3rd December 2005[5].

---

* Carmen D. Caraiman, Lecturer, PhD, Nicolae Titulescu University of Bucharest (cdcaraiman@univnt.ro).

[1] Alina Mungiu-Pippidi founded SAR (Romanian Academic Society), is an expert of the European Commission and frequently participated in conferences organized by renowned universities (Oxford, Stanford, Harvard, and Princeton).

[2] Most literary critics that wrote about *The Evangelists* appreciated that this work of art deserves the prize of the best play of the year (1992). Few Romanian intellectuals, however, such as Teodor Baconski, Adrian Papahagi, Academician Constantin Bălăceanu- Stolnici, regarded the play as heretical.

[3] Alina Mungiu-Pippidi, *Moartea lui Ariel,* (Bucureşti: Editura Unitext, 1997).

[4] Alina Mungiu-Pippidi, *Evangheliştii*, (Bucureşti: Editura Unitext, 1993; see also the latest edition: Alina Mungiu-Pippidi, *Evangheliştii*, (Bucureşti: Editura Cartea Românească, 2006).

[5] An interesting detail in this respect is the fact that *The Evangelists* was first represented by the actors from Iaşi Tătăraşi Athenaeum under the coordination of Benoit Vitse in Hungary and only afterwards in Romania (see Alina Mungiu-Pippidi, „Interviuri", in *Evangheliştii*, (Bucureşti: Editura Cartea Românească, 2006).

The courage of re-interpreting and deconstructing the history of a millenary, internationally widespread religious ideology – Christian ideology – by projecting it into the time of Jesus and the Apostles and viewing it through the voice of the central character (Cherintos, a Greek sophist), who relates it to the universal world of ideas, to doubtful, ironical criticism and rational deduction, all have been interpreted as reflecting a boldly heretical attitude on the part of the author. Nevertheless, the writer's intention was to approach a millenary ideology in the form of theatre, the theatre of ideas.

The writer describes *The Evangelists* as "an exercise meant to deconstruct a social construction of a religion /…/ it is a play about propaganda"[6]. The text asks questions such as: How can we be certain that old sacred texts were written through the inspiration of God? How reliable is history since those who wrote it were either subject to the time rulers or were paid to write in a certain manner and with a certain political goal? Does the miracle recorded at the end of the play (Jesus stands and walks, though stabbed by Paul, and promises Maria Magdalena to go with Him to Heaven) represent the author's acceptance of the Christian truth? Is there any topic that should not be approached by playwrights for fear that it might sound heretical or agnostic to the Church? Is it appropriate for theatre productions to be construed by the Church? How influential have religious ideologies been in society? Have religious ideologies been subjected to modifications that were meant to inculcate their supporters certain mentalities and behaviours so that they could be more easily manipulated?

Paper Content

The reception of *The Evangelists* considerably depended on the audience's "horizon of expectation"[7], in our case – the Romanian post-communist theatre audience that prior to December 1989 had been accustomed to a rather *rigid* dramatic discourse[8], as Miruna Runcan pointed out in her study *Teatralizarea şi reteatralizarea în România (1920-1960) [Teatralization and Re-teatralization in Romania (1920-1960)]*. According to Miruna Runcan and C.C. Buricea Mlinarcic, the revitalization of Romanian theatre starting with the 1960s generation led to the creation of a *rigid canon*, from which the Romanian theatre audience found it difficult to "escape": "What the 1960s founders intended to be a normal and healthy process of authentic theatrical freedom of expression, including the challenge of the spectator's imagination and direct reflexivity, became after 1990 an *undeclared canon of aesthetical self-sufficiency*."[9] In consequence, the Romanian theatre audience was – when the play was published and represented on the stage – unprepared to perceive the author's message properly for it was stuck in the former canon created by the famous golden generation of stage directors and actors that had gained an outstanding reputation before 1989. Thus, the audience was aesthetically instructed but only up to a certain extent for it had been kept away from multiple experimental forms of theatre.

In our hermeneutical approach we have considered - in accordance with Hans Robert Jauss' theory on reception - the *three parties* involved in it: the author and her artistic goal, the play (the text), and the post-communist Romanian theatre audience. In order to point out the clash between the author's artistic goals and the audience's *horizon of expectation*, we have first of all considered the writer's declarations regarding her intention to approach such a topic in her playwriting, and also the temporal, social and cultural context in which this religious issue was developed. In the interview

[6] In original: „*Evangheliştii* este un exerciţiu de deconstruire a contrucţiei sociale a unei religii /…/ este o piesă despre propagandă." - Apud Alina Mungiu-Pippidi, cap. *Interviuri*, *Arta nu poate merge în vârful picioarelor de teamă că va deranja pe cineva*, în vol. *Evangheliştii*, (Bucureşti: Editura Cartea Românească, 2006), 123.

[7] See Hans Roberta Jauss, *Experienţă estetică şi hermeneutică literară*, (Bucureşti: Editura Univers, 1983) and Anne Űbersfeld, *Termenii cheie ai analizei teatrului*, (Iaşi: Editura Institutul European, 1999).

[8] Miruna Runcan, *Teatralizarea si reteatralizarea in Romania (1920-1960)*, (Cluj-Napoca: Editura Eikon, Colectia „Biblioteca Teatrul Imposibil", 2003).

[9] http://ekphrasis.accentpublisher.ro/files/articles_content/46/6.pdf - accessed on 1st March 2013.

with Emilia Chiscop[10], Alina Mungiu-Pippidi gives information about the time when she considered writing this play, i.e. around 1988 (a year before The Romanian Revolution in December 1989). In this interview, Alina Mungiu-Pippidi mentions her interest in the phenomenon of history falsification, and in the role played by intellectuals in society. At the time she was a psychiatrist (who faced human suffering daily) and a journalist (who was aware of the moral degradation of the intellectuals). Alina Mungiu-Pippidi draws our attention to the novel *Ultima cruciadă*[11] *[The Last Crusade]*, which she wrote between 1987 and 1989 and which she regards as illustrative for her vision in *The Evangelists*. In this novel, one of the characters embodies Teilhard de Chardin, who as a scholar and missionary dedicated all his life to the poor and dispossessed, and whose sacrifice for the other must be regarded, in the author's vision, as an example to be followed in everyday life. As an agnostic, Alina Mungiu-Pippidi admitted that if God's existence was real, he could not offer people good and justice for granted; in other words, without people's participation and self-sacrifice God's good intentions will not fulfil. The writer also admits the influence of Sartre's, Camus's and Montherlant's intellectual and anticlerical theatre upon her writing. Moreover, Alina Mungiu-Pippidi draws our attention towards a character in *Ultima cruciadă*, a representative of the clerical world, who wrote a heretical book that reinterpreted the life of Jesus from a perspective that departs from the official version promoted by the Orthodox and Catholic Churches. In this heretical book when Jesus is asked whether He had resurrected or not, the answer He gives is a rhetorical one: "What did you do for Me to resurrect?"[12]

The author's message is quite clear: as a society which regained its freedom and dignity we, the Romanians, have the duty to rebuild the Christian and political values that we praise in words through the very actions we perform. The intellectual "game" that the author proposes Romanian readers and theatre audiences in *The Evangelists* is to start thinking freely and to make Christian values real through our own sacrifice. That is to say religion must be lived; religion does not imply verbally inheriting Christian clichés about the meaning of life and its values; on the contrary it implies living these values, acquiring them on inner level. The play also does more than that: it hints at the influence of religious propaganda upon society members. Is this surprising for a representative of our society which was for decades subjected to brain cleansing through political propaganda?

On the other hand, besides the fact that the Romanian theatre public was not ready (accustomed and instructed) to accept freedom of expression in art, religion has always been a delicate topic to approach in our country; thus, the author's theatre of ideas came as an unexpected struck on the Romanian theatre repertoire. From this perspective, Liviu Maliţa was right when he pointed out that the writer's anti-clerical attitude in post-communist Romanian society was not meant to be an offensive attitude but a manifestation of his/her freedom of speech: "The writer, the artist in general, started to assume the liberty of adopting a rebellious attitude against the religious sphere. If he/she disavowed it during the communist period, when the religious topic itself was oppressed, and consequently it arose a feeling of solidarity from the artist; now, in the climate of liberty, the rebellious attitude becomes legitimate in the artist's eyes. More often than not, this is not a stronger reaction against the autochthonous realities, but the linkage to the Western ethos, to <<postmodernism>> and deconstruction, to de-structuring, parody and a certain demystifying disposition. But, since the new attitude is no longer imposed in a propagandistic manner, but freely chosen by the playwright, it has a good chance to become artistic."[13]

---

[10] Apud Alina Mungiu-Pippidi, cap. *Interviuri*, *Arta nu poate merge în vârful picioarelor de teamă că va deranja pe cineva*, in vol. *Evangheliştii*, (Bucureşti: Editura Cartea Românească, 2006) 119-140.

[11] Alina Mungiu-Pippidi, *Ultima cruciadă*, (Bucureşti: Editura Humanitas, 2001).

[12] In original: „*Ce aţi făcut să mă înviaţi?*" - Apud Alina Mungiu-Pippidi, cap. „Interviuri. Arta nu poate merge în vârful picioarelor de teamă că va deranja pe cineva", in *Evangheliştii*, (Bucureşti: Editura Cartea Românească, 2006) 127.

[13] Liviu Maliţa, *The Religious Imaginary in the Romanian Post-War Dramaturgy***,** Babeş-Bolyai University, Cluj-Napoca, Romania, http://www.phantasma.ro/caiete/caiete/caiete12/31.html - accessed 7th February 2013.

The reception of a play which is meant to deconstruct religious ideology and is published and represented on stage in post-communist Romania has to be linked to the social and cultural context in which it was created. Absolute aesthetic freedom that creators enjoyed after December 1989 in Romania represented a challenge that many authors and artists dared to assume no matter the reactions they might generate. Naturally, the effervescence of literary activity comprised a wide range of tones on the part of authors who either embraced a violent language and a gloomy perspective over communist / post-communist Romanian society in prose, poetry, drama, and script writing or used their freedom to develop topics that approached previously unacceptable subjects (criticism of political ideology) or sensitive themes (religion and its power and influence over masses, which is one of the topics of *The Evangelists*).

The horizon of expectation characteristic of the post-totalitarian theatre public was on the one hand marked by the eagerness to experience new artistic creations and on the other hand it proved rather inhibited (a natural reaction to the once forbidden act of free reasoning). Despite the newly gained freedom of speech and expression, the post-December 1989 Romanian art consumers (theatre / film audience, readers, music fans) and public institutions reacted to the new creative context set up after the Revolution either with enthusiasm or by embracing a harshly critical attitude.

Writing a play that questioned Christian ideology and coldly analysed it as any other ideology through the voice of the central character, Cherintos, and through the perspective of human sins (such as thirst for power) embodied by Paul and, in fact, by all characters (including by Jesus) must have represented an unacceptable blasphemy for many.

Church representatives reacted promptly after the play's first representation. Thus, the former Patriarch of the Orthodox Church, Teoctist, stated that: "/…/ if somebody writes about the Church or about *The Holy Book* or even a literary work such as *The Evangelists*, that person unconsciously brings defamation to Christian learning".[14] In his turn, Ioan Robu, Bishop of Roman-Catholic Church of Bucharest, stated that: "It is blasphemy to our life and faith. [...] When such a play is interpreted in a theatre, I, as a man of Church, and each of us cannot feel happy to see that what we hold as holy is ridiculed". And, finally, we quote the words uttered by one of the most famous members of the Romanian Academy, Constantin Balaceanu-Stolnici, who considers that: "Any person who has a Christian culture will regard this play as a shame".

In an article published in *Cotidianul*[15], Cristian Teodorescu informs readers that *The Evangelists* was not initially represented on the stage in Romania because actors did not want to provoke a scandal and, consequently, the play was interpreted in Hungary. Afterwards, the play was interpreted in Romania. Besides the reaction of the Church, on the 6th of December 2005, the cultural commission from the Local Council of Iaşi joined in order to decide whether the play could be represented or not on the Tătăraşi Athenaeum stage any more. The mayor of Iaşi at the time, Gheorghe Nichita, planned to inspect the Tătăraşi Athenaeum's activity, an attitude that reminded people of the former totalitarian repressive methods and censorship. However, the play was finally not interdicted.

Apart from the above mentioned wave of criticism, we consider that reference must be made to a part of Romanian society which reacted in a critical way to *The Evangelists* because religious faith has always been perceived as a constant unifying factor for Romanians no matter the provinces they came from or the historical period. From this point of view, the Church has symbolized a form

[14] You can read here the translated fragments in original: I.P.S. Teoctist: „şi cineva, dacă scrie despre Biserică sau despre Evanghelie sau chiar o piesă literară precum Evangheliştii, aduce fără să-şi dea seama o jignire Bisericii, învăţăturii creştine"; Ioan Robu: „Este o blasfemie la viaţa şi credinţa noastră. [...] Când se joacă aşa ceva într-un teatru, eu, ca om al Bisericii, şi fiecare nu putem fi bucuroşi că ceea ce este mai sfânt pentru noi este ridiculizat". Constantin Bălăceanu-Stolnici: „Orice om care are o cultura creştină consideră această piesă o ruşine". See: http://www.observatorcultural.ro/Despre-Ratiune-si-Credinta.-Evanghelistii*articleID_14488-articles_details.html – accessed 16th February 2013.

[15] Cristian Teodorescu, *Cotidianul*, 5 decembrie, 2005.

of resistance against foreign suppressors and the communist atheist propaganda, besides the fact that it is an essential part of our moral and spiritual heritage. However, the tragic events that the Romanian Christian Churches (The Catholic Church United with Rome[16], The Orthodox Church[17], The Catholic Church, and The Protestant Church) underwent during the totalitarian regime are in general known to little extent by Romanians even if many books have been published on this topic. Naturally, this unawareness and lack of interest manifested by most of the Romanians is on the one hand an offence to the martyrs of the Church and on the other a negative factor that currently hinders our moral evolution as a nation.

The play contains a set of shocking details as to the Christian myth, such as the ones referring to Jesus (the Narrator of the play and the character who finally reveals to be Christ), Paul and Peter (the Apostles), and the four Evangelists (the four disciples of the Greek sophist Cherintos: Luke, Matthew, John, and Mark). All of them are depicted in a manner that does not correspond to the well-known history related by the New Testament. Briefly speaking the most representative figures of Christianity are depicted as ordinary men, apart from the last scene in the play in which Christ, even if stabbed by Paul, does not die. In Alina Mungiu-Pippidi's play Jesus appears as a feeble, inoffensive character, who is fond of Helen (the Greek, pagan correspondent of Maria Magdalena) and whose dream of spreading the Christian ideology made him follow Paul. In *The Evangelists* Paul represents the fanatical, combative "Christian", who is aware of the power that ideas may have over the others and who decides to re-compose the whole story of Christ in order *to seduce* (conquer) through it as many supporters as possible. To him religion must be imposed on the others no matter the sacrifice this must require in order to transform the world into a better place. Murders did not prevent Paul from making his dream come true. Thus, the four holy books are written in the presence of Christ, whose words are, however, modified as Paul indicates in order to correspond to the version that the latter wants to have. After the four books are written, Paul murders the Evangelists and tries to convince Cherinthos about joining him in his attempt to make the prospective Christian Church a powerful institution through the new Christian doctrine. However, Cherinthos commits suicide by drinking the poisonous wine prepared by Paul for the Evangelists. Cherinthos cannot accept that his disciples died because of his negligence and that the books written in his Academy will be used as ideology for conquest. Finally, Paul sees his dream fulfilled for his thirst for power is now satisfied. Apparently, he is the only character who is victorious. Yet, the play concludes with Christ's words, who - despite of being stabbed by Paul - keeps walking and promises Helen, his lover, to join Him in Heaven.

The other Apostle in the play, Peter stands, at least apparently, for the real Christian: he is meek, humble, fair, kind-hearted, and incapable of imposing his faith upon the others through force. However, the play does not leave room for great ideals to come true. Thus, Peter, after being deceived into believing that he sees the figure of Resurrected Christ, leaves Antiochia to let the other Jews know about this miracle and about Paul's "assiduous" work for disseminating the Christian learning.

Another element that must have shocked Church representatives in the play is the reinterpretation of Jesus' resurrection. The Christian traditional version of resurrection is replaced with a story in which Jesus is not killed on the cross, but Barabbas through an intrigue woven by Paul and meant to keep Jesus alive so that the Jews would believe in His resurrection subsequent to Barabbas' (apparently Jesus') sacrifice at the order of Pilates.

---

[16] The Catholic Church United with Rome or the Greek-Catholic Church was abolished in 1948 by the communists, an act that brought with it a large number of sacrifices on the part of priests or church goers who were either killed or suffered in prisons'.

[17] The Orthodox Church also underwent a tragic period during the communist regime; in this respect, one can consult the following selective bibliography: Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române*, (Chişinău, 1994); Mihai Rădulescu: *Rugul aprins. Duhovnicii Ortodoxiei în ghearele comuniste*, (Bucureşti: Editura Ramida, 1993); Pr. Prof. Dr. Dumitru Stăniloae, „Prigonirea Bisericii Ortodoxe strămoşeşti sub comunism", in *Vestitorul Ortodoxiei Româneşti*, 1990, no. 3, p. 3; Vasile Manea, *Preoţi ortodocşi în închisorile comuniste*, (Cluj: Editura Patmos, 2000).

The dialogues between the four Evangelists (who are paid together with their master, Cherinthos, to write the life of Christ according to the story told by Paul and the Narrator) illustrate in part freedom of thinking and in part irony and cynicism. The four Evangelists and Cherintos are a group of Greek philosophers who had not known or heard about Jesus Christ and who accept to write the story of the Jewish prophet in exchange of money. The dialogue between Cherinthos and one of the disciples regarding the writer's freedom of creation is bitterly sad. According to Cherinthos no writer can exceed the limits imposed on him by the client who paid for that work to be written; the only thing a writer can do is to try to write a very good and trustful story.

The ambiguous ending leaves more room for interpretation. The writer did not intend to contradict or deny the Christian myth. On the contrary it accepted its possibility and miracle. The conclusion which the reader draws refers both to the uncertain process of writing the allegedly sacred texts and to the use thereof in a fanatical way and with the intention to control masses.

From an aesthetical point of view the play is written in a vivid and intellectual style, and it is full of witty dialogues. Dramatic action aims at formal perfection: scenes follow each other in a natural manner, without delays or unnecessary sequences. Characters seem, however, to be somehow outlined, except for Paul, the fervently fanatic supporter of the Christian ideology – depicted according to his corrections and indications. Finally, the characters and dramatic action serve the purpose that the author assigned them, i.e. that of being the vehicles of the author's deconstructive approach to Christianity.

Conclusions

An interesting aspect remains to be analysed in the future, namely: how the perception of this play will evolve in time for - according to Hans Robert Jauss - the hermeneutics of any text is in fact an attempt: "to examine the text in its original historical context – by examining the dynamic of its original production and reception (*the text within history*)", "/…/ to trace a history of the text – by examining the text's reception by communities of readers in different historical periods (*the text throughout history*)" and "/…/ to examine the text in relation to general history – by examining the way a text, in its social function, not only arises out of, and is received from within a historical context, but can also have determining impact on that wider, general history (*the text and history*)."[18]

The Evangelists is the author's protest against the power of any ideology that attempts to lead people blindly and transform them into mechanical performers of rituals, as well as a lesson which teaches us that in any society and at any time it is natural for the former and present hierarchy of values to be gradually reinterpreted and challenged in order to make room to a multitude of forms of expression, topics and discourses. And isn't such a perspective necessary especially in a society which undergoes a period of transition from totalitarianism to democracy?

References

- Liviu Malița, *The Religious Imaginary in the Romanian Post-War Dramaturgy***,** Babeș-Bolyai University, Cluj-Napoca, Romania.
- Vasile Manea, *Preoți ortodocși în închisorile comuniste*, Cluj: Editura Patmos, 2000.
- Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române*, București: Editura Institutului Biblic si de Misiune al Bisericii Ortodoxe Române, 1980-1981.
- Alina Mungiu-Pippidi, *Evangheliștii*, București: Editura Unitext, 1993.
- Alina Mungiu-Pippidi, *Evangheliștii*, București: Editura Cartea Românească, 2006.
- Mihai Rădulescu: *Rugul aprins. Duhovnicii Ortodoxiei în ghearele comuniste*, București: Editura Ramida, 1993.

[18] Ormond Rush, *The Reception of Doctrine: An Appropriation of Hans Robert Jauss' Reception*, (Roma: Editrice Pontifica Universita Gregoriana, 1997) 39.

- Miruna Runcan, Teatralizarea si reteatralizarea in Romania (1920-1960), Cluj-Napoca: Editura Eikon, Colectia „Biblioteca Teatrul Imposibil", 2003.
- Pr. Prof. Dr. Dumitru Stăniloae, "Prigonirea Bisericii Ortodoxe strămoşeşti sub comunism", in *Vestitorul Ortodoxiei Româneşti*, 1990, no. 3, p. 3.
- Cristian Teodorescu, *Cotidianul*, 5 decembrie, 2005.
- http://www.phantasma.ro/caiete/caiete/caiete12/31.html - accessed 7th February 2013.
- http://www.observatorcultural.ro/Despre-Ratiune-si-Credinta.-Evanghelistii*articleID_14488-articles_details.html – accessed 16th February 2013.
- http://ekphrasis.accentpublisher.ro/files/articles_content/46/6.pdf - accessed on 1st March 2013.

ETHICAL CHALLENGES OF THE E-LEARNING SYSTEM

MARIA CERNAT*

Abstract
This article is the result of a four years teaching experience in one of the largest and controversial Romanian Universities using the E-learning system: Spiru Haret. It is a well-known fact that this was the first Romanian academic institution that used the E-learning techniques in wide and systematic way. Numerous articles appeared in the press in 2009 when the scandal of fake diplomas first started. This article is the perspective of an insider, that is, of someone who taught information and communication techniques in this institution for several years. I consider my experience and my findings to be balanced and objective and I also believe that we have to analyze things in a more profound and rational manner after the 2009 media storm ended. My article provides very useful information in this area since there are no academic articles on the way this Romanian academic institution (mis)understands the power of E-learning tools.

Keywords*: academic capitalism, E-learning system, digital resources, ethical problems in higher education, e-learning and higher education.*

1. Introduction

I shall begin my article with a series of general considerations about the E-learning system. Since this new technological tool made its way into the university numerous scholars tried to bring forward its merits but also its pitfalls. The E-learning system covers a wide variety of technological instruments used in the educational process. The first section of my article consists in an attempt to provide a definition of the E-learning concept. The ways E-learning can be used are also numerous and this is why I consider it is very important to establish some of its most important functions. Without such conceptual clarifications it is not possible to argue for or against E-learning.

In the second section of my article I am concerned with a general perspective on the advantages and disadvantages of the E-learning system. It is of course common knowledge the fact that E-learning system is not a positive thing by itself. It is merely a tool and before embracing it as one of the most important elements in assuring the quality in higher education we must be aware of its downsides. This is why I shall focus in the second section of my article on gathering the most important arguments for and especially against E-learning educational tools. My perspective is rather pessimistic in terms of technological capacity of developing educational quality.

I consider the technological determinism to be a very naïve and misleading perspective. Using computers in the educational system is not a positive thing in itself. Quality in higher education has to do more with people than anything else. If the arguments in the second section of my article are not convincing enough I am almost certain that the data presented in the third part of my paper will prove that sometimes the E-earning system can be the worst enemy of quality in higher education. The way Spiru Haret University managed to use the E-learning against quality is the sad lesson of our recent educational history every fan of the E-learning system has to learn.

2. What does "E-learning" means?

The term "E-learning" has been used for almost two decades. *A bright future for distance learning: One Touch/Hughes alliance promotes interactive 'e-learning' service* is the article published in 1997 by Aldo Morri wrote an article in the "Connected Planet" review[1]. Since 1997 this

* Lecturer, PhD, "Dimitrie Cantemir" Christian University of Romania (macernat@gmail.com).

[1] Aldo Morri (1997) „A bright future for distance learning: One Touch/Hughes alliance promotes interactive 'e-learning' service", *Connected Planet*, *online* document found at http://connectedplanetonline.com/mag/telecom_bright_future_distance/.

term has been used to designate several ways that modern computers can be used to make the educational process more efficient. The pioneers of E-learning were the major private corporations that had important financial resources and little time to invest in the training of their employees. No matter how loose a definition of the E-learning might be is has to do with the use of computers. Private companies had the ability to invest in educational hardware and software. Universities – the place where the Internet was first developed – soon followed this trend and began using more and more digital resources in the educational process. This is also the result of the fact that in today's academic capitalism the university is no longer the unique "provider of knowledge"[2].

I think it is crucial to have a general perspective on the way nowadays university works before understanding the meaning and the function of the E-learning system. The development of E-learning went hand in hand with the idea of making education a more efficient process. The ideal of efficiency in higher education is by no means the direct result of adopting a liberal perspective on education. We are no longer engaged in the difficult and vague task of building a character. The most important task of faculty members is to make "knowledge corporation" (the university) profitable. We no longer provide young students with insightful knowledge. Instead we sell profitable information to our potential "clients". Our efficiency is tested with the help of a dual "element": the student. He is a client, but also our product whose insertion on the market labor is the ultimate indicator of a well done job. The use of digital tools in the educational system is therefore the result of the private corporation pressure (the universities had to compete with other "knowledge providers") and of the liberal perspective on higher education (the university has to function as efficient as a major private company).

But what E-learning rely means? From a very general point of view E-learning is related to distance learning. The use of computers on a wide range as well as the technological advances of the Internet made distance learning a more feasible project than ever before. But the E-learning system is related to a series of activities that are not necessarily connected with distance learning. In fact, there are components of E-learning that can be used in any educational circumstances: forums, audio and video-taped educational materials, the use of informational supports such as the CDs. As all the definitions provided over the years mine is surely incomplete but I consider the best way of rendering the proper meaning of this concept is to think of E-learning system as *the process that uses digital resources in educating people*.

Broadly speaking there are three components of almost every educational process: teaching, learning and evaluating. The digital resources can be used in each of those training steps. Video and taped materials can serve as an excellent tool for a more vivid and provocative academic presentation. Virtual simulation of certain processes can provide very memorable representations for extremely abstract scientific concepts. And finally, tests can be taken on computers and students can be evaluated *online*.

The most important functions of E-learning are closely related to the main steps in the educational process. Therefore, the E-learning has the function of making teaching more provocative and cost-beneficial, easing the learning of abstract concepts and providing very powerful and useful tools for evaluation.

There are indisputable merits of the E-learning system. Those merits can be devised into two categories: educational merits as well as "business" merits. I shall not embark here on the difficult if not impossible task of providing an exhaustive list of those merits but I think it's important to focus our attention on the most important ones. The distinction between the educational merits and the "business" merits is difficult to grasp especially in the era of academic capitalism. I believe it is related to the intellectual and the financial value. The intellectual merits of E-learning are related

[2] Delanty, G. (2001) *Challenging Knowledge. The University in the Knowledge Society*. Buckingham: The Society for Research into Higher Education & Open University Press.

solely to the educational process. When listing those advantages such an assessment should ignore the financial benefits. Such merits are:

- Asynchronous education: the teaching process is not necessarily done in real-time. The *online* lectures offer the student the possibility of taking a certain class at a later time during the day.
- Interactive education: the forum and discussion lists makes it very easy for the trainer to gain access to the students feedback;
- Connectivity: even if the student-teacher relation is digitally mediated, it offers both of them more ways of constructively interact. The digital tools provide multiple communication channels bringing the teacher and the student closer;
- Flexibility: the student has access more information than ever before and he/she can access it on its own time;

In the process of adopting the E-learning system those merits are not the most important elements taken into consideration. The financial benefits of the E-learning system are the crucial ones. In the era of the entrepreneurial university we often hear people speak in marketing terms. The famous concept of the return of investment (ROI) is used as the decisive tool of evaluating whether the E-learning system is used or not in an academic institution. Does it pay off to invest in computers, learning software and other software license? In the case I am about to present such an investment proved to be incredibly profitable.

I shall not end this section of my paper without presenting some of the most important downfalls of the E-learning system. Most of them are the result of adopting the narrow perspective of technological determinism:

- expecting the E-learning to function in the same way the classical educational system does;
- expecting the E-learning to replace highly trained professors;

I believe that the most important pitfalls of the E-learning system come from the main assumptions its creators and users are adopting:

- education should be focused on the individual and his/her needs;
- the students are rational clients in search of useful information that will allow them to find good jobs on the labor market;
- the educators are intellectual workers that provide useful and profitable information and are guided in their efforts to secure the profit of the university by the trends in the labor market;
- last but no least: education has to be cost-effective;

I shall now analyze each of those assumptions. Most of the advantages related to the E-learning system are related to the possibility of each individual to study in his own way and rhythm. Nowadays it seems the whole educational process is conceived and focused on the individual and its needs. The university is no longer a place where a group of people are following the same educational paths. The postmodern "multiversity" is a place where several individuals find their own way through the curricula. While this flexible perspective seems appealing it ignores the role of the academic community in the educational process. "The informal curricula" – being together with other students, following the same educational path in and outside the university is almost as important as the individual study. The main reason most of the long-distance students drop out is exactly this one: they lack the emotional support of others in the whole educational process. While flexibility is by no means important, the sense of belonging to a community that overcomes the same obstacles is also crucial to a good education.

This is surely related to the next assumption I underlined above. The neoliberal perspective on higher education assumes the fact that students are rational clients in search of useful information. The emotional needs of the students as well as the importance of the academic community are completely ignored. The emotional needs are closely connected to academic profit. In order to secure the institution's financial welfare the educators have to "seduce" the students to *like* their courses. Being in a constant competition with each other and with educators in other institutions the faculty

members have to get the students to like their courses by all means necessary. In our consumerist and hedonistic society it seems only natural to appeal to the student's emotional needs.

This puts the educator in a very difficult situation: although the student is supposed to be a rational individual in search of useful information, the education provider has to get him/her to *like* the course he/she is teaching. The higher educator's ability to attract as many students as possible is connected to the last assumption: the main goal of any university is to place the higher numbers of students on the labor market using the lowest number of resources possible. If profit is the ultimate value of a university it makes it very difficult for quality to find its way into the educational process.

3. The Spiru Haret E-learning system

We may think fatalistically that what happened in Spiru Haret is merely another example on how Romanians manage to destroy any system that seems to work perfectly elsewhere. This is not entirely far from the truth, but there are also important aspects worth mentioning. Although this case contains almost surrealist and grotesque aspects it is merely the expression of the academic capitalist perspective taken to the extreme. But let us analyze what happened at Spiru Haret.

After the visit to several universities in the United States the former rector of Spiru Haret, prof.dr. Aurelian Bondrea, came home in 2007 with the idea of making radial changes in the educational process. Therefore he made a very cost-effective investment buying thousands of computers and opening dozens of long-distance learning centers all around the country and even abroad. He also paid a huge amount of money for the license of an otherwise very sophisticated educational E-learning platform. After two years of ongoing expansion a huge scandal started: the Ministry of Education received a solicitation for almost fifty thousand academic diplomas although this academic institution has systematically refused to be evaluated by the Romanian Agency of Quality Assurance in Higher Education in order to receive accreditation for its educational programs. This unprecedented fact is the direct result of introducing the E-learning system against the quality assurance in higher education. Thus, in 2005 the number of students enrolled at Spiru Haret University was 90.000. After the introduction of the E-learning platform the number of enrolled students reached the astonishing value of 275.000. Almost one third of Romanian students were enrolled at Spiru Haret. The large number could only mean that the university was seeking to expand. But, the big problem resided in the fact that while the number of students grew beyond all conceivable boundaries, the number of professors remained almost the same. Thus, in 2005 there were 1081 faculty members (from teaching assistants to professors). In 2008 there were 1334 faculty members hired by Spiru Haret University. This lead to the unprecedented situation in the Romanian education history where there was only one teacher to 206 students. For a comparison it is important to mention that the general ratio in Romanian state universities is 1/25.

Finally in 2009 Ecaterina Andronescu, former and current ministry of education, put an end to this situation by literally denying the right to enroll students for the long-distance learning centers of Spiru Haret University. This is the short story of a national educational disaster. I consider it is only fair to raise two questions:

1.How was this possible?

2.What was the role of the E-learning system in all this?

Although the first question could be addressed in a very complex and detailed manner I think there are some possible answers that can be considered as starting points for further research. The fact that a Romanian academic institution was able to enroll so many students without having the necessary accreditation forms proves a very simple thing: the Romanian institutions sent to control and restrain such behavior were not invested with enough money and power to do their job. They lacked the practical ability to control and stop such behavior.

I intentionally left at the end of my paper the most important question of my article: what was the role of the E-learning system in lowering quality standards at Spiru Haret University? After a careful examination of the arguments in section two we could be able to answer this question:

- The Spiru Haret management expected the E-learning system to function as the traditional educational system. No formal training for faculty members for the use the Black Board educational software was made before 2011 – almost three years after the E-learning was introduced;

- The Spiru Haret management expected the E-learning tools to replace highly trained academic personnel. Although the number of students exploded in 2008 only three hundred additional professors were hired;

- The Spiru Haret management was interested only in financial advantages: they paid no attention to any sort of quality assurance, nor formally or literally;

- The Spiru Haret students were only interested in buying a certification that could allow them to get ahead others in their careers;

- The very sophisticated Black Board educational software was used only to give multiple choice tests. The educators were forbidden to interfere with the testing methods and computer generated test results.

- The crucial "link" between teacher and student was severed since the evaluation was no longer in the hands of the teacher. The educators were not given the possibility of making other type of evaluation. They had to develop multiple choice items for all types of subject matters.

- The corruption of administrative personnel in the Spiru Haret University made it possible for the students to obtain in a black market system all the correct answers to the multiple choice items in their tests. All those answers were than published online[3], so any effort to offer a fair process of evaluation was futile.

4. Conclusions

Academic capitalism cannot function to the benefit of the society as long as the financial profit is the only relevant value taken into consideration. The labor market is a poor regulator of the "diplomas free trade". Although most of private companies do not value the Spiru Haret diplomas in the hiring process this decision is not the same for the state institutions. There are a lot of employees in the administration of our state that received important raise of salaries and climbed the institutional hierarchy as a result of such controversial diplomas.

The liberal perspective on higher education has to be tempered if we want to achieve quality in this important type of education. We need state founded institutions powerful enough to stop immoral academic behavior.

The university cannot function as a shoe factory. No matter how appealing the private management system may seem, education utterly transformed into some sort of capitalist trade is equivalent to the Spiru Haret "business" model. The university should be guided by other concepts than "return of investment", "cost-effective educational strategies" borrowed from corporate management.

References

- DELANTY, G., *Challenging Knowledge. The University in the Knowledge Society.* The Society for Research into Higher Education & Open University Press, Buckingham 2001.
- ROBINSON, G.,M.; Moulton, J., *Ethical Problems in Higher Education*, iUniverse.Inc., Lincoln 1985.
- SLAUGHTER, S.; LESLIE, L., *Academic Capitalism: Politics, Policies, and the Entrepreneurial University*, Johns Hopkins University Press, Baltimore 1997.

[3] http://www.onlinestudent.ro/categ/referate/grile-rezolvate-referate Here you can find a sample of the answers to the multiple choice tests.

SOCIO-EMOTIONAL COMPETENCE AND ITS ROLE IN THE PROFESSIONAL TRAINING OF FUTURE OFFICERS

HĂHĂIANU FLORENTINA[*]
ŢEICAN BRÂNDUŞA[**]

Abstract
The term competence has become a priority for public policies. In the field of education and professional training competences lie at the basis of curricula, of specializations in universities, of qualifications or professional standards. It is obvious that in any sector of human resources - be it economy, public services or policies, in any kind of activi - be it individual or at the level of organization, firm or collectivity, competences have become the key factor and the main reference.
Thus, its popularity went hand in hand with its unlimited spread in the detriment of its conceptual clarity. Today we meet the term competence everywhere and at any time, but there is no minimal consensus with respect to terminology. We speak of competences and "skills" (a term difficult to translate in Romanian), key and basic competences, capabilities and abilities etc.
With this article we will try to bring a better understanding of the concept. Moreover, since it plays an importnat role in an officer's activity or in their environment, we will tackle on the affective dimension in their competence profile: relations with others, decision-making process, work motivation and satisfaction, team work, self-control, etc.
In order to become experts in a certain socio-emotional competence, such as team work or analyzing a conflictual situation, we need to develop an inner ability from the socio-emotional fundaments. Why? Because i nany activity the rational dimension doesn't suffice, there has to be an affective side, as well. Emotion depends on the way a person evaluates and assesses a situation. Affective and cognitive processes, though different in their nature, are inseparable and in tight connection in the activity of an intelligence officer, for instance.

Key words*: competence, socio-emotional competence, education, socio-emotional intelligence, officers*

Context

Who can honestly say that they understand and fully master their emotions, or that they understand other people's emotions and the way these influence the quality of our daily life?

Increasing attention is given to the concept of socio-emotional intelligence at a national and international level (Roco, 2001) should raise questions on what was considered so far to be "intelligent"; hence the support of several programs for socio-emotional development, which are real instruments for disseminating and raising awareness on its impact on the daily life, in assuring a successful career. Speaking of the military environment in general and of the concept of "intelligence" in particular, this type of activity implies, among many others, certain relations between officer and source, relations whose success will depend of the competence of the officer. It is clear that a positive social relating will improve his position, his image, the trust required to obtain the necessary information. It also supposes an understanding of the opponents' strategies, so that their plans could be dismantled, as well as an assessment of the information obtained in order to establish if this should be accepted as truth or as potential disinformation.

