

LEX ET SCIENTIA

International Journal

Nr. XVI Vol. 1/2009

Published by « Nicolae Titulescu » University from Bucharest,
in cooperation with “Pro Universitaria” Publishing House

Getting the Internal CNCSIS Accreditation B

<http://lexetscientia.univnt.ro/>

contact: lexetscientia@univnt.ro

“Pro Universitaria” Publishing House



Phone: 004.021-314.93.15
Phone/Fax: 004.021-314.93.16
Str. Cobadin, No. 5, Bl. P14, sc. 1, ap. 3, sect. 5,
Bucharest, Romania
e-mail: editura@prouniversitaria.ro
<http://www.prouniversitaria.ro>

CNCIS Accredited Publishing House

Lex ET Scientia International Journal. Juridical Series (LESIJ.JS)

Editor

Mircea Damaschin, “Nicolae Titulescu” University,
Bucharest, Romania

Editors Associate

Lorena Winter Bachmayer, Complutense
University, Madrid, Spain, Stanciu Carpenaru,
“Nicolae Titulescu” University, Bucharest, José
Louis de la Cuesta, Del Pais Vasco University, San
Sebastian, Spain, Vasile Dobrinoiu, “Nicolae
Titulescu” University, Bucharest, Ion Dogaru, The
Romanian Academy, Maria Cristina Giannini,
University of Teramo, Italy, Zlata Durdevic,
University of Zagreb, Croatia, Mihai Hotca,
“Nicolae Titulescu” University, Bucharest, Mateut
Gheorghita, “Babes-Bolyai” University, Cluj-
Napoca, Raluca Miga-Besteliu, “Nicolae Titulescu”
University, Bucharest, Ion Neagu, “Nicolae
Titulescu” University, Bucharest, Norel Neagu,
Police Academy, Bucharest, Beatrice Onica-Jarka,
“Nicolae Titulescu” University, Bucharest, Nicolae
Popa, “Nicolae Titulescu” University, Bucharest,
President of High Court of Cassation and Justice,
Fábio Ramazzini Bechara, “Damásio de Jesus”
University, São Paulo, Brasil, Viorel Ros, “Nicolae
Titulescu” University, Bucharest

Editorial Review Bord

Jiri Fuchs, University of Defense, Brno, The
Czech Republic, Eszter Kirs, University of Miskolc,
Hungary, Tamás Lattmann, National University of
Defense “Zrínyi Miklós”, Budapest, Hungary,
Marcin Marcinko, Jagiellonian University, Cracow,
Poland, Nives Mazur-Kumric, “J.J. Strossmayer”

University, Osijek, Croatia, Vasile Nemes,
“Nicolae Titulescu” University, Bucharest

Editor for students

Cornelia Hanna, “Nicolae Titulescu” University,
Bucharest

Asistent Editor

Alexandra Apostol, “Nicolae Titulescu” University,
Bucharest

Lex ET Scientia International Journal. Economics Series (LESIJ.ES)

Editor

Maria Grigore, “Nicolae Titulescu” University,
Bucharest, Romania

Editors Associate

Amos Avny, Omnidev International, Israel, Yusuf
Akan, Department of Economics, Ataturk
University, Turkey, Gheorghe Iliadi, The Institute
of Economy, Finance and Statistics, Academy of
Sciences of Moldova, Shinji Naruo, Japan
International Cooperation Agency Expert, Olu Ojo,
Covenant University, Nigeria, Alexandru Olteanu,
“Nicolae Titulescu” University, Bucharest, Boris
Popesko, Tomas Bata University in Zlin, Ali
Salman Saleh, University of Wollongong,
Australia, Elias Sanidas, Seoul National
University, South Korea, Jørgen Lindgaard
Pedersen, Technical University of Denmark,
Denmark, Jacky Mathonnat, L’IUP Clermont-
Ferrand, France, Azlan Amran, Ph.D., School of
Management, Universiti Sains Malaysia

Editorial Review Bord

Oludare Tolulope Adeyemi, Lagos State
Polytechnic, Nigeria, Mahmoud Al-Dalahmeh,
University of Wollongong, Australia, Adewale R.
Aregbeshola, University of South Africa, Daniela

Mihai, University of Pitesti, Romania, Stephen Mutula, University of Botswana, Mehran Nejati, Yazd University, Iran, Daniela Pirvu, University of Pitesti, Romania, Magdalena Rădulescu, University of Pitesti, Romania, Mika Saloheimo, University of Lapland, Finland, Azadeh Shafaei, Rasht Islamic Azad University, Iran

Asistent editor

Loredana Maria Popescu, “Nicolae Titulescu” University, Bucharest, Romania

**Lex ET Scientia International Journal.
Administrative Series (LESIJ.AS)**

Editor

Simona Oana Hudea, “Nicolae Titulescu” University, Bucharest, Romania

Editors Associate

Viorel Cornescu, “Nicolae Titulescu” University, Bucharest, Romania, Sica Stanciu, “Nicolae Titulescu” University, Bucharest, Romania, Andrei Stănoiu, “Nicolae Titulescu” University, Bucharest, Romania

Editorial Review Bord

Buğra Hamşioğlu, Kafkas University, Turkey, Didem Hamşioğlu, Anadolu University, Turkey, Mostafa Nejati, University of Tehran, Iran

**Lex ET Scientia International Journal.
IT Series (LESIJ.IT)**

Editor

Cosmin Olteanu, “Nicolae Titulescu” University, Bucharest, Romania

Editors Associate

Marian Drăgulinescu, Politehnica University of Bucharest, Romania, Adrian Manea, Politehnica University of Bucharest, Romania, Ioan Rusu, Politehnica University of Bucharest, Romania, Gheorghe Brezeanu, Politehnica University of Bucharest, Romania, Vasile Lăzărescu, Politehnica University of Bucharest, Romania, Dan Stoichinescu, Politehnica University of Bucharest, Romania, Paul Şchiopu, Politehnica University of Bucharest, Romania, Ion Ileană, „1 Decembrie” University Alba Iulia, Romania, George Căruntu, Maritime University, Constanta, Romania

Editorial Review Bord

Adriana Barnoschi, “Nicolae Titulescu” University, Bucharest, Romania, Nicolae Grosu, Politehnica University of Bucharest, Romania, Alexandru Crăciun, Politehnica University of Bucharest, Romania, Emil Florea, “Nicolae Titulescu” University, Bucharest, Romania

CONTENTS

THE JUVENILE JUSTICE SYSTEM IN SPAIN

José Luis de la Cuesta, Isidoro Blanco Cordero 9

SISTEMUL JUSTIȚIEI PENTRU MINORI ÎN SPANIA

José Luis de la Cuesta, Isidoro Blanco Cordero 32

LEGISLATIVE AND THEORETICAL ASPECTS OF THE MONEY LAUNDERING CONTRAVENTION FORESEEN BY ART. 23, PARAGRAPH 1, LETTER B FORM THE LAW NO. 656/2002

Vasile Dobrinou, Florin Encescu 52

ASPECTE LEGISLATIVE ȘI TEORETICE ALE INFRAȚIUNII DE SPĂLARE A BANILOR PREVĂZUTĂ DE ART. 23 ALIN. 1 LITERA B DIN LEGEA NR. 656/2002.....

Vasile Dobrinou, Florin Encescu 65

THE APPEAL IN THE INTEREST OF LAW IN THE DRAFTS OF THE NEW ROMANIAN PROCEDURE CODES

Dan Lupașcu 78

RECURSUL ÎN INTERESUL LEGII ÎN PROIECTELE NOILOR CODURI DE PROCEDURĂ DIN ROMÂNIA

Dan Lupașcu 94

ARE THE DECISIONS OF THE INTERNATIONAL BODIES IN ALTERNATIVE DISPUTE RESOLUTION (ADR) BASED ON THE UNIFORM DISPUTE RESOLUTION POLICY (UDRP) FOR DOMAIN NAMES SUBJECT OF THE COURT APPLICATION PROVIDED BY ARTICLE 364 ROMANIAN CIVIL PROCEDURE CODE?

Beatrice Onica Jarka 110

SUNT DECIZIILE ORGANISMELOR INTERNAȚIONALE DE SOLUȚIONARE ALTERNATIVĂ A LITIGIILOR (SAL) FUNDAMENTATE PE POLITICA DE SOLUȚIONARE UNIFORMĂ A LITIGIILOR (PSUL) CU PRIVIRE LA NUMELE DE DOMENII SUPUSE ACȚIUNII ÎN ANULARE PREVĂZUTE DE ART. 364 CODUL ROMÂN DE PROCEDURĂ CIVILĂ?

Beatrice Onica Jarka 119

THE PRINCIPLE *PACTA SUNT SERVANDA*: DOCTRINE AND PRACTICE

Daniela Nicoleta Popescu 128

PRINCIPIUL PACTA SUNT SERVANDA: DOCTRINĂ ȘI PRACTICĂ

Daniela Nicoleta Popescu 138

**AWARDING THE ATTORNEY'S FEES IN THE ROMANIAN CIVIL TRIAL, CREATING
CONSISTENCY IN THE ROMANIAN COURTS PRACTICE**

Beatrice Onica Jarka 147

**ACORDAREA CHELTUIELILOR DE JUDECATĂ CONSTÂND ÎN ONONARIUL
AVOCAȚILOR ÎN PROCESUL CIVIL ROMÂN, CREAREA UNEI PRACTICI UNIFORME
A INSTANȚELOR DIN ROMÂNIA**

Beatrice Onica Jarka 155

**CERTAIN THEORETICAL AND PRACTICAL ISSUES, REGARDING THE ADMITTANCE
INTO GUARANTEE OF THE ESTATES GAINED ON BASIS OF LAW NO. 112/1995 FOR
THE REGULATION OF THE LEGAL SITUATIONS OF CERTAIN ESTATES WITH THE
DESTINATION OF DWELLINGS, TRANSFERRED INTO THE PROPERTY OF THE
STATE**

Cornelia Beatrice Gabriela Ene-Dinu 163

**ASPECTS REGARDING THE PLACE OF PERPETRATION OF THE OFFENSE, A
CRITERION FOR THE ESTABLISHMENT OF TERRITORIAL COMPETENCE IN
CRIMINAL MATTERS**

Bogdan Florin Micu 171

**ASPECTE PRIVIND LOCUL SĂVÂRȘIRII INFRAȚIUNII, CRITERIU DE
DETERMINARE**

A COMPETENȚEI TERITORIALE ÎN MATERIE PENALĂ

Bogdan Florin Micu 184

**INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SOME NOTES ON
THE PRINCIPLE OF COMPLEMENTARITY: A READING OF THE BRAZILIAN LAW**

Fabio Ramazzini Bechara 196

**AUDIO AND VIDEO INTERCEPTIONS AND RECORDINGS IN CRIMINAL LAW
IN ROMANIA**

Ion Neagu, Mircea Damaschin 202

THE INFRACTIONS OF TAX EVASION

Mihai Adrian Hotca 217

**NATIONAL AND COMMUNITY TRADEMARK INFRINGEMENT PROCEEDINGS IN
HUNGARY**

Mátyás Kapa 225

TOWARDS A DES-INCRIMINATION OF DRUG POSSESSION FOR OWN USE IN ROMANIA

Traian Dima 231

THE DIRECT EFFECT OF TREATY PROVISIONS

Anca-Magda Vlaicu 235

**DEFINITION OF REFUGEE IN INTERNATIONAL LAW: CHALLENGES OF THE PRESENT
TIMES**

Catrinel Brumar 250

THE PRINCIPLE OF FREEDOM AND EQUALITY

Elena Comșa 259

THE RELATIONSHIP BETWEEN INSTITUTIONS, BANKING REGULATION AND BANKING DEVELOPMENT IN THE MENA REGION

Samouel Beji, Darine Youssef 267

RESEARCHING THE GENDER ASPECT IN BUSINESS DEVELOPMENT (THE CASE OF MOLDOVA, UKRAINE AND BELARUS)

Elena Aculai, Adela Bulgac, Vitalii Gryga, Olga Krasovska, Olga Linchevskaya..... 283

THE STATE AND THE ECONOMY UNDER THE IMPACT OF GLOBALIZATION

Ion Bucur 291

CONTENT AND DYNAMICS OF THE ROMANIAN ECONOMY

Elena Ciucur, Dumitru Ciucur..... 299

TAXATION TRENDS IN EUROPEAN UNION

Maria Grigore 306

FINANCING SOURCES FOR COMPANIES AND THE IMPLICATIONS ON THEIR IMAGE

Mihaela Sudacevschi 324

YOUNGSTERS' MOTIVATION TO COMPLY WITH ONLINE GAMES RULES

Rita Yi Man Li 332

BEYOND THE LIMITS IN AMERICAN AND ROMANIAN FINANCIAL MARKETS

Serghei Mărgulescu, Elena Mărgulescu 338

SOME PARTICULARITIES OF THE MONETARY TRANSMISSION CHANNELS IN ROMANIA

Ramona Dumitriu, Cornel Nistor, Răzvan Ștefănescu..... 346

A CRITICAL VIEW ON HPWS AND EMPLOYEE COMMITMENT-FORM OF COMMITMENT MATTERS

Kaushik Chaudhuri 355

EDUCATION AND ECONOMIC GROWTH

Sasha Obradovic 377

DEVELOPMENT OF CAPITAL MARKET AND ITS IMPLICATIONS UPON THE ECONOMIC DEVELOPMENT

Carmen Radu 386

TRANSNATIONAL COMPANIES AND THEIR ROLE IN GLOBALIZATION

Liviu Radu 397

CONVERGENCE PROGRAM AND MACROECONOMIC POLICIES FOR ROMANIA JOINING THE EURO-ZONE

Magdalena Rădulescu, Carmen Secară..... 407

THE UNDERSTANDING OF NEW PUBLIC ADMINISTRATION

Halil I. Ulker, Gulcin Karakoc 424

EDUCATION AND LIFE LONG LEARNING ARGUMENT FOR THE DEVELOPMENT OF KNOWLEDGE BASED ECONOMY AND SOCIETY

Nicoleta Gudănescu, Anca Cristea 430

MOTIVATION FOR DISTANCE EDUCATION

Răzvan Ștefănescu, Ramona Dumitriu, Liliana Moga 442

THE INTEGRATIVE TENDENCIES OF THE CIVIC CULTURE IN THE AGE OF GLOBALIZATION

Elena Nedelcu 447

RECENT EVOLUTIONS AND TENDENCIES CONCERNING THE ROMANIAN POPULATION: A CHALLENGE FOR CENTRAL AND LOCAL ADMINISTRATION

Andrei Stănoiu 458

ETHICS VERSUS MANIPULATION: ABOUT CHARISMA AND OTHER TYPES OF COMMUNICATION

Corina Rădulescu 465

VIRTUALIZATION TECHNOLOGY FOR SMB

Adriana Barnoschi 476

BUSINESS INTELLIGENCE AND E-GOVERNANCE

Marius Coman 484

A PROJECT WITHIN MICROSOFT PROJECT 2007

Emil Cosma 492

DIGITAL DIVIDE IN THE EUROPEAN UNION

Radu Herman 505

NATIONAL UNIC NUMBER REGISTRAR. UTOPIY OR “A MUST HAVE”

Cosmin Olteanu 514

THE JUVENILE JUSTICE SYSTEM IN SPAIN

José Luis de la Cuesta*
Isidoro Blanco Cordero**

Summary

1. Relevant legal framework regulating criminal proceedings against juvenile offenders. 2. Age thresholds of criminal responsibility and liability to prosecution. 3. Specialized agencies. 3.1. Judges specialization. 3.2. Prosecutor's specialization. 3.3. Specialization required for any, other figure acting in the proceedings. 3.4. Social services (or similar agencies) involved in the proceedings. 4. Early definition of the proceedings. 5. Personality assessment procedures. 6. Mediation. 7. Personal liberty. 8. Safeguards for the protection of minors. 8.1. Affective and/or psychological assistance. 8.2. Preventing the disclosure of the juvenile offender's identity. 8.3. Other measures. 9. Final remarks.