In training human resources with higher qualification there is this view that a high level of emotional intelligence leads to academic success, but especially to social and professional success. Unfortunately, time has proved that the IQ is just a piece of the puzzle. The intelligence officer needs more than native intelligence. Relating or the "talent" to make people reveal their own thoughts,

[*] Assistant Lecturer, PhD, "Mihai Viteazul" National Intelligence Academy, Bucharest, Romania (flori.hahaianu@gmail.com).
[**] Assistant Lecturer, "Mihai Viteazul" National Intelligence Academy, Bucharest, Romania (brrandusa@gmail.com).

interests, feelings, state of mind, etc, represent a drive for the successful career of an intelligence officer. In this activity the cognitive component doesn't suffice; there has to be an affective side as well. Emotion depends on the way the person assesses and analyzes a situation.

That is why quality education regards the needs of the beneficiary. At present, training of future intelligence officers is a challenge for the educational system, and requires a holistic approach of intelligence. Therefore, in this article we propose a model of the competences necessary for an intelligence officer, a model that will lie at the basis of their training. Given the characteristic of socio-emotional intelligence, they are absolutely necessary in the military environment, especially for officers in intelligence. It is a reality that needs to be studies not only from a psychological point of view, but also from a social, educational and instrumental-operational one.

2. Socio-emotional intelligence: a critical-constructive perspective

In 1990, Joh D. Mayer and Peter Salovey, in an article for *Imagination, Cognition, and Personality* review for the first time defined emotional intelligence: a form of social intelligence that supposes the ability to acknowledge and understand their own feelings and emotions as well as other people's, to recognize various emotions and feelings, as well as to use this information both in guiding the cognitive abilities and in the correct adjusting of the behavior according to the context – "an ability to perceive emotions, to access and generate emotions so that they come to support thinking, to understand emotions and their significance and to efficiently regulate emotions so as to determine an improvement in emotional and intellectual development" (Salovey, Mayer, 1990, 189).

From this moment on, the concept of *emotional intelligence* takes the lead in the academia. At the same time, we also speak of *social intelligence*, a concept many theories in the field tend to leave aside (Neacşu, 2010). Howard Gardner (1983) describes individuals' tendency to ignore what happens during their interactions, naming this tendency "myopia". The consequence of this myopia is ignoring the social aspect of our intelligence. According to evolutionist psychologists, social intelligence evolved to cope with the challenges of certain social trends within a group.

Psychologists failed to agree which of human abilities are social and which emotional. The two fields are interwoven, just like the social feature of the brain overlaps the emotional centers (Parkinson, 1996, *apud* Goleman, 2007). "All emotions are social", says Richard Davidson, director of the Laboratory for Affective Neuropsychology from Wisconsin University. "You cannot separate the case of an emotion from the world of relationships – our social interactions are those who lead our emotions" (Goleman, 2007, 101).

2.1. Main directions in defining emotional intelligence

There are three *main models of emotional intelligence.* The first one belongs to Peter Salovey and John Mayer, a model that sees emotional intelligence as a form of pure intelligence, a cognitive ability. A second model belongs to Reuven Bar-On, which presents emotional intelligence as a mixed intelligence, made up of the cognitive ability and the personality aspects. This model emphasizes the way cognitive and personality factors influence the general state of mind of the individual. The third model was introduces by Daniel Goleman, who also sees emotional intelligence as a mixed intelligence, made up of the cognitive ability and the personality aspects, but this model revolves around the way the cognitive and personality factors determine professional success.

All three models are accompanied by instruments to gauge the emotional intelligence quotient. Recent research has shown there is a relation between the three models of emotional intelligence. Emotional intelligence has proved to be a predictor of satisfaction in life, of a healthy psychic, of positive interactions with colleagues and family. A low level of emotional intelligence was associated with a violent behavior, even delinquent, with illegal drug and alcohol consuming. Emotional intelligence was shown to be linked to a higher degree of success among those who share similar positions (senior managers, for example). Moreover, hiring people with a high level of

emotional intelligence, as well as training the existent personnel to have a more developed emotional intelligence, were associated with financial gain in the private sector. Thus, training for developing emotional intelligence at work may take place at all levels, through development programs.

Despite the extensive research dedicated to emotional intelligence in the past decade, the concept still remains controversial. There is currently a debate on the legitimacy of the construct, the superiority of a model over another, gauging emotional intelligence, as well as on the ability to form emotional intelligence.

With respect to social intelligence, a reliable method to measure it would include not only higher approaches (questionnaires), but also lower approaches (highly spread non-verbal measurement) (Goleman, 2007) or the Ekman test[1] to read micro-expressions. As Ekman's assessment shows, the social brain is eager to learn to read micro-emotions, which suggests that certain key abilities of social intelligence can be strengthened through training via electronic means.

Above all approaches and theoretical models, it is unanimously accepted that socio-emotional intelligence is an important part of the human psychic, more important for social and professional success than intelligence defined in classic manner (IQ).

3. Socio-emotional competence – a key factor in officers' professional training

3.1. Approaches in defining competence

The extreme popularity of the term was accompanied by its unlimited spread, to the detriment of its conceptual clarity. We hear the term competence everywhere and at any time, but it doesn't have a minimal terminology consensus. Competence and "skills" (a difficult word to translate in Romanian) are mentioned, key competencies and basic competencies, capacities and abilities, professional standards and occupational standards, qualifications and capabilities, etc.

Some clarification is needed. A remarkable effort in this respect was the OCDE project "Definition and Selection of Competences" (2002) or DESECO, as well as the initiative of the European Commission on key-competences (2006). We will focus on these contributions.

The DESECO project drawn up by OECD at the beginning of 2000 is a prestigious reference to be used in all discussions on using competencies. The team of this project (OECD, 2002; Weinert, 2001; Rychen and Salganik, 2003) use a definition focused on results and on the capacity of an individual to solve problems specific to a certain context (social, economic, cultural): "Competence is defined as the ability to successfully cope with the individual or social requirements, to achieve a certain activity or task" (OECD, 2002, 8).

In the Methodology of the national framework for higher education qualifications data[2] is presented referring to the definition of the concept of competence, as well as the categories used to analyze it.

According to the above mentioned methodology, *competence* represents *the proven ability to adequately select, combine and use knowledge, abilities and other acquisitions (values and attitudes), with a view to successfully solving certain work or learning situations, as well as to achieving professional or personal development, under conditions of efficacy and efficiency.* We may consider that competence is the ability to cope with certain situations, thus to solve a given task. Competence is the ability to efficaciously react to a series of situations by timely using the necessary knowledge with the purpose of identifying and solving problems. There is always knowledge subordinated to a certain competence, but competence is not just that. Competence gives the one who has it the right to say: *I can do this.*

In our country, professor *Dan Potolea* defines competence as: "*Competence is an adequate selection, combination and usage process, under the form of an integrated and dynamic assembly, of*

[1] Measurement that uses WEB to assess the ability to detect microemotions, resulting a new means to assess the ability to manifest empathy at a non-cognitive level, a basic condition for emotional resonance.

[2] http://www.upt.ro/pdf/calitate/Metodologia_CNCSIS.pdf. Accessed in October 20, 2012.

knowledge, abilities (cognitive, actional, relational, ethical, etc.) and of other acquisitions (values and attitudes, for instance), in order to successfully solve a certain category of situations under conditions of efficiency and efficacy" (Conceptual Bases for Developing the National Qualification Framework in Romanian Higher Education - ACPART 2010).

Joras M. (2002, Preface) presents five major ideas which represent consensual points of view on competences:

1. Competence ensures the creation of a group of "informal" abilities, difficult to pinpoint in the traditional literature;

2. Competence is linked to action; it allows one to take action, to achieve tasks, and thus it can be easily identified; it does not exist on its own, independent from activity, from the problems to be solved, from what needs to be done;

3. Competence is observable in a precise and confined context; only in this context can we speak of transferability conditions;

4. Competence regards three families of abilities: the ability to know or general knowledge, the ability to know what to do, and the ability to know how to be (relating abilities or social behaviors);

5. These abilities are integrated. It is not about acquiring abilities expressed in performance, but structured and constructed abilities; they represent a capital of resources that, combined among themselves, allow activity.

A question must be raised: *what we evaluate* or *what is the operational level we establish for evaluation*, taking into account the fact that a competence does not manifest itself as such, in a singular and isolated manner, and a certain competence may take the form of a multitude of contexts and through different actions. Moreover, the moment we switch to analyzing competences, we realize they are not similarly applicable, they are not equally compatible with their deconstruction into skills, behaviors and performance indicators. For instance, those non-cognitive components of competence (values, emotional moods) cannot be measured as easily as intellectual operations or practical activities, which are forms of manifestation of competences.

From the definitions mentioned above, we can say that what is unanimously accepted is the fact that any competence has two components:

~ *resources:* knowledge, skills and attitudes that a person needs to make use of in order to solve various problem-situations; resources are made of: *knowledge* ("to know"), *skills/abilities* ("to make") and *attitudes/values* ("to be, to become").

~ *problem-situations,* when the person needs to make use of these resources (learns and puts into practice that potential). Without creating concrete situations meant to put theory into practice, that potential remains only at the level "to know", and not advances to the level "to make".

As mentioned above, the current approaches on inscribing competence do not explicitly take into account the level of competence and the context. On the contrary, competence, the level of experience and the context are three different dimensions that should be inscribed separately in order to maximize their re-usage. For example, it is not yet clear if "flying a plane" covers both the ability to fly a small plane and the ability to fly a bigger, passenger plane. Or in the situation when "writing in English abilities" competence represents a certain level, such as intermediate, fluent, native or simply the existence of a competence. Thus, the same competences may be used in different contexts, or the same level of competence may be used again for various certifications. The same is applied to contexts that in many situations already exist, therefore may be used again by competences. In conclusion, competence may be a tridimensional model made up of the following variables: experience, competence and context.

3.2. Importance of socio-emotional competence

While socio-emotional intelligence determines our potential to learn how to be self-possessed, our socio-emotional competence shows how much of this potential we accumulated under the form

of practically applicable abilities. In order to become experts in a certain socio-emotional competence, such as team work or analyzing a conflicting situation, we need to internally develop an ability belonging to socio-emotional intelligence. But socio-emotional competences represent acquired abilities.

The way to define social competence has represented, for several decades, a difficult issue. Arguments in this field are most of the times characterized by a lack of vocabulary and common conceptual frameworks between academics. Keith Topping, William Bremner and Elisabeth A. Holmes (Bar-On, 2008, 39) consider that the complexity of the issue was highlighted several decades ago by Bandura, whose experimental research showed that social learning is a function with multiple variables. Among these, the most important ones were related to attention, retention processes, motion reproduction and motivation.

Who could be called, accurately and without any doubt, "competent from a social point of view"? Social competence seems to contain more variables, each evolving only in one dimension, since it doesn't have a yes/no binary or categorical value. The definition given by Keith Topping, William Bremner and Elisabeth A. Holmes (Bar-On, 2008, 43) to social competence is possessing and making use of the ability to integrate thinking, emotions and behavior, with the purpose of achieving tasks and social results that are valued in the context and culture of origin.

With the help of thinking and emotions, socially competent persons manage to select and control the behaviors they will use or restrain from in any given context, in order to reach the target set by themselves or by others (Keith Topping, William Brenmer and Elisabeth A. Holmes in Bar-On, 2008, 43). The definition suggests that a social competence doesn't include only knowledge and abilities to process information, but also a set of conditionally applied aptitudes or procedures. These might include a perception of relevant social clues, their interpretation, a realistic anticipation of hindrances, an anticipation of consequences of personal behavior on one's self and on the others, finding efficient solutions for interpersonal problems, shifting social decisions into efficient social behaviors, and expressing a positive feeling of self-sufficiency.

Specific abilities of social competence include communication in various environments, tolerance, expressing and understanding different point of views, trust and empathy. People should be able to manage stress and frustration, to express themselves in a constructive manner and to make the difference between various development plans (personal, professional, social). Attitudes correlated with this competence are collaboration, assertiveness and integrity. Individuals should be interested in socio-economic development and in intercultural communication and put a stress on diversity, respect for others and overcoming prejudices[3].

Social competences represent one of the key aspects identified by the European Commission having a direct impact on member states development. Social competences can be defined as abilities that allow individuals to "live together". Beyond such a large range of understanding the concept, these competences are really difficult to define, since they vary in content (for example, abilities, behaviors) function of context, age, etc. this kind of competences reflects a person's level of adapting and acting on various plans: family, work place, school, free time activities, etc., aspects that contextually and historically are understood and applied differently in different socio-cultural spaces. In the past years, approaching social competences was the drive for practitioners and theoreticians in various fields, partially because of their permanent character.

Social competences are linked with social and personal welfare, which supposes an understanding of how individuals can ensure their mental and physical health, including resources for self-use, for the family and for the social environment, as well as knowledge on how can all these contribute to a healthy life style. For a successful social and interpersonal participation, it is essential that generally accepted behavior codes be understood in various societies and environments (for instance, at the work place). It is equally important to acknowledge the basic concepts regarding

[3] http://www.upt.ro/pdf/calitate/Metodologia_CNCSIS.pdf. Accesed in October 20, 2012.

individuals, groups, work organizations, gender equality and non-discrimination, society and culture. What is essential is to understand socio-economic and multicultural dimensions of European societies and the way national cultural identity interacts with the European one.

The most important part of this competence includes the ability to constructively communicate in various environments, to show tolerance, to express and understand various points of view, to skillfully negotiate in order to trigger trust and to empathize. Individuals must be able to manage stress and frustration situations, to express them constructively, and also to distinguish between personal and professional environments. This competence is based on an attitude of collaboration, assertiveness and integrity. Individuals must show interest for socio-economic development and interpersonal communication and must appreciate diversity and respect for others, to be ready to overcome prejudices, but also to compromise.

Everyone is socially competent at least in one situation and no one is competent in all situations. We tend to consider a person as generally socially competent if they success in getting along with people in a wide range of situations. But sometimes we can be in the wrong if we make suppositions about the social competence of a person in other situations than based on the social competence within family environment.

Employers are interested in what a person can quickly learn and do, thus social competence becomes one of the transferable aptitudes constantly looked for by them. The reason is that the employee's activity will almost always take place in a social environment.

With respect to *emotional competence*, it has been defined in various ways, the most famous definition being given by Denham S. (1998): "*Emotional competence is the ability to understand, express and regulate emotions.*" When emotional competence is optimally developed, the three abilities are interdependent and act in an integrated and synergic manner.

"Establishing harmonious interpersonal relations is influenced both by the social and emotional competence." (Stănculescu, E., 2008, 83). Thus, the defining characteristics of emotional competence suppose emotional expression, understanding emotions, an ability to adequately react to other people's emotional manifestations.

Emotional competence is showing self-efficiency in social transactions that require affection - this is the definition of Carolyn Saarni (Bar-On, 2011, 79). Self-efficiency represents reaching a goal that reflects cultural values and beliefs through a personal note, within social transactions that require affection, the way everybody responses emotionally.

Processes that participate in emotional competence are the personal ego, the moral dispositions and the history of personal development. The complexity of these processes resides in the fact that they are localized in a certain period and cultural context. Thus, the ego is the one that has the role of coordinating and mediating in an adaptive manner the importance of environment for the individual. The moral disposition is in agreement with personal integrity. With respect to the history of personal development, this highlights the fact that we learn to give meaning to our contextual emotional experiences through social exposure to the emotional discourse and narrative by means of developed cognitive abilities.

Following this presentation of the theoretical fundaments of emotional competence, we will briefly present the structure of emotional competence as seen by Carolyn Saarni (Bar-On, 2011, 87), aptitudes that will be presented in a certain succession, other than their sequence of development:

- acknowledging the personal emotional state;
- the ability to recognize emotions in other people, based on the situations and expressive indicators;
- the ability to use the vocabulary of emotions and expressive terms usually available in the subculture of the person;
- the ability to show empathy and compassion for the emotional experiences of other persons;
- the ability to understand that the inner emotional states don't necessarily correspond to the exterior emotional expression;

- the ability to find adaptive solutions to perturbing emotions using self-regulating strategies;
- acknowledging the fact that the structure or nature of relations is partially defined by the degree of emotional transparency as well as by the moment of expressing or the authenticity of the exteriorized expression and the degree of reciprocity or symmetry in the relationship;
- the capacity of emotional self-sufficiency.

Research shows that the bases of emotional competence development are laid since early childhood[4]. Developing this emotional competence helps people create and maintain relationships; those who understand emotions and how they are expressed will be able to empathize with those who experience negative emotions and communicate them exactly what they feel. At the same time, people who are emotionally competent will be able to adapt more easily to the professional environment. Last but not least, developing this competence represents a means to prevent further behavioral and emotional problems.

3.3. Socio-emotional competence of the intelligence officer

Why is socio-emotional intelligence so important for an intelligence officer? Because it plays an important role among all factors that influence the efficiency of an officer's activity or the whole system he is part of, with all that it implies: relations with the superiors, the decision-making process, motivation and work satisfaction, maintaining talented people in the organization, team work, work quality, etc.

In this activity the rational dimension is not enough, there also has to be a affective component. Emotion depends on the way the person assesses and analyzes a situation. The affective and cognitive processes, though different in their nature, are inseparable and in a tight interrelation within the intelligence activity.

In conclusion, a person with a higher socio-emotional intelligence is likely to present *an increased tolerance to frustration*, an ability to postpone the achievement of desires and gratifications, an ability to *self-regulate dispositions* and an *optimistic, hopeful attitude*. An increased level of socio-emotional intelligence grants individuals *self-control* (over emotions, dispositions and feelings, but also over thoughts and actions), a *positive self-image* mixed with *a favorable self-esteem*, irrespective of external variables, *an ability to cope with stress and to adapt to changes, a capacity to empathize and efficiently relate* with others, a skill to establish *realistic goals* and *to find a motivation* in achieving them.

To come back to higher military education, the paragraph above may represent a "pattern" of the ideal graduate of a military school.

In what way does an intelligence analyst stand out? Through the fact that he operates with data and information from a wide range of themes (both from open sources, and from secret ones) and draws out explanations, predictions, prognoses etc. in national security issues, meant to fundament political decisions (Perianu, 30).

Moore and Krizan (2003, 96) make a complete configuration of the main *abilities, characteristics, skills* and category of *knowledge* necessary for an analyst, presented in ***Scheme nr.1.***

Doing performance in *intelligence* analysis[5] supposes the existence of certain psychological characteristics/requirements of the analyst, structured as following:

a) *mental skills*[6]

---

[4] http://orizontdidactic.wordpress.com/2012/02/18/competenta-emotionala-si-rolul-ei-in-dezvoltarea-armonioasa-a-copilului/. Accesed in November 20, 2012.

[5] Knowing the psychological profile needed for analysts offers the possibility to establish new minimal performance and selection standards, useful not only for analysts and their supervisors form the perspective for professional training and evolution, but also for projecting career evolution.

[6] The concept we used in the context, *aptitudes* represent the psychical and physical skills that allow individuals to successfully achieve several types of activities. The analysis activity needs more *mental* aptitudes. These are defining for the thinking process, which has a central role in reflecting reality: through abstractization and

Analytical performance means a continuous interrelating of several types of thinking. The way they act is valued according to certain criteria: proposed operations (algorithmic thinking - heuristic thinking), finality (reproductive thinking, productive, critical thinking), direction of evolution (divergent thinking and convergent thinking) and logical approaches (inductive thinking and deductive thinking). The functioning of all these thinking "species", relevant for the analysis process, require the existence of certain cognitive aptitudes considered essential for doing performance in this kind of activity;

b) *skills*

Function of the specific activities of the analytical process, they can be:

(1) *formative* (active learning, learning strategies) - presented mainly in the professional training process;

(2) *resolutive* (skills specific to scientific learning, ability to solve complex problems, active learning) - they actively and determinately intervene in the current activity (at all three analytical levels: operational, tactic and strategic);

(3) *regulatory* (ability to monitor and manage time) - it refers to those "automatisms" developed within the coordination and control processes, that ensure the quality of analytical activity;

c) *personality characteristics (actual features of direct relevance for the analysis activity and for professional interests) and connected elements related to psycho-character implied in this process.*

The psychological profile of the intelligence analyst combines variably the following styles of personality[7]: 1) investigative (analytical, cautious, critical, complex, curious, intellectual, with a capacity for introspection, precise, rational, reserved); 2) realist (social abilities, conformism, perseverance, sincerity, naturalness, normalcy, self-sufficiency); 3) conventional (careful, conformist, conscientious, defensive, efficient, methodical, persistent, practical); 4) artistic (complex, expressive, idealist, imaginative, impulsive, independent, creative, original, sensitive and open);

d) *work style*

Psychological practice shows us that the ideal profile of the analyst supposes a balanced combination between the *perfectionist, perseverant and balanced* styles;

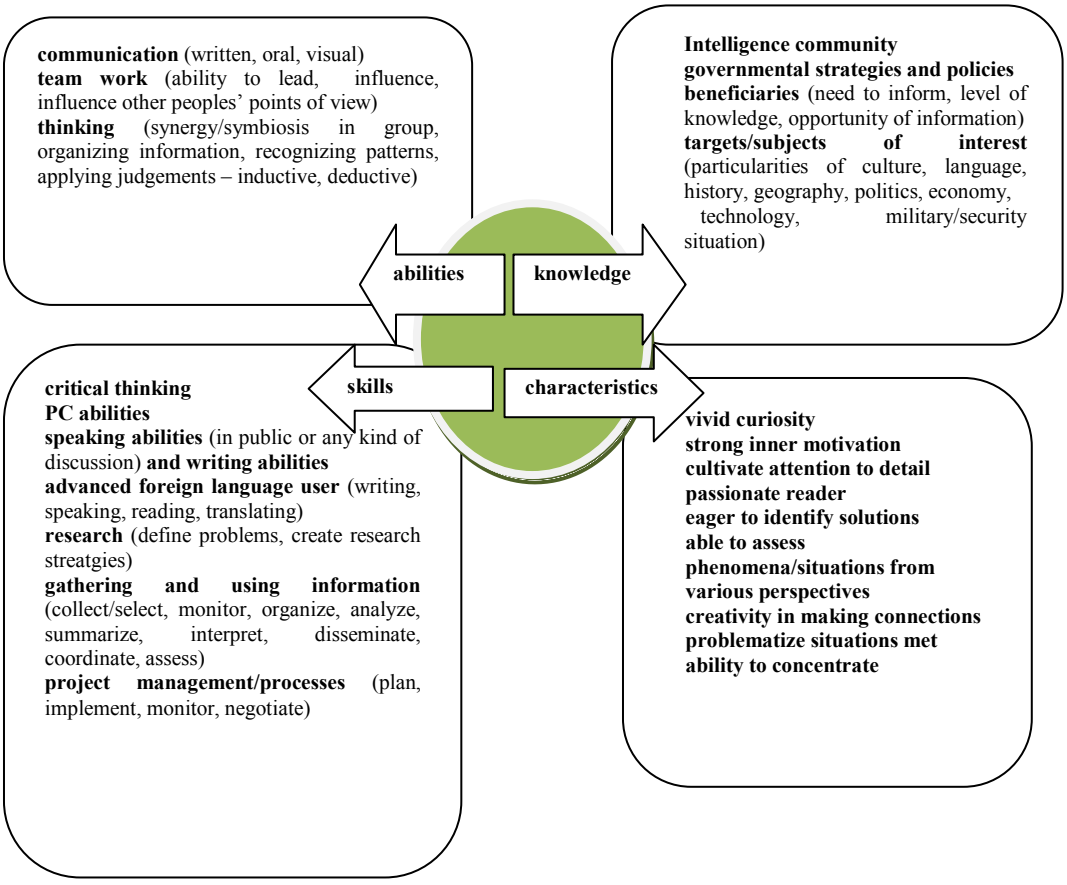
e) *motivational aspects of the analyst*

Similarly to other occupational categories, the following needs can be emphasized, whose fulfillment leads to professional satisfaction: the need to be successful, to exploit one's own potential, to have professional recognition, work diversity, professional independence.

generalization, coordinates in mental actions, it extracts and works with information related to category and determinant relations, in judgments and concepts.

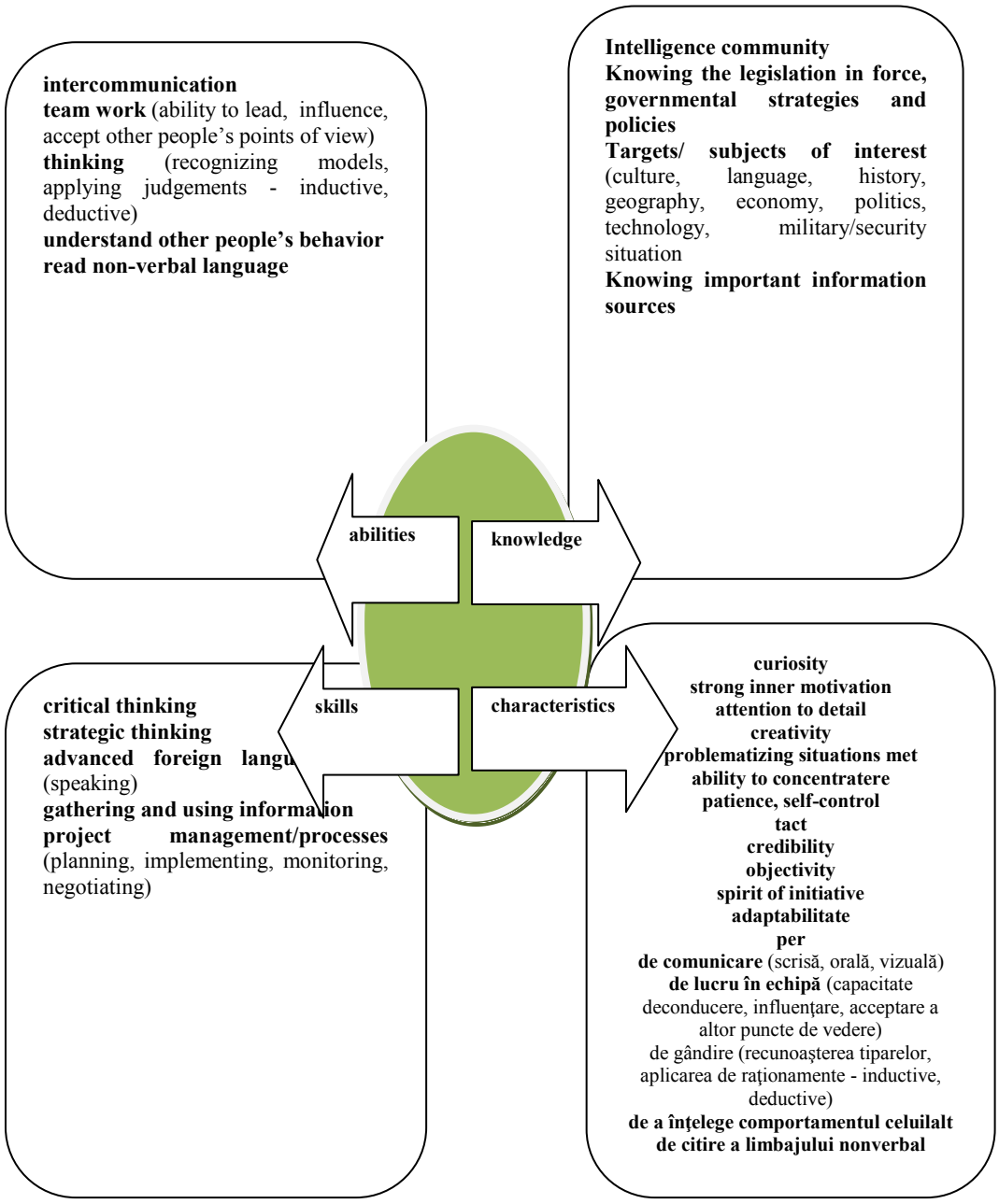
[7] In order to identify them, specialists started from *Holland's theory on professional interests and career choosing,* that develops a hexagonal model including 6 types of personality structured around the criterion of professional interests (*realist, investigative, artistic, social, enterprising* and conventional).

Scheme nr. 1 Basic competences of the *intelligence* analyst



With respect to the operative officer, the literature is not that generous. But we can read between the lines and see what competences he may need. Based on the previously presented model and on some documentary materials, we propose a configuration of the main abilities, characteristics, skills and category of knowledge he may need.

Scheme nr. 2 Basic competences of the operative *intelligence* officer



Many have wondered whether these competences can be improved once a person has reached maturity and started work. The answer is yes. The work place is a logical frame for the effort to improve competences associated with socio-emotional intelligence. There are hundreds of studies within organizations that present competences such as self-trust, flexibility, empathy, perseverance, a capacity to get along with others, associated with higher performance. Moreover, their improvement

has proved necessary, since many adults now start work without having the necessary competences. Last but not least, most of the adults spend most of their time at work, as compared to any other place.

Thus, there are efficient programs for improving socio-emotional intelligence in a number of fields associated with training and development. These include programs for management training, for communication and empathy development for doctors, programs that teach police officers how to tackle conflicts, courses for stress management and courses for the unemployed.

The concept of socio-emotional intelligence suggests new directions both for research and for the practice of training and developing in organizations. In the field of intelligence, the concept of socio-emotional intelligence will add something new, not only a conceptual contribution, but also a practical one. Thus, we propose a training program for intelligence officers as well, for them to improve their socio-emotional competences.

Finally, we consider as benefits of competence systems the fact that there would be a set of professional targets - employees are aware what is expected from them at the work place, and the recruitment systems and evaluation will be founded on objectivity, correctness and transparency, while the measurable and standardized processes will be presented in a certain organization framework. There will also be a connection between their individual and organizational objectives, as well as an increase in promotion, professional development and mobility.

References

- Bar-On, Reuven, and Parker, James.D.A. *Manual de inteligenţă emoţională*. Bucureşti: Curtea veche, 2011.
- Gardner, Howard. *Frames of Mind: The Theory of Multiple Intelligences*. New York: Basic Books, 1993.
- Goleman, Daniel. *Inteligenţa emoţională*, ediţia a III-a. Bucureşti: Editura Curtea Veche, 2008.
- Goleman, Daniel. *Inteligenţa socială*. Bucureşti: Editura Curtea Veche, 2007.
- Joras, Michel. *Le bilan de competences.* Paris: PUF, 2002.
- Mayer, John. D., and Salovey, Peter. „What is emotional intelligence?" în P. Salovey & D. Sluyter (Eds), *Emotional Development and Emotional Intelligence: Implications for Educators*, New York: Basic Books, 1997.
- Neacşu, Ioan. *Introducere în psihologia educaţiei şi a dezvoltării*. Iaşi: Editura Polirom, 2010.
- Niţu, Ionel. (coord). *Ghidul analistului de intelligence. Compendium pentru analiştii debutanţi.* Bucureşti: Editura Academiei naţionale de informaţii „Mihai Viteazul", 2011.
- Păun, Emil, Iucu, Romiţă Bumbu şi Şerbănescu, L. „Statutul profesional al cadrului didactic: statut-roluri, competenţe, standarde,personalitate, formare continuă, evaluare, autoevaluare. În D. Potolea, I. Neacşu, R. B. Iucu şi I. O. Pânişoară (coord.), *Pregătirea psihopedagogică. Manual pentru definitivat şi gradul II*, 426-449. Iaşi: Editura Polirom, 2008.
- Roco, Mihaela. *Creativitate şi inteligenţă emoţională*. Iaşi: editura Polirom, 2001.
- Salovey, Peter, and Mayer, J. D. „Emotional intelligence", *Imagination, Cognition, and Personality* 9 [1990]: 185-211.
- ***. *Bringing Intelligence About Practitioners Reflect on Best Practices*. The Joint Military Intelligence College U.S.A., 2003.
- ***. *The Definition and Selection of Key Competencies – Executive Summary.* OECD: Bruxelles, 2005.
- ***. *Revista de pedagogie Nr.58 (3)*. Bucureşti: Editura Institutul de Ştiinţe ale Educaţiei, 2010.
- http://www.howardgardner.com. Accessed in June 15, 2011.
- http://www.eiconsortium.org/members/baron.htm. Accessed in June 28, 2011.
- http://www.upt.ro/pdf/calitate/Metodologia_CNCSIS.pdf. Accessed in October 20, 2012.
- http://orizontdidactic.wordpress.com/2012/02/18/competenta-emotionala-si-rolul-ei-in-dezvoltarea-armonioasa-a-copilului/. Accessed in November 20, 2012.
- https://www.fas.org/irp/doddir/army/fm2-22-3.pdf. Accessed in December 15, 2012.

PRIVATIZATION OF EDUCATION IN IRAN: A COMPARATIVE MODEL

ABBAS MADANDAR ARANI[*]
LIDA KAKIA[**]
BATOL MOAZENI[***]

Abstract
In Iran and after end of war with Iraq in 1988, establishing Non-Governmental Schools was first action of the government in operationalizing the policy of privatization of education. During the early years like many newly-established economic activities, a common tendency existed among the government and investors. In recent years, non-governmental schools' authorities have been observing the "getting the stop sanction" proposal from the part of NGS founders. In fact, during the three last decades, different states adopted different policies about these schools. At the first years the government has followed "Strong Support" policy. In the middle years proceeded to the "Balanced Support" and now, the government applies the policy of "Washy Support". At first part of present paper we shortly try to explain policies and strategies on privatization of education according to the Klein's Model. In the second stage, privatization experiences of education in other countries are referred. In the final part, we will try to show the process and position of privatization policy of education in Iran in a comparative perspective. All these issues will show that policies changes of privatization of education are affected by the lack of consistency in policies of different Iran's States.

Keywords: *Educational System, Non-Governmental School, Privatization, State, Iran.*

Introduction

The change in economic attitudes and the global tendency towards decreasing the government's role should be considered as the main effective factors in the relationship of the political system with other social institutions such as education during the late two decades of the twentieth century and the early years of the new millennium. The main axis of reforms is increasing the role of private sector in managing tasks that governments considered it's planning, performance, and control as their own undeniable right (*cf* Bray, 1996). Because of this, many developing countries with centralized educational systems abandoned administrating different services and educational tasks to the private sector during this period (Whitty & Power, 2000). In Iran and after end of war with Iraq in 1988, establishing Non-Governmental Schools was first action of the government in operationalizing this policy. These schools came into existence with the purpose of increasing the society involvement - especially in economic & financial aspects- to help the government. During the early years like many newly-established economic activities, a common tendency existed among the government and investors. On the one hand, the government supported establishing NGS by economic helps and legal and organizational supports, a process that more or less has continued during the last two decades with ups and downs. On the other hand, increasing social demands for education and a competition for accessing to a qualified education provided suitable grounds for attracting the private sector's investors. While exact statistics has not been collected by the Ministry of Education about economic consequences of establishing NGS during the last two decades, existing statistics up to 2010 shows the amount of economic saving of Iran's government as follows:

- 13893 ten-class schools
- Employing of 105724 as NGS staff
- 7325227000000 Iranian Rials (NGSO, 2010)

[*] Assistant Professor, Lorestan University, Iran (Email : rie2000@gmail.com).
[**] Ministry of Education, Iran (Email : Lida.kakia@gmail.com).
[***] Ministry of Education, Iran (Email : moazeninasren@yahoo.com).

In recent years, non-governmental schools' authorities have been observing the "getting the stop sanction" proposal from the part of these schools' founders. The report of Non-Governmental Schools' Office (NGSO, 2009) at the Ministry of Education shows that the founders' request for "stopping the school's activity" is undergoing an ascending trend in all provinces compared with the previous years, so that during the two years of 2008 and 2010 and in the whole country –in three elementary, junior and high schools – 700 and 457 NGS have stopped their activities (NGSO, 2010). In addition to this, Mesri (2008) shows that from the total NGS of Tehran, 2000 schools have vacant seats and more than 90 percent of them get along with financial problems.

Despite being affected by the idea of "Knowledge Economy," the need for decreasing the economic dependence of schools and universities to the government income in a global level has been proved more than before (*cf* Best, Harmer & Dewey 1997; Bryson, 1998), economic changes in Iran and existing challenges does not show positive perspectives for the future of NGS (Kakia, 2009; Madandar Arani & Sarkar Arani, 2009). In fact, during the two last decades and by NGS in Iran, different states adopted different policies about these schools. In the first years, the government's policy was to support the spread of establishing and welcoming private investors. In the middle years, the current government proceeded from "Strong Support" to the "Balanced Support." Now, the government applies the policy of "Washy Support". Due to this, Iranian states have never been able to follow a unified and specified policy, and their policies have changed constantly. It is clear that this change can be interpreted from two aspects. The first is that the change of every state necessarily brings about the change in economic policies and the second is that investing in education is followed by economic fluctuations like any other investments. At first and shortly we try to explain policies and strategies of the education privatization according to the Klein's Model. In the second stage, privatization experiences of education in other countries are referred. In the final part of the paper, we will try to show the process and position of privatization policy of education in Iran using the above-mentioned model and in a comparative framework. All these issues will show that policies changes of privatization of education are affected by the lack of consistency in policies of Iran's government more than being affected by the economic changes.

Policies and strategies of the education's privatization

In analyzing and assessing the privatization process in the world, economists mainly acknowledge that education has changed from a social service to an industry. Teachers have changed to professional ones more than ever and they put their scientific abilities on sale. Among these, arts, foreign languages, mathematics, and sciences teachers are pioneering (Kakia & Zeinali, 2005). In this situation, schools are also competitive centers and active economic institutions that combat for survival. The results of this combat are efficiency, quality, and effectiveness that one benefits from in short-term (private benefits of education), and the group benefits from in long-term (social benefits of education). All this was said to be able to find a balance among people, investors, and the government in this basic process by accepting the reality of "Quality of Education" in present world. Considering the key role of governments, it is necessary to explain policies and strategies of the education privatization with regards to Klein's Allocating Resources Model.

During the two recent decades and in many parts of the world, we observed a movement trying to question the attitude that the government is the best system that can provide all people with instructional services (Heyneman, 2001). It is interesting to state that this great movement, as the new economic policies of statesmen, insists on the parental choice, establishing various private schools, and making competitions among them. These reforms are often called "Marketization" and "Privatization" of the educational system. Although the above terms are often used interchangeably and there exists no exact definitions for them, it can be stated that marketization is the elementary stage of privatization and what is often remembered from the privatization of education is actually marketization of educational activities in the form of getting tuitions and helps from people to schools and universities. On the other hand, it must be acknowledged that privatization has occurred

in none of the developed and developing countries in the real sense of the word, and what we observe in these societies is a movement on a continuum which starts from decreasing the complete role of government and continues towards marketization and finally complete privatization (Whitty & Power, 2000). Based on this imaginary continuum, the place of countries can be specified with a view to the economic orientations of the government and its effects on the educational system. Before specifying the place of countries on this continuum, it is better to mention the fourfold phases of the relationship between the private and governmental sectors with a view to providing educational and financial resources. For specifying the pattern of allocating financial resources and educational provisions, the theoretical model proposed by Klein (1984) can be used (Figure 1). This model shows the probable fourfold form of the government and private sector contributions as follows:

Financial Resources			
Private	**Public**		
2	**1**	**Public**	**Educational Provisions**
4	**3**	**Private**	

Figure 1: Allocation's Model of Educational and Financial Resources

Klein believes that abandoning the education to the private sector or government is comprehensible in the form of two basic fields: First providing financial resources such as building, material equipments, monetary expenditure and second educational provisions including training and employment of human resources, educational planning and school management (Klein, 1984). Considering these two fields, Klein recognizes four states of participation of government or private sector in education. In the first state, the State itself undertakes providing both financial resources and educational provisions (teachers, books, curriculum, and so on) and does not permit the private sector for participating and investing in education at all. The politicians' main presumption in the first state is that education has such a basic and sensitive role in the country's destiny that it must not be accessed by the market fluctuations and competitions of the private sector. In the second state, financial resources are provided by the private sector (mainly parents) and through establishing mechanisms like getting tuition, but formulating educational policies and performing them has been left to the State, and the private sector has no right to make decisions and people are mainly regarded as an Customer. This state is called Marketization of education. In the state 3, the State gives financial resources to the private sector through providing facilities like loans and abandoning lands. Likewise, educational decisions and policies such as method of enrolling students, employing teachers and principals and budget distribution and allocation are undertaken by the private sector and are determined based on the criteria and mechanisms governing the market. Perhaps, with regard to the culture common to economic issues in Iran, the term "Ministrant State" can be known as a suitable term for describing the position of government in this state. In the state 4, the State lacks any role in both the above two aspects that the phrase "Education without the State" can be used (Whitty & Power, 2000). In this state, education liberalization or complete privatization of education is started by deleting governmental subsides.

The education privatization: Other countries' experiences

Here education privatization policies in two developed countries of Britain and USA and two developing countries of China and India can be compared with each other according to the Klein

Model. For understanding the slow process of education privatization and its move towards the complete privatization, we start from the experience of China and finish with the experience of USA.

According to the Klein Model and for many years, the policy governing **China** has been to follow the first state that can be affected by the ideological governance of the Communist Party in this country. It is clear that after beginning economic reforms in the two final decades of the twentieth century and "Chinization the communism ideology" by Mao successors, the movement of China's government has tended from the first state towards the second state. Despite the first delay, China has started its hasty steps towards privatization of economics during the two past decades. Yet it is clear that China's political system does not accept changes and transitions in line with the economic system (*cf* Cheng & DeLany, 1999). However, policies taken by the China's government during the current half of the century enabled this country to face fewer problems in the field of education and to precede many countries, including its own great neighbor, India (Cheng, 1994). Strong educational system structures especially generalizing elementary instruction, improving the economic state of teachers, welcoming an economic system based on privatization, and developing good political relationships and dependent on priority of national benefits created a suitable ground for moving quickly towards marketization of education in this country. Due to this, the Chinese government regarded two main axes: First, the government's main role in determining policy-makings was constant, and its role decreased in the higher education and secondary education. Second, it continued its supportive policies on poor and rural strata, while increasing pressure on the rich and middle citizen for paying parts of educational expenses of their children. However, it can be stated that in spite of China's great achievements –especially during the current decade and developing the privatization process– the educational system has been influenced by it to a lesser degree (*cf* Bray, 1996). Due to this, it must not be forgotten that in a comparative perspective, China is still a rural country and its experience in moving towards free economics in the field of education is much less than India.

Simultaneous with China, changes in its great neighboring country, i.e., India can be remembered. India has enjoyed a longer background in facing the new world, and has adapted itself better with the exigencies of the world and education privatization process. Policies, especially started in the 1990s in India, were mainly affected by the membership in the Global Trade Organization and accepting the principles governing it that for instance the complete financial independence of universities on the government can be remembered. However, in this country and in the previous decades, non-governmental organizations (like religious institutions) have had active presence in forming educational and welfare trusts (especially in Health and Medicine). The Indian states tried to decrease the pressure of privatization process on the poor class of the society by determining some percentage of the universities quota and good schools for the poor children and also building and equipping schools in deprived areas (Molnar, 1998). In addition to this, in the recent years the role of two other factors should be mentioned that caused the development of education privatization process in India. The first factor considers increasing the share of educational expenses in the household economic baskets of the middle class – forming a great part of the billion population of this country. Policies of the Vajpayee's state in welcoming and accepting membership in the Global Trade Organization and economic conformity with the modern changes and consistency of these policies in Manmohan Singh's state has caused increasing the tendency of people for investing more in education (*cf* Desai et.al, 2008). Likewise, tendency of the Vajpayee's state reinforced the urban middle class – the class which is critically increasing the Indian population structure – flourishing private schools and universities. In recent years and by the re-governance of the Congress Party, it should be acknowledged that the State and the current Prime Minister, i.e. Mr. Sing, also follow exactly the previous policies and opposed to the traditional policies of the party, which mainly supported poor peasant people (French, 2008). Considering the system of capitalist economy's exigencies, the quick globalization process, a political system based on democracy, and a strong support of the human resources have all contributed that India's educational system be forced

to welcome the privatization process more than ever. In this situation, decreasing the role of the government and teachers' union on the one hand, and increasing parents' role on the other hand are clear. The second factor affecting positively on the education privatization process in the recent years should be known as increasing interests of Indians residing in abroad in sending their own money inside the country and establishing private schools and hospitals (Goyal, 2008). In a cursory look, education privatization policy in **India** is mainly tended to following the third state of Klein's Model. This is true especially about India's current State. This State shares financial resources to the private sector, especially to investors in small urban or rural areas, through providing facilities like loans and abandoning lands (Amiri, 2005). Also, it should be acknowledged that all States governing in India during the current half of the century believed in the principle that educational decisions and policies like the methods of enrolling students, employment of teachers and principals, and methods of budget distribution and allocation should be shared to the private sector and should be determined based on criteria and mechanisms governing in the market, while acknowledging the need for existing governmental schools.

Among developed countries, **Britain** must be known as the first country taking steps for actualizing the idea of social systems privatization. In England and during the 80s, majority of children were learning in schools which managed under the control of local education authorities (LEAs). By choosing Margaret Thatcher and then John Major, they tried to decrease options which were LEAs' monopoly (Whitty & Power, 2000). Also of other actions of these governments, establishing new schools named " Urban Technology Colleges " – which were a new type of secondary schools managed by private companies - can be mentioned (Newmark, 1995). In a quick look, it can be pointed out that intercommunion of Thatcher and Major's States in Britain were mainly based on decreasing the role of teachers' union for the benefits of the government and parents that were performed through putting more emphasis on holding national examinations under the supervision of the Ministry of Education and increasing parental intervention in choosing their children schools (Besley & Ghatak, 2001). Of course, by the start of Tony Blair's premiership, this point was stressed that although Thatcher's reforms, due to holding national examinations, caused increasing the qualitative level of schools in the whole country, its negative consequences were degrading the social position of teaching profession and increasing teachers' dissatisfaction. Due to this, during the current decade, Blair and his successors' policies mainly have been decreasing Thatcher's extremist changes and establishing a kind of balance among three sources of decision making power in the educational system, i.e. the government, parents and teachers' union (Simpson, 2009).

In **USA,** due to the limited power of the central government, determining its role is a difficult task, for many decisions and policies are made at states and regions' levels. Of course, economic orientations of states on the one hand based on less dependence on the federal government and on the other hand on decreasing attacks against the educational system – that is especially affected by the advances of the Soviet Union in the cold war era - caused starting a gradual and slow trend in privatization in final decades of the twentieth century (Broughman, Swaim & Keaton, 2009). This increasing trend shows that the government and teachers union's roles have not changed very much, but the amount of American parents' interests in their children's educational issues has increased and educational expenses in the baskets of the household economy has gone through a rising trend (Glenn, 1994 ; Gewirtz, Ball & Bow, 1995). However, according to Whitty and Power, state governments have adopted different policies for developing the education privatization during the two previous decades. A company named Edison Project can be mentioned as an example that using encouraging policies of states. This company has increased the number of schools under its coverage all over America to more than 48 and only in 1999; it has invested 126 million dollars in this task (Whitty & Power, 2000).

It is clear that regarding the historical background and the type of political management in two developed countries of Britain and USA, the degree of educational system's privatization has

enjoyed a quicker trend compared to other countries and their progress should be considered from education marketization towards the complete privatization (Hill et al, 1997). Considering the political and economic structures based on individual freedoms and capitalist system, these governments necessarily believe in the motto "Small is beautiful" and abandoning the majority of government tasks to the private sector and hence following Klein's 4th state. The only point to be stated about these two countries is differences in emphases partly affected by the governance of different parties made in these two countries. For instance, in Britain the Laborer Party and in USA the Democrat Party tend more to abandon more authorities to parents in school tasks and the Liberal Party in Britain and the Republican Party in USA tend more to increasing private investors' power in determining the tuition.

Policies on privatization of education: Case of Iran

Following the Klein Model**, Iran** has a conflicting condition (Figure 2). On the one hand, mainly Iran used the state 2, so that financial resources are provided by the private sector and through establishing mechanisms like getting tuitions, but formulating educational policies and performing them are left to the government and the private sector does not have the right to make any decisions and it is regarded more as a customer. On the other hand, by having a glance at the state 3, the government of Iran –like India– shares facilities like loans and abandoning lands to the private sector. Simultaneously, it should be acknowledged that sometimes some States in Iran are fond of the 4th state in their speeches and in practice they tend to the 1st state. Also, some educational authorities believe that because the education is not completely **private goods** and its market structure is not based on competition, then education without intervening and supervising of the government does not have conformity with economic logics. Due to this, observing many cases of deficiencies in the mechanism of the market in production, distribution and consumption of education completely justify the government's intervention and its role. On the other side, some supporters of the education privatization believe that because the education is not completely **public goods**, then its market structure is not a complete monopoly and it cannot be completely governmentally organized and have a logical justification for it, especially that experiences resulting from governmental schools show various weak points (Alavitabar, 1990). Although more than two decades have passed from this research results, the following assessments are also suggestive of continuation of this binary attitude during all these years (Madandar Arani, 2012). This contradictory mode causes confusions for the founders and creating challenges that partly from the very beginning it is followed by the stop of school activities and wasting individuals' time and economic capital.

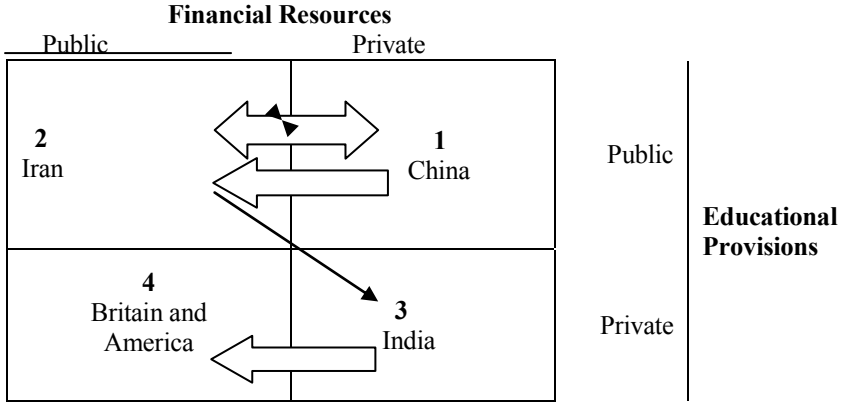


Figure 3: The place of countries according to Klein Model

Conclusion

Considering the above explanations and according to the Klein Model, the places of countries can now be outlined on an imaginary continuum from a complete governmentalization state towards the full privatization. In this continuum, 5 countries places have been determined:

Diagram 1: Continuum of the educational system privatization process

According to this continuum, we are observing a privatization trend that can be named "Creeping Privatization." In fact this type of privatization is a semi-marketization of the governmental services by the centrality of parents' choice power, giving more options to the local authorities, and individuals' investments in education. While decreasing the government's role, these actions cause that the private sector faces more optimistic perspectives for investing in education (Razzaghi, 1997). In such a situation, the private sector first feels that politicians have come to the belief that the privatization approach has more priority than methods that were already widespread. In addition to this, it finds out that the governmental institutions have been forces to make their selected mechanisms near the mechanisms of private sector and market more than ever (For example, making competitions in schools) (Lee, Lin & Wang, 1994).

Considering what was stated and with an analytical-comparative perspectives, it should be acknowledged that in the privatization process –and trying for decreasing the financial pressure of education on the government budget– **Iran**'s economic policies are assessable in the interval of China and India. On the one hand, Iran is fond of the private sector's intervention and especially cultural/religious institutions for investment in education, and on the other hand while decreasing the economic role, it continues its own political and educational role by presenting innovations like establishing Semi – Governmental schools. Due to this, it can be stated that currently the present State in Iran does not follow any of these countries approaches with certainty. It is a politic that can be the source for some problems of the Non-Governmental Schools' founders. Here, for a better understanding of this issue, past three decades transformations are referred to in detail:

NGS establishment and activity after conquering the Revolution in the late 1970s should be divided into three ten-year periods to assess its transformations trend. In the first decade (1979-88), and affected by the country's revolutionary atmosphere, few private schools inherited from the previous regime were closed and their pupils were transferred to the governmental schools (Bageri & Najafi, 2008). Opponents believed that only children of the high-income class could enroll in these schools and because of the high quality of education, a great share of the university students consists of these people during the upcoming years (Mohammad Beigi, 1991; Sarraf Esmaili, 2004). By passing 2 or 3 years, some events happened that it was not possible to be ignoring of their positive and negative effects. The most effective of these was the initiation of Iran and Iraq war. In fact, war

became the most important obstacle for allocating financial resources to the Ministry of Education, so that at the end of this decade student's capitation decreased very much in a fixed rate (Jafari, 2010). We should also mention the effect of decreasing oil revenues, government's policy supporting the increase of population rate, quantitative development of schools in rural areas and immigration to cities which caused increasing the rate of social demands of education and the number of pupils especially in elementary and junior schools (Ansari, 2005). All these provided the required political and educational grounds for making and approving formation of "Non-Governmental Schools' Bill" and permission of entering the private sector to the field of education at the end of this decade.

After approving the mentioned law in 1988, the second decade started (1988-1998). The government regarded the progress of privatizing policies of education as necessary with regard to purposes like increasing the amount of investments of private sector in education, and the decrease of the private sector liquidity. Because of this, these schools enjoyed the government's supporting policies. Governmental supports included the administrative (organizational supports), financial/material (giving low-interest loans and assignment of land), and human (dispatching teachers) aspects. The practical consequence of these supports at the end of this decade was to have about 5 percent from the whole student population-over 18 million students- under the coverage of NGS and more than 7000 schools were founded (Puyan, 1997; Tahmasbi, 2004; Falahi, 2009). By the beginning of the third decade (1998-2008), the number of schools from 6192 in the academic year of 2000- 2001 increased to 13000 in the academic year of 2009-10 (NGSO, 2010). Currently, the rate of Non-Governmental Schools has reached about 11% of all the country's schools. In recent years and with the intensity of economic crises like the simultaneous inflation and depression, educational authorities and policy makers observed appearing the phenomenon "Non-Governmental Schools Stop." Also, other previous supports has changed and decreased because of the special attitude of present president of Iran, Mr. Ahmadi Nejad towards private schools. Considering the time transformations of the three current decades and the Klein Model, these aspects can be inferred from the situation of NGSs in Iran:

- The relationship of NGS with governments is mainly affected by the economic motivations
- The governments' supports of these schools have not followed a constant and specified trend.
- Educational system's marketization and privatization have been a slow but increasing trend.
- For majority of States during the past three decades, economic independence of NGS has not been tantamount to accepting these schools' independence in other fields.
- For the founder, investing in education has not been necessarily based on rules of investment in economic activities or accepting the principle of its advantage and disadvantage, but it is based on bargain power and seeking assistance from the government.
- The government feels right to intervene in all issues of the school.
- The founder regards himself as the creditor of the government in all fields
- In reality, neither the government nor the founders have accepted 'The education privatization" as an economic activity subject to offer and demand

References

- Alavitabar, A. 1990. Education: State or private sector, *M.A Dissertation*, Isfahan: Isfahan University, Faculty of Administrative Sciences & Economic.
- Amiri, M. 2005. A survey on encouragement policies on investment at some Middle & Fareast of Asian Countries, *Etalaate Quarterly Journal of Economic and Politic* , 219-20: 45-56.
- Ansari, A. 2005. *A review on quality improvement strategies at the field of economic & development planning of education*, Tehran: Ministry of Education, Research Center on Education.

- Bageri , K and Najafi , N. 2008. Justice at education from Islamic perspective with emphasize on privatization of education, *Quarterly Journal of Psychology & Education*, 1(38): 4-15.
- Bast, J. L., Harmer, D., & Dewey, D. 1997. *Vouchers and educational freedom: A debate*. In Policy Analysis, Washington, DC: Cato Institute, No. 269.
- Besley, T and Maitreesh Ghatak, M. 2001. *Government versus private ownership of public goods*, London: Centre of Economic Policy Research.
- Bray, M. 1996. *Counting the full cost: Parental and community financing of education in East Asia*, Washington D.C : The World Bank in collaboration with UNICEF.
- Broughman, S. P. Swaim, N, L & Keaton, P, W.2009. *Characteristics of Private Schools in the United States, Results from the 2007–08 U.S*. Universe Survey National Center for Education, Statistics, Institute of Education Sciences, Department of Education, 313.
- Bryson.J.M. 1998. *Strategic planning for public and nonprofit organizations*, Jossy-Bass, Sanfroncisco, C.A.
- Cheng, K. 1994. Issues in decentralization: What the reform in China tells. *Educational Research*, 21(8): 794-828.
- Cheng , H & DeLany, B. 1999. Quality Education and Social Stratification: The Paradox of Private Schooling in China, *Current Issues in Comparative Education*, Teachers College, Columbia University, 48.1(2).
- Desai, S., Dubey, A. Vanneman, R. & Banjeri, R. 2008. *Private Schooling in India: A New Educational Landscape*. New Delhi: Brookings-NCAER India Policy Forum.
- Falahi, K. 2009. *A comparative study on NGS at Iran and other educational systems*, Tehran: Ministry of Education, Research Center on Education.
- French, R. J. 2008. *Schooling Participation and Pupil Achievement in India*, London: University of London, Institute of Education, Department of Quantitative Social Science.
- Gewirtz, S, Ball, S & Bow, R. 1995. *Markets, choice and equity*, Milton Keynes: Open University Press.
- Glenn, C.L. 1994. School choice and privatization, The International Encyclopedia of Education, In T. Husen and N. Postlethwaite (Eds.) *International Encyclopedia of Education*, Oxford: Pergamum.
- Goyal , S. 2008. Inside the House of Learning: The Relative Performance of Public and Private Schooling in India. *Education Economics*, 17: 315-327.
- Heyneman, S.P. 2001. The growing international market for education goods and services, *International Journal of Education Development*, 21(4):345–359.
- Hill, P., Lawrence, T. Pierce C and Guthrie, J. W. 1997. *Reinventing public education: How contracting can transform America's schools*, Chicago: University of Chicago Press.

- Jafari , P. 2010. *Participation of private sector at education*, Tehran: Privatization Organization, Management of Research and Planning.
- Kakia, L. 2009. *A new attitude on family economic*, Tehran: Varayedanesh Publisher.
- Kakia, L & Zeinali, A. 2005. *Garden of experience*, Tehran: Abed Publisher.
- Klein, R. 1984. *Privatization and the welfare State*, Lloyds Bank Review, No. 151: 12-29.
- Lee, T. Lin, B & Wang, P. 1994. Education, human capital enhancement and economic development comparison between Korea and Taiwan, *Economics of Education Review*, 13 (4): 275-288.
- Madandar Arani, A & Sarkar Arani, M. 2009. *Education & Development*, Tehran: Ney Publisher .
- Madandar Arani, A. 2012. *Privatization of Education in Iran: A survey on effective factors on stop of non – governmental schools*, Tehran: Ministry of Education, Research Center on Education.
- Mesri, K, 2008. *Failure crisis of NGS*, Cultural and educational Papers Bank, Available at: http://rasatous.ir/ wordpress/archives/267.
- Mohammad Beigi, A. 1991. NGS and their role on educational opportunities, *Quarterly Journal of Education*, 3-4: 5-13.
- Molnar, A. 1998. *Sponsored schools and commercialized classrooms: Tracking schoolhouse commercializing trends*. Milwaukee, WI: Center for the Analysis of Commercialism in Education, University of Wisconsin-Milwaukee.
- Newmark, C M, 1995. Another look at whether private schools influence public school quality - Comment, *Public Choice*, 82: 365–373.
- NGSO, 2009. *A report on Non-Governmental Schools performance,* Tehran: Ministry of Education, Non-Governmental Schools' Office.

- NGSO, 2010. *.A report on Non-Governmental Schools performance,* Tehran: Ministry of Education, Non-Governmental Schools' Office.
- Puyan, Y. 1997. *An analytical survey on researches about people participations at Non- Governmental Schools,* Tehran: Ministry of Education, Research Center on Education.
- Razzaghi, A. 1997. Effect of Privatization on social stability and security of Iran, Tehran: *Etalaate Quarterly Journal of Economic and Politic*, 115-116: 17- 29.
- Sarraf Esmaili, H. 2004. A debate on economic of education, *Parliament & Research Journal*, 46: 5-11.
- Simpson,L. 2009. *The Private Training Market in the UK*, London: National Institute of Adult Continuing Education.
- Tahmasbi, Z. 2004. *A survey on difficulties and problems of secondary school pupils enrollment to NGS of Hamadan Province*, Hamadan: Hamadan Education Organization.
- Whitty, G., & Power, S. 2000. Marketization and privatization in mass education systems, *International Journal of Educational Development*, 20: 93–107.

GLOBALIZATION IN RELATION TO NATIONAL AND LINGUISTIC IDENTITY

CAMELIA NEAGU*

Abstract
As an international language used for global, political, cultural and financial exchange, the English language teaching in promoting globalization has been approached from diverse views. The paper intends to investigate the most used terms for globalization since Western countries or the United Nations are now considered the super power with a leading economic, cultural and military position in the global order and, of course, with many of the most apparently cultural expressions of globalization. As English has been the prevailing foreign language in the curricula of educational institutions, it is accepted as the dominating language in the world for globalization comes to be commonly known in political and educational communication.

Key words: *international language, English, globalization, national identity, educational communication, curricula.*

Introduction

At the beginning of the 21st century, the world experiences processes of both integration and disintegration. The expansion of world markets as a form of economic globalization can be understood as a process of integration composed of international flows of capital, goods, information and people. This process is both a form of economic integration and polarization of wealth that exacerbates tendencies toward greater global inequalities between rich and poor countries and regions. It also accentuates the need of a new system of governance. We are the witnesses of an accelerated set of changes – economic, cultural, technological and political – that create new possibilities and dangers both for democratic state and the notions of citizenship and national identity.

However, as Sheila L. Croucher pointed out, few terms are so difficult to explain as this already commonly used one: "globalization": "Few terms have been more widely and frequently used yet less clearly defined or understood than <<globalization>>. Every year since the mid-1980s the number of books and articles with the term globalization central to their titles has grown exponentially /…/. It is also increasingly common for the authors of these works to begin their analyses bemoaning the lack of conceptual clarity surrounding their subject matter and promising to rectify it. Some progress has been made, but many of the aspirations for greater conceptual and analytical clarity remain unfulfilled. The challenge is a tall one, reflecting the genuine complexity of the topic at hand. Globalization is a reality that is so large, so multifaceted, so ongoing, and so defiant of conventional categories and methods of analysis that it frustrates social scientific precision even on the part of the most dedicated of scholars. On the other hand, some blame must be attributed to sloppy scholarship and to the desire on the part of the media, politicians, and the general public for quick and easy explanations, or excuses, for complex pervasive and often unsettling economic, political, social, and cultural trends."[1]

Paper Content

There is a close relationship between the issues of identity and globalization. The concept of identity has undergone significant changes which many authors attribute to as the "crisis of identity". In contemporary socio-cultural conditions, an individual is forced, even if he wants it or not, to be in a constant search for identities. That implies the search for the meaning of the individual in relation

* Camelia Neagu, Lecturer, PhD, "Nicolae Titulescu" University of Bucharest (camelianeagu@univnt.ro).

[1] Sheila L. Croucher *Globalization and Belonging: The Politics of Identity in a Changing World*, (Oxford: Rowman and Littlefield Publishers, Inc., 2004), 9.

to the self and to the society. But such an identity can no more be fixed and this contradicts with the way identity was perceived before globalization became so widespread.

How might the process of globalization affect the process of identity formation? The main feature of modern global society is the interrelation between numerous communities. From socio-cultural perspective, globalization exercises a great effect on building the relationships between and among various locales. In our present world, where different distances are much shortened by transportation and communication technology, globalization is becoming interwoven with human's life and sometimes it is the leading factor contributing to the de-centering and dislocation of identities. Due to the spread of mass communication, an individual becomes more and more involved in the process of increasing mutuality of the world, being exposed to the widest variety of opinions and viewpoints, often contradictory and hardly reconcilable. This has a great impact on his identity. With the increase in number of such groups originating from various cultural backgrounds his / her identity becomes more vulnerable to the influence of the external forces and more difficult to affirm. That means, not only that relationship between people and happenings transform, but also that identities of people also undergo dramatic changes.

These changes have led some authors to consider that the notion of identity is not valid any more since identifying oneself with someone or something is not the feature that characterizes the postmodern individual. The mediation of experience by the means of communication has reached its peak, and its dangerous influence causes the substitution of the real world with the world images, signs and representations and the individual no more gets involved into reality. That's why I consider television signifying a powerful medium of globalization. News is often cited as the example of the collage; events are reported in a single short news program that may share nothing in common but the date of happening. This radical view that renders globalization leads to the dissolution of identity, the dissolution of the sense of one's self. By placing the emphasis on the mediating effect of the mass media we can say that their selective reproduction and representation of the events must be based on the cultural and national specificity of the concrete locales. Most new programs on local television put an emphasis on the representation of local events over the international ones. So, we may conclude that the effects of globalization sometimes are exaggerated while the local specificity is ignored or denied.

What globalization had definitely contributed to was the erosion of the "master identities" such as citizenship in the abstract meaning of membership in the territoriality defined and state-governed society. While the process of globalization undermines the traditional perception of locality as a bounded space, it seems to have a different kind of influence on another dimension of "locality" – that is, various rituals, ceremonies and collective memories that bind the people together.

So, we can conclude that the impact of globalization is contradictory. On the one hand, it works towards unification of the world, but on the other, this proves to have a dubious effect on diminishing the local specificity and the tendencies towards the local and cultural become more and more discernible. At present, national identity continues to be the object of governmental policy. It may be more important how it actually is since national identity is the inexorable subject of politics.

As John Edwards pointed out: "The essence of identity is similarity: things that are identical are the same, after all, and the word stems from the Latin *idem*. And this most basic sense is exactly what underpins the notion of identity as it applies to personality. It signifies the 'sameness' of an individual 'at all times or in all circumstances', as the dictionary tells us, the fact that a person is oneself and not someone else. It signifies continuity, in other words, that constitutes an unbroken thread running through the long and varied tapestry of one's life. It can even invoke an almost mystical sense of connectedness, particularly when one considers the very real changes that take place in that tapestry."[2]

[2] John Edwards, *Language and Identity*, (Cambridge: Cambridge University Press, 2009) 19.

As linguistic identity is largely a political matter, we may say that there is an urgent need to foreground the issue of politics of language. The link between language and identity has had a long and varied history nowhere more than in Europe. It was in Europe that language became a key element in the emergent nation-states. These new nation-states have come to share their names with the languages that were so vital for their political legitimacy. This process is still continuing in the sense that we are still living in an age of nationalism.

Identity is not a mere reflection of reality, a simple form of self-awareness, but rather a socially constructed phenomenon. Identity can change and even the most homogenous state contains varieties that may form the basis for present or future affiliation. If they have to gain any political recognition, they will have to fight against the principle of economy of scale and against the vested interests and historical advantages of established standards. Identity may carry the sense of "sameness", but it does not have to be mono-dimensional.

The other factor working against a monolingual state is the immediate result of mass immigration. Most major European cities now contain a mosaic of ethnic groups, speaking languages new to the area.

Technological advances have also had a profound effect on the language. Air travel, satellite TV, the Internet, telephone, video films and publishing facilitate a range and diversity of linguistic contacts. These media will not by themselves promote and maintain a multilingual society. Without a feeling of language identity and the will to keep a sense of group no amount of digital communication will prevent language shift. European powers (Britain, Germany, France, Austria, Belgium and Italy, for example) not only controlled the economies of their third-world colonies, but also exported the notion of linguistic identity as a basis for political legitimacy.

Identity involves not only "sameness", but by extension "otherness". In knowing who we are like we also know who we are not like and the sense of identity is dependent to some extent on an understanding of boundary where that with which we identify stops.

The invention of nation-state had already persuaded people to identify themselves with something in addition to the traditional social structures of family, clan and religion.

All the border changes seen in Europe over the last few decades, the reunification of Germany, the division of the Soviet Union, Yugoslavia and Czechoslovakia, all point to the continuing partition of political units along ethno-cultural lines with languages as one of the most important factors in building and defining national identity. Anderson says that "in a world in which the nation-state is an overwhelming norm, all of this means that nations can now be imagined without linguistics commonly.", but the states can afford to be more accommodating and are more tolerant on minority languages. The language identity in Europe is diverse, complex and ever changing. Stephen Barbour adopts a broad approach and examines nationalist and internationalist discourse. He assumes that every nation should have its own nation state in which the national language should dominate since language and national identity are allied. Internationalist discourse demonstrates awareness not only of languages spoken by small groups, but also of English as a global lingua franca. Nevertheless, much internationalist discourse overstates the dominance of English in international exchanges.

In terms of language choice for world-wide relationship and communication, the foundation of globalization has led to growing international debate on the theme of English language in both academic and business fields.

How academics, politicians and journalists see the place of the English language in the image of the various nations? Many politicians and journalists adopt a generally nationalistic language because this reflects what the public wants to hear.

A global perspective recognizes the need of an international language. The response to this need on the part of many internationalists is to use English. A global perspective poses little real threat to national languages or minority languages. Globalism seems able to co-exist with linguistic

and cultural pluralism. The international language, be it English or the earlier international language French, tends to influence other languages, but not generally replace them in all spheres of life.

The consequences of espousing both internationalist and nationalist perspectives can impinge on many aspects of personal and professional life, for instance the professional activity in which many academics are engaged, namely language teaching.

There is a widespread perception of crisis in the teaching of languages other than English. Many students know they can encounter cultural variety in all major cities through the medium of English.

It can be said that English has gained a particular place among languages. Different languages have also been influenced by the challenge English imposes, inclining to a greater or lesser amount to establish English words, pronunciation, and word order in their language.

Language learning is thought to be a vital aspect of forming a European identity. The teaching and learning of English increased dramatically during the second half of the twentieth century in response to the growing use of English as an international language. This in turn was in large part related to the dominance of the USA politically and economically, a fact reflected in the role that English plays in international youth culture.

The popularity of English as a foreign language in European schools and universities means that young Europeans are now much better able to communicate with each other than their parents were. English does mean that young Europeans are able to speak to each other, which will surely give rise to a sense of being European. More relevant, however, is the question of whether English in Europe allows young people to express multiple identities. The growing body of research in Europe suggests that for young people English can symbolize the international youth culture. English is used now so extensively throughout the world that it can serve as an "open reservoir" for symbolic meanings.

English has become the prevailing foreign language in the curricula of educational institutions in foreign language learning. English is accepted now as the dominant language in the world as globalization comes to be commonly known in political and educational communication. Globalization and English language have been widely recognized as landmarks of most present societies. This indicates that cultural globalization is closely linked with the development of English as a global language. There is no doubt that many countries have been making attempts to support English education in order to engage actively in international activities.

One of the objectives of foreign language is to expand insight into the foreign nations since understanding different cultures will guide students toward globalization. The teaching of culture is not a secondary objective, rather equally important, and balances the linguistic syllabus of English teaching and learning typical English language instructional materials to convey cultural messages from a one-dimensional-base view toward a wide view. The students should be guided to take more reflective or ethnographic attitude toward the cultural values of other nations as a way of raising their knowledge of intercultural issues.

We want to prepare the students to communicate in the multicultural world of English. Globalization has not been implemented merely to unify language and increase use of English. National linguistic cultures may be under pressure and this is very much compatible with globalization theorists' characterization of the process. Governments must pay closer attention to languages as the language is the key factor in identifying national identity.

Because national identity of students is very important, they should be familiarized with their national history and identity. This is a better trend to acculturate learning, not simply providing a bulk of knowledge about foreign countries and people. Students may compare and contrast cultures of two or more nations while bearing in mind that the cultural manifestations are always constructed and, therefore, open to analysis and debate.

Cultural learning means not simply understanding of foreign culture but to tolerate cultural differences even when it is not fully understood or articulated. Such an approach fosters generally

open-minded, tolerant and sympathetic attitude towards other cultures. Students should understand that every culture must be respected and in the area of globalization, people should do their best to keep valuable cultural customs.

Cultural training does not necessitate teachers to act as information providers because details about different cultures are already available in a vast number of related publications, including textbooks. The role of the English language teacher, besides teaching students how to speak, understand, read and write English, is to provide opportunities for students to involve in meaningful communication with different people and cultures and to react critically on these interactions.

The recent developments have a tremendous impact on the very identity of individual languages and also that of the speakers of those languages. The question of identity is fast becoming a politically loaded issue, as Pandit (1975, p. 118) has noticed: "Loyalty to language is probably not as external to linguists as it may appear to be. An enormous amount of social and cultural information is encoded in a message; verbal interaction in a speech community is a cultural event; it reinforces sense of belonging and asserts one's existence in a community. In this sense, identity with language is not external, not a superposition – political or social – but an intrinsic linguistic trait. The speaker's attachment to his variety and his language is symptomatic of the cultural load his language carries for him."

Conclusion

In the emergent world order marked by instability and cultural intermixing at an unprecedented rate, we are constantly asked to negotiate our identities in response to pressures from all sides. In the case of our linguistic identities, the issue is further complicated by the fact that certain languages such as English have been found to be playing a hegemonic role, threatening the very survival of local and minority languages all over the world. Globalization has helped foster linguistic hybridity, but on the other hand contributed to the spread of certain language and the consequent disappearance of others. I believe that concepts as "master-language" and "native speaker-hood" are to be approached as political rather than linguistic issues.

References

- Reza Abbasian, Jaser Khajavi, "English Language Teaching. National Identity and Globalization in Iran: the Case of Public Schools", in *International Journal of Humanities and Social Science V, August 2011, Vol. 1 No. 10.*
- *Beyond Boundaries – Language and Identity in Contemporary Europe*, Edited by Paul Gubbins and Mike Holt, Multilingual Matters: p. 122 Library of Congress Cataloging in Publication Data, (Frankfurt Lodge: Cromwell Press Ltd., 2002).
- Sheila L. Croucher *Globalization and Belonging: The Politics of Identity in a Changing World*, Oxford: Rowman and Littlefield Publishers, Inc., 2004.
- John Edwards, *Language and Identity*, (Cambridge: Cambridge University Press, 2009).
- Featherstone, M., *Undoing Culture: Globalization, Postmodernism and Identity*, London: Sage Publications, Thousand Oaks, New Delhi, 1995.
- Lash, S. Friedman, J. (eds.), *Modernity and Identity*. Oxford and Cambridge, MA: Blackwell: 1991.
- Kevin Hetherington, Expressions of Modernity. Space, Performance, Politics, London: Sage Publications Ltd., 1998.
- Kanavillil Rajagoplan, "The Politics of Language and the Concept of Linguistic Identity", in *Revista de Filología y su Didáctica, no. 24, 2001, 17-28.*

COOPERATION AND EDUCATION FOR SUSTAINABLE DEVELOPMENT IN GLOBALIZATION ERA

NEDELCU ELENA*

Abstract
The present paper aims to approach a relatively new topic: international cooperation for sustainable development. The first part of this paper is a theoretical construct which deals with the connection that exists between its main variables: globalization, democratization and development. This part of the paper also brings into evidence the necessity and importance of international cooperation for sustainable development (SD) during the globalization era.
The second part of the paper aims to briefly analyse the importance and practice of education for sustainable development (ESD) in our contemporary society: the case of Romania. Conclusions represent the object of the last part of the paper.