Key words:

1. Relevant legal framework regulating criminal proceedings against juvenile offenders

Very important transformations in the treatment of juvenile offenders have intervened during the last decade of XXth century and the beginning of XXIst century in Spain¹.

1.1. Due to the absence of guarantees and procedures, twelve years after the approval of the new Constitution of 1978, the old welfare-model (the „tutelary model”) - regulated by an Act of 1948 and devoted to minors up to 16 - was declared unconstitutional by the Constitutional Court. This decision opened a process of deep transformation in the system of treatment of offenders under 16. Following the traditional positivist-correctional approach, the old „tutelary model” considered that delinquency among minors was a symptom of the need of public intervention to reform the individual quest for their social rehabilitation. Sanctions (measures) had to be not particularly punitive, but corrective and re-educative and they had to be inserted in the broader frame of protective interventions towards minors neglected or in danger. Theoretically, this system was only intended to protect, to improve and to give help: so, although deprivation of liberty was frequently imposed, tribunals did not need to be integrated by professional judges and no special guarantees had to be fulfilled. Indeed, the 1948 Act clearly stated that no ordinary or special procedure should be observed by the “tutelary tribunals”: they intervened without separation between investigation and adjudication with a full „freedom of criterion”, independent from all

* Professor of Criminal Law, Ph.D., University of the Basque Country, President of the International Association of Penal Law (2004-); Director of the Basque Institute of Criminology; Deputy of the President of the Society of Basque Studies (2005-); Elected member of Jakiunde Academy; Member of the International Scientific Advisory Board (Fachbeirat) Max Planck Institut für ausländisches und internationales Strafrecht (Freiburg, Germany) (2008); Member of the Board of Directors of the International Society of Criminology; Member of the Governing Board of the Istituto Superiore Internazionale di Scienze Criminalli (Siracusa, Italy); Member of the Governing Board of the Centro Internacional de Investigación sobre la Delincuencia, la Marginalidad y las Relaciones Sociales, San Sebastián; Honorable Professor, Northwest University of Politics and Law (Xi'an; China). E-mail: joseluis.delacuesta@ehu.es.

** Professor of Criminal Law, Ph.D., Department of Public International Law and Criminal Law, Law Faculty, University of Alicante, Spain, (e-mail: isidoro.blanco@ua.es).

¹ José Luis de la Cuesta, 1999, 101 ff.

kind of juridical concept and consequence, and taking into account only the nature of the facts and the minor's conditions. The hearings were not public and intervention of a lawyer was not allowed.

Spanish literature had since long criticized this model and demanded its substitution by a different system. Separation between the protective and the correctional intervention was achieved in 1996. According to the 1996 Minors' Legal Protection Act, the protection of minors was put under the responsibility of the social services (in particular, those of the Autonomous Communities)² and the civil Judges. But, although in 1985 the new Judges for Minors were established by the new Act on Judicial Power and although it required the government to present to the Parliament a new Bill on Minors, the reform of the system of intervention related to juvenile offenders had to wait until 1992. Indeed, only after the decision of the Constitutional Court (STC 14 February 1991) declaring unconstitutional the former regime, an „urgent” reform was approved. The Organic Act 4/1992 established a minimum age (12 years old) for the judicial intervention towards teenager delinquents (under 16) and „provisionally” introduced a hybrid system of reaction (tutelary/penal/social) based on the principle of the „best interest of the minor”³, considering that criterion governing intervention had to be the minor's education and social reintegration needs and not punishment or repression. The new proceedings, fully complying with the constitutional guarantees for minors, were inspired by the principle of flexibility and opened the way to the implementation of different means of diversion. It was also envisaged to refer minors who had committed non-serious offences (without violence or intimidation) to the social services, either directly or with a warning. The Organic Act 4/1992 equally gave an answer to an insistent request: the establishment of the technical team⁴. Integrated by a psychologist, a social assistant and an educator, its a „overriding role”⁵ was to facilitate the Public Prosecutor's and Judge's decisions concerning the minor's education and social reintegration, by issuing of a report on the minor's psychological, pedagogical situation and family background. New measures having a maximum span of two years were introduced. But the system was full of ideological contradictions⁶ and was not really helpful to make the concerned minor to assume responsibility⁷.

1.2. In 1995 a new Penal Code was approved in Spain. This Code raised from 16 to 18 the age limit for the Code's application, but the price⁸ was the admission of the penal responsibility of minors (Art. 19). The system introduced in 1992 was provisionally maintained in force until the approval of the new Act regulating the penal responsibility of minors.

1.3. Following the provision of Art. 19 of the new Penal Code, the Organic Act 5/2000⁹ introduced the new Spanish system of penal responsibility, giving a dear priority to educative and re-socialization criteria over those of the social defense¹⁰.

The Act came into force only one year later (January 2001), after several reforms; one in particular, related to the treatment of minors committing very serious crimes and, in particular, terrorism¹¹, was very criticized (Organic Act 7/2000).

² Spain is integrated by 17 regions, which benefit of a political autonomy, called „Autonomous Communities” (Comunidades Autonomas).

³ Altava Lavall, 2002, 247; Higuera Guimera, 2003, 253; Palacio Sanchez Izquierdo, 2000.

⁴ Beristain, 1995, XIV.

⁵ Urra Portillo, 1995, 8.

⁶ Rios Martin, 1993, 234.

⁷ Funes, 1998.

⁸ Cuello Contreras, 2001, 205.

⁹ Boletín Oficial del Estado, 13 January, 2000.

¹⁰ Cantarero Bandrés, 2002, 29; however, Cuello Contreras, 2001, 205.

¹¹ Etxebarria Zarrabeitia, 2001a.

In December 2006 a new reform has been introduced by the Organic Act 8/2006¹² in order to:

- Assure a higher proportionality between sanctions and the seriousness of the offence, opening new possibilities to the imposition of internment in closed regime, extending the limits of internment (not only if imposed as a sanction, but also as a preventive measure) in the most serious cases and allowing the execution of internment measures in penitentiaries as soon as the juvenile turns 18;

- introduce new measures, such as the prohibition to enter in contact or in communication with the victim, the victim's relatives or other persons; and

- strengthen and recognize the victim's rights.

This reform will come into force in February 2007.

Most of the changes introduced in 1992 were adopted by the Organic Act 5/2000, a comprehensive Act regulating both the penal and procedural aspects of the penal responsibility (and the civil liability) of minors having committed any of the criminal offences regulated by the Adults' Penal Legislation¹³. Nevertheless, the Organic Act 5/2000 has mainly a procedural content - only some of the provisions are-strictly of a penal nature¹⁴. It is thus a specialized Act, not embodied either in the Penal Code, or in the Criminal Procedure Code, even if the subsidiary application of both texts is envisaged to complement its provisions or to fill eventual gaps.

1.3.1. The Organic Act 5/2000 regulates, therefore, all of the material, procedural and executive aspects of the intervention against juvenile delinquents, establishing a system integrated within the criminal justice system. The main axes of the new system are the following¹⁵:

a) minor's penal responsibility: coherently with Art.19 of the penal code, the new model is aimed at reducing the importance of the ideas of protection and paternalism and dearly admits the „penal responsibility,, (or criminal responsibility) of minors. Thus, the Organic Act 5/2000 regulates this eventual penal responsibility as a *sui generis* one¹⁶, distinguishing between its ascertainment and the related consequences. The ascertainment of the penal responsibility, in a formal sense, is governed by parameters similar to those for adult criminal responsibility; in fact, the grounds of the minor's penal responsibility are not different from the adult's one: committing a penal offence and no concurrence of any of the possible causes of exemption generally set out by the Penal Code (Art. 5.1);

b) a mixed model: penal responsibility and re-education: in the trend opened in 1992, the new model is not a punitive, but a mixed one, fully complying with the Convention on Children Rights. The declaration of penal responsibility constitutes only a first step in an intervention that must be devoted to the re-education and re-socialization of minors. The main differences with the adults' system relate the consequences: the formally established penal responsibility is not followed by a punitive intervention, but by a pragmatic¹⁷ and, at least, predominantly non-punitive, strictly educative one. And by this way important differences to key principles of the adult penal and procedural law are allowed. Crimes and offences are not followed by punishments, but by measures submitted (in principle) to other imposition criteria. The special educative nature of the intervention determines procedural differences and the intervention of the technical team, as well

¹² Boletín Oficial del Estado, n° 290, 5 December 2006.

¹³ A treatment intervention is also envisaged for those minors who are deemed to be absent of capacity for forming criminal intent (Art.5.2). But although Organic Act 5/2000 forgets to say it in an explicit way, in these cases the imposition of therapeutic measures should always require a proved criminal dangerousness (Gonzales Cussac – Cuerda Arnau, 2002, 84-85).

¹⁴ Boldova Pasamar, 2002, 1553; Gonzales Cussac-Cuerda Arnau, 2002, 79.

¹⁵ de la Cuesta, 2004; see also Giménez-Sallinas i Colomer, 2000.

¹⁶ Bueno Arus, 2001, 72.

¹⁷ Cuello Contreras, 2001, 207.

as the need for the specialization of all the professionals who take part in the penal process (4th Final Disposition);

c) the best interest of the child. Following the wording of the Child Convention, the Organic Act 5/2000 frequently refers to the „minor's superior interest” or to the „best interest of the child” as cardinal principles¹⁸ of any intervention towards a minor: in fact, every participant in the process must respect this principle, further considered as the main criterion to be followed in the adoption of any decision and, particularly, in order to choose and determine the measure to be applied to the case (Art. 7.3). According to this „best interest”, the Organic Act 5/2000 leaves interesting possibilities open for exercising the „regulated” opportunity¹⁹ and the Prosecutor is therefore allowed, in certain cases, to decide not to prosecute (Articles 18 and 19), while in the adult penal law the Prosecutor is obliged to do so whenever a penal offence has been committed.

Definition of the best interest of the concerned child is the Judge's task, assisted by the technical team and in close coordination with the Prosecutor²⁰. Due to the little help to be found in the Organic Act 5/2000, non-legal criteria are available in order to give a content to the „minor's best interest”, a concept that should necessarily be connected to the minor's personal development, educational needs²¹, to the minor's re-education and re-socialization²².

1.3.2. Specifically, relating to the criminal proceedings provided by the Organic Act 5/2000, they are also in line with the 1992 trend, but include a much more developed regulation (Articles 16-42) to be completed by the general provisions on the abbreviated process (T.III, B.IV of the Criminal Procedure Code).

The trial is conducted by a specialized magistrate, the judge for Minors of the place where the facts were committed (Art. 2.3); if the facts were committed in various places, the decision on the competent Judge must also consider the place of residence of the minor concerned (Art. 20.3). In principle, the new procedure fully guarantees the presumption of innocence, the right for defense²³, the right to make an appeal and (not without distinctions) all the other fundamental procedural safeguards provided for the adults.

Other relevant features of this penal process are:

a) specialization of all the different intervening agencies (Judge, Prosecutor, Lawyer and the technical team);

b) pre-eminence and complexity of the Prosecutor's role (see below);

c) flexibility in decisions (they can always be revised, suspended, etc at any stage and options to diversion);

d) compliance with the accusatory principle²⁴ inside a procedure that is more accusatorial than the adults' one²⁵: according to Art. 8, the judge cannot impose a measure more restrictive of the minor's rights or for a longer time than the one demanded either by the Prosecutor or by the accuser; if the judge considers that the-demanded measure is not sufficient, he/she must proceed according to Art. 37.1²⁶;

¹⁸ Juan-López Martín, 2001, 107.

¹⁹ Alastuey Dobón, 2002b, 202; Bueno Arus, 1997, 164.

²⁰ Funes Artiaga, 1997, 65.

²¹ Higuera Guimera, 2003, 253.

²² Palacio Sanchez Izquierdo, 2000.

²³ Gómez Colomer, 2002, 185.

²⁴ Arrom Loscos, 2002, 87; Gómez Colomer, 2002, 184.

²⁵ Abel Souto, 2004, 13.

²⁶ Abel Souto, 2004, 27.

e) victims' participation. The regime of the victims' participation in criminal proceedings concerning juvenile offenders has been recently reformed in order to broaden the previous restrictive regulation. According to the former Art. 25 of the Organic Act 5/2000, victims were not allowed to intervene as actors in the process. Of course they could denounce, but accusation was the Prosecutor's task. During the process only in certain circumstances the intervention of the victims was possible, and in a limited way²⁷; they could also intervene in the separate judgement initiated to establish the civil liability, presenting their civil claim before the judge, under Articles 61-64²⁸. Art. 25 has been reformed by the Organic Act 15/2003. This one, paying attention to the criticism raised in certain sectors by the initial decision of excluding the victim from the criminal proceedings against minors²⁹ -even qualified as unconstitutional³⁰ - allows for the intervention of the victim as an actor in this context. On the other hand, Art. 3, as reformed by the Organic Act 8/2006, is devoted to the recognition of the most important victims' rights: assistance, right to claim the civil liability, participation in the file and information on the evolution of the proceedings and over the main decisions adopted, even if they are not taking part in the proceedings.

The process is also characterized by celerity and by division between the procedure devoted to the imposition of a measure and the establishment of the civil liability³¹.

The Organic Act 7/2000, adopted before the Organic Act 5/2000's coming into force, introduced, however, several restrictions to the general principles of the natural judge in relation to terrorist crimes³², that have been confirmed by the Organic Act 8/2006. Leaving aside the relevant increase produced in the deprivation of liberty measures' length according to the new Article 10, prosecutions related to terrorism fall into the competence of the Central Judge for Minors, in the National Audience, Madrid (Art. 2.4). The joinder of proceedings is not allowed and the measures imposed have to be executed with preference to any other measures.

1.3.3. There are two proceedings regulated by the Organic Act 5/2000: the declarative and the executive proceedings.

The former is divided in two stages: investigation (*instrucción*) and trial (*audiencia*). Investigation and adjudication are, thus, separated and both of them have an intermediary phase: the presentation before the Judge.

In order to guarantee the principle of the judicial independence, investigation is dealt with the Prosecutor³³. This subject - and not the Judge³⁴ - is the competent instance to start the case (Art. 16) and to close it after having carried out the investigation (Art. 30.1). Furthermore, the Prosecutor conducts the investigation, leads the action of the judicial police and decides on the practice of any search activities demanded by the minor's counsel or by the victims taking part in the process. The Prosecutor must give the minor's counsel (and those participant in the process) free access to the file to whenever required (Art. 23.2), except if the secret of the investigation has been declared by the Judge; in this case the minors' counsel will receive the file at the end in order to prepare the defense. Victims taking part in the proceedings have also the right of access to the file (Art. 25). However, in this stage, like in any other, only the judge, resolving in a motivated

²⁷ Planchadell Gargallo, 2002, 195.

²⁸ José Luis de la Cuesta, 2001b, 175; Navarro Mendizabal, 2001, 121.

²⁹ Abel Souto, 2003, 1077; Landrove Diaz, 1998, 293; Ventura Faci - Peláez Pérez, 2000, 124.

³⁰ Sáez González, 2001, 77.

³¹ Cuello Contreras, 2000, 88.

³² Rios Martin, 2001.

³³ Diaz Martinez, 2003; López López, 2002.

³⁴ Critically, Gómez Colomer, 2002, 177, 184.

way (Articles 23.3 and 26.3), is entitled to adopt all kinds of decisions restricting the minor's fundamental rights.

As soon as the investigation phase is over, the file is sent to the Judge for Minors. After hearing the minor's counsel (and the civil liable persons), and if there is no conformity among the different parties (Art. 32), the Judge decides whether opening the hearing or not (Art. 33).

The hearings are conducted by the judge with broader discretion than in the adult criminal process. Other differences are: no robes and stage, restrictions in the publicity... The hearings take place in the presence of the Prosecutor (and those other persons taking part in the proceedings), the minor's counsel, a representative of the technical team and the minor, who can be accompanied by his/her legal representatives, except if barred by a judicial decision. The public agency responsible for the protection or reform of minors (and those persons or entities potentially civil liable) can also take part in the hearings (Art. 35).

The main contents of the hearing concern the evidence, the presentation of proposals by the parties and by the technical team and the interview of the minor.

After the hearing, the judge has five days to pass the sentence (Art. 38), imposing the measures, specifying their content, duration and objectives, in a clear manner and with explanations that are appropriate to the minor's age (Art. 39.2). Sentences can be appealed before the Provincial Audience (before the National Audience in case of terrorism) within five days (Art. 41): An appeal to the Supreme Court in order to unify the judicial doctrine is also provided for by Art. 42 of the Organic Act 5/2000.

The execution process is regulated by Articles 43-60³⁵. The new system is coordinated with the social services working to protect minors as established in the Autonomous Communities; these are allowed to give their support to the judicial system and to the application of judicially adopted measures. The Organic Act 5/2000 entrusts the Autonomous Community of the place of the sentencing judge for Minors with the competence on execution (Art.45.1); conventions or agreements with public or private (non-profit) agencies in order to execute the measures can be drawn up (Art. 45.3). This does not mean in any case a referral of responsibility. Execution must be conducted under the control of the judge for Minors (Art. 44) and in full compliance with the legality principle. Special provisions for the execution of measures consisting in a deprivation of liberty are set out (Articles 54-60). By the Royal Decree 1774/2004 a general regulation of the execution of measures has been approved, developing the general provisions of the Organic Act 5/2000.

2. Age thresholds of criminal responsibility and liability to prosecution

2.1. Art. 19 of the new 1995 Penal Code established an age threshold for the full application of the Penal Code's provisions: 18 years old. Simultaneously, it ordered the drafting of a new Law on the penal responsibility of minors in Spain, suspending the application of the new age threshold until the effective coming into force of this new system.

According to the old penal Code, 16 years was the absolute age threshold of penal responsibility. Persons under 16 who had committed a criminal offence were not held responsible; in fact they benefited of an exemption of penal responsibility (Art. 8.2 old Penal Code). They were, nevertheless, sent to juvenile courts (to the „Tutelary Tribunals”, until 1991) who were qualified to non-penal measures. Nevertheless, after Act 4/1992, children under 12 were not sent to Juvenile courts; they were directly put under the supervision of social services.

³⁵ José Louis de la Cuesta, 2001c.

Nowadays, the situation has changed. First of all, age threshold have been raised and, after the last reform, the Minors' Jurisdiction only examines acts committed by persons between 14 and 18. Furthermore, 18 cannot be considered anymore as the absolute age threshold for criminal responsibility; while the new system is a system of „penal responsibility”, thus people under 18 can also be held responsible if they commit a penal offence as defined by the Penal Legislation. According to the new model, minors under 14 are the only ones who cannot be penal responsible (Art. 4); the minority of age (18) only prevents from applying the adults' Penal Code. Minors under 18 (but already 14) can be imputable, i.e. capable of culpability³⁶; indeed, in order to be declared responsible, the minor must be culpable³⁷ and no circumstance of non-imputation, justification or excuse must intervene. Therefore, the Organic Act 5/2000 reduces to 14 the age limit for the criminal imputation³⁸, although between 14 and 18 the penal, procedural and execution system provide for this age range special regulations for responsibility.

Minors' jurisdiction extends its competence to minors between 14 and 18, but an important distinction is legally made: minors aged 16-18 can be submitted to a more severe penal intervention than those aged 14-16, especially in serious cases (Art. 10). Sometimes determining the age of a person can be difficult. Therefore, if doubts on the age arise and the police have no elements to determine it, the decision on this issue will be adopted by the ordinary. Judge according to the general rules set out by the Criminal Procedural Code (Art. 2.9 of the Royal Decree 1774/2004).

The attainment of the age of majority does not put an end to the execution of the measure imposed. The execution of the measure goes on until the goals are achieved; but internment in closed regime imposed to (or still in execution by) 21 years old persons will be executed in a prison, in principle; the same rule will be applied if the young person becomes 18 years old in dosed regime and his/her behavior is not in accordance of the objectives proposed by the sentence or if, before initiating the execution, he/she has already executed totally or in part an imprisonment sentence or an internment measure in a penitentiary establishment (Art. 14). On the other hand, if, during the measure's execution, a 18 year old person is punished under the Penal Code and the simultaneous execution of this punishment and the measure is not possible, priority is given to the punishment; the execution of the punishment will extinguish the measures imposed, except if it is an internment measure and punishment is imprisonment: in this case, if the Judge for Minors does not leave without effect the execution of the measure, this one will take place in a penitentiary and will be followed by the execution of the prison sentence (Art. 47.7).

Art. 69 of the new Penal Code paved the way to the application of the new system for certain minors aged up to 21 (but older than 18) who committed a penal offence. Art. 4 of the Organic Act 5/2000 regulated this possibility, excluding very serious crimes (when punished with a 15 year penalty of deprivation of liberty or more) and crimes related with terrorism.

The application of Art. 4 remained however suspended until 2007 (Organic Act 9/2002) and the last reform (Organic Act 8/2006), after having considered the exclusion from this possibility only of those acts punishable by internment in closed regime, has finally decided to limit the field of application of the jurisdiction for minors to persons aged between 14 and 18.

2.2. Minors under 14 committing penal offences cannot be held responsible and they are to be dealt with according to the provisions and procedures on protection of minors contained in the Civil Code and the Organic Act 1/1996 on Minor's Protection. Consequently Art. 3 of the Organic Act 5/2000 orders the Prosecutor (as soon after verifying this point) to send all the relevant information to the competent authority in the field of protection of minors, so that this one can

³⁶ Alastuey Dobón, 2002a, 1545.

³⁷ Cuello Contreras, 2000, 49; Gonzáles Cussac - Cuerda Arnau, 2002, 82; however, Feijóo Sanchez, 2001, 24.

³⁸ Gonzáles Cussac - Cuerda Arnau, 2002, 88; Higuera Guimerá, 2002, 71.

promote the adoption of those measures of protection that are adequate to the minor³⁹. Every public authority qualified in the field of children's protection is legally obliged to intervene directly, immediately and with effectiveness in any situation of risk or danger to the children welfare, adopting all the necessary and suitable measures with an educative and interdisciplinary approach (Art. 14 Organic Act 1/1996). In cases of serious risk to the personal or social development of the minor, separation from the family can be ordered as to eliminate risk factors coming from the family environment. If parents fail to fulfil their protection duties depriving the minor of the necessary material and moral assistance, the qualified authority must assume directly and automatically the tutorship of the minor, and adopt all the necessary measures to guarantee protection (Art. 172.1 Civil Code).

In any case, the intervention must always be communicated to the minor's legal representatives, and carried out in coordination with all the competent authorities and under the control of the Prosecutor and the Civil Judge. The Prosecutor must be kept informed on every administrative decision and has to verify every six months the situation of the concerned minor and promote the adoption of the necessary protective measures by the Judge. Civil and Family judges are the entitled authorities to adopt any kinds of preventive measures (Art. 158 Civil Code) and to deal with appeals against any administrative decision.

3. Specialized agencies

As already explained, criminal proceedings against juvenile offenders constitute a judicial process - possibly too similar to the one for adults - conducted by a specialized magistrate, the judge for Minors. Indeed, specialization of the different intervening agencies is one of the main features of the new system established after the abolition of the tutelary system in Spain, and particularly by the Organic Act 5/2000. In this way, Final Disposition No. 4 requires the specialization of judges, Prosecutors and Lawyers, attributing to their respective governing boards the competence to organize training programs. Specialization courses are organized as one of the best ways to guarantee the specialized required training; but it could also be proofed by other objective criteria, such as the professional experience in working with minors and scientific studies or papers presented or published on this matter.

3.1. Judge's specialization

The specialization of the judges for Minors was already required in 1995 by the Organic Act of the Judicial Power; in this text the Judicial School was entrusted with training courses in order to assure it. A reform introduced by the Organic Act 9/2000 in Art. 329.3 reinforced this requirement, clearly establishing a hierarchy in the provision of these posts: firstly, those Magistrates having taken the specialization training organized by the judicial School; secondly, those Magistrates having served at least three years during the previous five years in the jurisdiction of minors; finally, in absence of the above mentioned requirements, the seniority rule. In any case, those who obtain a post by this way, before taking up office, have to participate in the activities of specialization determined by the General Council of the Judicial Power.

3.2. Prosecutor's specialization

Specialization of Prosecutors is also a legal requirement and, according to Final Disposition 4 of the Organic Act 5/2000, the Ministry of justice must not only assure it, but also create, in all the Prosecutor's Offices, a specialized Section for Minors.

³⁹ Lorca Martinez, 2001.

The Prosecutor's specialization is particularly crucial, due to the important role of Prosecutor in criminal proceedings concerning juvenile offenders⁴⁰. The Prosecutor not only conducts the investigation, leads the action of the judicial police and instructs the case (Articles 16.1 and 23); the Prosecutor also has to guarantee the minors' rights and protect their interests (Art. 6 of the Organic Act 5/2000 and Art. 3.13 of the Prosecutor's Organic Statute) as well as to assure the victims' defense and the social interest. These functions deserve a different logic⁴¹ and are not easily compatible⁴², particularly if they concentrate on the same person. However, the proposal to have two different members of the Prosecutor office (one to prosecute, the other one to watch over the minor's interest) participating in the process was not followed by the Organic Act 5/2000. Nevertheless, concerning the statements of the minor detained conducted in the absence of the minor's parents, tutors or guardians, Art. 17.2 clearly orders the participation of a member of the Prosecutor's office, but different from the Prosecutor who is instructing the case⁴³.

A specialized Minors' Prosecutor has been appointed inside the Supreme Court's Prosecutor Office in January 2005, in order to assure coordination and unity of guidelines in the activity of the different Minors' Specialized Prosecutors in Spain.

3.3. *Specialization required for any other figure acting in the proceedings*

The Organic Act 5/2000 (Final disposition No. 4) also requires the specialization of the legal counsels. The General Council of Bar Associations must adopt any necessary provision aimed at guaranteeing an adequate offer of specialized training in all the territory for those lawyers who desire to intervene before the judges for Minors⁴⁴. A specialized training, approved by the General Council, is necessary to be included in the list of lawyers authorized to intervene as official defending counsels before the Jurisdiction of Minors⁴⁵.

As far as the police forces are concerned⁴⁶, Final Disposition 3 required to the Government and the Autonomous Communities to strengthen the Specialized Groups for Minors of the Judicial Police, in order to give to the Prosecutors all the necessary support. Most of police forces (at least the most important ones) have organized specialized units to grant an adequate intervention in this field⁴⁷.

Furthermore, Royal Decree 1774/2004 has regulated the most important aspects of the judicial police's intervention related to minors under the Prosecutor's direction (Articles 2 and 3).

3.4. *Social services (or similar agencies) involved in the proceedings*

Several Articles of the Organic Act 5/2000 clearly envisage the participation of social services involved in the protection and reform of minors. This happens in the execution of measures (Articles 43-60), but also in other fields: adoption of provisional measures (Art. 28.1 and 28.2), participation in the hearings (Articles 35, 41 and 42.7), the choice (Articles 7.3 and 10.4) and modification of the measure (Art. 13) or the decision of suspending the sentence execution (Art. 40). Despite the importance of the adequate training of this non-jurisdictional personnel⁴⁸, the initial content of Final Disposition Nos. 3 and 4, setting out a new category of forensic

⁴⁰ Cavero Forradelas, 1997, 73; Sancho Casajus, 2002, 137.

⁴¹ Tamarit Sumalla, 2001, 87.

⁴² Gómez Colomer, 2002, 167.

⁴³ Critically, Salom Escrivá, 2002, 225.

⁴⁴ Ponz Nomdedéu, 2002, 382.

⁴⁵ Higuera Guimerá, 2003, 428.

⁴⁶ Antón Barberá, Cólás Turégano, 2002, 413.

⁴⁷ Bueno Arus, 1998; Clemente, 1997; Dominguez Figueirido, Balsebre Jiménez, 1998.