Key words: *international cooperation, globalization, sustainable development, education.*

Introduction

The present study aims to analyse a topic that is both interesting and exciting for the present world subject to the process of globalization. The topic we refer to is sustainable development (SD) seen as a fundamental objective of the millennium and the need of involvement and cooperation of all actors on the international scene with a view to accomplishing this objective. For the peoples of the world to be able to aspire to a sustainable future on Earth it is necessary for international cooperation to intensify, as well as for the administration of the development process to be intelligently and sensibly made, and for the political and civic involvement to be made in a massive and responsible way.

„Our biggest challenge in this new century is to take an idea which seems to be abstract – sustainable development – and turn it into a reality for all the world's people", as" Kofi Annan, the General Secretary of the United Nations, used to say on 14th March 2001, in Bangladesh.

The implication and cooperation with a view to accomplishing the objective represented by sustainable development implies a radical modification of mentalities and visions regarding economic and social development, the nature of social, national and international relations, as well as the act of bearing social responsibility by all international actors on the global scene. The change of mentalities requires modifications at the level of socialization and education. It is necessary for certain sustainable-development oriented concepts, attitudes and behaviours to be formed and for sustainable development to be an educational objective both at national and international level.

In order to point out certain significant aspects related to the extent to which sustainable development has become an educational objective in Romania we have pursued a case study. This case study aimed at revealing the interest, accomplishments and the degree of implication that are characteristic of the non-governmental organizations which got involved in educational projects for sustainable development.

The subjects of the present study: sustainable development and education for sustainable development (ESD) constituted a major concern for important thinkers: John Elkington, Holmberg, A.Sobol, Fritjof Capra, Ulrich Grober, Alfred Sauvy, Johannes Tschapka, Robert Axelrod and many others.

The present paper, even if it puts to good account only a part of the results generated by research outputs, it also contains a novel element: the above mentioned case study analyses

* Associate Professor, PhD, "Nicolae Titulescu" University of Bucharest (doina.nedelcu@yahoo.com).

educational sustainable development practices/projects proposed by non-governmental organizations in Romania in collaboration with other national and international organizations.

Paper Content

Sustainable development in globalization era. International cooperation for sustainable development

Motto:

"Sustainability is much more than a simple technocrat project that intelligently administers resources, it is much more than a simple term used within the Club of Rome, World Bank or UNO. This idea will be further reinforced once it is understood as a new civilizing project, a new one which is however deeply rooted into our traditions and human consciousness ....."[1]

Sustainable development is a new, generous and corrective perspective over the development of the world, societies, and human beings in the globalization era. ,,This perspective aims at creating an innovating social development concept which can face future in the sense of becoming a regulatory idea, as, in fact, happened with the concepts of: democracy, freedom, justice and so on and so forth."[2]

A synthetic definition of sustainable development – perhaps the most used – is given by Lester Brown, the founder of Worldwatch Institute. This definition has been taken from the report entitled "Our Common Future" of the Brundtland Commission: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." [3]

According to F. Capra: "/…/ A human sustainable community must be constituted in such a way that its lifestyle, technologies, as well as its commercial, economic and physical structures could *sustain nature and life, and not destroy them*.[4]

Nowadays, without a consistent international cooperation, sustainable development remains an unaccomplished ideal. Globalization – a continuous, complex, irreversible and contradictory process – has created such a system of interdependence that outside it chances to survive are scarce. In other words, there is no alternative to cooperation for international actors. The existence and development of international states, organizations, corporations, NGOs and individuals etc. is not possible outside cooperation. We refer to cooperation in general and cooperation for sustainable development in particular. We refer to cooperation among all international actors in order to help all the states develop economically, socially and culturally and in order to help the human being develop no matter to what part of the world we refer.

The multi-dimensional nature of sustainable development is outlined in a suggestive way in the chart below[5]:

---

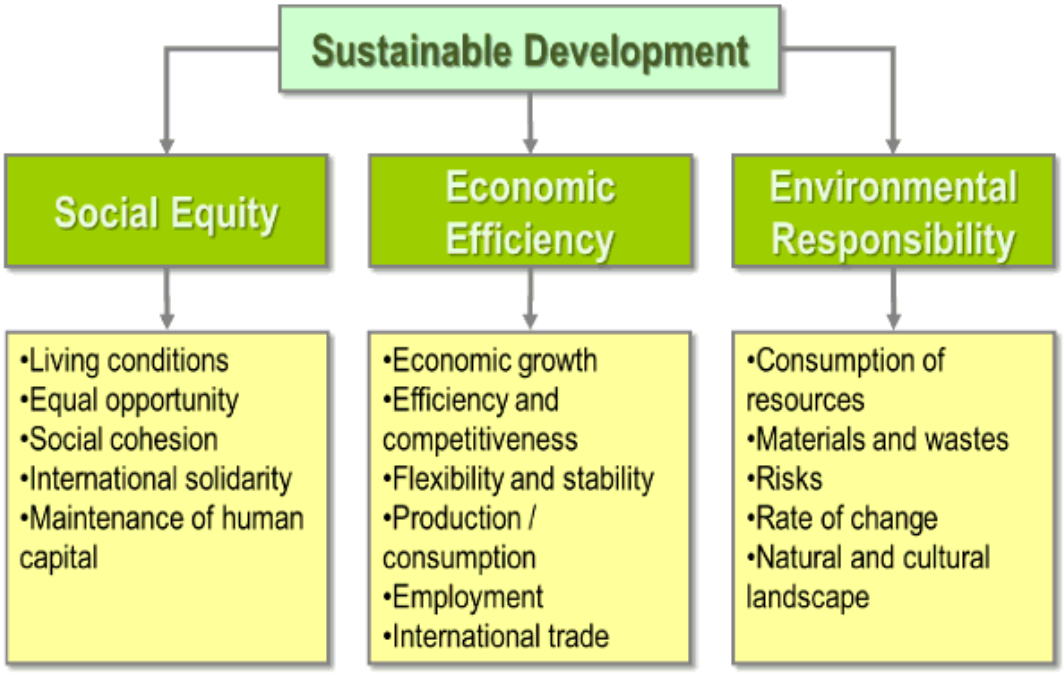
[1] Ulrich Grober, Die Idee der Nachhaltigkeit als zivilisatorischer Entwurf; în: Aus Politik und Zeitgeschichte 24/2001, p. 3, online version ; original text : *,,Durabilitatea este mult mai mult decât un simplu simplu proiect tehnocrat de administrare inteligentă a resurselor, mult mai mult decât un simplu termen din resortul Club of Rome, al Băncii Mondiale sau al ONU. Această idee va primi noi impulsuri odată ce va fi înţeleasă ca un nou proiect civilizator, un proiect nou, însă adânc înrădăcinat în tradiţiile şi în conştiinţa noastră umană.....''*

[2] Thomas Jäger/Michael Schwarz, Das sozial-ökologische Innovationspotential einer nachhaltigen, zukunftsfähigen Entwicklung auf betrieblicher und kommunaler Ebene;in: Aus Politik und Zeitgeschichte 50/1998, Bonn, p. 23.

[3] World Commission on Environment and Development (WCED), Our Common Future, Oxford 1987, p. 43.

[4] Fritjof Capra, Verborgene Zusammenhänge. Vernetzt denken und handeln - in Wirtschaft, Politik, Wissenschaft und Gesellschaft, Bern ş.a. 2002, p. 298; original text: „(…..) O comunitate umană durabilă trebuie să fie constituită astfel încât stilul ei de viaţă, precum şi tehnologiile şi structurile ei comerciale, economice şi fizice *să menţină natura şi viaţa, nu să le distrugă*."

[5] http://people.hofstra.edu/geotrans/eng/ch8en/conc8en/3es.html.



In a brief presentation, we may say that the general purpose of cooperation for sustainable development is the reduction of the differences that exist between the poor and the rich, as well as peace assurance, protection and preservation of natural life spaces.

International collaboration for development first of all implies a partnership between states/organizations that are donors and states/organizations that are beneficiaries; this is a partnership that involves all international actors (states, corporations, international organizations, NGOs etc.) of which, all parties have advantages on the whole. We do not refer to banks only, but to expertise, experience exchange, good practice exchange, as well as other potential benefits. The donating organization also promotes its image and increases its visibility; these are aspects that should not be ignored. The benefits of organizations must be understood in all their complexity and in relation to all the multiple dimensions that they imply.

Last but not least, cooperation for development indirectly aims at achieving certain macro-objectives like: assuring stability for beneficiaries, diminishing or stopping illegal migration, reducing migration of the labour force through the development of beneficiary member states at national level. Analysing these objectives – benefits posed by sustainable development, we conclude that they reflect a democratic perspective over the evolution of the world and international relations. In other words, the implementation of sustainable development is a component and a premise for the democratization of international relations.

2.2 Education for sustainable development

Motto:

"The purpose of this ... UNO decade ...is to bring together the multitude of initiatives from political education to environmental education, from global education to peace-oriented education,

while also including all these elements into the larger domain of education for sustainable development."[6]

Sustainable development implies that all categories of international actors go beyond certain economic, narrow and selfish visions and mentalities. Thus, it is necessary for a new perspective to be shaped and shared over human to human relationships, as well as over human – environment relationship.

It is also necessary – as the famous physicist Fritjof Capra, a supporter of the holistic paradigm, argues – to adopt radically different principles and values. According to F. Capra, the main obstacle that prevents us from accomplishing sustainable development is the fact that we are trapped in our own obsolete principles, and Newtonian rigid image over life. As a counterbalance measure he suggests a conceptual framework that integrates the biological with the cognitive and social dimensions of life. The unified, holistic way of understanding life is represented by his fundamental manner of organization: the network. In his paper "Hidden Connections – A Science for Supporting Life", Fritjof Capra argues that all living systems components are linked between them through equal and horizontal relations like in a network. This is true for the metabolic networks within the cells, as well as for trophic relations within ecosystems and even for communication networks within human societies.

The conviction that the whole is always different than the simple sum of its components is central for this systemic perspective. According to this theory, only sustainable measures are accepted, that is to say only measures that do not affect living systems.

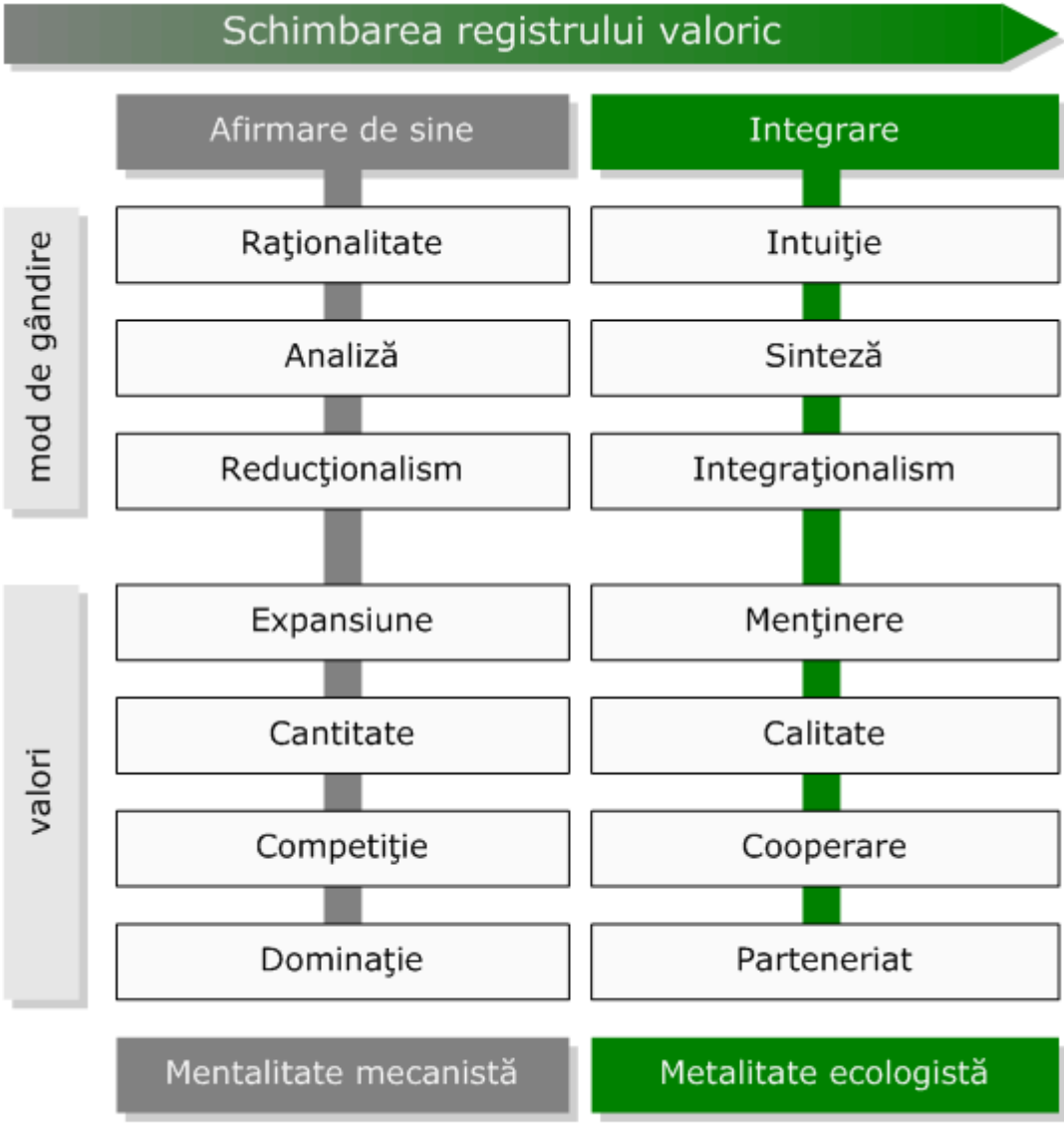
Fritjof Capra tries to put his theory into practice. He is a founding director of the Centre for Eco-literacy located in Berkeley, California, which promotes ecology and systems of thinking in primary and secondary education.[7]

He understands that it is necessary to have an intense and consistent education for sustainable development so that the holistic perspective over life could have more and more supporters. Subsequent to the application of this paradigm – the famous physicist argues – mentality and values will be different, they will transform in a better way human beings, societies, the environment and the planet. The way mentalities are going to be altered is briefly, yet illustratively outlined in the chart below:[8]

[6] Johannes Tschapka; apud: Ökolog Netzwerkzeitung, 3/2004, "Nachhaltigkeit leben (und) lernen"; in: Umwelt & Bildung 3/2004; original text: *"Scopul acestui ... deceniu ONU ... este să aducem la un numitor comun multitudinea de iniţiative, de la educaţia politică şi până la educaţia de mediu, de la învăţământul global şi până la educaţia pentru pace, subordonând toate acestea domeniului mai larg al educaţiei pentru o dezvoltare durabilă.".*

[7] http://en.wikipedia.org/wiki/Fritjof_Capra.

[8] Fritjof Capra , Wendezeit, Munchen 1991, p.XI-XII, http://www.dadalos.org/nachhaltigkeit_rom/grundkurs_1.htm.



(după: Fritjof Capra, Wendezeit, München 1991, p. XI-XII)

Another point of view integrates ESD within the educational system and it correlates it with the other components thereof. According to this perspective, education for a sustainable development "does not represent a mere extension of environmental education, which further includes social or economic aspects..., [while it must] be a strong connection element between politics, global education, environmental education or sanitary education[9]

[9] Willi Linder, Hohe Ansprüche; în: umwelt & bildung 3/2004, p. 3.

The efficient and consistent implementation of ESD is a major objective of UNO and the European Council. The accomplishment of the Millennium Objectives cannot be conceived outside appropriate educational policies or outside the implementation of ESD.

In consequence, the General Assembly of the UNO decided on the 20th December 2002 that the period comprised between 2004-2014 should be named the Decade for education in the spirit of sustainable development (resolution 57/254). The assembly appointed UNESCO as a leader-agency in promoting the Decade, and assigned UNESCO the task of conceiving a pattern for international implementation and for clarifying the link between the Decade and other educational processes like the Dakar Action Platform, which was adopted in 2002 by the World Forum of Education. Governments were invited to promote public awareness and an as large as possible program attendance, including cooperation with civil society and other authorities.

In Romania, besides the Ministry of Education and Research, as well as other authorities, the civil society (especially certain non-governmental organizations) brought a substantial contribution to the implementation of ESD projects that are basically aimed at young people, i.e. pupils and students.

2.3 CASE STUDY:
INVOLVEMENT OF CIVIL SOCIETY IN EDUCATION FOR SUSTAINABLE DEVELOPMENT: "AGENDA 21"

The present case study aims to present Romanian NGOs involvement in achieving education for sustainable development, as well as the successes and difficulties they face in implementing programs aimed at this objective. We focused on the work pursued by Agenda 21 in this area.

Our case study was based on participatory observation in the project. For achieving the Millennium Development Goals, for involving students and teachers in colleges of education programs and projects in development, Agenda 21 included a management interview and study documents with a view to recording the activities of the foundation.

In contemporary society we find that there are a lot of both governmental and non-governmental organizations involved in achieving sustainable development education.

Among the most representative non-governmental organizations concerned with ESD one should mention: The Civil Society Development Foundation, UNICEF Romania, The International Organization for Sustainable Development, Agenda 21, The Association for Sustainable Initiative etc.

Among the public organizations that pay a particular interest in this field of activity I would mention: The Environment Fund Administration, The Ministry of Environment and Forests, Region 8 Bucharest – Ilfov – Regional, The Agency for Environmental Protection Bucharest, The Environment Fund Administration, The Romanian Water Headquarters, The Municipality of Bucharest, City Hall District 1 Bucharest, City Hall District 2 Bucharest, City Hall District 3 Bucharest, Hall District 4 Bucharest, Hall District 5 Bucharest, Hall District 6Bucharest, The Ministry of Education, Research, Youth and Sport , The Council of Europe, and The Canadian Agency for International Development.

Assistance and Programs for Sustainable Development – Agenda 21

The main goals of Agenda 21 are: assistance and programs for Sustainable Development. Agenda 21 is a non-governmental, not-profit organization, of national interest, which is politically and religiously free and it was founded in February 2003.

Agenda 21 has devised a variety of ESD projects undertaken both nationally and internationally. The project results developed by this organization are outstanding: in collaboration with the Ministry of Education helped to introduce in Romanian pre-university education to a new discipline aimed at education for sustainable development.

Agenda 21 has initiated and coordinated the modernization process of social science curricula taught in school education so that it would match the needs of sustainable development and the Millennium Goals.

The Organization Structure comprises: President (Professor PhD Alexandru Tasnadi), Executive President (Professor Nina Cugler)**,** Project Coordinator (Florina Pavel) and Volunteers.

The Mission of Agenda 21 includes the following objectives: a) strengthening the role of children and young people in the implementation of sustainable development; b) developing partnerships with the local authorities for valorising the local initiatives and for making the local government more efficient; c) granting assistance and support for the marginalized groups.

Target Group Value

The education opportunities given to children and young people are the guarantee of a sustainable society. Volunteer work in the benefit of the community is one of the fundamental values of the association. Young people are part of the process and are involved in all projects of the organization.

Collaborations with other organizations and institutions : Open Education Centre – Bulgaria, Bucharest School Inspectorate, Ilfov County School Inspectorate, Romanian Radio Society, HIVSports – UK, County Council of Seville, Open Youth Bulgaria, Youth Council Romania, Town Hall of Cazalla de la Sierra, Askim City Hall – Norway, Bucharest Museum,

The main projects of Agenda 21

Of the main projects pursued by Agenda 21 we mention: *Millennium Development Goals Achievement involving high school students and educators specialized in development education programs and projects, Strengthening environmental governance in Bucharest, Students Ombudsman, The involvement of young people in the promotion of human rights, ABCD... Multipliers for human rights**, Civic education through television, A European ABC of Young people participation etc.*

Millennium Development Goals Achievement involving high school students and educators in development education programs and projects (December 2010 – June 2013***)***

- Development education is one of Romania's obligations undertaken once joining the European Union, that of defining and developing a national policy of international cooperation.
- The main objective of development cooperation policy of the European Union is to end poverty in the framework of sustainable development, including achieving the Millennium Development Goals.
- The aim of the project is to involve students and educators from 4 EU countries and one from the Republic of South Africa in the process of elaborating and promoting the development education programs.
- The themes approached will be correlated with 3 pylons from National Strategy of development cooperation: social justice and ending poverty, sustainable development, good governance and guarantee for observing human rights.
- Objectives: to enhance public awareness about Global problems and Millennium Development Goals among young people and among educators at community level; to develop and use the creative potential of young people so that they will be capable to initiate projects on themes related to global problems, human rights and millennium development goals; to build a support for the local policies on development issues with focus on poverty, discrimination and human rights; to establish communication networks between educators / teachers / local authorities and young people from developing and developed countries which will change the attitudes of the people involved in them.
- Expected results: the elaboration of a Development Education Guidelines, the creation of a Development Education Trainer's Kit, the creation of three Country Development Education curricula (Bulgaria, Romania, Italy), and three Country Development Education packs (Bulgaria, Romania, Italy), as well as an International Development Education Curriculum and an International

Development Education pack; setting up a network of well trained and motivated 150 educators / teachers and university lecturers which will introduce Development Education and the accomplishment of MDG within the partner countries; assuring an increased level of awareness among 3,000 young people, high school students, and university students; encouraging young people activities: 30 projects on development education that will aim at increasing the level of awareness in what concerns the development education problems in the developing countries; 80 policy-makers in schools inspectors and representatives of civil society; 3 Country Development Education Conferences (Bulgaria, Romania, Italy) on development education theme, an International Development Education Conference and Students "World Summit" on MDG.

Strengthening environmental governance in Bucharest (July 2009 – December 2010)

- Financed by: The Council of Europe, Norway Government, Bucharest City Hall

-The project entailed a more sustained involvement of the civil society in the process of strengthening the institutional capacity of the local authorities for elaborating environment strategies, as well as for raising citizen's level of awareness in what concerns environmental issues within the community they live and for enhancing collaboration with the public authorities for identifying and applying proper solutions.

- Objectives: strengthening environmental governance in Bucharest, by importing the know-how offered by the Municipality of Askim, Norway; educating the citizens, especially young people to adopt a behaviour characteristic of a sustainable life style.

- Results: valuable expertise provided by the grant giver and by the Norwegian partner :study visit for 2 Romanian experts ,training for civil servants, experience exchange through a climate network; human and institutional resources diversity: NGOs, public authorities, academic institutions, schools, teachers, students, pupils, the public television, other media institutions, young volunteers; young people, the main actors of the educational activities:12 young leaders, trainers: 400 young people in 12 high schools, 3,000 young people participant in the eco-volunteers march, over 5,000 young beneficiaries of the projects realized in high schools.

Students Ombudsman **(**March 2005 -present)

- Funded by: UNICEF Office Romania, The Ministry of Education, Research, Youth and Sports, The Council of Europe

-Students ombudsman is a national project that started in 2005 in partnership with MERYS and UNICEF Office in Romania.

- Student's Ombudsman is a project that aims at creating and implementing in schools an institution capable of assuring knowledge, promotion and respect for children and the youth's rights. The aim of the project is to teach young people how to act in a democratic society, how to take responsibilities and how to gain skills for exercising their rights.

- Vision: The Students Ombudsman proposes the creation of an institution that: a) will ensure the knowledge, promotion and respect of child / young people rights; b) will mobilize by a unitary mechanism students, teachers, parents, other partners in the community (local authorities, mass media, private companies etc.); c) will stimulate the significant participation of young people and will focus their energy and creativity for shaping the environment they live in.

- Mission : a) to teach young people how to act in a democratic society; b) to help young people take responsibility and fight for their rights; c) to contribute to the development of young people's participative behaviour; d) to complete the education offer of school and family by involving the young people themselves as education providers.

- Structure: In each selected school , the Students Ombudsman was formed by 7 people : 5 students (SO President, SC President, Member 1, Member 2, Member 3) , 1 teacher , 1 parent.

- Results:

a) Over 10,000 young people from 300 schools gained skills and developed necessary competences for their life as an adult in a democratic society; b) Over 5,000 cases of child rights infringements were solved; c) The training during 4 annual training session of the school inspectors

responsible with educational activities (42 participants from all the country's counties and from Bucharest); d) 10 workshops for developing monitoring mechanisms and a National strategy on education for human rights in schools; e) Meetings of the experts for the elaboration of the National strategy on human rights education in schools; f) The elaboration of a curricula based on child rights that will be introduced in the initial training of the teachers in SNSPA; g) Promotion and training materials elaborated and disseminated: child rights manual, methodological guides, posters, flyers, child rights caravan; h) 3 national camps organized in partnership with UNICEF and MECTS (editions 2009 and 2010) and with MECTS and ANSIT (2011 edition), which were attended by 300 young people from all over the country; i) The referral to the project as a good practices example for the youth participation in the UNO's Child Rights Commission report; j) The promotion at international level within some international conferences ("Let's create Europe with and for children", organized by Council of Europe in Stockholm, 2009, "Europe for Citizens", European Commission, Trieste 2010) and within international youth exchanges where members of the organization participated.

- Difficulties in accomplishing ESD projects

Subsequent to interviewing Mrs Executive President (Professor Nina Cugler) we could identify the major difficulties that the organization is facing in implementing its projects. The President of the organization appreciates that most of the managers in the domain identify the same obstacles in achieving their goals.

In accomplishing international projects, the main identified difficulties are connected to the differences between the educational systems, especially that these projects propose the introduction of the ESD issues in the curriculum. The Western European partners have a much more considerable autonomy in establishing the curriculum based on the needs of the local community. Parents, students and NGOs play an important part in this process. In this context, for example, in the new project in which Agenda 21 is partners with Italy, France and Austria, she is facing real difficulties in adjusting the project concept to our educational system, "as we have a centralized one".

On the other hand, there are financial difficulties especially because the projects are on a multi-annual basis, usually 3 years, the reconciliation for our investment (the commission initially grants 80% of the 100% grant that supports the project - meaning 75% on the projects coordinated by old state members of the UE, and respectively 90% for the new members) is done after the project is finished. This means that in case the coordinator is from the old members of the UE, we have to support a percentage of 45% from the costs of the project, and in case is a new member is 30%.

There are also linguistic barriers, sometimes it is hard to have target groups with whom to work in a common language and the work is doubled because of the need to translate a lot of materials. It is a double effort - on one hand all the documents of the initiator and the partners involved, on the other hand on national level all the documents in Romanian. Finally, the success of the project is given by the way in which all the partners are complying with their obligations and they are doing the activities as they were established. Sometimes, there are delays and even blockages in the implementation of the project due to the multi-partners character of the project.

3. Conclusions

The paper brought into evidence the importance and the need of international cooperation, the necessity to get all international actors involved in implementing SD principle in social life at all its levels. The vision according to which the development of certain states implies the poverty of others is already obsolete. Mitigating social differences, that is the clash between the rich and the poor, ensuring peace, protecting the green area are major objectives of the millennium. Their implementation requires not only the awareness of the crucial need to implement SD, but also the change of mentalities through a common effort to educate decision making factors, young people, as well as all citizens in the spirit of SD.

The paper points out that the Romanian society has proved open to promote SD and ESD. We have noticed that this issue is an important topic on the Ministry of Education and Research Agenda, as well as on the agenda of public and also private organizations, but basically on the agenda of Romanian NGOs.

The present case study brought into evidence the initiative, diligence, consequence and accomplishments of the Romanian civil society in implementing ESD projects. More precisely, the analysed case study focused on presenting Agenda 21 projects. Agenda 21 Foundation impresses through it numerous and complex projects, as well as through achieving its objectives and through an efficient collaboration with school inspectorates, as well as other public and private organizations. However, apart from its successes, the civil society is still facing important difficulties in the attempt to implement its projects, including the international ESD-oriented ones.

Besides financial difficulties, there are also differences that are hard to be overcome – especially the inconsistencies between the organization of the existing educational systems (see: the relation autonomy / centralization between the components of every system, linguistic barriers, the non-observance of deadlines by projects partners etc.

The present paper may be a starting point for the accomplishment of a larger research work that would imply a more complex methodology as regards the way in which different ESD socialization agents get involved in Romania.

References

- -John Elkington, Cannibals with Forks: The Triple. Bottom Line of 21st Century Business. Capstone. Oxford, 1997, p. 402.
- -Sobol, A., (2008). "Governance barriers to local sustainable development in Poland" in *Management of Environmental Quality: An International Journal*, Vol. 19, No. 2, pp.194-203.
- -Ulrich Grober, "Die Idee der Nachhaltigkeit als zivilisatorischer Entwurf" in *Aus Politik und Zeitgeschichte* 24/2001, p. 3, online version.
- -Thomas Jäger/Michael Schwarz, "Das sozial-ökologische Innovationspotential einer nachhaltigen, zukunftsfähigen Entwicklung auf betrieblicher und kommunaler Ebene" in: Aus Politik und Zeitgeschichte 50/1998, Bonn, p. 23.
- -World Commission on Environment and Development (WCED), Our Common Future, Oxford 1987, p. 43.
- -Fritjof Capra, "Verborgene Zusammenhänge. Vernetzt denken und handeln" in *Wirtschaft*, *Politik*, *Wissenschaft und Gesellschaft*, Bern *et alii*. 2002, p. 298.
- -http://people.hofstra.edu/geotrans/eng/ch8en/conc8en/3es.html.
- -Johannes Tschapka; apud Ökolog Netzwerkzeitung 3/2004 "Nachhaltigkeit leben (und) lernen" in Umwelt & Bildung 3/2004.
- -http://en.wikipedia.org/wiki/Fritjof_Capra.
- -Fritjof Capra, Wendezeit, Munchen 1991, p.XI-XII,http://www.dadalos.org/nachhaltigkeit_rom/grundkurs_1.htm.
- -Willi Linder, "Hohe Ansprüche" in Umwelt & Bildung 3/2004, p. 3.

ABOUT THE FOUNDERS OF LEGAL SOCIOLOGY AND THEIR IDEAS

MIRELA CRISTIANA NILĂ STRATONE*

Abstract
The main founders of the juridical sociology are considered to be Eugen Ehrlich, Max Weber, Theodor Geiger and Georges Gurvitch, The researches of juridical sociology from Romania are demonstrating the existence of a real tradition in this domain at a national standard. Some roumanian explores of formation jurists have practicated in the cognitive demarche a sociologycal abordation about the law, what have been fatal conduced to the fixing of the base of the juridical sociology in Romania.

Key words: *juridical sociology, alive law, normative life, social needs, the comprehensive and the rationality of the social actors*

Introduction

In one form or another, the initiators of legal sociology had in mind from the beginning the social needs.

Most jurists argue that the habit and the tradition can not constitute as sources of law. But the habit is formed by repeating the investigations to resolve a social need. Of course he, the habit, with time can join the tradition, that later to get custom. And not anyway, but by an evolutionary process. And if we talk about custom, we are in the area of sociological jurisprudence.

Therefore, starting from social need, it is imperative to analyze the relationship between social order imposed by judicial order, but also reverse legal order determined by social order, the latter being certainly the result of free human action that produces the so-called right living at Eugene Ehrlich.

Social determinism of the rules and legal rules confers the right a social character. This is expressed by the fact that legal norms are not aprioric to the social life of individuals or groups. They are even born from the contradictions that occur in the societal life.

The analytical capacity of sociology as a science inevitably leads to highlighting the deviant behavior compared with the conformist one. Through legal sociology, it has initially tried to capture the degree of internalisation of social norms and determining mechanisms of sanctioning through the dimensions of social control. In this sense, education and coordination of social agents in accordance with social needs, occupied an important place in their essential social role.

The ratio of law and morality sends us in the area of social order as a result of social morality of the time. Choosing by the social actor of a certain type of behavior is actually a result of its social need, coupled with the moral education at which it is situated.

Paper Content

The main founders of the juridical sociology are considered to be Eugen Ehrlich, Max Weber, Theodor Geiger and Georges Gurvitch.

Eugen Ehrlich[1] has been considered as being the founder of the juridical sociology. He consideres the law as being a result of a proceeded norme from the individual and social activity of the social actors.

---

* Lecturer, PhD, "Nicolae Titulescu" University of Bucharest (mrl_cristiana@yahoo.com).

[1] Eugen Ehrlich - Austrian origin, was a professor at the University of Cernauti (Bukovina), where he organized and condced a sociological seminar for the research of the living law of various ethnic groups, including the Romanian one. Praising the work of Ehrlich in this area, Dimitrie Gusti stated that: "Eugen Ehrlich occupied a place of honor in legal science as a lively and creative spirit, he was a devoted member of the Romanian Social Institute, and

In 1913 Eugen Ehrlich writes the book "*Grundlegung der Soziologie des Rechts"* which appears at Munchen and Leipzig. This work appears in the year 1936 in USA in english language with the title:" *Fundamentals Principles of Sociology of Law*").

"The whole development and evolution of the law doesn't exist neither in legislation nor in the sociology theory of the law or doctrines"[2].

In this meaning the author underlienes the fact that the rules of the behavior transformed in law norms by technical-juridical instruments can be intimate and explicated by the *induction*: This is realized by the base of metods of sociologycal research and it starts from the observation, the description and the explanation of the individual and social behavior.

Increasing the societal role of the "alive law" Ehrlich has underlined the study on the difference between *the legal* and *positive law* and the *"alive law"*. Thus it shows that the oficial legislation reaches only a part of the juridical order of the society, the biggest part of the law evolves and acts independent of the legal law and of the official order. This part of the law it is named *"the alive law"*, creation of the social quarters, result of the interactions between persons.

In this situation the role of the juridical sociology could be that to research systematic in totality and in deepness the alive law.

The alive law take difference and completed form by:

- the contemplation of the positive law and juridical documents
- the direct observation of the normative life of the social quarters

This necessity to explore the alive law has appeared in the succeeding of the evident and official finding, respecting the disability of the oficial law to control and to regulate the social activity in its totality.

Therewith the author shows that "the juridical sociology must occupy primal with the investigation of the alive law and with the prominence of the role and the social services of the various cutums usages and juridical sociology practices and nonjuridical of the social quarters which integrates the society".[3]

Regarding to the normative order. Ehrlich have mentioned and explained the notion of "*social order pacifier"*. This one is entitying and it works nearby the juridical one and official one of the state and is characterizing by:

- spontaneity
- non-contentious content
- underlain on the free organization
- adjustable by metods and instruments of communication

The importance of the study of the alive law has been assumed by others sociologers too, which have discovered in it the causes of the oficial law, idea which, all of a sudden with the one of the study of social effects of the official law, have remained to the researches's base regarding to the study of the object of the juridical sociology.

Max Weber[4] has denoted in the german sociology from the end of the XX century, by his contributions about the power, juridical sociology and the administrative one.

---

embraced with loyalty Romanian citizenship. "(Dimitrie Gusti, the individual, society and state in the constitution, in sociology militans, 1934, p. 105, Dan Banciu - Elements of legal sociology, Lumina Lex Publishing House, Bucharest, 2000, p. 32).

[2] *Ibidem*, p. 30.

[3] *Ibidem*, p. 31.

[4] Max Weber (1864-1921) - was awarded of the Faculty of Law in Berlin. He was a professor at Freiburg and Heidelberg. He lived a long time in Italy and the United States. He was appointed by a German armistice commitee of Versailles and in the committee charged with drafting the Weimar Constitution. In 1918 he taught at the University of Vienna and the University of Monaco in 1919. (Sophia Smith - Legal Sociology, Lumina Lex Publishing House, Bucharest, 2001, p.33).

He analized insistent the reports between law and society. This thing began with the publication of his first books[5] concerning to the socio-economic conditions of the prussian peasants, phenomenon which he studied under empiric form.

The results of that research have redounded to the promotion of some reformers ideas which were regarding the legislation.

The main directions to whom the cognitive demarche has straighten were:

- the social action
- the social relations
- the alive law

"The action is social in the extent that in the virtue of the subjective semnification keyed it from the persons who acts, and take adunt of the others behavior and as result it is orientated in that way"[6].

He defines the sociology as being the science of the social action.

Regarding to the report between the law science and the law sociology, Weber consideres that:

- the law science sees about the correct expression of the normes under form of specific linguistic concepts being a prescriber science, because it express what it have to be;
- the law sociology sees about the study of the manner in which the norms are transpose in usage, with other words it is searching the conformity or nonconformity of the behavior to the norms, it's a descriptive science, because it shows what it is.

Max Weber has redounded to the pointing out of the juridical sociology in the following directions[7]:

1. The comprehension and the rationality of the social actors: starting from the human person as base unit, the author shows that this has permanently a comprehensive behavior and the sociology has the merit to furnish explanations regarding to the *reasons* of the type choice of behavior squared up to by person.

Among the reason of the choice of a certain deportmental type, Weber has taken in disscution the *well-founded ones, so the rational ones*. Thus he tried a differentiation of the rationality in two types*: the symbolic rationality* (the correspondence of the aims with social values) and *the instrumental rationality* (the realization of the aims with the most efficient ways).