⁴⁸ Cuello Contreras, 2000, 146.

psychologists and educators and social Workers, was abolished by the Organic Act 9/2000 before the effective enforcement of the Organic Act 5/2000⁴⁹.

Furthermore, the Prosecutor can always propose the participation in the trial of persons or representatives of public and private institutions that can bring to the valuable elements in order to determine the best interest of the minor and on the suitability of the proposed measures (Art. 30.3). On the other hand, social services or similar agencies have to get involved if the socio-educative intervention over the minor proposed by the technical team is allowed for. Indeed, it is always up to the technical team's hands, to propose a socio-educative intervention over the minor, indicating the noteworthy aspects for this intervention (Art. 27.2).

4. Early definition of the proceedings

Coherently to the pursuance of the minor's best interest (and not punishment or repression) as the fundamental principle of the intervention towards minors, Spanish law allows an early definition of the proceedings avoiding new prosecutions against minors (14-18 years old).

So, by means of the principle of „regulated opportunity”⁵⁰, even before opening the case itself, Art. 18 allows the Prosecutor to decide not to start the investigation if the violations committed represent a less serious offence (without personal violence or threat) or misdemeanours, and there is no evidence of the previous commitment, by the minor, of similar acts⁵¹. In this case, if the Prosecutor decides not to open the file, he will transmit all kinds of information to the authority for the protection of minors. Although Art. 18's wording apparently obliges the authority to the adoption of protection measures provided for by the Organic Act 1/1996⁵², the decision to promote them is only to be found according to the minor's situation⁵³; discretion is, however, at this level, really broad and not sufficiently controlled⁵⁴.

Under Art. 19, conciliation or reparation can also determine a closure by the Prosecutor of an already opened investigation or file⁵⁵. In any case, the seriousness of the offence and other circumstances of the facts especially the absence of serious violence or threat - are very important elements for the adoption of this decision; furthermore serious offences cannot be dealt with by this procedure⁵⁶. On the other hand, although the victim's participation in this procedure is important, conciliation or reparation are not regarded as a manifestation of the privatization of the conflict's resolution⁵⁷ and can involve certain dangers to individual safeguards⁵⁸, so the controversial regulation introduced by Art. 19 of the Organic Act 5/2000⁵⁹ requires the intervention of different instances and defines what elements must be controlled in order to consider that conciliation or reparation have been achieved, and the procedure to be followed with this aim.

According to Art.19.2, conciliation occurs if the minor acknowledges the harm and apologizes to the victim and the latter -or the legal representative, with the approval of the Judge

⁴⁹ Higuera Guimerá, 2003, 429.

⁵⁰ Bueno Arus, 1997.

⁵¹ Dolz Lago, 2002, 281.

⁵² Higuera Guimerá, 2003, 434.

⁵³ Alastuey Dobón, 2002b, 203.

⁵⁴ Landrove Diaz, 2001, 287.

⁵⁵ Bernuz Beneitez, 2001, 263; Peris Riera, 2001.

⁵⁶ Critically, Tamarit Sumalla, 2002, 62.

⁵⁷ Torres Fernández, 2003, 89.

⁵⁸ Carmona Salgado, 2001, 121.

⁵⁹ Herrera Moreno, 2001, 425.

for Minors - accepts⁶⁰ or at least does not reject it⁶¹. On the other hand, in order to accept reparation - as a way of diversion, and independently from the civil liability issues⁶² - , an agreement of the minor to do something in favor of the victim or of the community is required; and this agreement must be followed by its effective execution. Reparation can also, in certain cases, be verified through the successful implementation of the educative activity proposed by the technical team⁶³.

In order to obtain conciliation or reparation, Art. 19.3 entrusts the technical team with the functions of mediation between the minor and the victim. It is also the technical team's task to inform the Prosecutor on the agreement that has been reached and on the obligations to be fulfilled. Nevertheless, the closure of the investigation is only possible if conciliation and reparation are effective (also if reparation was not possible in despite of the minor's will). Only then the Prosecutor will close the investigation and propose the Judge to dismiss the case.

Dismissal of the case by the way of Art. 19.1 can also be the consequence of a proposal coming from the technical team if it is regarded to be convenient in the minor's best interest due to the time elapsed since the commitment of the acts or because the blame that the facts deserve has already been sufficiently expressed by different interventions (Art.27.4). If the Judge dismisses the case, the Prosecutor is to send complete information to the competent public agency to facilitate possible necessary interventions to protect the minor.

An early definition of the proceedings can again derive from the fulfillment of the Prosecutor's request by the minors and their counsel, that - if the measures proposed do not consist in internment or absolute disqualification - give way, without any other intervention, to a sentence of conformity (Articles 32 and 36).

The principle of flexibility. also allows, once the sentence has been passed, to suspend its execution during two years and with the possibility of imposing certain conditions (Art. 40) or to suspend, modify or substitute the imposed measures (Articles 13 and 51), even putting an end to the penal intervention⁶⁴.

5. Personality assessment procedures

One of most important novelties of the new system introduced by the Organic Act 4/1992 was the establishment of a technical team, integrated by a psychologist, a pedagogue and a social worker, and with a fundamental task: to inform the Prosecutor and the judge on the psychological, pedagogic and familiar situation of the minor and his/her environment, assessing decisive elements in order to define the minor's best interest and to adopt any decision on the minor's rehabilitation and re-socialization.

In the Organic Act 5/2000 the position of the technical team remains an essential one⁶⁵: not only it investigates and reports on the minor's situation, but it also explores the possibilities of conciliation or reparation (eventually mediating between minor and victim) and proposes the non-prosecution of the case, in the minor's best interest, if the „social concern” has already been sufficiently considered or prosecution is deemed inadequate due to the time elapsed since the commitment of the offence (Art.27). The technical team's report is needed in order to adopt many

⁶⁰ Critically, Gomez Rivero, 2002, 9.

⁶¹ Marti Sanchez, 2001, 77.

⁶² Richard Gonzáles, 2000, 4.

⁶³ In a critical sense, due to the possible confusion between reparation and measures consisting in community service or socio-educative tasks, see Alastuey Dobón, 2002b, 207.

⁶⁴ Mena Álvarez, 2001, 221.

⁶⁵ Dolz Lago, 2001.

fundamental decisions, particularly those related to the provisional and the final measures, their order of application, modification, substitution or suspension.

The Royal Decree 1774/2004 develops the regulation of the technical team's intervention. Art. 4.1 establishes that the technical teams will be integrated by psychologists, educators and social workers (eventually other professionals can join the technical team in a temporal or permanent way) recruited to assist the Prosecutor and the Judge for Minors, according to their specialization. They are qualified to give a professional assistance to the minor detained, and to mediate between minor and victim.

The technical independence of the team is guaranteed (Art. 42). It's organically dependent from the competent Administration and intervenes under the supervision of the Prosecutor and the Judge for Minors. But the reports are drawn up applying strict professional criteria, and have to be signed by the team members. They can also be drawn up or complemented by those public or private entities that, being active in the field of minors' education, have a first hand knowledge of the situation of the alleged offender (Art. 27.6 Organic Act 5/2000).

The composition of the technical team is defined by the competent administration, according to the real needs. Either the Ministry of justice or each competent Autonomous Community have to guarantee that each Prosecutor will have enough and adequate staff to draw up the legally required reports in time (Art. 4.4 Royal Decree 1774/2004).

6. Mediation

One of the functions entrusted to the technical team is to mediate between minor and victim (Art. 19.3 of the Organic Act 5/2000; Art. 4.1 II of the Royal Decree 1774/2004).

Mediation can play an important role. at different stages of the proceedings (where several ways of diversion are envisaged, especially in case of conformity of the minor with the Prosecutor's demand or conciliation with the victim), but it is regulated by the Organic Act 5/2000 only in relation with the dismissal of the case due to the conciliation or reparation between minor and victim⁶⁶. Art. 27.3 of the Organic Act 5/2000 establishes therefore that the technical team, as far as it considers it to be convenient and in the minor's best interest, has to explore the possibilities of conciliation or reparation and must inform the Prosecutor on the content and on the aim of the possible restorative or conciliation activity⁶⁷.

The mediation procedure has been further developed by Art. 5 of the Royal Decree 1774/2004. According to this new regulation, the procedure begins either by the initiative of the technical team (as regulated by Art. 27.3 and already explained) or by a Prosecutor's petition: this one - taking into account the concurrent circumstances, the minor's counsel's request or the technical team's initiative - may regard a discontinuance of the proceedings more convenient; in this case the Prosecutor will ask the technical team on the suitability of an extrajudicial solution adequate to the minor's and victim's interest.

After receiving the Prosecutor's petition, the technical team must get in touch with the minor, his/her legal representatives and counsel, in order to explain the possibility of an extrajudicial solution, and to discuss the matter. If the minor, in his/her counsel's presence, accepts one of the proposed solutions, the conformity of the legal representatives is demanded.

If the minor agrees, the technical team contacts the victims in order to explore their willingness (if the victim is a minor or is incapable, the legal representatives must confirm it and the competent Judge for Minors must be informed) to take part in a mediation procedure. If the victim agrees, the technical team meets both the minor and the victim in order to consider the

⁶⁶ Peris Riera, 2001.

⁶⁷ Elicegui Gonzales, Santibáñez Gruber, 2002, 189.

particular aspects of the conciliation or reparation agreement; if the victim refuses, the agreement can be reached by any other way.

Finally, the technical team has to keep the Prosecutor informed about the result of the mediation procedure, on the agreements reached and on their degree of fulfillment or the reasons for a possible failure.

If the conciliation or the direct or social reparation is not possible (or if it is considered more suitable to the minor's best interest) the technical team can propose to the minor either a socio-educative task or a community service; in this event the minor's compromise and fulfillment of the service or task has the same value as conciliation or reparation in order to the adoption of the Prosecutor's decision to close the file and demand to the judge the dismissal of the case.

The mediation procedure regulated by Art. 5 of the Royal Decree 1774/2004 also applies to the sometimes „problematic”⁶⁸ cases of conciliation that can intervene after the application of the measure (provided by Art. 51.4 of the Organic Act 5/2000, without exclusion of serious offences). Here again conciliation or reparation can lead to the extinction of the measure, if the Judge - taking into account the Prosecutor's or the minor's counsel's proposal, and after having heard the technical team and the representative of the public body competent in protection and reform of minors - considers that conciliation expresses sufficiently the reject that the minor's offences deserve. However, in this case the mediation functions of the technical team already explained are usually developed by the public agency. The latter, as soon as the minor manifests his/her will of conciliation or reparation, has to inform the Judge for Minors and the Prosecutor, and then proceed in the way provided for the technical team under Art. 5 of the Royal Decree, without introducing any change in the execution of the measure imposed. If the victim is a minor the judge of Minor's authorization is required (Art. 15.1 of the Royal Decree 1774/2004 and Art.19.6 of the Organic Act 5/2000).

7. Personal liberty

In proceedings against juvenile offenders restriction or deprivation of liberty can occur since detention can be adopted either at the pre-trial stage or as final options.

7.1. Detention by the police⁶⁹ is regulated by Art. 17 of the Organic Act 5/2000 and Art. 3 of The Royal Decree 1774/2004. According to these provisions detention must be imposed in the less prejudicial form, in adequate facilities, different from the ones used for people over 18 (Art. 172); detained minors have to receive the protection and social, psychological, medical and physical assistance required according to their age, sex and individual characteristics.

The police must also immediately inform the Prosecutor and the minor's legal representatives, indicating the place where the minor is kept under custody; if the minor is a foreigner with legal residence outside Spain, consular authorities have to be equally informed.

The length of such detention should be restricted to the necessary time in order to clarify the facts. At least within 24 hours the Police must release or put the offender at the Prosecutor's disposal. This one within 48 hours since the detention has to decide either to release the minor or to open the case and send him/her to the competent Judge for Minors, eventually demanding the adoption of the necessary provisional measures.

Detained minors have the right to be informed immediately and in a clear and comprehensible way on the charges and their procedural rights. A detained minor has all the rights

⁶⁸ Alastuey Dobón, 2002b, 217; however, Tamarit Sumalla, 2002, 74.

⁶⁹ Antón Barberá, Colás Turégano, 2002, 429.

of a detained adult and, in particular, the right to maintain a private interview with his/her counsel before and after the practice of the declaration (Art. 17.2 II) and *habeas corpus* (Art. 17.6).

Any statement of the detained minor has to be made in his/her counsel's presence and also in the presence of the parents, tutor or guardian; if these ones are not present, a representative of the Prosecutor's office, different from the one investigating in the case, must participate (Art. 17.2)⁷⁰.

7.2. At the pre-trial stage, the Judge for Minors can adopt several provisional measures⁷¹: internment, controlled freedom, prohibition to enter in contact or in communication with the victim, the victim's relatives or other persons; the custody by a person, a family or an educational group. The decision must be founded on the risk that the minor may either elude justice or aggress the victim (Art. 28.1 of the Organic Act 5/2000), and requires a Prosecutor's request (or, eventually, the request of the private party taking part in the proceedings); the minor's defense counsel and the technical team must be heard. Aim of the provisional measures - that can last until the hearing or during the appeal - is to grant minor's custody and with defense. Obviously, the time of the provisional measure is counted as time served as part of a sanction, if a measure is finally imposed.

Provisional internment can be adopted taking into account the seriousness and repercussion of the offences and the social alarm caused by them. The minor's social background and personal characteristics, as well as the risk of evasion and the previous serious crimes committed by the minor must also be considered. The Judge decides on the proposal in a short hearing; the technical team and the public agency competent in the protection and reform of minors; these ones must inform the judge on the convenience of the adoption of the demanded measure, attending to the minor's best interest and situation. Evidence can be also proposed in this hearing.

Ordinarily, provisional internment's maximum time was three months, but the last reform (Organic Act 8/2006) has raised this limit to six months; an additional three months can be decided by the Judge in a motivated way and following a Prosecutor's request (Art. 28.3). The internment is applied in the centre designed by the competent public agency, and under the internment regime ordered by the Judge. Art. 29 of the Royal Decree 1774/2004 establishes that, in order to safeguard and respect the principle of presumption of innocence, the individualized program of execution will be replaced by an individualized intervention model, containing the plan of activities adequate to the minor's personal characteristics which must be compatible with the interment regime and the process situation.

In case of non-imputation due to mental impairment or any of the circumstances defined by Articles 20.1-2 and 3 of the Penal Code, the provisional measures foreseen by the Civil Code can be applied to the minor. However the investigation goes on and the application of a therapeutic measure adequate to the minor's best interest remains open by way of the sentence (Art. 29).

7.3. Restriction and deprivation of liberty play an important role in the system of measures, considered by academic literature as „punitive sanctions”⁷² or „juvenile punishments”⁷³. However, as Landrove Diaz⁷⁴ states, being formally penal sanctions, these measures have materially a sanctioning-educational nature⁷⁵.