2. *Ideals types of authority*: analising the report between the juridical order and the administrative one. At Weber "the state and the administration compose that human partnership which is allocating the monopoly on the physic legitim constraint and which realize a domination report of the people, by people based on the legitim exertion instrument of the constraint"[8].

For this authority under form of domination to manifest to the persons, appearance the necesity of the existence of some justifications. These can take an interior and exterior form:

a) - *the interior justifications* are recovering in:

- *the traditional authority* – what suppose the unconditional adhesion of the persons to the cutums, become legitim, usages customs, being the oldest form of authority, met to the sovereigns, monarches,pontiffs,etc;
- *the charismatic authority* – the holders of this type of authority interweave the physic qualities with the ethical ones, they are the politician leader, the militants bosses, who we find in the traditional societies and in the modern ones; in antiquity they were gods and herous, today they are the public persons from which is parttakeing mass-media;

---

[5] Wirtschaft und Gesellschaft - Economy and Society (op.cit)
Rechtssoziologie - Sociology of Law (op.cit).

[6] N. Popa, I. Mihailescu, M. Eremia - Legal Sociology, University Publishing House. Bucharest, 1997, p 26.

[7] Dan Banciu - Elements of Legal Sociology, Lumina Lex Publishing House, Bucharest, 2000, p. 43.

[8] *Ibidem*, p. 45.

- *the legal authority* - it is underling on the rational conformer of the social actors, convinced by the valability legality of the law state and in the same time the competence and the objective of the public and official authority.

b) - *the exterior justifications* are represented by the law and legislation[9] agents diverse in space and time.

Weber consideres that the transformations and the revolutions occurred, in conjunction with the law and the representative institutions have fallowed the rationalizing and of the bureaucratic what is determining so order predictibilitation and stabil hierarchy of status at organizational level, and so dissary in some special situations.

An another aspect of the researches undertaked by Weber it referes to the relation: *customs-convention-law*. The custom appears here as atitude wich on recurrence is typifying. The type is maintaining by tradition, being transmited from the forerunners to the progeny by recurrence having to the base the imitation (imitation-custom). In this situation the custom becomes convention, at which the person accedes from his own. The passing from the convention to the cutum ot os made gradual and continued.

In this situation "we are in the presence of the specific law when the interest subjects can ask for the garanty of the observance of the conventional norme or even of the custom, of a coercitiv[10] apparatus".

An another subject squared up to by Weber in his studies makes reference to the *juridical occupations*. Thus, he sintetize the following ideal types[11] of law:

- *the materialistic and irrational law*, that is destitute of the report to a norme, but amenable only to the arbitrary choice of the one who judges; this law type has determinated the advent of a prime development stage of the law in which the base element is constituting the *law creation by the prophets;*

- *the materialistic and rational law* in which the decision it is based on "a sacred book or appealing to the ethic imperatives, to the politics saings", it is the law type which has determinated the advent of the second development stage of the law and namely the *empiric production of this one, with the help of the anterior*, so a reference base appears;

- *the formal and irrational law* in which the magistrate in his adjudicational act it is based on irrational norms, but existed in religious books or belonging to the divine revelation; this law form is the one who has contoured the third development stage of the law by his assessment by the *theocratic power*, that is the period when the law acts as a divine power, what it have led to the forming of the theocratic state, too;

- *the formal and rational law* – "this exists when the lawgiver and the magistrate decide basing on anterior, relegating to the codificated norms and taking offence his decisition, on the base of abstract concepts" ; here we meet with a law type, which it have determinated the advent of the fourth development stage, put across in the listing of the law in the sisthematic cadre, this being a result not of the prophet's acts, neither effect of the anteriors of the magistrate practice or of the divine act, but purely, *materialization of the jurist's acts.*

The Weber's work is imposing, and the aspects squared up to are from far away the most burner subjects and alike problems, with which it has collated among the history the capitalist society.

In the study of the law sociology he analizes punctilious all the law's pecularitys reported to the epoch, but specially the society's culture of the membership.

---

[9] *Ibidem*, p.47.

[10] Popescu - Legal Sociology, Lumina Lex Publishing House, Bucharest, 2001, p. 34.

[11] Ibidem, p.35.

The contribution of Weber to the sociological theory in different European countries is imposing. More, in USA, weberian conceptions have led to the action's advent and of the symbolic relations, two forms of relations.

Theodor Geiger[12] (1891-1952), an another representative of the german sociology have undertaken multiple researches succeeded with results drisen in the representative works. Among these, we consider needful to present the following:

"*Das unecheliche Kind und seine Mutter im Recht des neuen States*"("The legitim son and his mother in the right of the new state") – 1920 , it's his licence's work in the idea pursuant to whom beyond the law the born child out of marriage belonged to the maternal social medium, while the legitim one belonged to his paternal social medium. In these conditions the legitim kids were in amterial inferiority comparative with the legitim ones.

In 1939 Geiger has published a *sociology tenor in the Danish language*. Offering a definition to the social sciences, he was making the difference between sociology in a large meaning and the sociology in a limited meaning.

To mention is the fact that the sociology in limited meaning is reffering to that which is named "the empiric analytic and general theory of the sociology". One of its discipline is the special sociology, which at its turn is dividing in subdisciplines. One of this subdisciplines is the law sociology, too.

The law represents a namely type of social order and namely the imperative order, existed in second plan than real order. In this work the author presents the difference between the law sociology and the juridical science in the meaning that "the sociology is first interested of the real order, while the jurist is interested of the imperative order.

The sociology discourses the law as genre of social order, in general while the jurists take in consider only the order maintained by the state"[13].

In 1946 appears in Sweden a work, *centred on the report between law and morality*. Thus, he shows that while in the primal society the law and the morality concurred, in modernism these are separated, in the meaning that each acts in different planes and automatic the morality has lost the attribute of social control instrument about the law.

The preliminary studies concerning to the law sociology appear in 1947 in Danmark and it's named "*Vorstudien zu einer Soziologie des Rechts*".

In this studies are analyzed the aspects clung: social order and independence, behavior, norm as the law under form of social order, sanctions, systems, law's sources. It emerges that the analysis of the juridical sociology it is differenced from the one of the juridical science, by which she discovers and explains the facts and the social relations, which is constituting premises of the compulsoriness and of validity of the norms of the law's source, the passing from the spontaneous sanction to the organized one.

In this studies, too, Geiger discourses " the reports of the law with the morality, the politic and the juridical awareness[14]" and with them the passing from the social organization to the juridical one,

---

[12] Theodor Geiger (1891-1952) was awarded the University of Würzburg. From 1918 is set at Berlin, where carried out an intense activity of study and research. In 1928, he was appointed professor at the Higher Technical School in Braunschweig. He took a stand against National Socialism. He was forced to emigrate to Denmark (1938), where obtained a chair. After the German invasion of Denmark is forced to flee to Switzerland. he sets in Stockholm and Uppsala, has lectures and conferences in Lund,too. After the war he returned to Denmark where he is a professor at the University of Aarhus. Between 1951-1952 he taught at the University of Toronto (Canada). He conduced research in empirical legal sociology and wrote theoretical works in this field. His license was a work of sociology that has sustained at the University of Würzburg in 1918 and included Geiger's research findings on 'illegitimate son and mother in law new state ". It was published in 1920 and regarded as one of the first books on the subject. (Sophia Smith - Legal Sociology, Lumina Lex Publishing House, Bucharest, 2001, p. 43).

[13] *Ibidem,* p.45.

[14] *Ibidem,* p.47.

this on the agency of the sanction, which appears here as a dynamic instrument of the cognitive demarche.

Concerning to the law's sources the author offers information about a namely successive order of those: commonness, juridical practice, legislation, juridical science.

An another subject discoursed by Geiger in his preliminary studies aims scarcely the juridical awareness order "and analyses his cognitive function, the reality of the juridical awareness, its role as a critic instance, the subject of the juridical awareness and positive juridical awareness"[15].

On the other hand, Geiger has launched the theory pursuant to whom the general sociology, by the agency of the subjects amenable the research, represents an ideological criticism.

The work "*Arbeiten zur Sociologie*" ("Sociology study ") has been published posthumous, at Berlin, in 1962. In this study, Theodor Geiger explains the difference between the *material juridical sociology*(is regarding the determinant character of the society to the law's address) and *the formal juridical sociology*(the law represents the cultural system which offers reference for the adjustment of the society's life).

The author suggests in this work "as subjects of research" socio-juridical, the actors which persuade the decision of those who are transposing in life the law, the social effects of some juridical institutions, thus like family, property,etc[16].

Georges Gurvitch[17](1894-1965) has substantial redounded to the substantiation of the juridical sociology as science, by the realization of an definitely bond between sociology and the law science.

His works[18] are constituting in present reference points for the explores of the juridical science domain and of the juridical science ones.

Georges Gurvitch has dignified the contrast between society and state. Thus he show that the state law doesn't constitute the only or the unique law source, and from here he made only a step, namely to show that the juridical order represents the result of the statal action and of the others independent organisms of state which are sources generator of law[19].

The ideas on which have supported his researches have dressed the *form of the juridical pluralism of the normative facts and of social law*.

Regarding to the juridical pluralism, in Gurvitch's opinion this is basing on the theory of the normative facts differenced as followings:

- *relation facts*-facts which endorses the sociability, the relationship with other persons; these facts trains the personal values of the individual and they are in conjunction with the individual law.

- union and sociability facts by communion and interpenetration-facts which implies *transpersonal values* and they are in conjunction with the social law.

The individual law persuades the adjustment of the interpersonal relations, while the social one is manifesting at organization level or human community.

The social law is a integration law, communion and collaboration, manifested specially under two froms: the work's law and the international law.

Georges Gurvitch has defined the juridical sociology under the form "expression of some pluralistic concepts, being that part from the sociology of the human spirit which studies in its totality

---

[15] *Ibidem*, p. 48.

[16] *Ibidem,* p. 44.

[17] Georges Gurvitch (1894-1965) was a native of Russia. In the period 1915-1920 was professor at Petrograd and then to Tomsk. He was one of the participants in the Russian Revolution of 1917, then emigrated to France. Here he worked as a professor at the University of Strasbourg, then in Paris at the Sorbonne. From France he went to U.S. in New York, where he was professor at the Faculty of Social Sciences.

[18] *L'ideé du droit social* (Paris, 1934), *L'expérience juridique et la philosophie pluraliste du droit* (Paris, 1935), *Eléments de sociologie juridique* (Paris, 1940), *Sociology of Law* (New/York, 1942), *Problémes de sociologie du droit* (în *Traité de sociologie*, Paris 1960).

[19] Dan Banciu - Elements of Legal Sociology, Lumina Lex Publishing House, Bucharest, 2000, p.52.

the social reality of the law and which take count of the variety almost infinite of the experiences of all the societies and all the platoons describing the concrete content of each type of experience and disclosing the law's reality which the schedules and the symbols are more hiding then expressing it[20]". From here results that that juridical pluralism is a cement between law and social reality.

The juridical sociology in Gurvitch's opinion is dividing in three categories:

a) - juridical microsociology or the microsociology of the law which is dividing[21] in:

- the horizontal study – about on the organized societies law which acts by sanctions and organized coercion, exteriors, but about on the unorganized societies law, which forces under spontaneous form and diffuses the collective life.

- *the vertical study* – about on the law's species which acts by the hierarchy's complexity of status existed in interdependence. With the specific social relations.

b) - the differenced sociology of the law – the functions which are executing some human collectivity is putting across in manifestations of the law it studies:

- *the juridical typology of the particular active platoons*, able to create organized suprastuctures(familial, territorial, professional, interes, platoons, etc);

- *the juridical typology* of the global societies which conduces to the constitution of the great law's system.

c) - the genetic sociology of the law, whom objects are constituting from:

-the tendentious regularities of any type of juridical system

-the factors which persuades those regularities of the change of the juridical system: economics, political, demograss, cultural, etc.

The juridical sociology has in Gurvitch's conception a theoretic and philosophical character. In this way it is distancing from that fundamental juridical sociology on the empiric research and although the author doesn't negate the respective research type, he is appreciating selective.

The contribution of Georges Gurvtich to the development of the juridical sociology consists in that, on a hand he has underlain a model for the systematic construction of the juridical sociology, and on the other hand, he offered in a realist mode an ensemble image of the domain and the specific of this science, a thing which conduced to the extending of the research area and to the thoroughgoing study of the study's object.

Conclusions

As a result of attempts to demonstrate the link between social life free of rules and marked by social needs and the rules of law, legal consciousness appears positive in the spotlight.

In its entirety legal order represents the reference system necessary to the regulation of social life. In this context, it is inevitable the contrast between society and state. While the state believes in a form more or less explicitly that state law is the only source of law and implicitly of the legal system, legal sociology demonstrates that legal order can not perform their goal, unless is established as a result of state action coupled action of other bodies, unstated, the latter being undoubtedly sources of law.

Through the connection between the living and the legal right, is justifying the need for legal size evolution of social life. The right can not be an immobile entity, because it is not a dogma: it provides understanding, explanation and especially is in constant change, according to the requirements of the social life. When a legal norm is no longer matching to the social need, it is necessary another. In the absence of this action, anomia appears inevitable, given the social movements.

The sociological research of the evolution of social and legal order is a essential condition of the regulation of societal life.

---

[20] *Ibidem*, p.54.

[21] *Idem*.

References

- Giddens, *Sociologie*, Ed. Bic All, Bucureşti, 2000.
- Boudon, R., *Tratat de sociologie*, Ed. Humanitas, Bucureşti, 1997.
- Dahrendorf, R., *Essays in the theory of society*, Stanford University Press, Stanford, 1968.
- Dan Banciu – *Elemente de sociologie juridică*, Ed. Lumina Lex, Bucureşti, 2000.
- E. Speranţia, *Introducere în sociologie*, vol. I, Bucureşti, Editura Casa Şcoalelor, 1944.
- E.M. Litwicki, *Visions of America: Public Holidays and American Culture*, University of Virginia, 1992.
- Ehrlich, E. ([1913] 2001). *Fundamental Principles of the Sociology of Law*. Transaction Publishers, New Brunswick.
- Georges Gurvitch, *Sociology of Law*, London: Routledge & Kegan Paul, 1947.
- James A. Beckford, *The Sociologi of Religion. 1945-1989*, în „SocialCompas", nr. 37, 1990.
- N. Popa, I. Mihăilescu, M. Eremia – *Sociologie juridică*, Ed. Univ. Bucureşti, 1997.
- Nilă Stratone Mirela C., *Sociologie juridică*, Ed. Paralela 45, Piteşti, 2006.
- Sofia Popescu – *Sociologie juridică*, Ed. Lumina Lex, Bucureşti, 2001.
- http://www.ohlj.ca/english/documents/6-47_3_Coutu_FINAL.pdf.
- http://mainelaw.maine.edu/academics/maine-law-review/pdf/vol19_1/vol19_me_1_rev_1.pdf.
- http://plato.stanford.edu/entries/weber/.
- http://agso.uni-graz.at/lexikon/klassiker/geiger/17bio.htm.
- http://books.google.ro/books?id=IuwMmnstnHIC&pg=PR3&hl=ro&source=gbs_selected_pages&cad=3#v=onepage&q&f=false.
- http://www.ruhr-uni-bochum.de/rsozlog/daten/pdf/Roehl%20-Theodor%20Geiger,%20Bemerkungen%20zur%20Soziologie%20des%20Denkens.pdf.

THE MUSLIM FAMILY BETWEEN MYTHS AND SOCIAL IMPACT, SEEN TROUGH THE EYES OF A NON – MUSLIM

MIRELA CRISTIANA NILĂ STRATONE[*]

Abstract

This study is part of an extensive analysis of the social impact caused by the characteristics of the Muslim family in the Romanian and European society. Between the religious and the social demands, Muslim family manages all the harder to enroll in the course imposed by tradition. A great importance has the knowledge and the understanding of the intra and interfamilial behaviors, this one needs first to detect and to avoid the myths related to the Muslim family. Addressing and clarifying this issue lies in the center of the present study. He represents a necessity without which Muslim family life, the role of the woman and the man in this family can not be understood fully, given that their religion and their way of life tend to cover an area of increasingly greater psychosocial space both at European level and worldwide.

Key words: *Muslim family, myths, social impact, European psychosocial space, reintegration.*

Introduction

The fact that the Muslim religion is dominated by a strong expansionist character has never been a secret and much less it is not a secret in present, when this trend is openly expressed.

The faith in Islam is presented both as a dynamic tool of the Muslim [1] religion and as a basis, foundation of the Muslim spirit. It must be given that the Islam dominates the Muslim religion until near confusion. This is no way an exaggerated opinion, as some Muslims might support, but evidence, which logical it mustn't be demonstrated. His power consists in the ignorance of the tribal society and in the conservative form of organization: THE CLOSED CIRCLE.

This symbol is fundamentally and separates the world in two: on one sight is the Islamic population, located inside the circle and on the other sight is the rest of the population, the non-Islamic one, located outside the circle.

In terms of social psychological, the core of the closed circle is represented by the Muslim family, The family group is one of the strongest channel through which is transmitted intergenerational the Islam.

Under theoretical facts, the Islam is presented as a beautiful religion, rich, interesting, and especially tolerant. This Islam religion is soaked in her nature by the force of the Arab cultural imperialism which has between others the major interest to annihilate the women's personality under the mask of the familial worthiness.

But, the Muslim family, like another ordinary social family, assumes for the existing and the function of the married couple two parts, each other with its status and role. The two elements of the married couple behave major differences comparative with what exist outside the closed circle. These differences, beyond the interest derived from the need for knowledge of the non-Muslims, terrible intrigue, because they often transcend the most elementary rules of hygiene, good sense and respect. Even the family affection is hard to understand. And here I make the bracket suitable for the ethnocentric approach.

It is obvious that on the Muslim woman's shoulders stand all the pride and shame of the world located in the closed circle. Towards her it acts so much coercion and punishment that femininity acquires hideous, grotesque meanings.

---

[*] Lecturer, PhD, "Nicolae Titulescu" University of Bucharest (mrl_cristiana@yahoo.com).

[1] The Islam itself.

Increasingly often, the ancestral need for freedom and affection is pushing these women outside the marking killer - circle line.

But not only is the woman the one who makes the unusual prohibitions and the need for normal but the man, too. We are surprised to find out that the Muslim men has reached the conclusion that he is no longer accepting the carnage forcibly imposed by Islam on his body. At the same time, he is the one who is directing, supervising and applying crushing sanctions against the women. However, his human nature and social influence have come to intertwine into a force once impossible through which it defeats the power of Islamic dogma and here it is now, how in growing number he leaves the fear circle.

Paper Content

Beyond the closed circle area the Muslim citizens are living their lives in other dimensions, sometimes confused and overwhelmed by an immense freedom. This freedom embraces them as a divine gift to which many of their fellows not even dream of. However, the free life outside the circle is foreign to them too and incomplete in the same time because the Islamic precepts will never entirely leave them.

In good faith or not, some stereotypes regarding to the Islam practitioners has wanted to be demolished.

Faith in God has been used over the years to justify both extreme and extremist acts in a number of nations where collective consciousness and in some cases national consciousness have been based on religious concepts. Is the case of Muslim peoples too, whose full-time guide proved to be the Islam. As it was mentioned earlier, the Islam is a beautiful religion dominated by positive energy. This is from theoretical point of view. In fact, the Islam is used by expansionary interest groups, from a justifying position: in the name of Islam are committed murder and unimaginable atrocities and it is especially defended by a timeless law. Sure those things don't presents easy, so it is necessary for the beginning to bring at issue some of the so-called myths about Islam to easily see then how this element of a impressive dynamic is returned even against their own followers.

1. The Islam was spread by the force of the arms

Initially, those who have set out to the spreading of the Islam formed a small group. This small group preached Islamic religion to the east in countries like India and China and to the West, where they focused among others Morocco and Spain. The people of these territories could not be bound by a group of believers to renounce at their religion and forcefully to adopt another. If these people were even partially converted to Islam they did it willingly. Also here must be mentioned that on the occasion the Mongol invaders on the occasion of a little part of the Islamic territory conquering, they haven't prejudiced the religion, they haven't intended destroying or impairing it, but furthermore they have adopted it.

At the time when Islam had spread in some areas, this action was marked by the construction of churches and synagogues for non-Muslim s under the dominion, that the religious life of another faith should not be disturbed. This care and also respect for other religions prompted the non-Muslim s to convert to Islam.

That been said, it can be deduced that the Islam was not spread by the sword, so using jihad bis saif, but by respect.

2. The fight on the way to God, for His sake, take the form of Islamic jihad

In Arabic, jihad means struggle. This fight requires action of exertion, of struggle. Islam uses this word to explain the battle that gives the followers on the way to God. Jihad exists in several forms, some below and others located at a higher, deeper level. The main forms of jihad are: jihad al-nafs (fighting your own self), jihad bil-yl-san (fighting by word) bil yad jihad (fighting through

action), jihad bis saif (fighting with sword). Jihad al-nafs is considered to be higher than jihad bis saif.

The heroes' cult supports a full report to faith in God and what it refers to Him. So, those who die during a pilgrimage to Mecca, or for any reason when they are on their way to a mosque, they come to be considered martyrs.

The fact that a person dies while fighting the war and becomes a martyr is considered a false in the Islamic religion.

In conclusion, Jihad means to fight for God's sake. Under these circumstances, how can you convict an Islamist formation that solves everything through jihad, meaning that it is fighting for the sake of God, no matter what methods and with what results? So this is how it is seen the situation from the point of view of the followers of this religion, or rather how it is intended to be viewed things from certain groups. On the one hand we have fanatics who seek to justify any transgression in the name of God, and on the other side it must be said that there are not neglected the forces which are training causing fanatical movements under the umbrella of Islam.

3. The Muslim s commit atrocities during the war

And this is considered a myth by the supporters of the Muslim religion. They argue strongly that any Muslim military during war Muslim, wherever it is, is expressly bound to respect ten rules which absolutely prohibit murder of children, women and elderly men, mutilation of corpses, acts of betraying, movable and property of the enemy, the slaughtering of the animals outside the food need and other immoral acts.

Therefore, through the existence of these mandatory rules, is considered that the Muslim s are true good people even during the war. By trying to demolish this myth, the non-Muslim s, the entire public opinion is put in front of a model of gentleness, of kindness and exceptional humanity together, describe the Muslim warrior.

The question is: Which one is the myth and which one is reality between the two hypotheses?

4. The Muslim s are terrorists

It is true that Islamic terrorism is presented as a concept extremely generous in size. On one hand, we are dealing with some very effective stereotypes cultivated through mass communication. The public image of Islamic terrorism cover the entire Muslim breath and beyond. The view that if you have joined at Islam you instantly became member in international terrorism cult and you obey unconditionally the remaining commandments of Allah, is very strongly cultivated by the media. In parallel with this image, they return on the table every time it must defend the Islam even the teachings left from Mahomed or contained in the Qur'an and which are not promoting anything but love for Allah and man. But the issue is whether there is really an obstacle between Islamist religion promptings and actions of Muslim s Islamist terrorism.

How much faith in Islam succeeds to come between collective consciousness and geopolitical interests?

5. Women in Islamic religion have no rights

It makes case that, while in some Muslim countries are really serious force on laws against women, in countries dominated by Islamic religion women have the right to freedom of movement (to leave alone from house, if this can be a right and not normal state), education, marriage and divorce. But practice looks different and the question is why particularly women, after ascertaining that they complied with the teachings of the Qur'an, they feel betrayed by Allah, abandoned by him and get to ask increasingly stronger: Now, after I have subjected listened when I need you, where are you, Allah?

As I mentioned earlier in this paper, a increasingly number of Muslim s in groups or individually, are able to leave the countries where the oppression in the name of religion reached the limit of endurance.

A serious problem is the Muslim immigration in Europe. In larger groups or individual as well as families they arrived in developed and tolerant countries under social and political terms, where in time by the succession of generations, were stabilized.

Living and working in the new conditionst, the Muslim s came in contact with social and cultural values of Europeans. These values in their turn have influenced their lifestyle at individual and familial level.

Occidental lifestyle triggered a progressive impact on psychological matrix of the Muslim family. The effects of this impact are increasing from day to day, with negative behavioral symptoms, deviant within the group. This are reflected in the growth and diversification of intra-family problems.

The increase of the divorce rate is a rapid growing phenomenon directly proportional to the number of new immigrant of Muslim families, but also of the Europeanized ones. New immigrant families are coming from a culture where the partners have equal rights to marriage decision, more exactly they do not choose each other freely, because the woman is chosen to accept the husband imposed by parents. The impact with the freedom of decision on occidental society, determine firstly the renouncing of the married woman at the partner previously imposed, this being now in a society that no longer requires constraints under marital aspect.She can choose her wanted her husband, she can live in concubinage, she can remain alone, but above all these she has a chance to break away from a relationship imposed. This does not mean that only Muslim woman renounces at the married couple, but also Muslim man. One of the reasons is that he chooses to make everything from scratch, to renounce at the family obligations that came from home. However, it is noteworthy that divorce proceedings are brought in measure as the majority of women.

The stabilized Muslim families in Europe are subject of the divorce, because even if they live by the occidental rules, the dogmas of Islam are perpetuating within families in such a way as children reached the age of marriage are suffering the rigors of these dogmas. This happens often under pressure from origin families also living in Europe or when the young do not know enough rights.

Also about these Europeanized families it must be said that they get to fall apart from common , non-religious causes without any connection with the Islam or Muslim tradition. The causes may be common namely an emotional economic, sexual level, etc..

The mixed marriages between Muslim women and non-Muslim men represent sometimes the proper framework of the birth disagreements in the marital couples. Of course, we can mention here a variety of causes, but it is clear that overrides the cultural-religious ones.

The intra-familial problems often take forms of ***marital abuse*** or ***spouse abuse.*** Here you find, firstly the sexual abuse in the couple, the Muslim man being the ordinary one with the woman-object, subjected at his wishes at any time. Do not forget that in the Muslim families is almost a rule that the young wife must sexually serve her husband as well as his father and his brothers,too. In terms of respect and affection that Muslim women are founding outside the closed circle, it is natural for women to claim their rights. It results nearly normal physical and verbal aggression, economic constraints, freedom of movement and expression, etc.

The difference of culture between country of origin and the adoption one of Muslim s, creates serious problems of adaptation. Thus, while children of Muslim families in poor countries are used as aids for maintaining their parents, younger brothers and sisters, children of occidental families have special care, that goes from personal development to vocational training all passing through institutionalization, being subjected to education. The fact that Muslim s give birth and then treating them according to the custom of the country they had left her for a better life leads to a kind of

abandonment, ***parental neglect***. Here it must be said that these parents often do not understand the reason they are accused of parental neglect. Underlying these problems is, of course, the lack of education.

The expectations that have the Muslim immigrants in Europe are not on the same wavelength with social offer from countries where they choose to live and work. Moreover, we are talking about a big discrepancy. Obviously they are not prepared to accommodate the requirements of the new society they enter. Sure that those already established in occidental society have advantages not only morally and therefore they handle easier. But it can not be said that they do not encounter obstacles. The past is perpetuated in their consciousness and it demands his tribute.

On one hand, the lack of education, is hard transmitted from ancestors, on the other hand, the lack of good intentions and limited capacity to adapt to the society, is leading to ***deviant social behaviors***. From social deviance to the reduced ability or inability integration path appears shaped closed circular trajectory, because these two dimensions are interdependent. In this way, some Muslim s who managed to escape from the closed circle are reaching to another circle, where education, individual freedom, justice and the quality of human relationships dictate the social rules.

The deviant behavior of these individuals frequently conflict with the law and get in the ***delinquency***. Europeanized Muslim s, individually or together with their families reach to fully contribute to increasing crime rates. And we do not call cases where the Muslim families, compelled by individuals or terrorist groups end up committing large-scale atrocities. It would be a too simplistic approach and such a subject requires a special approach.

The increasing number of ***acts of prostitution*** appears as a growing plague of Muslim traditional family values, values which at least theoretically promotes fidelity between spouses and unconditional obedience of parents.

A freedom that Muslim man or woman does not know how to receive and put to good use in his own and beneficial sense, puts the individual in a position to choose wrong. This is one of the causes of joining the crime of prostitution.

At the same time we are witnessing at some kind of revenge from the Muslim women from sexual oppression that their religion did not grow, but the reality of the Muslim community practice it diligently. Once they have escaped from the influence of unhealthy family practices (I mentioned about this in the first part of this paper) they feel the need for compensation. This compensation sometimes takes negative forms under moral and social aspect, among them being the practice prostitution, too. ***The revenge or compensation*** (it substitutes the meaning of the two terms here two terms) comes as a response to poverty in their home country through prostitution and aiming the solving of the financial problems.

Not the least it must be said that prostitution as other delinquent behaviors are simply accepted as a model of behavior in the absence of alternatives. The cause in this case is clearly the lack of education.

An example worth for noting here is that the girls ran away from Muslim families from poor countries and whose new address is not known by parents, relatives, reach in countries like the Netherlands or Belgium where social system and the law on immigrants advantages them. Over there they get involved in casual relationships or concubinage with strangers of their culture. They make known to the families left behind these relationships, knowing that it is almost impossible for relatives to found and punish them. The reason is the revenge on a mother who have mutilated their body in childhood (cutting the labia sometimes with a shard of glass and sewing them to preserve their virginity until marriage, or family would be dishonored) and on a father who has built the respect of the community with the cost of physical and psychological sacrificing of their daughters.

Very suggestive in the book, “The handcuffed Virgin”, the author Ayaan Hirsi Ali, a somali born Muslim, describes the physical horrors which was subjected of her mother and grandmother, female genital mutilation. Running away from an arranged marriage, her settle in the Netherlands

and the stages followed to integrate into the new society. She gets politician in the Dutch Parliament, makes a movie with Theo Van Gogh on the condition of the Muslim women. Because of this movie, Van Gogh, because it shows to the world realities which musn't be known by the public, is assassinated in broad daylight in Amsterdam by Islamists. Under these conditions, Ayaan Hirsi Ali who has ran away from homeland because of Islam, is running away from the Netherlands this time also because of the Islam and reach in the U.S., where observes the same thing: here the Islam begins to spread.

These issues and many others that I have not mentioned here can be easily observed. They are a warning to the Muslim community. Deviant acts presented at Muslim families tend to crack the main stronghold of the Muslim community, because the family is the safe nucleus of this community, the keeper of virtue and moral force.

The Muslim conversion of the Europe

One of the non-violent methods by which Muslim s want to evangelize the world is based on *increasing the birth rate* among this population. This measure fits like a glove to fill the gap left by the declining of the birthrates not only in Europe and in the USA. To maintain a people on a normal demographic line, each family is required to give birth to two children and a quarter. In civilized countries they are opting more frequently for a child, and because earlier this future birth parents were taught to count the costs that would be required for the growth, care, and education of future child. The Muslim family, mostly poor and uneducated do not call for such an analysis, being guided of commandments blindly inherited from the Prophet.

The low birth rate among indigenous Europeans combined with an unprecedented wave of Muslim immigrants with large families could see Europe becoming dominated by Islam in the space of a few generations. (*Telegraph.co.uk, sept, 2010*).

So, it is expected that in a few decades, Europe will be majority Muslim.

Another method which aims the musulmanize of the Europe is based on *converting of the non-Muslim to the Islam.*

Those who defend the religion shout loudly that does not seek the Muslim conversion the imposing of the Islam religion with the sword or terrorist acts, but by the great jihad (struggle with his own soul, with his own conscience), which on first examination by translation means peace. If we look at the Qur'an, we find that the root, jhd, appears in 35 verses 22 times with a general sense, 3 times with spiritual connotation and in the 10 cases remaining, with clear reference to warlike action. Even Allah ordered, 'Kill those who fight you, wherever you find them and expelled them from where they expelled you ..,,,."[2] „ Believers[3] are to you a clear[4] enemy". „ Fight them or convert them to Islam" 'Kill them (Christian, Hebrew) wherever you meet[5]."

To note that there are about 1.3 billion Muslims worldwide. They live in the regionalised Islamic territories as specified in The Cambridge History of Islam: central territories (Arabia, Egypt, Syria, Anatolia, Persia, Central Asia) and remote territories (Europe, Africa, Southeast Asia). Starting from the fact that these people understand Islam as a submission to their God Allah, there are born absolutely legitimate questions about how they can transform their bodies into weapons to exterminate innocent people. Of course, we seek answers to question in their culture and civilization dominated by religion.

[2] Coran-Sura 2; 191; 192.
[3] The reference is made to the Christian faithful, Hebrew, generally non-Islamists.
[4] Coran, Sura 4; 104.
[5] *Ibidem*, Sura 2; 187.

The international social-political perception

The combination of the terrorist attacks and suicide terrorism of the entire Muslim world lead to the identification of this world with terror. In fact, the Islamic world should be dissociated of the terrorist attacks of extremists.

But this is very difficult, especially after the WTC 11 September 2001. The strong bond created by Islam and terrorist have drove the Jihad on the highest level of international terror. Even if in support of this dissociation is to ban the Koran call, "Do not kill yourself"[6] public opinion can not compromising the facts and evidence.

Above of peace and love of God, in the social and international politics we are dealing with distinct features of Muslim life. These are represented very strong with a kind of fanaticism that it often exceeding the one of the Japanese kamikaze (just one example among others possible) by a fear of God that they are taught to love for fear of punishment and a fatality which never proved correspondence with reality.

The effects of these characteristics are materialized in the degrading habits, vacancy, delinquent behavior, negligence to the quality of life and more. A large gap in the lives of Muslim s refers to dignity, sanctity and respect for man. Underlying these privations is the degrading sexuality that we have mentioned in this paper.

,, The Muslim s, individually may show splendid qualities - but the influence of the religion paralyzes the social development of her followers. There is no other more retrograde force in the world[7]."

Therefore, the Islam is expected to grow mainly through the Muslim conversion of the Europe and beyond, as mentioned above. Regarding to this, it raises a number of questions and all converge to formula: "How?"

Of all the questions, one is distancing and namely:

How many individuals who will be born in Muslim families in developed countries, in a not subject Islamic society will embrace Islam instead other religion and more, instead of freedom and an uncensored life by the rules imposed by the Prophet?

Important is that more and more Muslim people get to know a civilized lifestyle. And they prefer it from the love of Allah, the one that has been imposed to them and who do not respond when they need him.

From a sociological point of view, is aimed on one hand in what proportion the Muslim s already Europeanized have adapted to the social rules of non-Muslim occidental society, and on the other hand what will select the future immigrants and newborns in Muslim families: ***the religion or the laicism***?

Conclusions

The Muslim family continues to surprise with the force which it defends its traditional values, no matter how hard it is to do and how much it sacrifice. The conformity in obedient form represents the matrix on which the set of values and rules within Islamic culture has been formed.

It is true that through the eyes of a non-Muslim European, most of the habits and customs which govern Muslim family life seem to be real punishments and is not normal to be judged these issues from a different culture. Such an approach can be considered an effect of the ethnocentrism. But on the other hand, is a fact that Muslim s want to convert Europe and beyond, so it is inevitable the observing, studying and accepting or not accepting the values that shape social behavior.

While they seek to integrate, we, outside the closed circle, seek to know and to understand them, this being a condition which is emerging for possible future coexistence. For the future, those who see these lines unrealistic, inaccurate or even an affront (who knows?) are challenged to openness, honesty and explanations. It is a way to get to know and accept each other.

---

[6] *Ibidem*, Sura 4; 29.

[7] Winston Churchill on Islam and Why He Was Right, http://www.articlesbase.com/politics-articles/winston-churchill-on-islam-and-why-he-was-right-293496.html.

References

- ***_Coranul,_ Ed. Cartier, Bucureşti, 2011.
- Abdel Aziym, Dr. Sherif, *Femeia în Islam*, Ed. Taiba, Bucureşti, 2008.
- Anne Nivat, *Islamiştii-cum ne văd ei pe noi*, Ed. Corint, Bucureşti, 2011.
- Ayaan Hirsi Ali, *Fecioara încătuşată*, Ed. Minerva, Bucureşti, 2008.
- Hisham Matar, *În ţara bărbaţilor*, Ed. Minerva, Bucureşti, 2008.
- Malek Chebel, *Sclavia pe pământul Islamului*, Ed. Artemis, Bucureşti, 2009.
- Mark Sedgwick, *Islamul şi musulmanii*, Ed. Niculescu, Bucureşti, 2010.
- Meududi, *Introducere în Islam*, Ed. Charter, Bucureşti, 1991.
- Parinoush Saniee, *Cel care mă aşteaptă*, Ed. Polirom, Bucureşti, 2012.
- Rajaa al-Sanea, *Fetele din Riad,* Ed. Polirom, Bucureşti, 2010.
- http://www.articlesbase.com/politics-articles/winston-churchill-on-islam-and-why-he-was-right-293496.html.
- http://www.theglobalist.com/AuthorBiography.aspx?AuthorId=947.
- http://vorige.nrc.nl/binnenland/article1872596.ece/Ayaan_Hirsi_Ali_terug_in_Nederland.
- http://ro.wikipedia.org/wiki/Ayaan_Hirsi_Ali.
- http://thefeministwire.com/2012/09/sophia-azed-responds-to-ayaan-hirsi-ali/.

GENDER EQUALITY POLICIES DURING THE POST-COMMUNIST ROMANIAN SOCIETY - TRANSFORMATION OR CONSERVATION OF GENDER PATRIARCHAL REGIME?[1]

ALINA HURUBEAN*

Abstract

The paper aims to analyze family policies, labor market and social protection policies in the light of their correlated effects on the dynamics of gender relations, to identify such new tools for understanding national realities in European countries and to propose appropriate directions for intervention by programs and policies. The current research on public policies considers that the analysis of family policies, of labor market or social security policies, from the perspective of gender (in)equality, offers relevant indicators with regard to the welfare regimes and quality of democracy or to the democratic deficit in the post-communist Romanian society, placed in the actual European context.

This paper attempts to identify the mechanisms through which the state and its public policies reproduce and enhance traditional/conservative cultural models on gender roles and asymmetric social relations between men and women, also they reproduce the restrictive force of classic dichotomies between public-private life or productive-reproductive work. Despite the stated principle of gender equality, public policies maintain hierarchies and gender disparities in Romanian society, as in other European countries. This approach research shows that the complex interaction between cultural models of gender roles in the family/society and public policies is relevant to contextualized analysis of public policies and gender equality policies.

The purpose of this paper is to analyze the influence of cultural patterns (on family gender roles, labour organization etc.) on public policy (family policies, labor market policies, gender equality policies) in order to advance a set of questions: how do family and gender ideology influence the content of public policy and the conservation of gender regime in post-communist Romanian society? How can gender equality increase through public policies and to what extent is gender mainstreaming approach an appropriate solution in this sense?

Keywords: *public-private life report; gender regime; post-communist Romanian society; gender equality policies; cultural gender patterns.*

Introduction

This study falls within the thematic range which focuses upon the analysis of public policies from the perspective of gender equality. *The research objective* is the analysis of the relation of interdependence between the public policies concerning education, labour market, family, social security and cultural models (values, attitudes, convictions, stereotypes) related to family, gender roles, labour organization, correlating professional life with family and personal life, the border between public and private life as they are configured in post-communist Romanian society. By engaging in this research I look for answers to the following questions: *How do cultural models/family and gender ideology influence the contents of public policies? To what extent do public policies related to education, labour market, family, social security, depending on their cultural context, contribute to the (re)production of the gender division of labour and the preservation / change of gender imbalances in the sphere of public and private life?*

In the "cultural context" phrase, the concept of *culture* is used in its broad sense given by social anthropology, where culture is conceived as a "mental soft" referring to the patterns of

[1] **Acknowledgments:** This work was supported by the strategic grant POSDRU/89/1.5/S/62259, Project „Applied social, human and political sciences. Postdostoral training and postdoctoral fellowships in social, human and political sciences" cofinanced by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007 – 2013.

* Postdoctoral researcher, "Alexandru Ioan Cuza" University of Iaşi, Romania (e-mail: hurubean.alina@yahoo.fr).

thinking, feeling and acting typical of a social group, community or nation (Hofstede et al. 2012, 17). The kernel of a culture is given by its values, which are considered to be the "invisible mental soft" of institutions, laws, public policies and social practices. The international researches of the population's values and attitudes (The World Values Survey (WVS) have facilitated the development of comparative studies, which give a clearer picture of the cultural background of public policies and explain why similar laws and practices work differently in different countries (Hofstede et al. 2012, 34). Besides other analysis dimensions of national cultures used in the comparative researches, the representation of masculinity and femininity is considered to be one of the aspects which shed light upon the understanding of cultural differences among countries with regards to the contents and impact of gender equality policies.

Aiming at identifying the social and cultural mechanisms which produce and maintain gender inequalities, i.e. the cultural basis of public policies, the investigation goes beyond the declarations of policy makers or governments with regards to reaching the objective of the equality between men and women in Romania. Endorsing the necessity of correlating the policies which regulate the sphere of public life (especially the policies related to labour market) with the policies focused upon social security / rights which also regulate private life issues (family, maternity, sexuality, domestic labour, care, the correlation and "reconciliation" between the professional and personal family life), I direct this analytic procedure towards the interrogation of the complex relations between the public and the private sphere in relation to gender regime or order[2] in the Romanian society of the present.

The analysis of this complex interconditioning between the public policies and the cultural models with regards to gender roles in family/society, i.e. the values and attitudes related to the issues of equality between women and men and the significance of the border between the public and private sphere is relevant to any contextualized research which focuses on the public policies from the point of view of gender equality. Since the 1970s, feminist studies and the research focused on the dynamics of the social relations between the sexes have shown that the issues of equality between women and men must be approached at the intersection between the public and the private space because the inequalities in the sphere of private life are inevitably projected onto and then firmly grounded in the sphere of professional labour and public life (Bereni et al. 2011, 110). Through this kind of research, which includes the gender component and the feminist perspective and analysis of public policies, the labour of care is taken out of the area of the private life in order to shed light upon the underlying social protection systems and the way in which these are built on the pattern of sexed and unfair division of labour. Domestic work, seen as a hypostasis of the labour of care performed within the family especially by women, becomes a referential field of research with significant economic and political stakes, lying at the very core of today's debates around restructuring the social protection systems and reformation of welfare regimes. Comparative reesearch shows that family is the main supplier of welfare, which means that the issue of correlating productive labour with the activities of care is not solved at the level of the EU countries, and the regimes of European social welfare, except for the Northern countries, give an uncertain answer to the issue of gender inequalities in the sphere of public and private life (Letablier 2001, 19-24).

Therefore, this study tackles the relation between the public and the private sphere correlated with productive-reproductive work, the gendering of the two areas, the hierarchy-oriented approach and unfair valorization, as well as the consequences of this dichotomy at the level of the public policies related to the labour market and correlated policies in the context of post-communist Romanian society.

[2] *Gender regime* or order implies the dynamics of the socially and historically contextualized social relations between genders, i.e. the means of interaction between men and women within everyday institutions and practices, related to education, division of labour, public and private life, structure of power and the mental structures of these practices and institutions (Magyari-Vincze 2002, 146).

1. Gendered Frontier of the Public-Private Relation – Analytical and Political Stakes

The analysis of the issues related to labour and labour market from the point of view of the social relations between genders puts the whole problem in the area of the multiple interdependent connections between the public and private sphere because the social importance of labour and its economic stakes must be taken into account both in relation with the paid/productive labour and with domestic labour, and the gendered labour division in the public and private domains. Identifying gender inequalities, which are obvious in the public sphere (such as the weak participation and representation of women in political bodies; the inequalities between women and men on the paid labour market from the point of view of payment, work place quality, professional trajectories, etc.), as well as taking intervention and correction measures with a view to striking a balance will have no social impact and sustainable effects if they ignore the structural and invisible inequalities in the private sphere (mainly the imbalance generated by the gendered labour division, by defining and assuming domestic labour and the management of social time) (Silvera, 2012).

Tackling the imbalance between women and men in relation with labour, in all its forms (paid and unpaid; productive and reproductive or domestic), I raise some thorny aspects entailed by the relation between the sphere of public life and the sphere of private life, which used to be considered areas of demarcation between the two genders. The rigid separation of the two spheres, done in the name of liberal democracy and of the right to privacy, excluded an important set of social life issues from the area of research and public policy intervention. Those issues are related to the body, sexuality, violence, reproductive labour, maternity, family (Miroiu 2004, 69-71). At the same time, the analysis of the relation between the public and the private sphere in terms of opposition generated narrow and exclusivistic meanings of politics and citizenship, defined in terms of values and masculine activities and resulting in the exclusion of women from history (Waylen 2000, 216-221).

The modern person's need for *individual freedom* lies at the origin of this distinction, its effect being the statement of one's right to private life and the creation of a space where other persons or state institutions will not interfere (a space free from such interventions). Thus, the classical deep seated meanings of the public and private life concepts are outlined: *the sphere of private life* refers us to "the closed, personalized zone, which is invisible to the public eye, the place where the intervention of other people in one's own life stops, the limit to the information others have on our life" (Miroiu 2004, 70), as well as everything that has to do with "the private property, market and civil society"; *the sphere of public life* is identified with the action area of the State through public policies and political activity in general, (Gal and Kligman 2003, 57), with the public interest and welfare, with what is visible and accessible to others (Miroiu 2004, 70).

This distinction, considered "*the most solid and enduring of the liberal political and philosophical proposals*" (Iliescu 1998, 154), is related to other distinctions and must be judged in association with these: state-civil society, political-personal sphere, social-individual sphere, work place-home, productive/paid labour-domestic/unpaid labour, a.s.f. These correlations allow the understanding of different and nuanced meanings acquired by the public and private life concepts, in the contents of some theoretical constructs, within some culturally and historically contextualized everyday ideologies and practices.

Although it has an older history, the distinction between public and private life mainly belongs to the space of liberal policies and theories, which launched the *"separate spheres" doctrine,* which distinguishes between public and private, state-civil society, production-family. Through this perspective, the idea of a private life area, which must be seen by the authorities as holy and inviolable (Iliescu, 1998) becomes defining. The classical liberals gave a major importance to this distinction, associating what is private with freedom, in the sense of *negative freedom*. The attempt of distinguishing the two spheres, of establishing the border between public and private life is problematic and may generate controversies. Serious objections can be made against the idea that a really private sphere should exist, and within it the individiual's acts and attitudes should not

influence society, which renders the demarcations between facts of exclusively private significance and events of public sequence rather difficult (Iliescu 1998, 159).

Thus, both the intervention of the state as a warranter of individual rights and the role of the state as an important actor in formulating the policies of social protection are put forward, which means the stakes of the analysis of the relation between the public and the private sphere and of reconsidering the border between the two spheres are social (the social relations between sexes from the perspective of justice and social citizenship), economic (economic and social valorization of labour in the private sphere; the development of domestic services and emplois domestiques) and political (the issue of the intervention of the State in managing social welfare).

Apart from the positions supporting the necessity of a clear and often rigid demarcation between the two spheres, there are theoretical perspectives which argue the interdependence between the two areas and the flexibility of the border separating them (Phillips 2000, 397). The women's emancipation movement, as well as gender studies, have significantly contributed to the effacement of this border and the reconsoderation of their relation.

The feminist movement of the 1960s belongs in this mode of interrogating and critiquing the definitive nature of a border between the public and the private sphere. It saw the contentious character of the drastic separation (rigid distinction) between the public and the private sphere, (instituted by the tradition of European modernity, as well as the older Judeo-Christian tradition) on account of the fact that *the private sphere* is very frequently a space of abuses and injustice, of family violence, while the state refrains from intervening in this area, which may mean a tolerant approach to these abuses and the frailty of securing individual freedom. Carol Hanisch's message "*the personal is political"* in the essay "The Personal Is Political" (1971), which remains the epitome of the second wave of feminist movement, marked a major contribution to enriching political theory through reconsidering the concepts of public and private life and the role of the State and public policies, which become more sensitive to the domestic/private issues (Ballmer-Cao et al. 2000, 40). In this sense, a concept of *privacy* in relation with the individual and not with the family must be created, in the sense that "freedom must be extended in the private sphere as personal, individual, and not collective (family) freedom." The argument is that "personal problems are not merely personal, but also part of the social/public phenomena just because human rights do not lose their validity on the doorstep to one's home" (Miroiu 2004, 71).

Both in a reflexive context and at the level of concrete action, the dualism/dichotomy between the public and the private sphere, masculine/feminine, respectively, are frequently associated, and this association refers us to the order of gender/gender relations characteristic of a given society (Gal and Kligman, 2003). There is a whole theoretical and practical tradition of this association, whose origins are in ancient history and which has not disappeared; this tradition considers the dualism between the public and the private sphere a factor which generates separate spaces for women and men, placing women in the "domestic" private sphere and men in the space of collective business (Dragomir and Miroiu 2002, 301). Thus, it may be argued that the *distinction between the public and the private sphere has been gendered,* which means it has been culturally encoded from the point of view of gender differences, which led to the architecture of a social space with gender peculiarities for women and for men, which often becomes a space of gender inequalities (Miroiu 2004, 71).

The manner of analysing and representing the relation between the public and the private sphere, i.e. the opposition/separation, engendering and ranking of the two spheres, the habit of identifying femininity and the roles taken by women with the private space (as if this were a matter of fact), as well as the reflex of unequally valorizing tasks, which results in taking the family problems, care labour, gender inequalities in the private sphere out of the public sphere are considered problematic by the feminist approaches (Okin 2000, 345-347).

Thus, putting forward the relation between the public and the private sphere (le rapport public-privé) and the flexibility of the border between the two spheres does not mean that this border has been effaced and the private life has been turned into a political issue or that the idea of some

high and abusive interferences (which yielded bad consequences upon the dictatorial regimes by adopting pro-natalist policies in communist Romania or forced sterilization policies in China).

Even if there are numerous differences and divergences among the feminist theorists concerning the relation between the public and the private sphere, reconsidering this relation has generated a significant shift of perspective at the level of social and political theory, with visible effects at the level of concrete life. The following gains/new perspectives upon the way of getting to grips with the world are relevant to this argument: a) looking at the two spheres as interdependent and understanding that the inequalities in the private sphere trigger other inequalities in the professional sphere; being aware that the private sphere is an important place of fabricating/molding gender relations (Bereni et al. 2011, 113); the connections between these two spheres (professional and familial/domestic), both at the level of analysis and at the level of intervention through public policies increase the chances of achieving the translation from *de jure* (judicial equality) to *de facto* (actual equality); b) the problems in the private sphere (travail domestique, de sexualité, de fécondité) are not merely personal, but political problems of general interest, which implies a reconsideration of the concept of political issues (Phillips 2000, 397); c) questioning the notions and implications of domestic labour, the gendered division of labour and unequal valorizing of labour: productive versus reproductive labour; d) the issues of correlating the professional time, the familial time and personal time (Silvera 2010, 63-64); e) the rigid distinction between public and private grounds any patriarchal system of reference (Miroiu, 2004); f) the more involved in the private sphere and the more attached to domestic roles women are, the more acute their subordination and oppression will be (Bereni et al. 2011, 113); g) putting forward the supposedly universal concept of *citizenship* and the issues of keeping women out of the area of civil, political and social area for a considerably long time interval; h) the identification and analysis of gender inequalities from the perspective of both components (public-private); gender problems relate to the way in which both spheres are organized (Miroiu 2004, 72); i) extending the concept of democracy, in the sense that enforcing democracy in the public sphere is not possible in the absence of enforcing its principles in the private sphere to begin with; j) reconsidering the "*gender contract*" and questioning the condition of woman in today's society from the perspective of the values of freedom, equality and social justice (Silvera 2010, 63-64); k) the relevance of the analysis of cultural, social and institutional mechanisms through which the restrictive force of the classical dichotomy is reproduced and reinforced by the public policies, and which, despite the declared principle of gender equality, are likely maintain the gender hierarchies and disparities.

Another impact of these perspective shifts upon the relation beween the public and the private sphere, generated by the feminist movement and gender research, consists in a series of regulations adopted in several countries worldwide in the last decades; these regulations have guaranteed and reinforced the civil and social rights within the sphere of private life: family rights (marriage, divorce, children custody) ; the possibility of sexuality and reproduction control; the support of the state in bringing up children ; gender equality on the labour market; access of women to jobs stereotypically considered to be the panache of manhood; equal payment for labour of equal worth; legal provisions preventing rape, pornography, prostitution, sexual harassment and domestic violence; policies of preventing sexism in education, hiring, mass-media (Miroiu 2004, 72).

Considering the relation between the public and the private sphere as a social and cultural construct and analysing the process of the (re)configuration of the two spheres and the border between them contextually, and the way in which productive labour and care are related to them, re-considering care as a womanly job, which is invisible and mainly done in the family/domestic sphere, is a political, social and economic stake of major importance for our modern times.

2. Gender and Unequal Division of Labour – a Structural Imbalance

Thematizing the dichotomy between the public and the private sphere puts forward the gender division of labour, the separation and hierarchy between productive labour, which is mainly

masculine, and reproductive or domestic labour, considered to be typically feminine. Issues related to the aspects of the gender division of labour, care and domestic labour, the way in which they are transferred and reproduced in the sphere of public activities (resulting in the weakening of women's position on the labour market (inequality of access, maintenance and progress in the labour market), directing them towards womanly fields of activity, the segregation of labour market both vertically and horizontally, thus perpetuating and reinforcing the structural inequalities in the social relations between women and men are crucial to this analysis.

Domestic or reproductive *labour* (including housework, house maintenance, cooking, caring for and bringing up children, caring for dependent persons, administrative tasks, a.s.f.) is considered to be the labour behind productive labour (which is paid and visible); it is performed, in most European countries, as unpaid labour and it is almost exclusively the responsibility of women as "double labour day", even when they are active on the labour market. Even if theorists are divided as far as the economic stakes and identified solutions to domestic labour are concerned, they share views with regards to its specific contents, domestic labour comprising any type of labour, performed for the benefit of others and free of charge, within the couple and family, in the name of nature, love or maternal duty (Bereni et al. 2011, 114).

Revealing the mechanisms that generate gender inequalities, the research in the field of gender studies has highlighted several aspects related to domestic labour and mainly the fact that it does not enjoy the same social valorization as paid labour, it generates and maintains relations of power and structural gender inequalities within the couple and family, preserving the woman's economic dependence, isolating her in the private space and being the cause of rendering her inferior and oppressed. Labour performance and the income associated with labour are, in the contemporary society, criteria measuring social success and personal success, while *domestic labour*, although being the women's ancestral contribution to economic activity, *remains in the invisible, unpaid and socially low valorized area*. Ignoring the wealth generated by domestic labour and its contribution to the economic welfare, as well as the fact that this type of labour is not included in the classical statistics and in the enforcement of social rights, have negative impacts at several levels: a) it generates and maintains situations of *economic dependence and impoverishment* for several categories of women, mainly housewives, women living in rural areas, uneducated women, women without any qualifications and diplomas, women doing part-time jobs, women suspending their career, single-parent families led by women, etc. b) it underestimates women's economic contribution to the social production/welfare, although women ensure, even in the 21st century, two thirds of the whole of domestic tasks; c) it generates distortions in the economic analysis and in the projection of public policies by ignoring the correlation between domestic labour and professional activity; d) it shows the limits of GDP calculus and of the procedures which determine other indices of measuring social welfare and economic growth (Méda, 2008, 155) .

Research focused on reconsidering and revising the border between the public and the private sphere shows that running public life according to the principles of democracy cannot be achieved without enforcing those principles in the private sphere in the first place, and approaching the issue of the political participation of women and promoting women's employment without paying heed to the constraints of private life is pointless and it also implies a very narrow and restrictive outlook with regards to democracy (Phillips 2000, 405-416). Women's low participation in the political life, as well as the frequent interruptions of their careers can be largely explained by the private constraints which exert a pressure upon their public engagement (e.g. the time budget of women and especially those who are mothers is different from men's, the subordinated roles in the domestic sphere which generate and maintain the women's lack of self-confidence, as well as the low-esteem representations of women).

Behind the issues of correlating productive labour with care, professional life with family/personal life lies, more or less overtly, the stake of equality between women and men in the public and private space (Walby 2000, 51). Failure in striking a balance between professional labour

and domestic labour and family life has a negative impact upon performance, efficiency and the satisfaction derived from one's work, and at the same time it is considered to be a *factor of indirect discrimination against women on the labour market* for at least three reasons: a) women's access and maintenance on the labour market, as well as quality work places (which entail constant professional investments) are limited in the absence of caring services for minor children and for other dependent persons in the family (who usually become women's responsibility); b) the difficulty of striking a balance between the two labour spheres reduces women's participation in all the other components of social, cultural, political and economic life; c) it leads to maintaining the gender stereotypes and asymmetries in terms of resource and power distribution, of playing gender roles in the public and private space (they maintain the unequal division of labour in the family; lower positions of dependence for women (Dragolea, 2007).

The balance ("reconciliation") *between professional and personal life*, between productive labour and domestic labour respectively, is defined as "the situation characterized by satisfaction, minimum role conflict and optimum capability of the employee both in the tasks and roles at the work place and those in the personal/family life," aspects which can be measured with the help of subjective/qualitative and quantitative indices of work satisfaction (www.cpe.ro, 2007). How can this balance be struck? What are the factors responsible and the examples of good practice recorded in the European space so far? – these are only a few questions thrown by the researchers on this topic in the last few years[3].

The policies of equality among women and men (from equality of access to the labour market, from payment equality to the policies of correlating professional life with personal and family life) have been and still are essential to the social and economic policies of the European Union (Lisbon Agenda and post-Lisbon Agenda). In their context, the issues of correlating the social time – as family, personal, professional time – are of major concern because they have implications both at an *ethical* and *social* level (the purpose being the founding of a fairer society, centered upon the principle of equality between women and men), as well as at an *economic* and *demographic* level (increasing women's employment level on the labour market; demographic increase; "reconciling" family and professional life) (Silvera 2010, 63). Equality between women and men on the labour market "restera uniquement formelle tant que la question des soins informels aux personnes dépendantes ne sera pas résolue" (Jenson, 2001).

The strategic development directions at a European level, also supported by the development of research in this complex field, shows that equality on the labour market and in relation with labour does not concern only women/mothers, nor is it a problem of the individual or of the family. The role of the state, of the market and of employers, as well as the manner and the extent to which these key factors get involved are elements of maximum importance in devising proper and efficient gender equality policies. In this context, regulations generically called *reconciling policies* between professional labour and family or personal life have been developed.

Initially centered upon the rights which result from assuming parental condition (maternity/paternity leave; parental leave), reconciling policies at the present moment consist in the totality of the measures designed to support the employees with a view to harmonizing the social roles they perform in the space of public and private life, i.e. the balance between professional and family life. Therefore, apart from the rights provided in relation with parental leave, the "reconciling"[4] policies include childcare services (at least for age groups between 0-3 years from 3

[3] For a discussion of this aspect, please see Moller Okin S., 2008; also: *Revue Française de Socio-Économie,* 2008/2 - n° 2; *Travail, genre et sociétés,* 2001/2 - N° 6; 2010/2 - n° 24; 2011/2 - n° 26; *Cahiers du Genre,* 2009/1 - n° 46.

[4] The terms of "reconciliation" – used in relation to the policies of the EU which aim at striking a balance between the professional sphere and the family and personal sphere – are considered, within the feminist research of the present, as improper because they preserve the idea of "natural" division and segregation between women and men. Alternatively, the concepts of *balance* or *correlation* among all the components of our labour, time and activity are preferred (professional time/family time/personal time; productive work/reproductive work) (Silvera 2010, 63).

years - compulsory school age), after school programs, family friendly programs for organizations, flexible working arrangements (part-time, flexible hours, career breaks, although these measures are considered "false" conciliation measures, viewed in terms of the risks posed by long-term) and financial grants, subsidies, tax rebates, social care (Bereni et al. 2011, 122-124). All these regulations and intervention methods can be found in a set of correlated public policies – *policies of education, of labour market, family policies and social policies* – which, in connection with one another, could offer sustainable solutions to the issues of the correlation/balance between professional life (labour market; the sphere of public life) and personal/family life (the sphere of private life) (Letablier, 2001).

At present, there are no unitary political practices concerning the equality between women and men on the labour market and in relation to labour at the level of the EU member countries. In order to meet the objective of gender equality, some countries adopt mainly anti-discriminating policies (which are necessary, but not suffiecient in order to ensure a sound equality), while other countries lay stress upon correlated policies, which support the labour market (« reconciliation » policies, family and social policies, which are characteristic of the welfare regime). In other words, the policies regarding the labour market must be projected and analysed in correlation with the social policies (ensuring, warranting social rights) and with family policies (the system of care for children and dependent persons; supporting birth policies), which should integrate the dimension of gender equality, because a real increase of the rate of employment for women and men on the labour market – considered to be the essential condition for economic progress at the EU level – cannot be achieved without ensuring some institutional and financial mechanisms of correlating professional life with family/personal life, adapted and contextualized according to the profile of each country (Letablier, 2001). The insufficient correlation of these policies, as well as the scarcity of services and support structures in most of the European countries do not only prevent the achievement of the labour market objectives, settled at the level of the EU, but they also maintain and reinforce the inequalities between women and men, as well as those among various categories of women.

3. Cultural Models Underlying the Relation between Labour and Family in Post-communist Romania

In today's Romanian society, as well as in other European countries, there are many inequalities/disparities beween women and men on the labour market, as well as in the public and private life. Despite the considerable changes in women's status in society in comparison with previous decades, *women and men do not have equal chances* in terms of their educational and professional trajectory or family life. The gender asymmetries and inequalities are social constructs, being generated and maintained by conservative social and cultural mentalities and mechanisms, largely perpetuated in the communist period, which maintain the traditional roles and gender stereotypes, thus restricting women's choices, opportunities, development and participation in the social and professional life.

The analysis of family policies, labour market and social protection policies from the perspective of the cultural models endorsing them, and the conjugated effects they generate upon the dynamics of gender relations offer new tools for getting to grips with the national realities in the European countries, and they may indicate adequate intervention methods through public programmes and policies. Reflecting the social gender relations existing in a society at a given moment in history, as well as the prevailing cultural models, public policies contribute, in their turn, to building and regulating gender relations in the public and private sphere, while their allegedly neutral nature only disguise and more often than not deepen existing gender inequalities in the sphere of the two social sectors.

This *complex interconditioning between cultural models related to gender roles in family/society and public policies* is considered relevant for a contextualized analysis focused upon public policies (Lazăr 2010, 113-116). Identifying the mechanisms by which the state, through the

public policies it promotes, reproduces and deepens the traditional cultural models with regards to the gender roles and social relations between the sexes, as well as the restrictive force of the classical dichotomy between the public and the private sphere, productive and reproductive work is an important objective. Despite the declared principle of gender equality, public policies may maintain gender-based hierarchies and disparities. However, the figures and statistics which are usually invoked and which may indicate a more or less acceptable reality concerning the equality between women and men on the labour market cannot explain the social and cultural mechanisms underlying the social relations of gender in relation to labour, which maintain the structural gender inequalities.

Therefore, in order to reach "the heart of the matter" and account for the differences among the European countries, as awell as perceive the difficulty of conceiving and enforcing a shared plan aimed at solving the issues at EU level, we need to look into the values and attitudes of the population in relation to gender roles, the problem of equality between women and men and the relation between the public and private sphere. The international research of the values and attitudes of the population (the World Values Survey (WVS), the European Social Survey (ESS) have facilitated the development of the studies focused on the correlations between the cultural models/national cultures, public policies, welfare regimes[5].

In today's Romanian society women face the difficulty of striking a balance between the two spheres of labour (professional/paid labour and domestic labour), resulting in social constraints and pressures, which means difficult and sometimes radical life options of the "*either…or*" kind (either professional life/career or family life), the success in either of the two fields being achieved to the detriment of the other. Because of the cultural and socializing models, striking this balance is more imperative for women than for men and it consequently puts more strain on women than it does on men because it is precarious, threatened by the role conflict and the eternally awkward negotiation on the distribution of reproductive labour in the private sphere. This state of affairs actually typifies countries in which the major social actors (the state, the market, the business company) fail to involve in the social welfare system from the point of view of gender equality in relation to labour, labour market, family.

In Romania, thematizing the issues related to domestic labour occurs in academic research and a few European financed projects, but it is absent from the public debates and the analysis of public policies. Even if in the official documents the principle of "reconciliation" or harmonization between profession and private life/family is often referenced, there are no specific regulations concerning this issue, which might also indicate the means by which this balance can be struck. This means that it is there merely as an abstract statement with no concrete support.

Comparative research shows that in most of the European countries, as well as in Romania, a cultural pattern has been preserved, and according to that pattern family is regarded as the main provider of welfare, which means that the issues of correlating productive labour with activities of care have not been solved. Explicit gender equality principles (antidiscrimination laws which ensure legal access to education, employment, political participation, as well as assertive measures designed to favour women in order to give them the opportunity of redressing past injustice) fail to contribute to an increase of the actual level of gender equality in a society/country, unless they are endorsed by the set of public policies of implicit equality (those policies which, although they are not focused on the equality between women and men, *implicitly* generate significant effects upon social relations among genders by maintaining or diminishing structural gender inequalities).

---

[5] Two seminal research studies are worth mentioning: R. Inglehart, 1997, *Modernization and Postmodernization: Cultural, Economic and Political Change in 43 Societies,* Princepton University Press; G. Hofstede, G.J. Hotstede and M. Minkov, 2012, *Culturi şi organizaţii. Softul mental. Cooperarea interculturală şi importanţa ei pentru supravieţuire* (Cultures and Organizations. Software of the Mind. Intercultural Cooperation and Its Importance for Survival), Humanitas, Bucharest.

This category includes labour market policies, family policies, social protection and education policies, which from the point of view of the conjugated effects they produce upon the dynamics of gender relations, implicitly increase or reduce gender inequalities. If there is no correlation between the two sets of policies from the point of view of gender equality, then the latter will be merely a formal (legal) equality and not a real (concrete, substantial) one, and the problem of reconciling one's profession and private life remains unsolved.

The social attitudes to and representations of domestic labour gravitate around a dominant tendency: care is not considered to be work, it is confined to the private sphere behind closed doors, and it is thus seen as women's "natural duty", something which occurs naturally and gets sorted out only through individual or family arrangements. The culture of partnership, of negotiating and sharing tasks and roles, of equal valorizations of the differences between the sexes, of accepting an open competition based on equality of chances is very litlle developed in the Romanian society, both at the level of couple and family life, and in the sphere of public life. Inequalities in the sphere of private life are plentiful, but they are not addressed publicly and nor are they perceived as social issues of public interest. The public-private separation, considered a "natural given", is very clear cut, like the gendering of the two spheres, correlated with the "inferiorization" of the private sphere and the invisibility of domestic labour. The significance of these correlations owes a lot to life experience during the communist regime.

The relation between the public and the private sphere was correlated in the Romanian society during the communist regime, when the private sphere and family haven were particularly valorized, being considered a "refuge" protecting the individuals from the hardships of political power, which gave them some room to enjoy freedom as well as a necessary support network (Heinen 1996, 249). Therefore, the significance of the relation between the public and private space was far from the formula "le personnel est politique" of the feminist movement in the 1970s. The way in which the private sphere was valorized in communism explains, to a large extent, the attitude of rejecting feminism and its slogan in the post-communist period, an attitude which has its origins in the fear of blurring the borders between the two spheres, which might deny the individual's access to an important refuge area (Heinen 1996, 259).

Social rights of a universal kind were an important safety net, but they were accompanied by the individual's submission towards the omnipotent paternalist and intrusive State (Heinen 2009, 106). Ensuring *welfare socialist* mechanisms and reinforcing social citizenship was achieved at the price of breaching the civil and political rights and freedoms (Dorottya and Dorota 2009, 77).

The emancipation of women through labour did not entail an equivalent gain in the sense of an increased autonomy for them, an aspect which should raise the issue of today's strategies and national and European policies, which insist unilaterally upon a higher rate of employment for women on the labour market, without correlating it with family and social policies.

Previous research on this topic emphasizes the coexistence of several cultural (normative) models which regulate (prescribe, pre-establish) the social relations between men and women with regards to labour and the labour market, family life and gender roles.

The criteria used/dimensions analyzed in the studies focused on the survey of cultural models and gender regimes, which regulate the social relations between the sexes are: women's investments in their profession and/or children, family; their interest in professional formation; continuity or discontinuity on the labour market (Magyari-Vincze 2004, 29-48); the flexibility/non-flexibility of the border between public and private sphere, as well as the roles performed in these activity areas (analysis dimensions aim to identify whether the two spheres and associated roles are seen as interdependent or separated and separately/unequally valorized; public/private correlation versus segregation; productive/reproductive labour) (Sainsbury 2000, 233); family model and gender roles or "family and gender ideology" (in this respect, there is the traditional model, based on role segregation; the family in which the man is the head of the family and the main breadwinner, while the woman's responsibilities are entirely focused on housework and children upbringing; the modern

family model, which is mainly egalitarian, the family with two income sources and "the double career family"; celibacy; single parent family, etc.) (Badinter 2010, 31-37); feminine ideology (the practice of autonomy and the assertion of the subject-woman; autonomy versus submission/dependence) and masculine ideology (career, success versus family/personal life) (Lipovetsky 2000, 171-176).

Correlating the existing research results with direct (exterior and participative) observations of several categories of women, I applied and developed the pattern proposed by Elisabeth Badinter in her contentious book published in 2010 *Le conflit: la femme et la mère*, thus configuring a few models (ideally types) of correlating between profession and family life, professional labour and caring labour, which outline a certain horizon for women in the Romanian society, at the crossroads between personal options and social constraints. Thus:

a) **the traditional cultural model**: may include women with three or more than three children, who interrupt their labour on the labour market for a long interval of time or even irreversibly in order to commit themselves to the full-time job of being mothers. The model is characterized by: clear segregation of family roles ("male breadwinner / female care"); public-private separation and opposition; women are economically dependent upon their partners; this is a patriarchal model based on relations of power and "the complementarity of roles"; it is a model which may be identified both in the rural and in the urban environment, as well as in the couples with a high level of education;

b) **the neo-traditional cultural model** (or the modernization of the previous model): may include mothers with two children, active on the labour market, with low income or more often than not part-time jobs, or working without a work contract. This model includes women who pay more attention to family life than to their profession. It also includes the family with two income sources, but it fails to bring essential alterations to the previous model with regards to women's autonomy and the division of domestic labour. Nevertheless, this model is not always identified with the patriarchal model of couple relations, since there are also partnership relations between the members of the couple; this category might also include women who, although childless, "choose" to refrain from working on the labour market in order to look after their spouses/partners or to accompany their partners as "decorative objects";

c) **the modern cultural model** : like the previous model, this tends to « reconcile » maternity, family, personal and professional life ; the model includes couples/families with two income sources and double career couples/families, in which the partners invest in their professional formation and development and both perform domestic labour (« deux pourvoyeurs de revenus/deux pourvoyeur de soins » (Méda 2008, 119); women are interested in the dynamics of labour market and the opportunites it offers, they institute a partnership with regards to domestic roles and/or they outsource them (from the larger family : grandparents and/or access to paid services) ;

d) **the postmodern cultural model** : includes childless women ; some of these define themselves as independent ; their ideals in life do not match marriage or family patterns ; celibacy is an assumed life model, but there is also the « unintended » celibacy, perceived as failure or as resignation ;

e) **the model of single parent families led by women** ("femmes au singulier ou la parentalité solitaire", Gaulejac and Aubert 1990): is characterized by the diversity and heterogeneity of its social and professional types and categories ; their marginality or marginalization is not the same and it is not perceived as such by all the types of single parent families (Gaulejac and Aubert 1990, 47); there are relatively few points they share : the fact that they involve women who bring up their child/children on their own or they involve intended single parenthood (the celibate women) or unintended single parenthood (separation, divorce, the partner's death) differences are numerous : the single parenthood which is coped by social services and not by assisted categories ; transitory single parenhood and lifelong single parenthood, etc. The situation of single parenthood depends very much on the cultural and social capital of the single mother/parent : cases vary from adolescent mothers

(who are « deviant » or not trained in contraceptive methods and sex life) to the category of « mothers in distress » (who lack the skill of planning their life/have no life project, who see no prospect in surviving/developing outside of the married couple, and who had no alternative models in this respect) and the voluntary celibate motherhood (characterized by social innovation ; high school and professional capital ; economic independence; age above average maternity age; high self esteem, etc.) (Gaulejac and Aubert 1990, 47-51).

Applying this typology to the Romanian social reality, we notice that the group of women is very heterogenous in relation to the way in which they combine labour with family life (the men's group is more homogenous). Heterogeneity depends upon living environment (rural-urban), education level and degree, professional formation (higher education, further education, no education or incomplete education), regions, age, ethnic belonging. Despite the absence of statistic data which should indicate with accuracy the proportion of these models characterizing the feminine population in Romanian society, observing the behaviours and « options » around us, we may say that, in spite of the heterogeneity of individual options, the traditional and neo-traditional models prevail for a diversity of social and professional categories, and especially for the age group (35-50), which shares a certain socialization pattern, more exactly the differentiated/stereotypical gender socialization, characterized by dichotomy and asymmetry, which induces an imbalance of power in gender relations, generates multiple social disparities, prescribes specific trajectories for women and for men, thus considerably reducing the equality of development chances for the two groups.

There are few educational messages encouraging girls/women to become independent by investing in their school and professional formation in the first place. Even if girls outnumber boys at all levels of education (with certain variations of profile) and their school results are often better than the boys', more often than not they have to cope with the social pressures of defining their identity by getting married and having children. These social pressures are supplemented by economic constraints generated by the labour market in Romania (low salaries ; different salary for women and for men) and the absence of child care services, which make mothers « opt » for the « smaller evil. »

The postmodern model of the independent woman is not particularly encouraged, especially in certain social environments and country regions. The socializing factors send contradictory messages, family ideology and pleas for maternity (social pressures for being a « good mother » are numerous) co-exist with the ideology of « attractive womanhood » and « successful manhood ». Women's identity in Romania is closely connected with marriage and maternity, considered to be key factors in a woman 's life. The state also endorses this through its public policies (two year parental leave) and through the lack of care support, care remaining the families'/women's responsibility. The labour market failing to be particularly attarctive for women (in terms of salary and promotion), success through marriage is considered to be a « sound » option, just like the « option » of being a housewife and looking after one's own children.

Conclusion

Promoting gender equality in the post-communist Romanian society faces a paradox: many of the policies and programmes run in the name of gender equality (equality of chances; equality with the masculine standard) actually continue and reinforce the gender inequalities typical of the traditional gender order. That is an apparent paradox, which becomes explicable (albeit not acceptable) if we analyse in its depth the invisible „mental soft" (concepts, values, attitudes, behaviour characteristic to Romanian society and culture), which underpins the enforced laws and regulations and the created institutions and organizations.