⁷⁰ See, in a critical sense, Salom Escrivá, 2002, 225.

⁷¹ Aparicio Blanco, 2000, 169; Gisbert Jordá, 2001, 103.

⁷² Sánchez García de Paz, 2000.

⁷³ Cerezo Mir, 2001, 1094; García Pérez, 2000, 686; Extebarria Zarrabeitta, 2001b, 32.

⁷⁴ 2001, 160.

⁷⁵ See also González Cusac, Cuerda Arnau, 2002, 103-105.

The list of measures is broad and includes the following⁷⁶: different kinds of ordinary (and therapeutic) internment (in close regime, half-open regime and open regime); ambulatory treatment; visiting a day-centre; week-end arrest; supervised freedom (eventually with intensive supervision); prohibition to enter in contact or in communication with the victim, the victim's relatives or other persons; custody by a family or educative group; community service; warning; socio-educative tasks; deprivation of the driving license for motorcycles; revocation of other administrative licenses (to hunt, to fish, or allowing the use of arms); absolute disqualification in relation to taking part in political elections or to become a public servant (Art. 7.1).

Measures, in general, may not exceed (Art. 9.3) two years (community service: 100 hours; week-end arrest: 8 week-ends). Internment measures are divided in two periods: internment and supervised freedom. The technical team advises on the content of each period and the judge decides each period's length.

However, there are special cases (Art. 10):

a) those aged more than 16 who have committed either a serious offence or a less serious offence with violence or coercion or endangering other people's life or well-being and the commission of any offence by a minor in a group, or belonging to a criminal organization or association, can deserve (after the last reform) measures up to six years (200 hours in case of community service, and up to 16 week-end arrest); if aged 14 or 15 the measure will be limited to three maximum; 150 hours in case of community service, and up to 12 week-end arrest. In extremely serious cases (and recidivism is always considered so) internment will be in a closed regime for 1-6 years (excluding all substitution before one year of effective execution) and supervised freedom with educative assistance up to 5 additional years will follow;

b) the Organic Act 7/2000 introduced a particular system for very serious offences and terrorism; this system has been reformed again in 2006:

- very serious offences (murder, homicide, rape, violent sexual aggression, terrorism and, in general, those punished by the Penal Code with 15 years imprisonment or more)

- if committed by minors of 16 years, deserve a measure of internment in a closed regime (1-5 years) followed by supervised freedom (up to three years more)

- if committed by those aged more than 16, internment in closed regime (from 1 to 8 years) will be followed by supervised freedom (up to five years more) and the measure will not be modified, suspended or substituted until a half of the internment period has been spent;

- in cases of terrorism, according to the seriousness of the offence, the number of acts committed and the circumstances related to the offender, the judge can also impose an absolute disqualification for taking part in political elections or to become a public servant (4 to 15 years); such a measure has to be executed after internment.

All these criteria have to be applied even if the minor is held responsible of more than one infraction and the measures will be executed according to the order established by Art. 47⁷⁷; but if the offences are connected or continuous infractions, the judge will take as a reference the most serious offence committed. In case of a plurality of infractions, if one (or more) constitute a very serious crime or a crime of terrorism the internment in closed regime can be raised up to 10 years for those aged 16 or 17 and up to six years for those under 16 (Art. 11).

⁷⁶ Abel Souto, 2002, 105; Carmona Salgado, 2002, 917; Muñoz Oya, 2001, 185.

⁷⁷ If the measures come from different resolutions, the Judge in charge of the execution will have to apply the provisions of Art.47 (Art.12).

In any case, general limits in imposition of sanctions are the following:

- the accusatory principle (Art. 8) impedes the Judge for Minors to impose a more severe measure than the one demanded either by the Prosecutor or by the accuser a comparison that can be difficult in case of non-homogeneous sanctions⁷⁸;

- for misdemeanours only supervised freedom (up to six months), warning, week-end arrest (up to 4 week-ends), community service (up to 50 hours), deprivation of licenses (up to one year) and prohibition to enter in contact or in communication with the victim, the victim's relatives or other persons or socio-educative tasks (up to six months) can be applied (Art. 9.1).

On the other hand, internment measures - as an absolute temporal limit⁷⁹ - cannot exceed the prison's length established by the Penal Code for the commitment of the same offence by an adult (Art. 8). Only minors responsible of:

- either serious offences,

- or less serious offences committed with violence or coercion or posing a great risk to the life or personal integrity of others,

- or offences committed in group or if the minor belongs to a gang, organization or association devoted (even transitorily) to the commission of such activities, can undergo in a closed regime (Art. 9.2). Regulation of the internment in a closed regime is, in any case, mainly oriented in a punitive way⁸⁰.

In cases of mental disease or other circumstances that provoke the minor's non-imputability, therapeutic internment or ambulatory treatment are the only admissible measures, and they should be imposed taking into account risk or dangerousness posed by the minor (Art. 9.5).

In order to choose the appropriate measure (Art. 7.3) the model followed by the Organic Act 5/2000 opens a broad field to judicial discretion⁸¹: flexibility is much more acknowledged than in adults' proceedings⁸² and the Judge for Minors must take into account not only the evidence and the legal scope of the conduct, but, in particular, the information provided by the technical team on the minor's age, social and family conditions and personality. The public institutions competent for the protection and reform of minors can also advise the judge on these issues. Although general prevention and retribution are present in a certain sense, special prevention criteria prevail⁸³.

The imposition of more than one measure of different nature in the same resolution is possible, if it appears to be the most suitable decision for the best interest of the minor. If two or more measures of the same nature imposed in different resolutions have to be simultaneously executed, the Judge will accumulate them, but the total time of execution will not exceed twice the length of the most serious one. Furthermore, if the different measures pronounced can not be simultaneously applied, the judge can substitute all (or some) of them or indicate the order of application beginning with the internment measures. Inside this category, the execution of a therapeutic internment will have the preference over all the internment in closed system, and the latter over any other internment measure (Art. 47). Judges are, however, allowed to establish a different order if they consider it more suitable to the minor's best interest (Art. 47.5 e); the Judge can also during the execution modify, suspend, reduce, substitute or put an end to the measure „at any moment”, in accordance with the minor's best interests and if the social concern for the minor's behavior has been sufficiently expressed (Art. 13).

⁷⁸ Cervelló Donderis, Colás Toregano, 2002, 130.

⁷⁹ Arrom Loscos, 2002, 87.

⁸⁰ Cuello Contreras, 2000, 45.

⁸¹ González Cussac, Cuerda Arnau, 2002, 105.

⁸² Tamarit Sumalla, 2001, 77.

⁸³ Cadena Serrano, 2002, 93.

Measures (under two years) can benefit from the conditional suspension of the execution (Art. 40)⁸⁴. During the conditional suspension the minor can be put under supervised freedom or else the judge can require the development of a socio-therapeutic activity (if it is the case with the participation of parents or tutors), if proposed by the technical team or the public agency competent to protect or to reform minors. A successful conditional suspension requires not only the fulfillment of the conditions judicially established, but also the absence of new convictions during the probation period, and the minor's commitment not to reoffend.

Measures' execution⁸⁵ is under the responsibility of the respective Autonomous Community (Art. 45); this one must intervene under the control of the judge for Minors (Art. 44) and fully complying with the principle of legality (Art. 43). Autonomous Communities execute the measures directly or by means of contracts with other public or private (non-profit) agencies (Art.45); a professional is appointed (Art. 46.3) to assume the responsibility for overseeing the youth's sentence and for reporting periodically to the judge, to the Prosecutor and to the minor's counsel on the execution of the measure and the minor's progress (Art. 49).

Special provisions are set out for the treatment of minors who escape during the execution of the measure (Art. 50).

Concerning the execution of the measure of internment⁸⁶, 2001, 155), the special provisions included in Articles 54-60 of the Organic Act 5/2000 are developed by Art. 23 to Art. 85 of the Royal Decree 1774/2004.

Vicinity receives, as a principle, a stronger acknowledgement⁸⁷ than in the penitentiary legislation (for adults): minors must be kept in institutions close to their residence, although the judge can decide otherwise if it is required by the best interest of the minor; minors belonging to gangs, organizations or associations cannot execute the measure in the same centre (Art. 46.3).

The execution of internment consists of two periods: effective internment and supervised freedom (Art. 7.2). The effective internment must be spent in specific center, organized by the competent Autonomous Community, directly or by agreements with other public or private (non-profit) bodies. These center are different from those provided for by the penitentiary legislation to execute punishments and provisional measures of deprivation of liberty imposed to persons who have already attained the age of 18. Measures imposed when a terrorist crime has been committed have, however, to be executed under the control of specialized staff and in the center of the National Audience (Audiencia Nacional), established by the Government, directly or by contracts with the Autonomous Communities (Art. 54.1).

According to An. 55, re-socialization is a fundamental principle. Therefore, Art. 56 grants all those inmates' rights not affected by the conviction (the duties are defined by Art. 57) and Art. 55.2 requires that the life inside the centre must be organized in a similar manner to the one in the outside world, trying to reduce the negative effects that internment can produce on the minor or his/her family, by promoting the social links and family contacts, collaboration and participation of the public and private agencies (particularly those geographically or culturally close) in the process of social integration of the minor. Minors have always the right to be informed in writing and in a comprehensible language on their rights and duties and on every aspect of the centre's rules; they also have the right to file petitions and claims and to appeal (Art. 58).

Articles 45-52 of the Royal Decree 1774/2004 establish a complete regulation of ordinary and extraordinary leaves and releases. Minors in open or half-open regime can ordinarily benefit from permissions up to 30 days (open regime) or 20 days (half-open regime) every semester (each permission will not exceed 15 days). Even minors in closed regime will be able to benefit from

⁸⁴ Alastuey Dobón, 2002b, 210.

⁸⁵ Guinarte Cabada, 2004, 405; López Martín Dólerro Carillo, 2001, 141; San Martín Larrinoa, 2001, 141.

⁸⁶ López Caballo.

⁸⁷ Ortiz González, 2001, 191.

these leaves after having served a third part of the internment period, according to their personal evolution and the process of social reinsertion; in this case each permission will not exceed 4 days, the maximum amount per year is fixed in 12 days and the competent judge for Minors has to authorize it (Art. 25 of the Royal Decree 1774/2004). On the other hand, minors in open regime can ordinarily leave the establishment every week-end from Friday 4 p.m. to Sunday 8 p.m. (with the addition of 24 h, if Friday or Monday are holidays). Minors in half-open regime deserve one week-end leave every month, and after having served one third of the internment period, two leaves per month; in the same circumstances minors in dosed regime can be authorized to a week-end leave per month (Art. 46). Extraordinary (until 4 days) and planned leaves (48 h) are also possible (Art. 47 and Art. 48), as well as all the different varieties of oral (two per week, 40 minutes per visit), phone and written communications; concerning the conjugal visits, (at least one per month, minimum one hour is reserved for those who cannot benefit from leaves during period longer than one month; and the reception of parcels is equally allowed (Articles 40-44).

Each centre must have an internal regulation, as provided by Art. 30 of the Royal Decree 1774/2004, and has to be organized in sections, adequate to the age, maturity, needs and social capacities of the minors interned. Minors have the right to education, training, health and religious assistance (Articles 37-39); as far as they have attained the minimum age to work, their right to carry out a remunerated activity (with the legally inherent social protection and in the limits of the public entity's possibilities) will be recognized; special rules are set out in relation to the nature of the working activity and to the conditions to be fulfilled in the case of workers aged under 18 (Art. 53). Those minors needing special protection will be separated from those who may represent a danger or a risk. Mothers will be authorized by the judge for Minors to keep their children (under 3 years) with them if, according to the criteria of the public authority, this situation represents no risk for the children.

Disciplinary rules and rules related to surveillance and security measures are particularly important in the centre's life. Thus, the provisions of the Organic Act 5/2000 (Art. 59) on security are developed by Art. 54 and Art. 55 of the Royal Decree 1774/2004, where surveillance, security and the application of the defined contention methods are specially regulated. Provisions on discipline (Art. 60) find also a detailed regulation in Articles 59-85 of the Royal Decree.

After having pointed out the compliance with constitutional principles and rules in their content, form and procedure, the regulation:

- defines the disciplinary infractions, classified according to three levels: very serious, serious and light (Art. 61-64);
- reproduces the disciplinary sanctions already listed by the Organic Act 5/2000 (Art. 60.3): separation from the group (in cases of aggression, violence or serious breach of the rules of communal life), separation during the week-end, deprivation of week-end leaves; deprivation of other leaves; deprivation of participation in leisure activities and warning; and
- sets out the imposition and execution guidelines, and the disciplinary procedure.

Personal dignity, the right to nourishment, the right to mandatory education, the right to be visited, and the right to communicate are always granted to the sanctioned minors (Art. 60.1 of the Organic Act 5/2000). The separation between investigation and sanctioning (Art. 60.2 of the Royal Decree 1774/2004) and the right to appeal any disciplinary decision - either in writing or orally - before the Judge for Minors (Art. 60.7) are granted too.

Disciplinary sanctions can always be reduced or suspended and conciliation with the offended, restitution, reparation and the development of activities for the benefit of the centre's collectivity, when voluntarily assumed, will be specially considered in order to close the disciplinary procedure or to leave without effect the imposed sanctions (Art. 60.5 of the Royal Decree 1774/2004).

8. Safeguards for the protection of minors

8.1. *Affective and/or psychological assistance.*

The minor's right to psychological and affective assistance during the provisional detention and the investigation is clearly envisaged by the Organic Act 5/2000; but no special provision relates to the limits and rights under which the supporting figures can intervene. Only Art. 22.1.e of the Organic Act 5/2000 acknowledges this right in the course of penal proceedings by a reference to the presence of parents or other person mentioned by the minor, that is submitted to the Judge's authorization. On the other hand, Art. 4.1 II of Royal Decree 1774/2004 provides for a duty of the technical team to give its professional assistance to the minor.

Where psychological treatment is appropriate, due to the minors' personal characteristics that affect their penal imputation, it is possible to impose those provisional measures envisaged by the Civil Code (Art. 29). This will be normally followed by the imposition of a therapeutic measure - therapeutic internment or ambulatory treatment - in the sentence (Art. 29); the ambulatory treatment is specially intended for those minors who suffer from psychological disturbances but do not need internment.

8.2. *Preventing the disclosure of the juvenile offender's identity*

Art. 35.2 of the Act explicitly establishes that the mass media cannot obtain or release the minor's photo or any data that allow identification. The Judge and the Prosecutor are legally obliged to strictly enforce this mandatory rule; every participant in the proceeding is also obliged to respect the minor's right to confidentiality and cannot diffuse his personal data and other relevant information included in the file (Art. 35.3).