In the mainly patriarchal/masculine cultures, the idea of gender equality itself is perverted and becomes equality with the masculine standard. The gender inequalities and imbalances are continued in a more subtle and paradoxical form, even in the guise and through the ideal of gender equality, figured out at the level of common sense within certain public programmes and policies (Magyari-Vincze 2004, 29-30). Running governmental programmes, public policies and European financed

projects aimed at promoting gender equality does not mean that these will also yield sustainable effects in the field of concrete life. These only reproduce the cultural patterns and gender stereotypes at the level of the collective mindset.

Contrary to the almighty and oppressive role (of total control on public and private life) exerted by the communist state, the post-communist state, relying on a neoliberal ideology, has dramatically reduced its economic and social role, and especially its role of redistributing and achieving social justice, which has led to an alarming decrease in the number and quantity of existing support services (nurseries, kindergartens, public care services for persons in need, hospitals), which inflated the amount of labour "to be carried out" by women in the private sphere, the impairment of their freedom of movement and of their chances to combine professional labour with domestic/family tasks. The social protection system at present, which depends on the level of income, is centered upon the most needy categories. In contrast to family-centered ideology, social and family policies are not oriented towards family development and demographic growth, but merely upon ensuring a minimum level of survival. Unlike in the previous period, the gains in the field of civil and political liberties have been achieved at the cost of sacrificing social rights and alarming quotas of inequality and social polarization, thus affecting the social citizenship component.

The equal opportunities principle is double-edged in the sense that the meritocratic side it contains (according to which women are not supposed to be promoted through assertive action), which is part and parcel of the equality of opportunities in its most current meaning in our cultural space as well, allows past injustice and gender inequalities to continue in the present despite the legal frame which provides gender equality (Dragomir and Miroiu 2002, 25).

Ensuring the equality of chances in gender social relations means ensuring equality as a premise, equality with regards to the conditions of one's start in the social competition. In this case, gender equality (as chance equality), related to the liberal principle of meritocracy, ignores *ab initio* the existence of gender equalities in the area of private life and the fact that women, who have the responsibility of work in the sphere of private life, have a reduced access to competition and resources. "*Frozen in their condition of housewives and active mothers, women cannot be equal competitors on the labour market, they have a real deterrent in the competition. Meritocracy invoked as a liberal principle applies to those who are free from feeding and care activities*" (Miroiu 2004, 114).

Experiences which are typical of women (such as pregnancy, abortion, breast feeding, maternity) as well as the experiences which are generally conceived as the responsibilities of women (such as the care for children, the elderly, the sickly persons; single parenthood, sexual harassment, rape, prostitution, sexual exploitation; the experience of subordination and discrimination, etc.) outline a set of *specific interests* despite major differences among women according to age, education, ethnicity, cultural and geographic space, etc. (Băluţă 2007b, 46-47). In order for these specific interests to get on the public/political agenda and to be sorted out through the public policies focused on gender equality, women need a group awareness and forms of political activism based on the existence of interests which are different from those of men (Mihai 2011, 9).

Reconfiguring the public space in post-communist Romania has been achieved in mainly masculine terms, both the representation of women in decision-making structures and their public visibility being reduced. In this context, the formulation of specific interests has been and still is rather weak, and the progress made is not consolidated, the risk of regress being a permanent threat. The constraints of everyday life, the cultural models promoting family and maternity-oriented measures as key factors of structuring feminine identity, the absence of civic practice, as well as the "preventive antifeminism" maintain an attitude of resignment from involving in the public and political life on the part of women. Nevertheless, the topics perceived to have an urgent character when related to basic needs (supporting children and women in need) manage to engage women's energies, unlike the strategic and political interests. The question is whether the formulation of the social issues of the private sphere and their constant and coherent presence on the public agenda might generate a more active involvement of women in the civil and political life, thus contributing

to the concrete expression of women's social citizenship (Heinen 1996, 258). In our society, there is an almost paradoxical co-existence of the discourse favouring maternity and the precarious rights and services supporting it (for instance, the child's allowance, received since birth until the child's coming of age at 18, amounts to around 10 Euro). Both in communism and in post-communism, the social protection and family policy system, which is under-financed, stuck in inner contradictions and incoherent approaches, contributes to the maintenance and even the consolidation of gendered labour division: horizontal and vertical segregation, salary discrepancies, gender inequalities in relation with domestic labour and professional paid labour.

References

- BALLMER –CAO, T., H., Mottier, V., Sgier, L., (eds.). 2000. *Genre et politique. Débats et perspectives*, Éditions Gallimard, Paris.
- BADINTER, Elisabeth. 2010. *Le conflit. La femme et la mère*, Éditions Flammarion, Paris.
- BĂLUŢĂ, Oana, IANCU, Alice, DRAGOLEA, Alina (eds.). 2007. *Parteneri egali, competitori egali*, Editura Maiko, Bucureşti.
- BĂLUŢĂ, Oana, IANCU, Alice, DRAGOLEA, Alina (eds.). 2007b. *Gen şi interese politice. Teorii şi practici*, Editura Polirom, Bucureşti.
- BERENI, L., Chauvin, S., Jaunait, A., and A. Revillard. 2011. *Introduction aux gender studies. Manuel des etudes sur le genre*, Éditions De Boeck Université, Bruxelles.
- Centrul Parteneriat pentru Egalitate. 2007. *Cum dezvoltăm şi implementăm politici şi programe de work–life balance în companii*, Bucureşti, www.cpe.ro, Centre of Partnership for Equality. 2007. *How Do We Develop and Implement Policies and Programmes of Work-Life Balance in Companies*, Bucharest, www.cpe.ro.
- DEL RE, A., HEINEN, J. 1996. *Quelle citoyenneté pour les femmes? La crise des États-providence et de la représentation politique en Europe*, Éditions L'Harmattan, Paris.
- DRAGOMIR, Otilia, Miroiu, Mihaela (eds.). 2002. *Lexicon feminist*, Editura Polirom, Iaşi.
- DRAGOLEA, A. 2007. "Preferinţe şi mecanisme pe piaţa muncii – o abordare de gen sau cum "aleg" femeile performanţe profesionale mai scăzute şi bani mai puţini", în Băluţă, O., (ed.), (2007) *Gen şi interese politice. Teorii şi practici*, ("Preferences and Mechanisms on the Labour Market – a Gender Approach or How Do Women "Choose" Lower Professional Performances and Less Money", in Băluţă, O., (editor), (2007) *Gender and Political Interests. Theories and Practices*), Editura Polirom, Bucureşti.
- GAL, Susan and Gail Kligman. 2003. *Politicile de gen în perioada postcomunistă. Un eseu istoric comparativ*, Editura Polirom, Bucureşti.
- GAULEJAC Vincent and Nicole Aubert. 1990. *Femmes au singulier ou la parentalité solitaire*, Edition Klincksieck, Paris.
- HOFSTEDE, G., Hotstede, G.J. and M. Minkov. 2012. *Culturi şi organizaţii. Softul mental. Cooperarea interculturală şi importanţa ei pentru supravieţuire* (Cultures and Organizations. Software of the Mind. Intercultural Cooperation and Its Importance for Survival), Humanitas, Bucharest.
- ILIESCU, Adrian-Paul. 1998. *Liberalismul între succese şi iluzii*, Editura All, Bucureşti.
- JENSON, Jane. 2001. « D'un régime de citoyenneté à un autre : la rémunération des soins », *Travail, genre et sociétés*, 2001/2 N° 6, p. 43-58. DOI : 10.3917/tgs.006.0043.
- LAZĂR, Florin. 2010. *Introducere în politici sociale comparate. Analiza sistemelor de asistenţă socială* (An introduction to Compared Social Policies. The Analysis of Social Assistance Systems), Editura Polirom.
- LETABLIER, M.-T. 2001. *Le travail centré sur autrui et sa conceptualisation en Europe*, in *Travail, genre et société* magazine, 2001/2, nr. 6, pp. 19-41.
- LEWIS Jane (ed.). 1993. *Women and Social Policies in Europe. Work, Family and the State*, Adward Elgar, London.
- LEWIS Jane (ed.). 1998. *Gender, Social Care and Welfare State Restructuring in Europe*, Aldershot, Ashgate.
- LIPOVETSKY, Gilles. 2000. *A treia femeie* (The Third Woman), Editura Univers, Bucureşti.
- MAGYARI-VINCZE, Enikö. 2002. *Regimurile de gen şi cetăţenia femeilor*, pp. 77-105, în COSMA, Ghizela, MAGYARI-VINCZE, Enikö, PECICAN, Ovidiu (eds.), *Prezenţe feminine. Studii despre femei în România*, Editura Fudaţiei DESIRE, Cluj-Napoca.

- MAGYARI-VINCZE, Enikö. 2004. *Le patriarcat d'en haut et d'en bas en Roumanie*, in Nouvelles Questions Féministes, Vol.23, No.2, Postcommunisme: Genre et États en transition, pp.29-48.
- MIHAI, Tudorina. 2011. *Cotele de gen în politică şi aplicarea lor în România* ("Gender quotas in politics and their application in Romania"), dissertation paper, SNSPA, Bucureşti, 2011.
- MIROIU, M. 2004. *Drumul către autonomie. Teorii politice feminist* (The Road to Autonomy. Feminist Political Theories), Editura Polirom, Bucureşti.
- MÉDA, Dominique. 2008. *Le temps des femmes. Pour un nouveau partage des roles*, Champs actuel, Paris.
- OKIN, M. S. 2000. "Le genre, le public et le privé", in Ballmer-Cao, T.H., Mottier, V., Sgier, L. (coord.) (2000) *Genre et politique. Débats et perspectives*, Ėditions Gallimard, Paris.
- PHILLIPS, A. 2000. "Espaces publics, vies privées", in Ballmer-Cao, T.H., Mottier, V., Sgier, L. (eds.). 2000. *Genre et politique. Débats et perspectives*, Ėditions Gallimard, Paris, pp. 405-416.
- SAINSBURY, D., (1996) *Gender, equality, and welfare states*, Cambridge University Press.
- SAINSBURY, D. 2000. "Les droits sociaux des femmmes et des homes", in Ballmer-Cao, T.H., Mottier, V., Sgier, L. (coord.) (2000) *Genre et politique. Débats et perspectives*, Ėditions Gallimard, Paris.
- SILVERA, R. 2010. *Temps professionnels et familiaux en Europe: de nouvelles configurations* in *Travail, genre et société*, Revue, Novembre 2010/2 - n° 24, Editions La Découverte, Paris.
- SZIKRA Dorottya and Szelewa Dorota. 2009. « Welfare et socialisme: de certains concepts relatifs au genre », *Cahiers du Genre*, 2009/1 n° 46, p. 77-100.
- WALBY, S. 2000. "La citoyenneté est-elle sexuée?" în Ballmer-Cao, T.H., Mottier, V., Sgier, L. (coord.) (2000) *Genre et politique. Débats et perspectives*, Ėditions Gallimard, Paris.
- WAYLEN, G. 2000. "Le genre, le feminism et l'Etat: un survol", in Ballmer-Cao, T.H., Mottier, V., Sgier, L., (coord.) (2000) *Genre et politique. Débats et perspectives*, Ėditions Gallimard, Paris.

NEGOTIATION METHODS FOR COLLABORATIVE ACTIVITIES IN NETWORK ENTERPRISES

ADINA-GEORGETA CRETAN*

Abstract

This paper provides a collaboration support for small and medium enterprises within a Network Enterprises which cannot or do not want to fulfill a major contract alone. In that case, in order to better meet a higher external demand, the managers are willing to subcontract parts of their contracts even to competitors.
This approach is illustrated by a business-to-business interaction, being proposed a scenario where partners are autonomous gas stations grouped in a virtual enterprise (VE). In such a VE, we present a schematic example of a collaboration process using negotiation and coordination mechanisms that we proposed in this paper.

Keywords*: Network Enterprises, Services, Cooperation, Collaboration, SME*

1. Introduction

Recent advances in the information technology have made possible the development of a new type of organization, the virtual organization. The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos[1] defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks".

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations among independent organizations that participate in a Network Enterprises.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that the manager is in charge and has the ability to select the information exchanged.

When a purchasing request reaches a gas station, the manager analyses it to understand if it can be accepted, taking into account job schedules and resources availability. If the manager accepts the purchasing request, he may decide to perform the job locally or to partially subcontract it, given the gas station resource availability and technical capabilities. If the manager decides to subcontract a job, he starts a negotiation within the collaborative infrastructure with selected participants. In case that the negotiation results in an agreement, a contract is settled between the subcontractor and the

* Senior Lecturer, PhD, "Nicolae Titulescu" University, Computer Science Department (E-mail: adinacretan@univnt.ro).

[1] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston.

contractor gas station, which defines the business process outsourcing jobs and a set of obligation relations among participants[2].

The gas station alliance scenario shows a typical example of the SME virtual alliances where partner organizations may be in competition with each other, but may want to cooperate in order to be globally more responsive to market demand.

The collaborative infrastructure, that we describe, should flexibly support negotiation processes respecting the autonomy of the partners.

We are starting with a presentation in Section 2 of a VE life cycle model. Then, we are briefly describing in Section 3 the architecture of the collaboration system in which the interactions take place[3].

The main objective of this paper is to propose a collaboration framework in a dynamical system with autonomous organizations. In Section 4 we define the Coordination Components that manage different negotiations which may take place simultaneously.

In Sections 5 and 6 we present the model of the negotiation process, that can be used by describing a particular case of negotiation, and the negotiation algorithm. Finally, Section 7 concludes this paper.

2. The main steps of the Virtual Enterprise life cycle

The life cycle of virtual enterprise is classified into six phases. The relevance in different phases is shown in Figure 1 and the statement for each phase is given as follows:

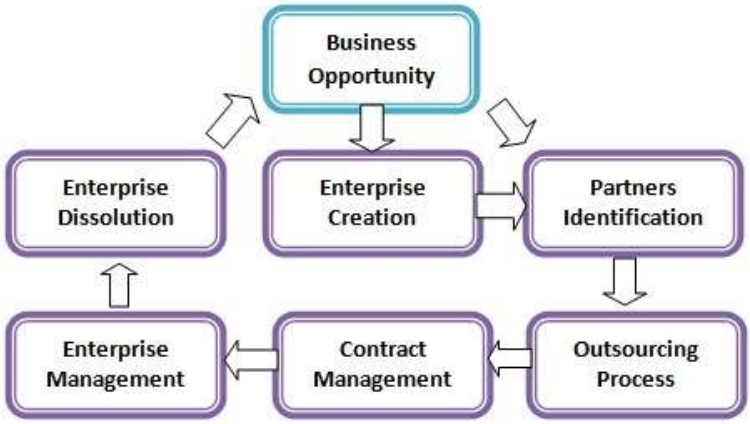


Figure 1. Life-cycle of a virtual enterprise

a) VE creation

When a business opportunity is detected, there is a need to plan and create the VE, identify partners, establish the contract or cooperation agreement among partners, in order to manage the processes of the VE.

[2] Singh M.P., (1997) *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pp. 141–155.

[3] Cretan, A., Coutinho, C., Bratu, B., and Jardim-Goncalves, R., NEGOSEIO: A Framework for Negotiations toward Sustainable Enterprise Interoperability. Annual Reviews in Control, 36(2): 291–299, Elsevier, ISSN 1367-5788, 2012, http://dx.doi.org/10.1016/j.arcontrol.2012.09.010.

b) Partners search and selection

The selection of business partners is a very important and critical activity in the operation of a company. Partners search can be based on a number of different information sources, being private, public, or independent. The enterprise's private suppliers' list is a data repository that contains information about the companies that have had commercial relationships with this enterprise. This information composes an *Internal Suppliers Directory (ISD)*. External sources include directories maintained by industrial associations, commerce chambers, or Internet services. This information composes the *External Suppliers Directory (ESD)*. Another emerging solution is the creation of clusters of enterprises that agreed to cooperate and whose skills and available resources are registered in a common *SME Cluster Directory* (CD).

c) Outsourcing of tasks within a VE

In this stage of a VE life cycle, we can assume that a gas station company receives a customer demand. In this respect, the Manager of this company may negotiate the outsourcing of a schedule tasks that cannot perform locally with multiple partners of selected gas station companies, geographically distributed. The Manager can select the partners of the negotiation among the database possible partners according to their declared resources and the knowledge he has about them.

The outcome of a negotiation can be "success" (the task was fully outsourced), "failure" (no outsourcing agreement could be reached) or "partial" (only part of the task could be outsourced).

d) Contract management in the VE

In case the negotiation process ends in a successful, a contract is established between the outsourcing company and the insourcing ones. The contract is a complex object, which is based of trust in this coordination mechanism. Moreover, it contains a set of specific rules, such as penalties, expressing obligation relations between the participants.

In case of failure of a partner, the Manager will have to supervise if the obligations are honored (for example to oblige the partner to finish his work or to set penalties) and to modify the business process renegotiating parts of the work that have not been realized.

e) Management of the VE

A VE is a dynamic entity in which a new company may join or leave it. Members may need to leave for many reasons, when they change their activity or when they don't want any more to collaborate with the partners of the VE. In case of departure from the VE, the leaving partner may either notify all the partners. It also may leave without giving any information. The departure of a partner from the VE will have an important impact on ongoing contracts especially when this partner is an insourcer of an important amount of task.

f) VE dissolution - after stopping the execution of the business processes.

3. The Collaborative Infrastructure

The main objective of this software infrastructure is to support collaborating activities in virtual enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

Figure 2 shows the architecture of the collaborative system:

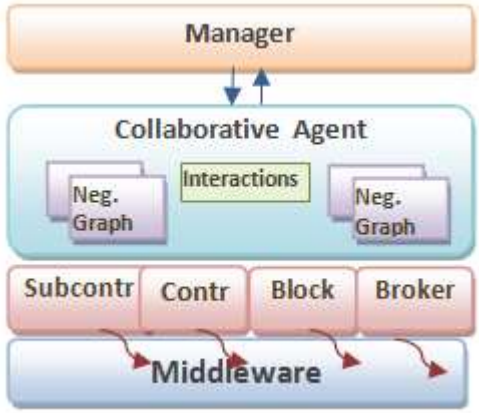


Figure 2. The architecture of the collaborative system

This infrastructure is structured in four main layers: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[4]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place simultaneously.

A Collaborative Agent aims at managing the negotiations in which its own gas station is involved (e.g. as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[5]. The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[6]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure (Zhang and Lesser, 2002). In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints (Barbuceanu and Wai-Kau, 2003). The manager may participate in the definition and evolution of negotiation frameworks and objects (Keeny and Raiffa, 1976). Decisions are taken by the manager, assisted by his Collaborative Agent (Bui and Kowalczyk, 2003). For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents (Faratin, 2000).

---

[4] Bamford J.D., Gomes-Casseres B., and Robinson M.S., *Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization*. San Francisco: Jossey-Bass, 2003.

[5] Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991.

[6] Smith R., and Davis R., *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.

4. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose different components[7]:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* component for assuring that a task is entirely subcontracted by the single partner;
- *Broker*: a component automating the process of selection of possible partners to start the negotiation;

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[8].

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of components:

Coordination components in closed environment**:** components that build their images on the negotiation in progress and manage the coordination constraints according to information extracted only from their current negotiation graph (*Subcontracting, Contracting, Block)*;

Coordination components in opened environment: components that also build their images on the negotiation in progress but they manage the coordination constraints according to available information in data structures representing certain characteristics of other negotiations currently ongoing into the system (*Broker)*.

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker)* allow the coordination of constraints among several different negotiations in parallel[9].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of coordination components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual enterprise. To achieve a generic coordination framework, nonselective and flexible, we found necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. To develop this structure, we proposed a succession of phases that are specific to different stages of negotiation (initialization, negotiation, contract adoption) that provided a formal description of the negotiation process.

---

[7] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes.* In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011.

[8] Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000.

[9] Muller H., *Negotiation principles.* Foundations of Distributed Artificial Intelligence, 1996.

The advantage of this structure of the negotiation process consists on the fact that it allows a proper identification of the elements that constitute the object of coordination, of the dependencies that are possible among the existing negotiations within the VE, as well as the modality to manage these negotiations at the level of the coordination components.

5. The Negotiation Coordination Model

This section proposes a formal model to settle and manage the coordination rules of one or more negotiations which can take place in parallel, by describing the basic concepts underlying the model, and the negotiation model using the metaphor of Interaction Abstract Machines (IAMs). The Program Formula is described to define the methods used to manage the parallel evolution of multiple negotiations.

Basic concepts

In this setup, at a local level, the model requires a formal description of the rules of coordination that manage the behavior of the agent in a negotiation; at a global level, the model must provide a global coordination of all negotiations of an agent.

The fundamentals of the negotiation model are given by the following basic concepts:

A *Negotiation Model* is defined as a quintuple M = <T, P, N, R, O> where:

- T denotes the *time of the system*, assumed to be discrete, linear, and uniform[10];
- P denotes the *set of participants* in the negotiation framework. The participants may be involved in one or many negotiations;
- N denotes the *set of negotiations* that take place within the negotiation framework;
- R denotes the *set of policies of coordination* of the negotiations that take place within the negotiation framework;
- denotes the *common ontology* that consists of the set of definitions of the attributes that are used in a negotiation.

A *negotiation* is described at a time instance through a set of negotiation sequences.

Let Sq = {si | i $\in \mathbb{N}$} denote the set of *negotiation sequences*, such that $\forall$si ,sj $\in$ Sq, i $\neq$ j implies si $\neq$ sj. A *negotiation sequence* si $\in$ Sq such that si $\in$ N(t) is a succession of negotiation graphs that describe the negotiation N from the moment of its initiation and up to the time instance *t*. The negotiation graph created at a given time instance is an oriented graph in which the nodes describe the negotiation phases that are present at that time instance (i.e., the negotiation proposals sent up to that moment in terms of status and of attributes negotiated) and the edges express the precedence relationship between the negotiation phases.

The *negotiation phase* (*ph*) indicates a particular stage of the negotiation under consideration.

The *Status* is the possible state of a negotiation. This state takes one of the following values (*Status* $\in${*initiated, undefined, success, failure*}):

- *initiated* – the negotiation, described in a sequence, has just been initiated;
- *undefined* – the negotiation process for the sequence under consideration is ongoing;
- *success* – in the negotiation process, modeled through the sequence under consideration, an agreement has been reached;
- *failure* – the negotiation process, modeled through the sequence under consideration, resulted in a denial.

[10] Hurwitz, S.M., *Interoperable Infrastructures for Distributed Electronic Commerce.* 1998, http://www.atp.nist.gov/atp/98wpecc.htm.

Issues is the set of attributes with associated values that describe the proposals made in a negotiation phase.

Snapshot is the set of combinations between a negotiation aspect (*Status*) and the information that is negotiated (*Issues*).

The functions *status* and *issues* return, respectively, the state (status) of a negotiation instance and the set of the attributes negotiated (issues) within a negotiation instance.

Metaphor Interaction Abstract Machines (IAMs)

The metaphor Interaction Abstract Machines (IAMs) will be used to facilitate modelling of the evolution of a *multi-attribute, multi-participant, multi-phase negotiation*. In IAMs, a system consists of different *entities* and each entity is characterized by a state that is represented as a set of *resources*. It may evolve according to different laws of the following form, also called "*methods*":

A1@…@An <>- B1@…@Bm

A method is executed if the state of the entity contains all resources from the left side (called the "*head*") and, in this case, the entity may perform a transition to a new state where the old resources *(A1,...,An)* are replaced by the resources *(B1,...,Bm)* on the right side (called the "*body*"). All other resources of the entity that do not participate in the execution of the method are present in the new state.

The operators used in a method are:

- the operator @ assembles together resources that are present in the same state of an entity;
- the operator <>- indicates the transition to a new state of an entity;
- the operator & is used in the body of a method to connect several sets of resources;
- the symbol "T" is used to indicate an empty body.
- In IAMs, an entity has the following characteristics:
- if there are two methods whose heads consist of two sets of distinct resources, then the methods may be executed in parallel;
- if two methods share common resources, then a single method may be executed and the selection procedure is made in a non-deterministic manner.

In IAMs, the methods may model four types of transition that may occur to an entity: *transformation*, *cloning*, *destruction* and *communication*. Through the methods of type *transformation* the state of an entity is simply transformed in a new state. If the state of the entity contains all the resources of the head of a transformation method, the entity performs a transition to a new state where the head resources are replaced by the body resources of the method. Through the methods of type *cloning* an entity is cloned in a finite number of entities that have the same state. If the state of the entity contains all the resources of a head of a cloning method and if the body of the method contains several sets of distinct resources, then the entity is cloned several times, as determined by the number of distinct sets, and each of the resulting clones suffers a transformation by replacing the head of the method with the corresponding body. In the case of a *destruction* of the state, the entity disappears. If the state of the entity contains all the resources of the head of a transformation method and, if the body of the method is the resource T, then the entity disappears.

In IAMs, the *communication* among various entities is of type broadcasting and it is represented by the symbol "^". This symbol is used to the heads of the methods to predefine the resources involved in the broadcasting. These resources are inserted in the current entity and broadcasted to all the entities existent in the system, with the exception of the current entity. This mechanism of communication thus executes two synchronous operations:

- *transformation*: if all resources that are not predefined at the head of the method enter in collision, then the predefined resources are inserted in the entity and are immediately consumed through the application of the method;

• *communication*: insertion of the copies of the predefined resources in all entities that are present in the system at that time instance.

6. Negotiation Algorithm

In the proposed scenario, a conflict occurs in a network of enterprises, threatening to jeopardize the interoperability of the entire system. The first step consists in identifying the Enterprise Interoperability issue. The following steps refer to analyse the problem, evaluate possible solutions and select the optimal solution. The proposed solution for conflict resolution is reaching a mutual agreement through negotiation. The benefit of this approach is the possibility to reach a much more stable solution, unanimously accepted, in a shorter period of time.

The design and coordination of the negotiation process must take into consideration[11]:

• Timing (the time for the negotiation process will be pre-set);

• The set of participants to the negotiation process (which can be involved simultaneous in one or more bilateral negotiations);

• The set of simultaneous negotiations on the same negotiation object, which must follow a set of coordination policies/ rules;

• The set of coordination policies established by a certain participant and focused on a series of bilateral negotiations[12];

• Strategy/decision algorithm responsible for proposals creation (Olteanu, 2012);

• The common ontology, consisting of a set of definitions of the attributes used in negotiation.

The negotiation process begins when one of the enterprises initiate a negotiation proposal towards another enterprise, on a chosen negotiation object. We name this enterprise the Initiating Enterprise (E1). This enterprise also selects the negotiation partners and sets the negotiation conditions (for example sets the timing for the negotiation) (Schumacher, 2001). The negotiation partners are represented by all enterprises on which the proposed change has an impact. We assume this information is available to E1 (if not, the first step would consist in a simple negotiation in which all enterprises are invited to participate at the negotiation of the identified solution. The enterprises which are impacted will accept the negotiation) (Kraus, 2001).

After the selection of invited enterprises (E2 … En), E1 starts bilateral negotiations with each guest enterprise by sending of a first proposal. For all these bilateral negotiations, E1 sets a series of coordination policies/rules (setting the conditions for the mechanism of creation and acceptance of proposals) and a negotiation object/framework (NO/NF), setting the limits of solutions acceptable for E1. Similarly, invited enterprises set their own series of coordination policies and a negotiation object/framework for the ongoing negotiation.

After the first offer sent by E1, each invited enterprise has the possibility to accept, reject or send a counter offer. On each offer sent, participating enterprises, from E1 to E2 ... En follow the same algorithm:

Algorithm: Pseudocode representation of the negotiation process

Inputs: Enterprises *E1...En; NO(Negotiation Object); NF(Negotiation Framework)*

Outputs: The possible state of a negotiation: *success, failure*

```
BEGIN
on receive start from E1{
      send initial offer to partner;
```

[11] Oancea B., Andrei T., Rosca Ion Gh., Iacob A., *Parallel algorithms for large scale econometric models*. 1st World Conference on Information Technology 2010, published in Procedia Computer Science, volume 3, pp. 479-483, 2011.

[12] Ossowski S., *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, 1999.

```
}
on receive offer from partner{
      evaluate offer;
      if(conditions set by the NO/NF are not met){
            offer is rejected;
            if(time allows it){
                  send new offer to partner;
            }else{
                  failure;
            }end if;
      }else{
            send offer to another partner;
      }end if;
      if(receive an accepted offer){
            if(offer is accepted in all bilateral negotiations){
                  success;
            }else{
                  if(time allows it){
                        send new offer to partner;
                  }else{
                        failure;
                  }end if;
            }end if;
      if(receive a rejected offer){
            if(offer is active in other bilateral negotiations){
                  failure in all negotiations;
            }end if;
      }end if;
}
END
```

7. Conclusions

The functioning of this kind of alliance suppose task achievement, which cannot be individual treated, by a single participant for better adjustment of the clients requirements.

The proposed infrastructure aims to help the different SMEs to fulfill their entire objectives by mediating the collaboration among the several organizations gathered into a virtual enterprise.

A specific feature that distinguishes the negotiation structure proposed in this work from the negotiations with imposed options (acceptance or denial) is that it allows the modification of the proposals through the addition of new information (new attributes) or through the modification of the initial values of certain attributes (for example, in the case of gas stations the gasoline price may be changed).

The business-to-business interaction context in which our activities take place forces us to model the unexpected and the dynamic aspects of this environment. An organization may participate in several parallel negotiations. Each negotiation may end with the acceptance of a contract that will automatically reduce the available resources and it will modify the context for the remaining negotiations.

In the current work we've described in our collaboration framework only the interactions with the goal to subcontract or contract a task. A negotiation process may end with a contract and in that case the supply schedule management and the well going of the contracted task are both parts of the outsourcing process.

In order to illustrate our approach we have used a sample scenario where distributed gas stations have been united into virtual enterprise. Take into consideration this scenario, one of the principal objectives was related to the generic case and means that this proposed infrastructure can be used in other activity domains.

Regarding research perspective continuation, one first direction which can be mentioned is the negotiation process and the coordination process taking into consideration the contracts management process. In this way the coordination can administrate not only the dependence between the negotiations and the contracts which are formed and with execution dependences of those contracts.

Another perspective is to deliver to the user one instrument which allows him negotiation protocol definition according with the restrained negotiation interactions possibilities. Consequent, this will be a problem of coordination on which the infrastructure must solve on negotiation protocol administration and protocol build perspective.

References

- Camarinha-Matos L.M. and Afsarmanesh H., *Collaborative Networked Organizations,* 2004 Kluwer Academic Publisher Boston.
- Singh M.P., *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pages 141–155, May 1997.
- Cretan, A., Coutinho, C., Bratu, B., and Jardim-Goncalves, R., *NEGOSEIO: A Framework for Negotiations toward Sustainable Enterprise Interoperability.* Annual Reviews in Control*,* 36(2): 291–299, Elsevier, ISSN 1367-5788, 2012. http://dx.doi.org/10.1016/j.arcontrol.2012.09.010.
- Bamford J.D., Gomes-Casseres B., and Robinson M.S., *Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization*. San Francisco: Jossey-Bass, 2003.
- Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991.
- Smith R., and Davis R., *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.
- Zhang X. and Lesser V., *Multi-linked negotiation in multi-agent systems*. In Proc. of AAMAS 2002 July, Bologna, pg. 1207 – 1214.
- Barbuceanu M. and Wai-Kau Lo, *Multi-attribute Utility Theoretic Negotiation for Electronic Commerce*. In AMEC III, LNAI 2003, pg. 15-30.
- Keeny R. and Raiffa H., *Decisions with Multiple Objectives: Preferences and Value Tradeoffs*. JohnWilley & Sons, 1976.
- Bui V. and Kowalczyk R., *On constraint-based reasoning in e-negotiation agents*. In AMEC III, LNAI 2003, pp. 31-46.
- Faratin P., *Automated service negotiation between autonomous computational agent*. Ph.D. Thesis, Department of Electronic Engineering Queen Mary & West-field College, 2000.
- Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes.* In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011.
- Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000.
- Muller H., *Negotiation principles.* Foundations of Distributed Artificial Intelligence, 1996.
- Hurwitz, S.M., *Interoperable Infrastructures for Distributed Electronic Commerce.* 1998, http://www.atp.nist.gov/atp/98wpecc.htm.
- Oancea B., Andrei T., Rosca Ion Gh., Iacob A., *Parallel algorithms for large scale econometric models*. 1st World Conference on Information Technology 2010, published in Procedia Computer Science, volume 3, pp. 479-483, 2011.
- Ossowski S., *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, 1999.
- Olteanu, C.C., *E-Mail Server and Traffic Control Management in 2012*. Manager Journal 16.1 (2012): 133-141.
- Schumacher M., *Objective coordination in multi-agent system engineering – design and implementation.* In Lecture Note in Artificial Intelligence, No. 2093, Springer Verlag, 2001.
- Kraus S., *Strategic negotiation in multi-agent environments.* MIT Press, 2001.

TIME SERIES FORECASTING USING NEURAL NETWORKS

BOGDAN OANCEA[*]
ŞTEFAN CRISTIAN CIUCU[**]

Abstract
Recent studies have shown the classification and prediction power of the Neural Networks. It has been demonstrated that a NN can approximate any continuous function. Neural networks have been successfully used for forecasting of financial data series. The classical methods used for time series prediction like Box-Jenkins or ARIMA assumes that there is a linear relationship between inputs and outputs. Neural Networks have the advantage that can approximate nonlinear functions. In this paper we compared the performances of different feed forward and recurrent neural networks and training algorithms for predicting the exchange rate EUR/RON and USD/RON. We used data series with daily exchange rates starting from 2005 until 2013.

Keywords*: neural networks, time series, forecasting, exchange rate, predicting*

Introduction

Classical statistical and econometric models used for forecasting in the field of financial time series fails to efficiently handle uncertainty nature of foreign exchange data series. One of the largest and more volatile financial market is the foreign exchange market, exchange rates being among the most used and important economic indices. Forecasting the exchange rates is a difficult problem from both theoretical and practical point of view because the exchange rates are influenced by many economic and political factors. During the time, many statistical and econometric models have been developed by researchers for the purpose of forecasting exchange rates but this problem remains one of the major challenges in the field of forecasting methods.

Recent studies have shown the classification and prediction power of the Artificial Neural Networks. It has been demonstrated that a neural network can approximate any continuous function. Neural networks have been successfully used for forecasting of financial data series. The classical methods used for time series prediction like Box-Jenkins, ARMA or ARIMA assumes that there is a linear relationship between inputs and outputs. Neural Networks have the advantage that can approximate any nonlinear functions without any apriori information about the properties of the data series.

In this paper we compared the performances of different feed forward and recurrent neural networks and training algorithms for predicting the exchange rate EUR/RON and USD/RON. We used data series with daily exchange rates starting from 2005 until 2013 provided by the National Bank of Romania. We developed two different kinds of neural networks, a feed forward network and a recurrent network and compared their performances for foreign exchange rate prediction. The feed forward network was trained by the classical backpropagation method, by the resilient backpropagation and one of its' versions, while the recurrent network was trained using a multistream approach based on the Extended Kalman Filter.

Related work

In (Kondratenko, 2003) the authors presents a forecasting method for exchange rates between American Dollar and Japanese Yen, Swiss Frank, British Pound and EURO using a recurrent neural network. Before the data series were presented to the neural network some preprocessing operations have been done based on normalization, calculation of Hurst exponent, Kolmogorov-Smirnov test in

[*] Professor, PhD, "Nicolae Titulescu" University of Bucharest (email: bogdan.oancea@gmail.com).
[**] IT Director, "Nicolae Titulescu" University (email: stefanciucu@yahoo.com).

order to remove the possible correlations. An Elman-Jordan recurrent network has been used to forecast the one-day ahead value of moving average of returns with the window equal to 5 observations. The number of hidden neurons was chosen equal to 100 with a linear activation of the input layer and logistic activation of the hidden and output layer. The neural network predicted the increments sign with a high probability – approximately 80%.

(Chen, 2003) compared the performance of a Probabilistic Neural Network with a GMM-Kalman Filter and random walk approach for predicting the direction of return on market index of the Taiwan Stock Exchange. They reached to the conclusion that PNN has a stronger forecasting power than both the GMM–Kalman filter and the random walk models because PNN has a better capability to identify erroneous data and outliers and it also doesn't require any apriori information about the underlying probability density functions of the data.

A comparison between a neural network and a Hidden Markov Model used for foreign exchange forecasting is also given in (Philip 2011). The results of the study show that while the Hidden Markov Model achieved an accuracy of 69.9% the neural network had an accuracy of 81.2%.

A hibrid model ARIMA-PNN is presented in (Khashei, 2012). The values estimated with the ARIMA model are changed based on the trend of the ARIMA residuals detected by a PNN and optimum step length obtained a mathematical programming model.

Data transformation in order to improve the accuracy of the forecast is used in (Proietti, 2013). The authors considered the Box-Cox power transformation and showed the forecasts are improve significantly compared to the untransformed data at the one-step-ahead horizon.

(Man-Chung, 2000) used a conjugate gradient learning algorithm with a restart procedure to improve the convergence. To further improve the convergence the authors also used a multiple linear regression for weight initialization instead of the classical random initialization. They used the network to predict the daily trading data of some companies from Shanghai Stock Exchange.