8.3. *Other measures*

On the other hand, hearings are public, as a general rule⁸⁸, but, if it is in the interest of the minor or of the victim, Art. 35.2 authorizes the Judge to sit in chamber. Furthermore, Art. 37.3 of the Act has provided the enforcement of the criminal procedure code's provisions set out for the protection of witnesses and experts (Act19/1994), and according to the Art. 37.4 the Judge is entitled to order the minor to leave the hearing temporarily if, *ex officio* or upon parties' application, he considers that it is in the minor's best interest.

Conclusions

The new Organic Act 5/2000 introduced in Spain a new system of intervention towards juvenile offenders, regulating all the relevant aspects, including the criminal proceedings. These were shaped on the model of the abridged penal process for adults, but with remarkable differences. For instance, in this field possibilities for diversion are much broader than those to be found in the adults' proceedings, strictly submitted to the principle of legality in prosecution. The strengthening of the technical team is to be applauded, although greater emphasis should have been placed on improving the communication between the technical team and the Judge.

Regarding the critics on the penal procedure, the stress has been put on several points:

- too wide and complex functions entrusted to the Public Prosecutor;
- the important limits to the participation of the victims;
- too restrictive preventive measures: in particular, the period of precautionary internment can be, in practice, too long;

⁸⁸ Tomé García, 2001, 176.

- the absence of an administrative regulation of the execution stage;
- the lack of sufficient investment in structures and facilities, a responsibility both of the Government and the Autonomous Communities.

Some of these critics have progressively received an answer: the Act 15/2003, reforming the Art. 25, allowed for intervention of the victim as a full actor in the penal process for minors; by the Royal Decree 1774/2004 a general regulation developing the Organic Act 5/2000 was finally approved; and the new reform intervened in 2006 has introduced a specific Additional Disposition in order to assure the evaluation (after 5 years!) of the costs of the duties imposed to the Autonomous Communities by the Organic Act 5/2000.

Nevertheless, the most criticized aspects of the new regulation were the suspension of the possibility of applying it to young people between 18-21 and the reforms introduced by the Organic Act 7/2000 concerning very serious offences and terrorism. In particular, the prosecution of minors under 18 accused of terrorist crimes before the National Audience (Audiencia Nacional) (brought in by the Organic Act 7/2000) is deemed to break the fundamental principle of vicinity and to reproduce merely the system applied to adults.

Successive reforms intervened since the entrance in force of the Organic Act 5/2000 have accentuated the repressive aspects of the new system. By the Organic Act 15/2003 a new Additional Disposition (the 6h) was included, promoting the application of measures oriented to a harsher and more efficient sanctioning of most serious crimes and authorizing to extend the time of internment, strengthening the system of security measures of the execution center and providing for the transfer of convicted persons to penitentiaries as soon as they reach the age of 18.

In the same trend, the last reform approved by the Parliament (Organic Act 8/2006) proceeds to a significant revision of important aspects of the legal regulation in order to:

- introduce new measures, such as the prohibition to enter in contact or in communication with the victim, the victim's relatives or other persons;
 - strengthen and recognize the victim's rights;
 - exclude the application of the justice system for minors over people aged more than 18 and mainly;
 - assure a higher proportionality between sanctions and the offence's seriousness,
 - opening new possibilities to the imposition of internment in dosed educational center,
 - extending the limits of internment (not only if imposed as a sanction but also as a preventive measure) in the most serious cases, and
 - allowing the execution of internment measures in penitentiaries as soon as the juvenile turns 18.
- Increase of the offences committed by minors is alleged as the main justification for a regrettable evolution that has transformed the original purposes of the system approved in January 2000.

Furthermore, perspectives cannot be optimistic in this field: in fact, instead of putting the accent in the minor's interest (i.e. his/her education and re-socialization) the last reforms dearly prefer to follow the increasing trend of a criminal policy based mainly on a myopic view of social defense.

Law sources.

Minors' Legal Protection Act 1996 Organic Act 4/1992

Organic Act 5/2000

Organic Act 7/2000

Royal Decree 1774/2004

Organic Act 9/2002

Organic Act 1/1996

Organic Act 9/2000

Organic Act 15/2003

Organic Act 8/2006

References

1. Abel Souto, Las medidas del nuevo Derecho penal juvenil (Consideraciones en torno al artículo 7 de la Ley penal del Menor), *Actualidad penal*, 6, 2002.
2. Abel Souto, Los menores, el principio acusatorio y la proporcionalidad penal en la Ley Organica 5/2000, *Actualidad Penal*, 43, 2003.
3. Abel Souto, La reforma de 25 de noviembre de 2003 en materia de principio acusatorio y la proporcionalidad garantizada por la Ley penal del menor, *Estudios penales y criminologicos*, XXIV, 2004.
4. Alastuey Dobón, El Derecho penal de menores: evolution y rasgos esenciales de la Ley organica 5/2000, in *La Ciencia del Derecho Penal ante el nuevo siglo. Libro Homenaje al Profesor Doctor Don Jose Cerezo Mir*, Madrid (2002a).
5. Alastuey Dobón, Alternativas al procedimiento y a la ejecucion de las medidas en la Ley Organica 5/2000, in Boldova Pasamar (ed.), *El Nuevo Derecho penal juvenil espaniol*, Zaragoza, 2002b.
6. Altava Lavall, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), *Justicia penal de menores y juvenes. Analisis sustantivo y procesal de la nueva regulation*, Valencia, 2002.
7. Antón Barberá, Colás Turégano, Ley reguladora de la responsabilidad penal del menor (LO 5/2000 de 12 de enero). Aspectos policiales, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), *Justicia penal de menores y juvenes. Analisis sustantivo y procesal de la nueva regulation*, Valencia, 2002.
8. Aparicio Blanco, Diligencias de instruction restrictivas de derechos fundamentales, competencia del Juez de menores en el ambito de la Ley de Responsabilidad Penal de los Menores, *Revista del Poder judicial*, 2000.
9. Arrom Loscos, El proceso penal con implication de menores. Ley organica 5/2000 sobre responsabilidad penal de los menores, Palma de Mallorca, 2002.
10. Beristain, Prologo, in Urra Portillio, Menores, la transformation de la realidad, Ley Organica 4/1992, Madrid, 1995.
11. Boldova Pasamar, Principales aspectos sustantivos del nuevo Derecho Penal juvenile espanol, in *La Ciencia del Derecho Penal ante el nuevo siglo. Libro Homenaje al Profesor Doctor Don José Cerezo Mir*, Madrid, 2002.
12. Bernuz Beneitez, La conciliación y la reparación en la LO 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores. Un recurso alternativo o complementario a la justicia de menores, *Revista de Derecho Penal y Criminologia*, 2001.
13. Bueno Arús, El Anteproyecto de Ley Orgánica reguladora de la Justicia de Menores elaborado por el Ministerio de Justicia, *Eguzkilore. Cuaderno del Instituto Vasco de Criminologia*, 11, 1997.
14. Bueno Arús, Policia judicial y menores, *Harlax*, 26, 1998.
15. Bueno Arús, Aspectos sustantivos de la Ley Orgánica reguladora de la responsabilidad penal de los menores, *Icade*, 53, 2001.
16. Cadena Serrano, Las medidas de la ley reguladora de la responsabilidad penal del menor, in Boldova Pasamar (ed.), *El Nuevo Derecho penal juvenile espanol*, Zaragoza, 2002.
17. Cantareno Badrés, Delincuencia juvenil: Asistencia terapbutica versus Justicia penal?, Logrono, 2002.
18. Carmona Salgado, Algunas observaciones sobre la responsabilidad penal de los menores, a raiz de la Ley 5/2000, de 12 de enero, in Zugaldia Espinar, Roca Roca (coords.), *Los derechos humanos. Libro homenaje al Excmo. Sr. D. Luis Portero Garcia*, Granada, 2001.
19. Carmona Salgado, Las medidas y sus criterios de determinación en la LO 4/2000, reguladora de is responsabilidad penal de los menores, *Estudios Juridicos. Ministerio Fiscal*, I, 2002.
20. Caverro Forradellas, El papel del Ministerio Fiscal en la Ley Organica 4/1992, de 5 de junio: analisis critico y propuestas, in *Justicia juvenil en la C.A.P.V. Situacion y perspectivas*, Vitoria-Gasteiz, 1997.
21. Cerezo Mir, Hacia un Derecho Penal Juvenil en España, in *Politica Criminal, Derechos Humanos y Sistemas Juridicos en el siglo XXI. Volumen en homenaje al Prof. Dr. Pedro R David*, Buenos Aires, 2001.
22. Cervelló Donderis, Colás Torégano, La responsabilidad penal del menor de edad, Madrid, 2002.
23. Clemente, El menor como objeto de las diferentes diligencias policiales, *Eguzkilore. Cuaderno del Instituto Vasco de Criminologia*, 11, 1997.
24. Cuello Contreras, El nuevo derecho penal de menores, Madrid, 2000.
25. Cuello Contreras, El nuevo derecho penal espafiol de menores a la luz de las modernas tendencias del derecho penal y de la criminologia, in *Modernas tendencias en la ciencia del derecho penal y en la criminologia*, Madrid, 2001.
26. De La Cuesta, El abandon del sistema tutelar: evolution del derecho espaniol en materia de protection y de tratamiento de los menores delincuentes y en peligro, *Annales Intemationales de Criminologie*, 37, 1999.

27. De La Cuesta, The Position of Victims and Victim Support in the New Spanish Juvenile Criminal Law, in Fattah, Parmentier (eds.), Victim policies and criminal justice on the road to restorative justice. Essays in Honour of Tony Peters, Leuven, 2001b.
28. De La Cuesta, Capítulo VII. La ejecución de las medidas, in Gimenez, Salinas, Colomer (coord.), Justicia de menores: una justicia mayor. Comentarios a la Ley reguladora de la Responsabilidad Penal de los Menores, Madrid, 2001c.
29. De La Cuesta, Responsabilidad civil, in La Ley Organica 5/2000 de Responsabilidad Penal de los Menores, Bilbao, 2001a.
30. De La Cuesta, Le nouveau statut penal du mineur en Espagne, Revue Internationale de droit compare, 1, 2004.
31. Diaz Martinez, La instruction en el proceso penal de menores, Madrid, 2003.
32. Dolz Lago, Labor y funciones del equipo tecnico, Estudios Juridicos. Ministerio Fiscal, I, 2001.
33. Dolz Lago, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y juvenes. Analisis sustantivo y procesal de la nueva regulacion, Valencia, 2002.
34. Dominguez Figueirido, Balsebre Jimenez, La instancia policial en el ambito de la justicia juvenil. Referencia al proceso de especializacion cualitativa de los Mossos d'Esquadra, in Dominguez, Ramos Ulgar (coords.), La Joven Sociologia Juridica en España. Aportaciones para una consolidation, Oñate, 1998.
35. Elicegui Gonzáles, Santibáñez Gruber, La mediación en la justicia de menores. Primer año de la LO 5/2000. La experiencia en Bizkaia, in Estudios Juridicos en Memoria de Jose Maria Lidon, Bilbao, 2002.
36. Etxebarria Zarrabeitia, Algunos aspectos de Derecho sustantivo de la Ley Orgánica 5/2000, reguladora de la Responsabilidad Penal de los Menores y de su Reforma en materia de terrorismo, Icade, 53, 2001a.
37. Etxebarria Zarrabeitia, Aspectos sustantivos, in Consejo Vasco De La Abogacia, La Ley Orgánica 5/2000 de Responsabilidad Penal de los Menores, Bilbao, 2001b
38. Feitjoo Sanchez, Sobre el contenido y la evolution del Derecho Penal español tras la LO 5/2000 y la LO 7/2000, Revista Juridica, UAM, 4, 2001.
39. Funes, Adolescentes y conflicto social. Algunas reflexiones sobre le respuesta social, Harlax, 25, 1998
40. Garcia Pérez, La evolution del sistema de justicia penal juvenil, Actualidad Penal, 32, 2000.
41. Gimenez-Salinas, Colomer, Características principales de la Ley orgánica reguladora de la responsabilidad penal del menor, Revista del Poder Judicial, 2000.
42. Gisbert Jordá, Las medidas cautelares, Estudios Juridicos. Ministerio Fiscal, I, 2001.
43. Gómez Colomer, Tuición procesal penal de menores y juvenes, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y juvenes. Analisis sustantivo y procesal de la nueva regulacion, Valencia, 2002.
44. Gómez Rivero, La nueva responsabilidad penal del menor: las Leyes Orgánicas 5/2000 y 7/2000, Revista penal, 9, 2002.
45. Gonzáles Cussac, Cuerda Arnau, Derecho penal de menores: criterios generals de aplicacion de medidas, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y juvenes. Analisis sustantivo y procesal de la nueva regulacion, Valencia, 2002.
46. Guinarte Cabada, Algunas consideraciones sobre la ejecución de las medidas previstas en la Ley penal del menor, Estudios Penales y Criminologicos, XXIV, 2004.
47. Herrera Moreno, La 'conciliation menor-victima' en el ambito de la desviadon juvenil; reflexiones en torno a su controvertida plasmacion en la Ley Organica 5/2000, de 12 de enero, Anuario de Justicia de Menores, I, 2001.
48. Higuera Guimera, El problema de la imputabilidad de los menores y de los juvenes en la Ley organica reguladora de la responsabilidad penal de los menores, in Boldova Pasamar (ed.), El Nuevo Derecho penal juvenil espaniol, Zaragoza, 2002.
49. Higuera Guimera, Derecho penal juvenil, Barcelona, 2003.
50. Juan-López Martin, El interés del menor como columna vertebral de la Ley 5/2000 de 12 de enero, in Justicia de menores e intervention socioeducativa, Murcia, 2001.
51. Landrove diaz, La Moderna Victimologia, Valencia, 1998.
52. Landrove Diaz, Derecho Penal de Menores, Valencia, 2001.
53. López Cabello, Ejecución de las medidas privativas de libertad, in Consejo Vasco de la Abogacia, La Ley Organica 5/2000 de Responsabilidad Penal de los Menores, Bilbao, 2001.
54. López López, La instrucción del ministerio fiscal en el procedimiento de menores, Granada, 2002.
55. López Martin, Dolera Carrillo, Ejecución de las medidas no privativas de libertad, in Justida de menores e intervention socioeducativa, Murcia, 2001.

56. Lorca Martínez, Las medidas de protección de menores y la intervención de la entidad pública en la LORPM 5/2000 de Responsabilidad Penal de los Menores, Estudios Jurídicos. Ministerio Fiscal, I, 2001.
57. Martí Sánchez, Protección de la víctima y responsabilidad civil en la ley penal de los menores, Actualidad Penal, 4, 2001.
58. Mena Álvarez, Reglas para la determinación de las medidas aplicables: modificación y sustitución de medidas, Estudios Jurídicos. Ministerio Fiscal, 2001.
59. Muñoz Oya, Estudio sobre las medidas en la Ley Orgánica Reguladora de la Responsabilidad Penal de los Menores, Estudios Jurídicos. Ministerio Fiscal, I, 2001.
60. Navarro Mendizabal, La responsabilidad civil en Is. Ley Orgánica de Responsabilidad Penal del Menor, Icade, 53, 2001.
61. Ortiz González, La medida de internamiento en la Ley reguladora de la responsabilidad penal de los menores, Icade, 53, 2001.
62. Palacio Sánchez Izquierdo, El principio del superior interés del menor, Surgam, 2000.
63. Peris Riera, El modelo de mediación y reparación en el nuevo marco de la responsabilidad penal de los menores previsto por la Ley Orgánica 5/2000, La Ley, 5250, 2001.
64. Planchadell Gargallo, La intervención de la víctima en la instrucción del proceso penal de menores, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y jóvenes. Análisis sustantivo y procesal de la nueva regulación, Valencia, 2002.
65. Ponz Nomdedéu, La responsabilidad penal de los menores desde la perspectiva del Abogado, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y jóvenes. Análisis sustantivo y procesal de la nueva regulación, Valencia, 2002.
66. Richard Gonzales, El nuevo proceso de menores, La Ley, 28 junio 2000.
67. Ríos Martín, El menor infractor ante la ley penal, Granada, 1993.
68. Ríos Martín, La ley de Responsabilidad Penal de los Menores, cambio de paradigma: del niño en peligro al niño peligroso, Icade, 53, 2001.
69. Saez Gonzáles, La imparcialidad y situaciones de contaminación en la nueva Ley orgánica de responsabilidad penal del menor, Anuario de Justicia de Menores, 1, 2001.
70. Salom Escrivá, La intervención del Ministerio Fiscal en el proceso de exigencia de responsabilidad penal de los menores, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y jóvenes. Análisis sustantivo y procesal de la nueva regulación, Valencia, 2002.
71. San Martín Larrinoa, Ejecución, in Consejo Vasco de la Abogacía, La Ley Orgánica 5/2000 de Responsabilidad Penal de los Menores, Bilbao, 2001.
72. Sánchez García de Paz, La nueva ley reguladora de la responsabilidad penal del menor, Actualidad Penal, 33, 2000.
73. Sancho Casajus, Singularidades del procedimiento de la Ley penal del menor (LO 5/2000). Especial consideración del papel del Ministerio Fiscal, in Boldova Pasamar (ed.), El Nuevo Derecho penal juvenil español, Zaragoza, 2002.
74. Tamarit Sumalla, El nuevo Derecho penal de menores: Creación de un sistema penal menor?, Revista penal, 8, 2001.
75. Tamarit Sumalla, La mediación reparadora en La ley de responsabilidad penal del menor, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y jóvenes (Análisis sustantivo y procesal de la nueva regulación), Valencia, 2002.
76. Tomé García, Aspectos procesales en la nueva ley del menor, Icade, num. 53, 2001.
77. Torres Fernández, La desjudicialización como respuesta a la delincuencia de menores de edad, Cuadernos de Política Criminal, 79, 2003.
78. Urrea Portillo, Menores, la transformación de la realidad, Ley Orgánica 4/1992, Madrid, 1995.
79. Vaquer Aloy, La responsabilidad civil, in Gonzáles Cussac, Tamarit Sumalla, Gómez Colomer (coords.), Justicia penal de menores y jóvenes Análisis sustantivo y procesal de la nueva regulación, Valencia, 2002.
80. Ventura Faci, Pelaez Perez, Ley Orgánica 5/2000 de 12 de enero reguladora de la responsabilidad penal de los menores. Comentarios y jurisprudencia, Madrid, 2000.

SISTEMUL JUSTIȚIEI PENTRU MINORI ÎN SPANIA

José Luis DE LA CUESTA*
Isidoro BLANCO CORDERO**

Sumar

1. Cadrul legal în materie de procedură penală aplicat infractorilor minori în Spania. 2. Pragurile de vârstă pentru angajarea răspunderii penale, respectiv a începerii urmăririi penale a minorilor. 3. Organe judiciare specializate. 3.1. Specializarea judecătorilor. 3.2. Specializarea procurorilor. 3.3 Specializarea cerută pentru alte persoane care participă la procedurile judiciare penale cu minori. 3.4. Serviciile sociale (sau alte asemenea autorități) implicate în procedurile cu minori. 4. Noțiuni preliminare de procedură penală aplicabile minorilor. 5. Procedurile de evaluare individuală. 6. Procedura medierii. 7. Libertatea personală. 8. Garanții ale protecției minorilor. 8.1. Asistența afectivă și/sau psihologică. 8.2. Prevenirea dezvăluirii identității infractorului minor. 8.3. Alte măsuri. 9. Concluzii.

1. Cadrul legal în materie de procedură penală aplicat infractorilor minori în Spania

Importante transformări au intervenit în tratamentul infractorilor minori în timpul ultimei decade a secolului al XX-lea și începutul secolului al XXI-lea în Spania¹.

1.1. Datorită lipsei garanțiilor procesuale și a reglementărilor procedurale, la 12 ani de la aprobarea noii Constituții spaniole din 1978, vechiul model de asistență socială (modelul tutelar) - reglementat printr-un act normativ din 1948 – prin care erau avuți în vedere minorii până la 16 ani - a fost declarat neconstituțional de către Curtea Constituțională. Această decizie a deschis un proces de profundă transformare în sistemul tratamentului infractorilor sub 16 ani.

În conformitate cu abordarea pozitivistă-corecțională, vechiul sistem juridic spaniol (sistemul “de tutelă”) avea ca premiză faptul că infracționalitatea în rândul minorilor presupunea în mod necesar intervenția publică în vederea reabilitării sociale a acestor persoane. Sancțiunile penale nu trebuia să fie deosebit de represive, ci corecționale și reeducative, având și un pronunțat caracter preventiv extins și asupra posibililor infractori minori (cei neglijați sau în pericol). Teoretic, acest sistem doar intenționa a proteja, a îmbunătăți realitatea socială și a oferi ajutor. În acest fel, chiar dacă sancțiunile care implicau privarea de libertate au fost frecvent dispuse, instanțele nu se constituiau cu judecători specializați pentru infracțiuni comise de minori iar garanțiile judiciare nu puteau fi asigurate corespunzător.

Astfel, prin Legea din 1948 era statuat în mod clar faptul că minorii, deși erau judecați de instanțele tutelare, nu beneficiau de proceduri speciale pe parcursul procesului penal. La individualizarea pedepsei erau luate în considerare doar natura faptelor penale și circumstanțele personale în care se aflau minorii. Audierile nu erau publice iar avocatul, deși prezent, nu putea interveni.

* Profesor universitar doctor, Universitatea Țării Bascilor, Spania; Președintele Asociației Internaționale de Drept Penal (2004-); Director al Institutului Basc de Criminologie; membru al Academiei Jakiunde; membru al colectivului științific internațional al Institutului Max Planck, Freiburg, Germania (2008-); membru al colectivului director al Societății Internaționale de Criminologie; membru al colectivului director al Institutului Superior Internațional de Științe Penale, Siracusa, Italia (e-mail: joseluis.delacuesta@ehu.es).

** Profesor universitar doctor, Catedra de Drept Internațional Public și Drept Penal, Facultatea de Drept, Universitatea Alicante, Spania (e-mail: isidoro.blanco@ua.es).

¹ De la Cuesta, 1999, 101.

Acest model juridic a fost îndelung criticat în literatura de specialitate din Spania, solicitându-se înlocuirea sa cu un sistem procesual diferit. Delimitarea între cele două componente ale sistemului juridic aplicabil minorilor (o componentă socială, protecționistă, prin care se viza reintegrarea socială a minorilor și o a doua componentă prin care se realiza coerciția statală) a fost realizată în 1996. Astfel, conform Legii privind protecția minorilor, a fost instituită responsabilitatea serviciilor sociale (în particular, a Comunităților Autonome²) și a judecătorilor.

Chiar dacă din 1985 judecătorii pentru minori erau stabiliți prin noua Lege de organizare judiciară și Guvernul se angajase să prezinte Parlamentului un nou Proiect de lege pentru minori, reforma sistemului juridic aplicabil minorilor a trebuit să aștepte până în anul 1992. Astfel, numai după o decizie a Curții Constituționale prin care sistemul “de tutelă” era declarat ca fiind neconstituțional, reforma s-a împlinit. Prin Legea nr. 4/1992, a fost stabilită vârsta minimă (12 ani) care să permită intervenția autorităților judiciare pentru infracțiuni comise de minori sub 16 ani. De asemenea, a fost introdus “provizoriu” un sistem “hibrid” prin care au fost reglementate forme diverse de reacție social-penală având drept scop ocrotirea dar și reeducarea minorilor, având la bază principiul acțiunii în “cel mai bun interes al minorului”³, urmărindu-se integrarea în societate a acestuia și nu pedepsirea prin aplicarea represiunii penale. Noile proceduri instituite erau conforme cu prevederile constituționale, fiind caracterizate prin flexibilitate și presupunând mijloace diversificate de acțiune. În cazul săvârșirii de infracțiuni cu un grad mic de pericol social minorii erau deferiți direct sau în urma unui avertisment serviciilor sociale. Prin Legea nr.4/1992 s-a reglementat instituirea unei comisii tehnice consultative, formată dintr-un psiholog, un asistent social și un educator, aflată la dispoziția procurorilor și judecătorilor⁴ și având “rolul esențial”⁵ de a facilita organelor judiciare luarea unei decizii cu privire la educarea minorului și la reintegrarea sa socială, prin redactarea unui raport asupra situației psihologice și pedagogice a minorului și a mediului familial.

Noile măsuri erau reglementate pentru o aplicare provizorie pentru maxim doi ani. Cu toate acestea, sistemul judiciar nu era scutit de critici⁶ și nu era eficient în angajarea răspunderii penale a minorului pentru fapta prevăzută de legea penală săvârșită⁷.

1.2. În anul 1995 un nou Cod penal a fost adoptat în Spania. Prin prevederile acestui nou Cod penal limita de vârstă pentru angajarea răspunderii penale a fost ridicată de la 16 la 18 ani, fiind reglementată expres, în articolul 19, răspunderea penală a minorilor ca regulă derogatorie de la dreptul comun. Sistemul introdus în 1992 a rămas provizoriu în vigoare până la aprobarea unei noi legi speciale ce reglementa răspunderea penală a minorilor.

1.3. În concordanță cu prevederile art.19 al noului Cod Penal, prin Legea nr. 5/2000 (Monitorul Oficial al Statului, 13 ian 2000) a fost introdus noul sistem spaniol al răspunderii penale a minorilor, în care este prioritar scopul educării și resocializării minorilor și nu cel al apărării sociale caracteristic dreptului penal, subliniindu-se astfel caracterul derogator al acestor norme⁸. Legea a intrat în vigoare un an mai târziu (ianuarie 2001) după multiple modificări, cea mai criticată privind sancțiunile penale aplicate minorilor care săvârșesc infracțiuni cu grad sporit de pericol social, în special acte de terorism⁹ (Legea nr. 7/2000).

² Spania este integrată în 17 regiuni (“Comunități autonome”) care beneficiază de o politică autonomă.

³ Altava Lavall, 2002, 247; Higuera Guimera, 2003, 253; Palacio Sanchez Izquierdo, 2000.

⁴ Beristain, 1995, XIV

⁵ Urra Portillo, 1995, 8.

⁶ Rios Martin, 1993, 234.

⁷ Funes, 1998.

⁸ Cantarero Bandres, 2002, 29; oricum, Cuello Contreras, 2001, 205.

⁹ Etxebarria Zarrabeitia, 2001a.

Prin Legea nr. 8/2006 (Monitorul Oficial al Statului din 5 decembrie 2006) a fost introdusă o nouă reglementare :

- asigurarea proporționalității între sancțiunile penale aplicate și gradul de pericol social al faptei săvârșite prin dispunerea executării măsurii educative a internării într-un centru de reeducare în regim închis, similar pedepselor privative de libertate, în cazul infracțiunilor grave precum și transferul minorilor într-un penitenciar la împlinirea vârstei de 18 ani.

- introducerea unor măsuri suplimentare, cum ar fi interzicerea de a intra în contact cu victima, rudele victimei, ori alte persoane, și

- recunoașterea și garantarea drepturilor victimei.

Aceasta reformă a intrat în vigoare în februarie 2007.

Majoritatea modificărilor introduse în 1992 au fost implementate prin Legea nr.5/2000, o lege cuprinzătoare reglementând ambele aspecte: penale și de procedură penală, prin măsuri concrete de angajare și tragere la răspundere penală (și civilă) a minorilor care săvârșesc una dintre faptele prevăzute de legea penală pentru adulți¹⁰. Cu toate acestea, Legea nr. 5/2000 are în principal un conținut procedural – doar unele dintre prevederi fiind de natură penală¹¹. Este astfel o lege specială, având ca drept comun fie Codul Penal, fie Codul de procedură penală, aplicarea subsidiară a ambelor texte fiind avută în vedere să completeze prevederile sale ori să acopere unele lacune.

1.3.1. Legea nr. 5/2000 reglementează prin urmare aspecte de drept penal, procedural penal și execuțional penal aplicate minorilor infractori, sub forma unui sistem distinct, integrat în justiția penală. Principalele reglementări ale noului sistem sunt următoarele¹²:

a) răspunderea penală a minorului : corelat cu art.19 al Codului Penal, noul model are scopul să reducă influența noțiunilor de protecție și paternalism și admite clar „răspunderea penală” a minorilor. Astfel, Legea nr. 5/2000 reglementează răspunderea penală obiectivă *sui generis*¹³, distingând între condițiile angajării răspunderii penale și consecințele corelative. Condițiile angajării răspunderii penale, într-un sens formal, sunt guvernate de parametri similari celor ai răspunderii penale ale adulților; în fapt, condițiile răspunderii penale a minorilor nu sunt diferite de cele ale adulților: săvârșirea unei fapte prevăzute de legea penală și absența oricăror posibile cauze de înlăturare a răspunderii penale prevăzute de Codul Penal (art. 5.1).

b). un model mixt : răspunderea penală și reeducarea : în lumina reglementărilor din 1992, noul model nu are caracter exclusiv represiv, ci unul mixt, în concordanță cu prevederile Convenției privind drepturile copilului. Angajarea răspunderii penale constituie numai prima etapă a reacției sociale având drept scop reeducarea și resocializarea minorilor. Principalele diferențieri față de sistemul răspunderii penale a adulților se referă la consecințele angajării răspunderii, care în cazul minorilor reprezintă sancțiuni penale în majoritatea lor fără caracterul represiv al pedepselor, măsuri educative, pragmatice¹⁴ aservite scopului sistemului mixt. Astfel, deși aceleași, principiile generale de drept penal și procesual penal se vor aplica diferit minorilor dobândind o interpretare teleologică. Faptele prevăzute de legea penală săvârșite de minori nu sunt urmate de pedepse, ci de măsuri subordonate altor criterii de aplicare și executare. Scopul educativ special al reacției sociale determină diferențe de procedură judiciară, participarea comisiei tehnice

¹⁰ Un tratament este de asemenea avut în vedere pentru acei minori care sunt considerați ca lipsiți de discernământ în a acționa cu intenție criminală (Art. 5.2). dar, deși legea organică 5/2000 uită să mai preziceze într-o manieră explicită, în aceste cazuri impunerea unei măsuri terapeutice ar trebui să necesite întotdeauna și un pericol social dovedit. (Gonzales Cussac – Cuerda Arnau, 2002, 84-85).