Methodology

In this paper we analyze the exchange rates for two currencies EUR and USD between 03.01.2005 and 19.02.2013. The data series are obtained from the National Bank of Romania. Figure 1 and 2 shows the corresponding exchange rates EUR/RON and USD/RON. It can be seen from these charts that the data are heavily jagged. To improve the accuracy of the forecasting it is better to remove the correlations between the inputs and made them statistically independent. Thus, we studied not the exchange rates but the logarithmic returns given by the following formula:

$$R_n = \frac{\ln E_n}{\ln E_{n-1}}$$

More, in order to increase the learning rate additional data preprocessing that smoothed the data distribution was performed before training the network. We normalized the data using a logistic function according to the following formula:

$$\tilde{R}_n = 1/(1 + \exp(\frac{R_n - \bar{R}}{\sigma}))$$

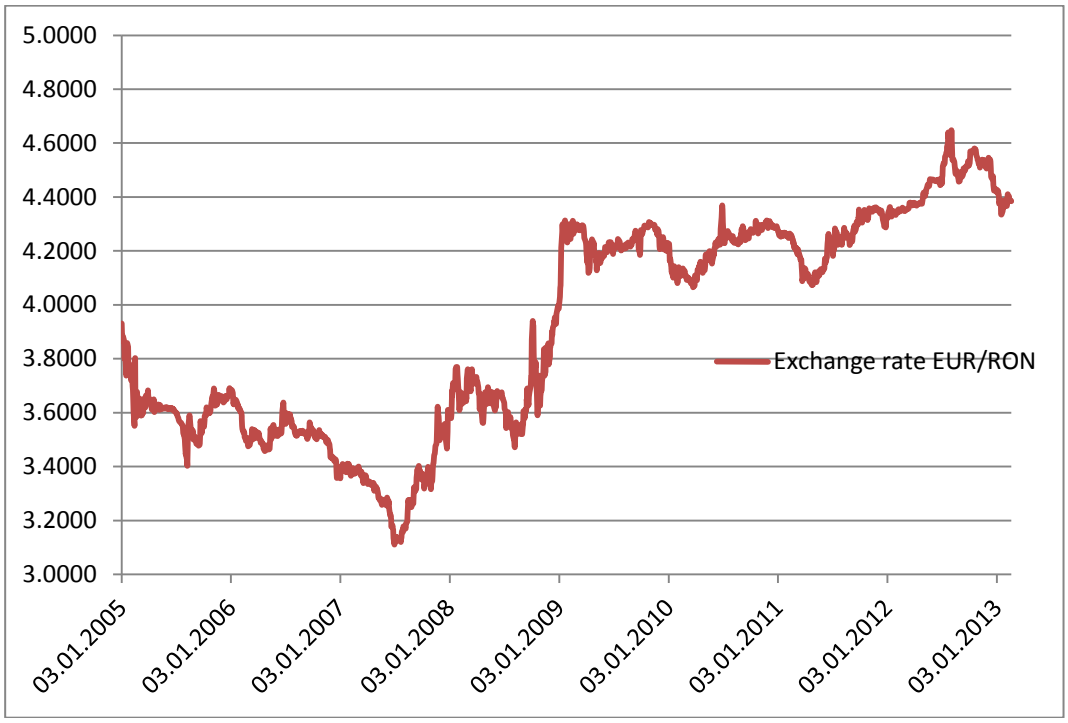


Figure 1. The exchange rate EUR/RON

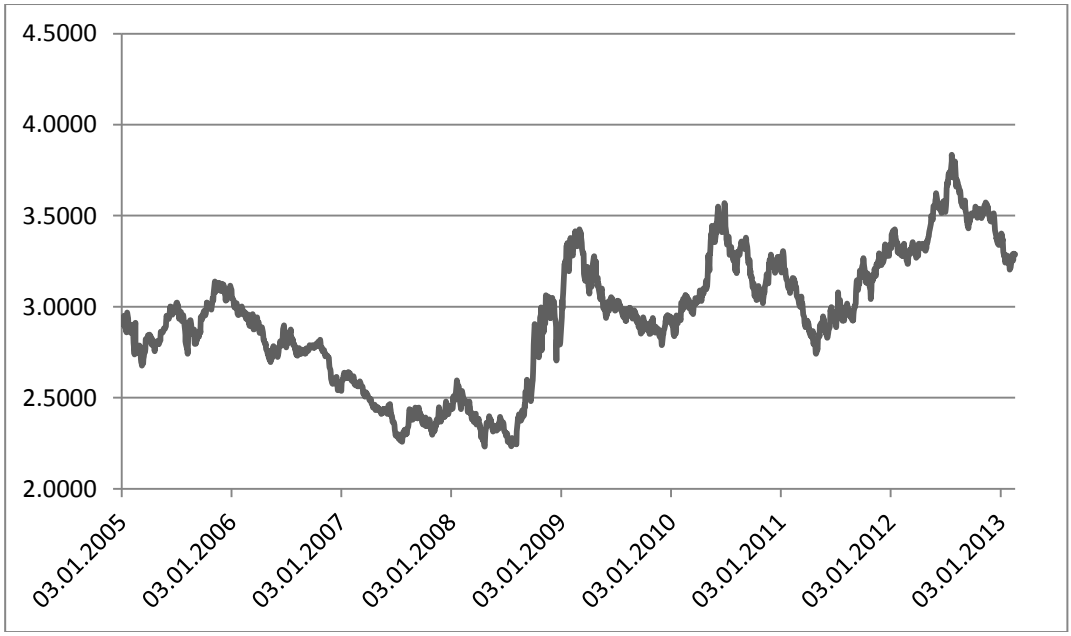


Figure 2. The exchange rate USD/RON

This transformation normalizes the data and guarantee us the values are in [0,1] interval. The two data series transformed according to the method described above are presented in figures 3 and 4.

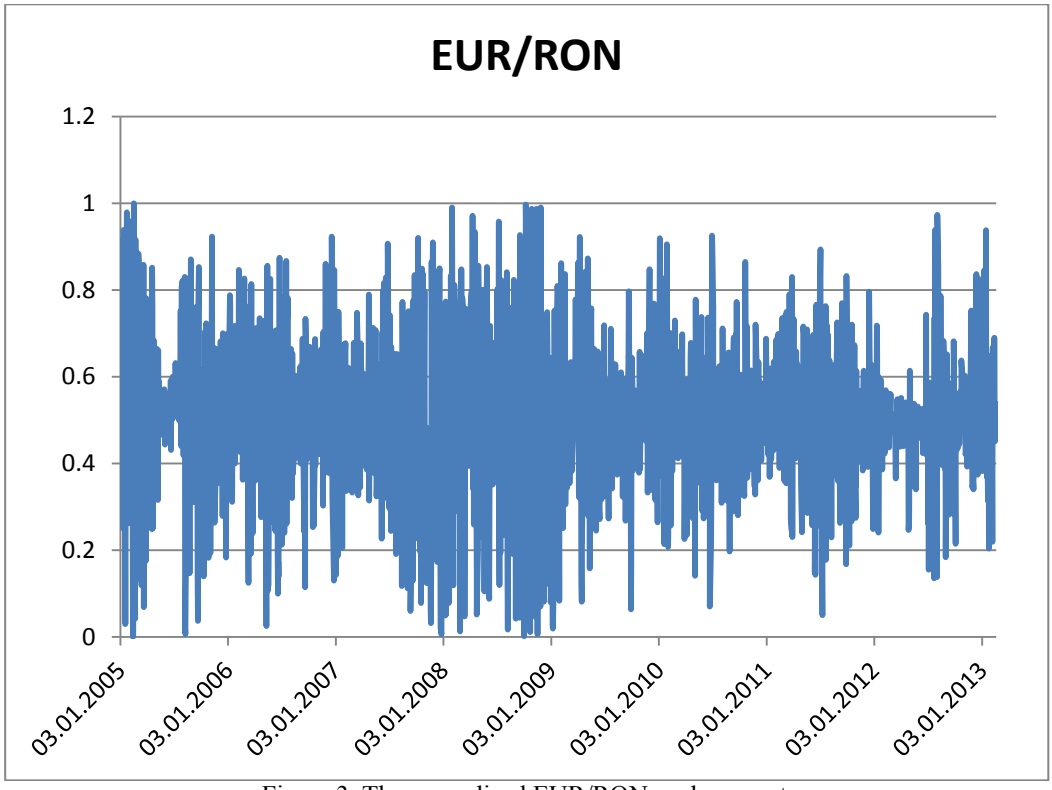


Figure 3. The normalized EUR/RON exchange rate

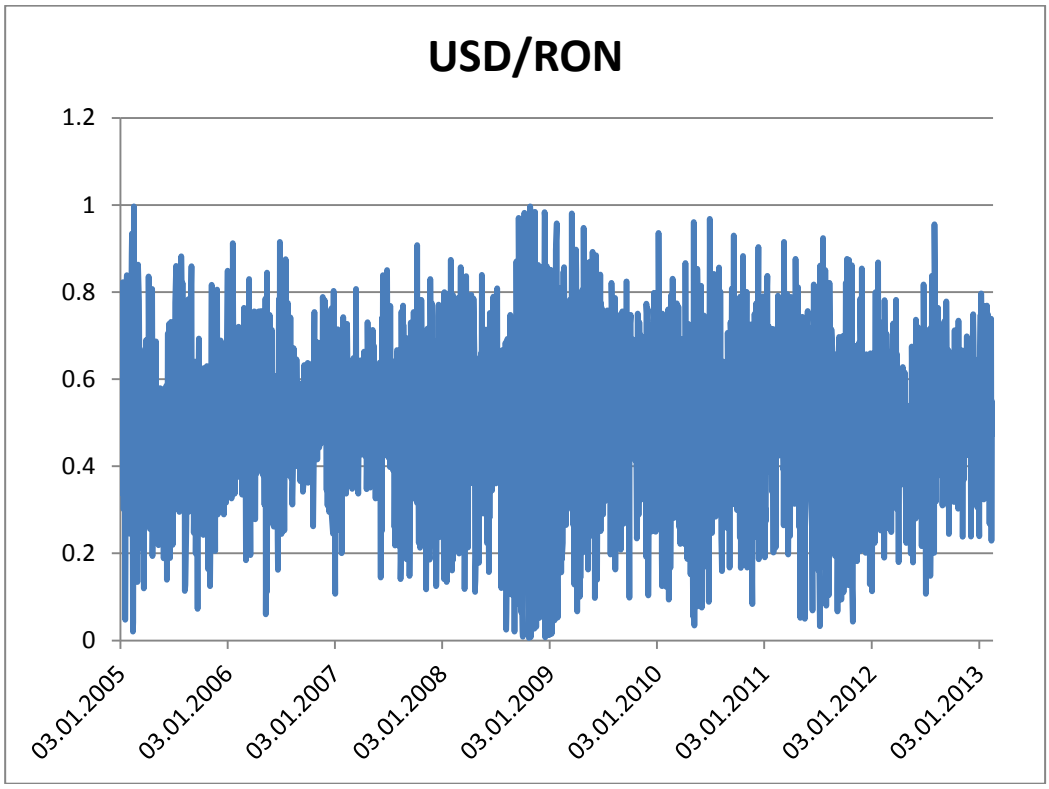


Figure 4. The normalized USD/RON exchange rate

Results

First, we built a feed forward neural network with three layers, one input layer, one hidden layer and one output layer. We chose the optimum number of neurons by trial and error: 20 neurons (i.e. we fed into the network the past 20 values of the time series) in the input layer and 40 neurons in the hidden layer. The output layer has one neuron, the value of the time series at t+1 time moment. For the input layer and the output layer we used a linear activation function and *tanh* for the hidden layer. The data sets were spitted in two parts: 80% of the values were used for training and 20% for testing purposes. We tested several training algorithms (Rojas, 1996): backpropagation, resilient propagation and a version of it called RPROP+ which is one of the best performing first-order learning methods for feed forward neural networks (Igel, 2000). The iRPROP+ training algorithm combines information about the sign of the error function derivative which is error surface information with the magnitude of the network error when the decision of reverting an update step is taken. As the error function for our network we used MSE.

The results for the three training algorithms were similar, with an increase in convergence speed of about 25% in the case of iRPROP. As a stopping criteria we imposed a value of 0.1% of the error function.

Second, we tested a recurrent neural network (Jaeger, 2002) with an Elman Simple Recurrent Network architecture trained by Extended Kalman Filter (EKF) method, with the derivatives of the network output computed by Truncated Backpropagation Through Time method (Werbos, 1990), (Zipser, 1995). We used a multistream approach for training the network. If the training data sets are heterogeneous, it is possible that a recency effect may appear – the weights are updated according to the currently presented training data. To circumvent this issue the solution is to scramble the order of

the presentation of the data and to use a batch update algorithm. The multistream procedure avoids the apparition of the recency effect by combining the scrambling and batch updates. Multistream EKF divides the training data set into several parts, each subset being a stream. For each *Ns* streams a different instance of the same network is used. A full description of the training procedure (multistream EKF) is beyond the scope of this paper but an interested reader can find this in (Feldkamp, 1998). We used a network with 20 input neurons, 10 fully recurrent hidden neurons and one output neuron. We split the training data in 20 streams randomly chosen each stream with 200 points. The window for truncated backpropagation was 20. With these parameters we obtained an error in forecasting of about 0.01% which is an order of magnitude better than in the case of the feedforward network.

Conclusions

Forecasting financial time series is a difficult problem. In this paper paper we compared the performances of different feed forward and recurrent neural networks and training algorithms for predicting the exchange rate EUR/RON and USD/RON. We used data series with daily exchange rates starting from 2005 until 2013 provided by the National Bank of Romania. Before training the networks we applied a preprocessing procedure to the data sets which removes the correlation between data and normalized the data series. Our tests showed that the recurrent network performs better than classical feed forward network in this case.

References

- An-Sing Chen, Mark T. Leung, Hazem Daouk, Application of neural networks to an emerging financial market: forecasting and trading the Taiwan Stock Index, Computers & Operations Research 30, pp. 901–923, 2003.
- Man-Chung Chang, Chi-Cheong Wong, Chi-Chung Lam, Financial Time Series Forecasting by Neural Network Using Conjugate Gradient Learning Algorithm and Multiple Linear Regression Weight Initialization, Computing in Economics and Finance 2000(61), Society for Computational Economics, July 2000.
- Lee A. Feldkamp, Danil V. Prokhorov, Charles F. Eagen and Fumin Yuan, Enhaced multi-stream Kalman filter training for recurrent networks, in J. Suykens and J. Vandewalle (Eds.) Nonlinear Modeling: Advanced Black-Box Techniques, pp. 29-53, Kluwer Academic Publishers, 1998.
- Igel, C., Hüsken, M., 2000. Improving the Rprop Learning Algorithm, Proceedings of the Second International Symposium on Neural Computation, pp. 115–121, ICSC Academic Press.
- Herbert Jaeger, Tutorial on training recurrent neural networks, covering BPTT, RTRL, EKF and the "echo state network" approach, Technical Report GMD Report 159, German National Research Center for Information Technology, 2002.
- V. Kondratenko, Yu. A Kuperin, Using Recurrent Neural Networks To Forecasting of Forex, Condensed Matter, Statistical Finance, 2003.
- Mehdi Khashei, Mehdi Bijari, Gholam Ali Raissi Ardali, Hybridization of autoregressive integrated moving average (ARIMA) with probabilistic neural networks (PNNs), Computers & Industrial Engineering 63, pp. 37–45, 2012.
- Adewole Adetunji Philip, Akinwale Adio Taofiki, Akintomide Ayo Bidemi, Artificial Neural Network Model for Forecasting Foreign Exchange Rate, World of Computer Science and Information Technology Journal (WCSIT), Vol. 1, No. 3, pp. 110-118, 2011.
- Tommaso Proietti, Helmut Lütkepohl, "Does the Box–Cox transformation help in forecasting macroeconomic time series?, International", Journal of Forecasting 29, pp. 88–99, 2013.
- R. Rojas, Neural Networks, Springer-Verlag, Berlin, 1996.
- Hong Tan, Neural Network for Stock Forecasting, Master of Science in Electrical Engineering Thesis, Faculty of Texas Tech University, 1995.

- Anupam Tarsauliya, Shoureya Kant, Rahul Kala, Ritu Tiwari, Anupam Shukla, Analysis of Artificial Neural Network for Financial Time Series Forecasting, International Journal of Computer Applications (0975 – 8887), Volume 9– No.5, pp. 16-22, November 2010.
- A. Cretan, A Model for Coordinating Negotiations among Virtual Enterprises, Journal of Applied Quantitative Methods, 4(1):54-67, 2009, ISSN 1842-4562.
- Paul J. Werbos, Backpropagation through time: what it does and how to do it. Proceedings of the IEEE, Volume 78, Issue 10, pp. 1550 - 1560, Oct 1990.
- Ronald J. Wiliams, David Zipser, Gradient-Based Learning Algorithms for Recurrent Networks and Their Complexity, in Y. Chauwin & D. E. Rumelhart (Eds.) Back-propagation: theory, Architectures and Applications, Hillsdale NJ: Erlbaum, 1995.
- Jing Tao Yao, Chew Lin Tan, Guidelines for Financial Forecasting with Neural Networks, Proceedings of International Conference on Neural Information Processing, Shanghai, China, 14-18 November, pp. 757-761, 2001.
- Gioqinang Zhang, Michael Y. Hu, "Neural Network Forecasting of the British Pound/US Dollar Exchange Rate", OMEGA - The International Journal of Management Science, Vol. 26, No. 4, pp. 495-506, 1998.

CLOUD COMPUTING AND INTERNET OF THINGS FOR SMART CITY DEPLOYMENTS

GEORGE SUCIU[*], ALEXANDRU VULPE[**], GYORGY TODORAN[***], JANNA CROPOTOVA[****], VICTOR SUCIU[*****]

Abstract
Cloud Computing represents the new method of delivering hardware and software resources to the users, Internet of Things (IoT) is currently one of the most popular ICT paradigms. Both concepts can have a major impact on how we build smart or/and smarter cities. Cloud computing represents the delivery of hardware and software resources on-demand over the Internet as a Service. At the same time, the IoT concept envisions a new generation of devices (sensors, both virtual and physical) that are connected to the Internet and provide different services for value-added applications.
In this paper we present our view on how to deploy Cloud computing and IoT for smart or/and smarter cities. We demonstrate that data gathered from heterogeneous and distributed IoT devices can be automatically managed, handled and reused with decentralized cloud services.

Keywords: *cloud computing, open source, internet of things, smart cities, decentralized cloud*

Introduction

The paper addresses the convergent domain of Cloud computing and Internet of Things (IoT), that are nowadays two of the most prominent and popular ICT paradigms, together with the emerging topics of Big Data and Energy Efficient IT. The Cloud computing paradigm[1] is an umbrella term for computing services that are accessible over the Internet and developed on a common pool of remotely hosted resources.

There are different kinds of cloud computing services depending on the type of resources delivered via them, current state-of-the-art Cloud services can be such as Infrastructure as a service (IaaS), Platform as a service (PaaS), Software as a service (SaaS), Network as a Service (NaaS), Storage as a service (STaaS), Sensor as a Service (SSaas) and others. These services permit to the users to obtain high reliability, increased security, high availability and to deliver Quality of Service (QoS) at low total cost of ownership (TCO). There are projects like RESERVOIR, VISION-CLOUD, OPTIMIS, CONTRAIL, that are cofounded by the European Commission, thru which were developed pan-European cloud services and also created new Cloud technologies like resource management, security or others and also relevant applications.

Correspondingly, the IoT paradigm[2] relies on the integration of a large number of heterogeneous devices, which are connected to the internet via different networking protocols. IoT

[*] PhD Student, Dipl. Eng, University POLITEHNICA of Bucharest, Faculty of Electronics, Telecommunications and Information Technology, 3CPS Department (george@beia.ro).
[**] PhD Student, Dipl. Eng, University POLITEHNICA of Bucharest, Faculty of Electronics, Telecommunications and Information Technology, 3CPS Department (alex.vulpe@radio.pub.ro).
[***] PhD Student, Dipl. Eng, University POLITEHNICA of Bucharest, Faculty of Electronics, Telecommunications and Information Technology, TEF Department (todoran.gyorgy@gmail.com).
[****] PhD Student, Practical Scientific Institute of Horticulture and Food Technology of Chisinau (jcropotova@gmail.com).
[*****] PhD Student, Dipl. Eng, University POLITEHNICA of Bucharest, Faculty of Electronics, Telecommunications and Information Technology (victor.suciu@beia.ro).
[1] P. McFedries, "The cloud is the computer," *IEEE Spectrum Online*, August 2008. Electronic Magazine, available at http://www.spectrum.ieee.org/aug08/6490.
[2] O. Vermesan and P. Friess "Internet of things-Global Technological and Societal Trends", Denmark: River Publishers, 2011.

permits the communication between different sensors connected to the Internet and the use of their services towards relevant applications. The concept was originally coined and introduced by MIT, Auto-ID Center and closely linked to RFID (Radio Frequency Identification) and electronic product code (EPC). Similarly the EC has financed a number of FP7 projects in the area of IoT (IOT-A, iCore, BUTLER, SENSEI).

The importance of our research derives from the fact that we propose ways thru which the Cloud and IoT concepts can be used in the context of Smart Cities. Therefore, our main objective is to propose a framework for cloud-based management of data received from sensor devices that can be used for Smart Cities scenarios. We will describe related work and their shortcomings that our research aims to address and present the adopted research methodology and implementation framework.

1.RELATED WORK

Already at the emerging of Cloud and IoT technologies, it has become clear that there is a need of convergence. Furthermore, integration with green energy efforts is a current hot research topic. IoT applications are using a wide range of heterogeneous distributed sensor network. They need to handle a huge number of sensor streams, and could benefit from the distributed elastic storage capacities of cloud computing systems. This cloud structures can boost the computational capabilities of IoT applications, permitting to several multi-sensor applications to perform complex big data processing that is subject to different QoS constraints. Other IoT services like large scale sensing experiments or smart city applications can benefit from a utility-based model, which is based on the on-demand delivery of IoT services over a cloud infrastructure.

A current state of the art about EU FIRE[3] projects is presented in Fig. 1.

Fig. 1. List of current IoT and Cloud eco-system

[3] EU FIRE project - http://www.ict-fire.eu/home/fire-projects.html

A number of projects originated from Machine-to-Machine (M2M)[4] but the current state of art of M2M platforms is quite fragmented and there is not a single view toward an interoperable smart object world. The M2M commercial platforms are vertically focused on solving specific sector issues and are tightly integrated with applications. This approach, taken from the telemetry legacy applications, has created a bunch of sensor devices not interoperable with each other, with high boundaries and integration possible only at database or presentation layers, without possibility of efficiently applying big data mining approaches.

For many years, M2M deployments were based on proprietary/custom applications and networking infrastructures, which were typically expensive to build, manage and maintain. Today's market for sensor devices is a hotbed of idea generation, as the prospect of embedding intelligence in the form of M2M technology into mobile devices has everyone excited about the possibilities[5]. The current market is already filled up with devices that can track everything from blood-glucose levels to traffic patterns.

As an example, SmartSantander proposes a unique in the world city-scale experimental research facility in support of typical applications and services for a smart city. The facility will comprise more than 20,000 sensors and will be based on a real life IoT deployment in an urban setting. The core of the facility will be located in the city of Santander, the capital of the region of Cantabria situated on the north coast of Spain, and its surroundings. SmartSantander will enable the Future Internet of Things to become a reality[6].

2. PROPOSED CONCEPT

2.1. Research Methodology

With our study we would extend the advances of IoT and cloud computing, by highly innovative and scalable service platforms through which to enable smart city services. The paper analyzes the gaps and designs solutions of how cloud computing is applicable to real-time data from embedded applications, thus unifying the IoT and cloud paradigms.

The vision is to propose a concept for a cloud open-platform integration of existing M2M approaches. The sensor and communication device manufacturing community is only one part of the model, where the application and service side is pushing for enablers to seamlessly access to widely distributed, real-time data from the environment. Throughout the recent past years, the concept of open-platform development, management and monitoring has emerged, basically solving again problems mainly from the technological point only in specific sectors.

In Cloud Computing, the word CLOUD is used as a metaphor for "the Internet," so the phrase cloud computing means "a type of Internet-based computing", where different services – such as servers, storage and applications – are delivered to an organization's computers and devices through the Internet. Similarly to IoT, a Cloud is a type of parallel and distributed system consisting of a collection of interconnected and virtualized computers that are dynamically provisioned and

[4] M. Kranz, L. Roalter, and F. Michahelles, "Things That Twitter: Social Networks and the Internet of Things", *What can the Internet of Things do for the Citizen (CIoT) Workshop at The Eighth International Conference on Pervasive Computing (Pervasive 2010)*, Helsinki, Finland, May 2010.

[5] G. C. Fox, S. Kamburugamuve, and R. Hartman, "Architecture and Measured Characteristics of a Cloud Based Internet of Things" *API Workshop 13-IoT Internet of Things, Machine to Machine and Smart Services Applications (IoT 2012) at The 2012 International Conference on Collaboration Technologies and Systems (CTS 2012)* May, 2012.

[6] Future Internet Research & Experimentation - http://www.smartsantander.eu/

presented as one or more unified computing resources based on service-level agreements established through negotiation between the service provider and consumers[7].

The concept will focus on a Smart City cloud interoperability and connectivity scenario based on the SaaS delivery model. This approach holds the immense promise of reducing capital and infrastructure costs while improving efficiencies of service provision within the Smart City framework. SaaS delivers software over the Internet, that eliminates the need to install and run the application on private servers, simplifies maintenance and enables customers to use applications remotely through IoT from anywhere in the world.

2.2. Conceptual framework

The framework proposes to design and implement an interoperable decentralized open source cloud platform for IoT applications, with the main objective to enhance existing M2M and their IoT foundations.

We will introduce in this chapter SlapOS, an open source Cloud Operating system which was inspired by recent research in Grid Computing and in particular by BonjourGrid[8]. Slapos is a meta Desktop Grid middleware for the coordination of multiple instances of Desktop Grid middleware. It is based on the motto that ”everything is a process”.

2.3. Cloud and IoT Architecture

SlapOS is based on a Master and Slave design. In this chapter we are going to provide an overview of SlapOS architecture and are going in particular to explain the role of Master node and Slave nodes, as well as the software components which they rely on to operate a distributed cloud for telemetry applications.

Slave nodes request to Master nodes which software they should install, which software they show run and report to Master node how much resources each running software has been using for a certain period of time. Master nodes keep track of available slave node capacity and available software. Master node also acts as a Web portal and Web service so that end users and software bots can request software instances which are instantiated and run on Slave nodes. Master nodes are stateful. Slave nodes are stateless. More precisely, all information required to rebuild a Slave node is stored in the Master node. This may include the URL of a backup service which keeps an online copy of data so that in case of failure of a Slave node, a replacement Slave node can be rebuilt with the same data[9].

It is thus very important to make sure that the state data present in Master node is well protected. This could be implemented by hosting Master node on a trusted IaaS infrastructure with redundant resource. Or - better - by hosting multiple Master nodes on many Slave nodes located in different regions of the world thanks to appropriate data redundancy heuristic. We are touching here the first reflexive nature of SlapOS. A SlapOS master is normally a running instance of SlapOS Master software instantiated on a collection of Slave nodes which, together, form a trusted hosting infrastructure. In other terms, SlapOS is self-hosted, as seen in Fig. 2.

---

[7] R. Buyya, et.al. “Market-oriented cloud computing: Vision, hype, and reality for delivering it services as computing utilities”, *CoRR,* 2008.

[8] J.P. Smets-Solanes, C. Cerin, and R. Courteaud, "SlapOS: A Multi-Purpose Distributed Cloud Operating System Based on an ERP Billing Model," *IEEE International Conference on Services Computing (SCC)*, pp.765-766, July 2011.

[9] G. Suciu, C. Cernat, G. Todoran, V. Suciu, V. Poenaru, T. Militaru, and S. Halunga, “A solution for implementing resilience in open source Cloud platforms”, *9th International Conference on Communications, COMM 2012, IEEE Communications Society,* pp. 335-338, June 2012.

SlapOS master nodes keep track of the identity of all parties which are involved in the process of requesting Cloud resources, accounting Cloud resources and billing Cloud resources. This includes end users (Person) and their company (Organisation). It includes suppliers of cloud resources as well as consumers of cloud resources. It also includes so-called computer partitions which may run a software robot to request Cloud resources without human intervention. It also includes Slave nodes which need to request to SlapOS master which resources should be allocated. SlapOS generated X509 certificates for each type of identity: X509 certificates for people who login, an X509 certificate for each server which contributes to the resources of SlapOS and an X509 for each running software instance which may need to request or notify SlapOS master. A SlapOS Master node with a single Slave node, a single user and 10 computer partitions will thus generate up to 12 X509 certificates: one for the slave, one for the user and 10 for computer partitions.

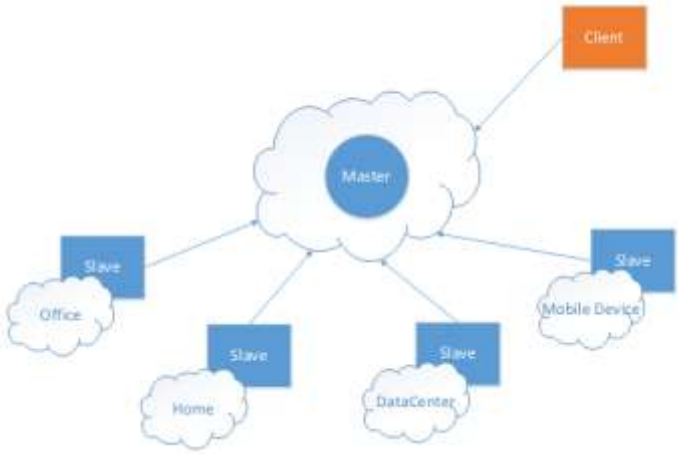


Fig. 2. SlapOS Master – Slave Architecture

Any user, software or slave node with an X509 certificate may request resources to SlapOS Master node. SlapOS Master node plays here the same role as the backoffice of a marketplace. Each allocation request is recorded in SlapOS Master node as if it were a resource trading contract in which a resource consumer requests a given resource under certain conditions. The resource can be a NoSQL storage, a virtual machine, an ERP with web-portal interface for displaying sensor data and Google Maps integration for RTUs localization, a Wiki, etc. The conditions can include price, region (ex. China) or specific hardware (ex. 64 bit CPU). Conditions are somehow called Service Level Agreements (SLA) in other architectures but they are considered here rather as trading specifications than guarantees[10]. It is even possible to specify a given computer rather than relying on the automated marketplace logic of SlapOS Master.

By default, SlapOS Master acts as an automatic marketplace. Requests are processed by trying to find a Slave node which meets all conditions which were specified. SlapOS thus needs to know which resources are available at a given time, at which price and under which characteristics. Last, SlapOS Master also needs to know which software can be installed on which Slave node and under which conditions.

[10] A. Vulpe, S. Obreja, O. Fratu "Interoperability procedures between access technologies using IEEE 802.21" *2nd International Conference on Wireless Communication, Vehicular Technology, Information Theory and Aerospace & Electronics Systems Technology (Wireless VITAE)*, 2011, pp. 1-5.

SlapOS Slave nodes are relatively simple compared to the Master node. Every slave node needs to run software requested by the Master node. It is thus on the Slave nodes that software is installed. To save disk space, Slave nodes only install the software which they really need.

Each slave node is divided into a certain number of so-called computer partitions. One may view a computer partition as a lightweight secure container, based on Unix users and directories rather than on virtualization. A typical barebone PC can easily provide 100 computer partitions and can thus run 100 RTU web portals or 100 sensors monitoring sites, each of which with its own independent database. A larger server can contain 200 to 500 computer partitions.

SlapOS approach of computer partitions was designed to reduce costs drastically compared to approaches based on a disk images and virtualization. As presented in Fig. 3, it does not prevent from running virtualization software inside a computer partition, which makes SlapOS at the same time cost efficient and compatible with legacy software.

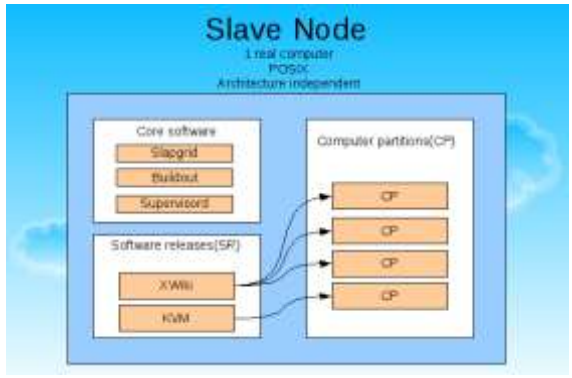


Fig. 3. SlapOS Slave Node

SlapOS Slave software consists of a POSIX operating system, SlapGRID, supervisord and buildout[11]. SlapOS is designed to run on any operating system which supports GNU's glibc and supervisord. Such operating systems include for example GNU/Linux, FreeBSD, MacOS/X, Solaris, AIX, etc

SlapOS relies on mature software: buildout and supervisord. Both software are controlled by SLAPGrid, the only original software of SlapOS. SLAPGrid acts as a glue between SlapOS Master node (ERP5) and both buildout and supervisord, as shown in Fig. 4. SLAPGrid requests to SlapOS Master Node which software should be installed and executed. SLAPGrid uses buildout to install software and supervisord to start and stop software processes. SLAPGrid also collects accounting data produced by each running software and sends it back to SlapOS Master.

Supervisord is a process control daemon. It can be used to programmatically start and stop processes with different users, handle their output, their log files, their errors, etc. It is a kind of much improved init.d which can be remotely controlled. Supervisord is lightweight and old enough to be really mature (ie. no memory leaks).

Buildout is a Python-based build system for creating, assembling and deploying applications from multiple parts, some of which may be non-Python-based. Buildout can be used to build C, C++, ruby, java, perl, etc. software on Linux, MacOS, Windows, etc. Buildout can either build applications

[11] J.P. Smets-Solanes, C. Cerin, and R. Courteaud, "SlapOS: A Multi-Purpose Distributed Cloud Operating System Based on an ERP Billing Model," *IEEE International Conference on Services Computing (SCC)*, pp.765-766, July 2011.

by downloading their source code from source repositories (subversion, git, mercurial, etc.) or by downloading binaries from package repositories (rpm, deb, eggs, gems, war, etc.). Buildout excels in particular at building applications in a way which is operating system agnostic and to automate application configuration process in a reproducible way.

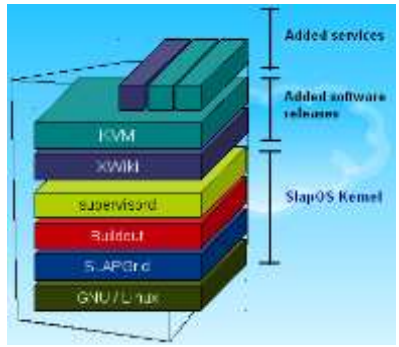


Fig. 4. SlapOS Kernel and User Software

Every computer partition consists of a dedicated IPv6 address, a dedicated local IPv4 address, a dedicated tap interface (slaptapN), a dedicated user (slapuserN) and a dedicated directory (/srv/slapgrid/slappartN). Optionally, a dedicated block device and routable IPv4 address can be defined.

CONCLUDING REMARKS

A Smart City deployment requires the integration of a distributed open sensor network and a decentralized cloud-based platform.

The current research explored the characteristics of a cloud platform for smart cities deployment with the focus on validating the platform's ability to deliver tailored IoT functionalities via the cloud middleware.

Furthermore, we will develop the proposed framework to include also applications for smart villages that will result in novel approaches for the monitoring of the agri-food supply chain and environmental monitoring in rural areas.

REFERENCES

- P. McFedries, "The cloud is the computer," *IEEE Spectrum Online*, August 2008. Electronic Magazine, available at http://www.spectrum.ieee.org/aug08/6490.
- Vermesan and P. Friess "Internet of things-Global Technological and Societal Trends", Denmark: River Publishers, 2011.
- EU FIRE project - http://www.ict-fire.eu/home/fire-projects.html.
- M. Kranz, L. Roalter, and F. Michahelles, "Things That Twitter: Social Networks and the Internet of Things", *What can the Internet of Things do for the Citizen (CIoT) Workshop at The Eighth International Conference on Pervasive Computing (Pervasive 2010)*, Helsinki, Finland, May 2010.
- G. C. Fox, S. Kamburugamuve, and R. Hartman "Architecture and Measured Characteristics of a Cloud Based Internet of Things", *API Workshop 13-IoT Internet of Things, Machine to Machine and Smart*

Services Applications (IoT 2012) at The 2012 International Conference on Collaboration Technologies and Systems (CTS 2012) May, 2012.

- Future Internet Research & Experimentation - http://www.smartsantander.eu/
- R. Buyya, et.al. "Market-oriented cloud computing: Vision, hype, and reality for delivering it services as computing utilities" *CoRR*, 2008.
- J.P. Smets-Solanes, C. Cerin, and R. Courteaud, "SlapOS: A Multi-Purpose Distributed Cloud Operating System Based on an ERP Billing Model," *IEEE International Conference on Services Computing (SCC)*, pp.765-766, July 2011.
- G. Suciu, C. Cernat, G. Todoran, V. Suciu, V. Poenaru, T. Militaru, and S. Halunga, "A solution for implementing resilience in open source Cloud platforms" *9th International Conference on Communications, COMM 2012, IEEE Communications Society*, pp. 335-338, June 2012.
- A. Vulpe, S. Obreja, O. Fratu "Interoperability procedures between access technologies using IEEE 802.21" *2nd International Conference on Wireless Communication, Vehicular Technology, Information Theory and Aerospace & Electronics Systems Technology (Wireless VITAE)*, pp. 1-5, 2011.

Table of Contents