¹¹ Boldova Pasamar, 2002, 1553; Gonzalez Cussa – Cuerda Arnau, 2002, 79.

¹² De la Cuesta, 2004; vezi si Gimenez-Salinas I Colomer, 2000.

¹³ Bueno Arus, 2001, 72.

¹⁴ Cuello Contrers, 2001, 207.

consultative, precum și specializarea organelor judiciare ce participă la procesul penal (a 4-a dispoziție finală).

c). scopul derogărilor de la dreptul comun este de a acționa în beneficiul minorului. În concordanță cu prevederile Convenției asupra drepturilor copilului, în Legea nr. 5/2000 se fac trimeri frecvente la “interesul superior al minorului” sau la “cel mai bun interes al minorului” ca principii coordonatoare¹⁵ ale oricărei acțiuni statale asupra minorului; în fapt, fiecare participant la procesul penal trebuie să aibă în vedere interesul minorului la adoptarea oricărei decizii și în particular, la dispunerea măsurilor procesuale în cazul concret (art.7.3). Pentru a înlesni acțiunea în interesul minorului Legea nr.5/2000 a dat posibilitatea procurorului de a nu dispune începerea urmăririi penale, în anumite cazuri(articolele 18 și 19) spre deosebire de cazul persoanelor adulte când procurorul este obligat să înceapă urmărirea penală în cazul săvârșirii de infracțiuni.

Stabilirea a ce este benefic pentru minorul infractor este obligația judecătorului asistat de comisia tehnică și în strânsă colaborare cu procurorul¹⁶. Datorită reglementărilor din Legea nr. 5/2000, criteriile non-legale pot fi utilizate în scopul de a da un conținut “celui mai bun interes al minorului”, un concept care trebuie în mod necesar corelat cu dezvoltarea personală a minorului, cu nevoile sale educaționale¹⁷, cu reeducarea și resocializarea sa¹⁸.

1.3.2. În mod concret, procedurile penale introduse de Legea nr. 5/2000 sunt în concordanță cu reglementările din 1992 dar sunt mult mai amănunțite (Art. 16-42) și completate cu prevederi generale care au rolul de a spori caracterul operativ al tragerii la răspundere penală (T.III, B.IV din Codul de procedură penală).

Procesul se desfășoară sub autoritatea unui magistrat specializat competent teritorial, judecătorul pentru minori de la locul săvârșirii faptelor (art. 2.3); dacă faptele au fost comise în mai multe locuri, se va lua în considerare locul domiciliului minorului (art.20.3). În principal, noua procedură consacră prezumția de nevinovăție, dreptul la apărare¹⁹, dreptul la căile de atac precum și toate celelalte garanții procesuale fundamentale asigurate adulților.

Particularitățile procesului penal al minorilor sunt următoarele:

a). specializarea tuturor organelor judiciare și consultative care participă la procesul penal (judecător, procuror, apărător și comisia tehnică);

b). preeminența și complexitatea rolului procurorului (vezi mai jos);

c). flexibilitatea deciziilor (pot fi revizuite, suspendate, etc., în orice fază a procesului penal) și diverse oportunități pentru minorii infractori;

d). implementarea principiului acuzatorial²⁰ într-o mai mare măsură decât în cazul adulților²¹; conform art.8 judecătorul nu poate impune o altă măsură restrictivă asupra drepturilor minorului, sau pentru mai mult timp, decât cea cerută de către procuror; dacă judecătorul consideră totuși că măsurile cerute nu sunt suficiente, va proceda conform art.37.1²²;

e).participarea victimelor. Regimul participării victimelor în procesele penale desfășurate cu privire la infractori minori a fost recent modificat cu scopul de a extinde prevederile anterioare. Conform fostului art.25 din Legea nr. 5/2000, victimelor nu le este permis să participe ca părți civile în procesul penal. Bineînțeles că persoanele vătămate puteau face plângere, dar se declanșa

¹⁵ Juan-Lopez Martin, 2001, 107.

¹⁶ Funes Artiaga, 1997, 65.

¹⁷ Higuera Guimera, 2003, 253).

¹⁸ Palacio Sanchez Izquierdo, 2000.

¹⁹ Gomez Colomer, 2002, 185.

²⁰ Arrom Loscos, 2002, 87; Gomez Colomer, 2002, 184.

²¹ Abel Souto, 2004, 13.

²² Abel Souto, 2004, 27.

numai latura penală a procesului penal, acțiunea civilă nefiind accesorie acțiunii penale. În timpul procesului, numai în anumite condiții despăgubirea victimelor era posibilă într-o manieră limitată²³; acestea puteau exercita acțiunea civilă separată privitor la răspunderea civilă, prezentând pretențiile civile judecătorului, conform art.61-64²⁴. Art.25 a fost modificat prin Legea nr. 15/2003. Aceasta, în urma criticilor datorate excluderii victimelor din procesul penal împotriva minorilor,²⁵ ca părți civile - chiar calificate ca neconstituționale²⁶ - permite, în prezent, constituirea victimelor ca părți civile în procesul penal. Pe de altă parte, art.3, așa cum a fost modificat prin Legea nr. 8/2006, garantează recunoașterea celor mai importante drepturi ale victimelor: asistența juridică, dreptul de a ridica pretenții privind repararea prejudiciului prin constituirea ca parte civilă în procesul penal, participarea și informarea cu privire la principalele decizii adoptate, chiar dacă acestea nu iau parte la proceduri.

Procesul penal este de asemenea caracterizat de celeritate și de diferențierea între soluționarea aspectelor specifice laturii penale, respectiv rezolvarea acțiunii civile²⁷.

Prin Legea nr.7/2000, adoptată înainte ca Legea nr. 5/2000 să intre în vigoare, au fost introduse totuși câteva restricții principiilor generale ce guvernează sistemul justiției pentru minori în cazul infracțiunii de terorism²⁸. Aceste restricții au fost confirmate prin Legea nr. 8/2006. Lăsând deoparte creșterile relevante ale măsurilor privative de libertate în cazul terorismului, în concordanță cu noul art.10, judecarea actelor de terorism este de competența judecătorului pentru minori, în Audiența Națională, Madrid (art. 2.4). Îmbinarea procedurilor nu este permisă, iar măsurile dispuse trebuie executate cu prioritate față de oricare alte măsuri.

1.3.3. Două tipuri de proceduri penale sunt reglementate prin Legea nr. 5/2000: procedurile declarative și procedurile executive.

Procedura declarativă este divizată în două faze : urmărirea penală (instrumentarea) și faza judecării (audierea). Urmărirea penală și punerea în executare a hotărârii sunt astfel, separate și ambele au o fază intermediară: prezentarea în fața judecătorului.

În scopul de a garanta principiul independenței judiciare, urmărirea penală este efectuată de procuror²⁹. Acesta este abilitat să înceapă urmărirea penală (art.16) și să dispună trimiterea în judecată (art.30.1). Mai mult, procurorul efectuează urmărirea penală, supraveghează acțiunile poliției judiciare și dispune asupra oportunității unor măsuri procesuale solicitate de apărătorul minorului ori de partea vătămată. Procurorul trebuie să asigure apărătorului minorului (și celorlalți participanți la proces) acces liber la materialul de urmărire penală, la solicitarea acestuia (art. 23.2), cu excepția cazului în care judecătorul declară secretă urmărirea penală; în acest caz apărătorul minorului va consulta dosarul la final pentru a-și pregăti apărarea. Părțile vătămate au de asemenea dreptul să aibă acces la dosar (art. 25). Oricum, în această fază procesuală, ca și în oricare alta, numai judecătorul, are dreptul să dispună, motivat (art.23.3 și art.26.3), restrângerea drepturilor fundamentale ale minorului.

De îndată ce faza urmăririi penale este încheiată, dosarul este trimis judecătorului pentru minori. După ascultarea apărătorului minorului (și a persoanei responsabile civilmente), și dacă nu există nici un impediment pentru părți (art.32), judecătorul decide deschiderea fazei de judecată sau nu (art.33).

²³ Planchadell Gargallo, 2002, 195.

²⁴ De la Cuesta, 2001b, 175; Navarro Mendizabal, 2001, 121.

²⁵ Abel Souto, 2003, 1077; Landrove Diaz, 1998, 293; Ventura Faci – Pelaez Perez, 2000, 124.

²⁶ Saez Gonzales, 2001, 77.

²⁷ Cuello Contreras, 2000, 88.

²⁸ Rios Martin, 2001.

²⁹ Diaz Martinez, 2003; Lopez Lopez, 2002.

Audierea minorului în cadrul ședinței de judecată nu este publică ca în cazul adulților. Alte deosebiri mai sunt : fără robe și prezidiu, restricționarea publicității... Audierile au loc în prezența procurorului (și a celorlalte părți ce participă la proces), a apărătorului minorului, a reprezentantului echipei tehnice și a minorului însuși, care poate fi însoțit de reprezentantul său legal, cu excepția situației în care îi este îngrădit printr-o hotărâre judecătorească. Instituția publică care se ocupă cu protecția și îndreptarea minorilor (și a acelor persoane potențiale responsabile civilmente) poate participa de asemenea la audieri (art.35).

Ședința de judecată se concentrează asupra probelor, asupra excepțiilor ridicate de părți, concluziilor echipei tehnice și asupra audierii minorului.

După încheierea dezbaterilor, judecătorul are 5 zile să pronunțe sentința (art.38), impunând măsurile adecvate, specificând conținutul, durata și scopul măsurii, într-o manieră concisă și cu explicații pe înțelesul minorului (art.39.2). Sentința poate fi atacată cu apel în fața Tribunalului de provincie (în fața Tribunalului de audiență națională în cazul actelor de terorism) în termen de 5 zile. Un recurs în interesul legii la Curtea Supremă este de asemenea permis cu scopul de a unifica practica judecătorească conform art.42 din Legea nr.5/2000.

Faza de punere în executare³⁰ a sancțiunii dispuse este reglementată prin art.43-60. Noul sistem este pus în aplicare în colaborare cu serviciile sociale ce lucrează pentru a proteja minorii în Comunitățile autonome; acestea vin în sprijinul sistemului judiciar în vederea aplicării măsurilor judiciare impuse. Prin Legea nr. 5/2000 a fost reglementată competența Comunității Autonome în locul judecătorului pentru minori pentru faza punerii în executare (art. 45.1); de asemenea pot fi încheiate convenții cu instituții publice sau private (non-profit) în scopul de a pune în executare măsurile dispuse (art.45.3). Aceasta nu înseamnă, în orice caz, o delegare a responsabilității executării sancțiunii. Punerea în executare se face sub controlul judecătorului pentru minori (art.44) și cu respectarea principiului legalității. Prevederi speciale privesc executarea măsurilor privative de libertate (art.54-60). Prin Decretul regal 1774/2004 a fost reglementată în mod general executarea măsurilor privative de libertate, dezvoltând prevederile generale ale Legii nr. 5/2000.

2. Limitele de vârstă ale răspunderii penale

2.1. Art. 19 al noului cod penal din 1995 a stabilit ca limită pentru aplicarea deplină a prevederilor Codului Penal vârsta de 18 ani. Simultan, s-a început elaborarea unei noi legi penale privind răspunderea penală a minorilor în Spania, suspendându-se aplicarea noului prag până la intrarea în vigoare a acestui nou sistem.

Conform vechiului cod penal, 16 ani era pragul absolut de vârstă al răspunderii penale. Persoanele sub 16 ani care comiteau fapte penale nu erau responsabile penal; în fapt, ei beneficiau de o cauză a înlăturării răspunderii penale (vechiul art. 8.2 din Codul penal). Ei erau, totuși, trimiși instanțelor pentru minori (la Tribunalele Tutelare, până în 1991) iar măsurile dispuse erau calificate ca sancțiuni nepenale. Totuși, ulterior adoptării Legii nr. 4/1992, minorii sub 12 ani nu erau trimiși instanțelor pentru minori; ei erau puși direct sub supravegherea serviciilor sociale.

În prezent, cadrul legal este modificat. Mai întâi, pragul de vârstă a fost ridicat, iar după ultima reformă, jurisdicția pentru minori examinează doar faptele comise de persoanele cu vârste între 14 și 18 ani. Mai mult, vârsta de 18 ani nu mai poate fi considerată ca fiind pragul absolut de vârstă pentru răspunderea penală; atâta timp cât noul sistem este un sistem de "răspundere penală". Astfel, persoanele sub 18 ani pot fi deasemenea trase la răspundere dacă săvârșesc fapte prevăzute de legea penală. Conform noului sistem, minorii sub 14 ani sunt singurii care nu pot răspunde penal (art.4); minoritatea vârstei (18) doar previne aplicarea Codului penal pentru adulți. Minorii

³⁰ De la Cuesta, 2001c.

sub 18 ani (dar care au împlinit 14 ani) pot fi trași la răspundere, având capacitate penală³¹; într-adevăr, pentru a fi declarați responsabili, minorii trebuie să fi comis fapta cu vinovăție³² și nici o cauză de neimputabilitate sau fapt scuzabil nu trebuie să intervină. Prin urmare, prin Legea nr. 5/2000 a fost redusă până la 14 ani limita de vârstă pentru răspunderea penală³³, între 14 și 18 procedura penală și sistemul de executare având reglementări speciale privind răspunderea.

Jurisdicția minorilor își extinde competența asupra minorilor între 14 și 18 ani, reglementarea fiind distinctă de cea pentru adulți : minorii cu vârste între 16 și 18 ani pot fi supuși unei represiuni penale mult mai severe decât minorii cu vârste cuprinse între 14 și 16 ani, mai ales în cazul săvârșirii de fapte penale cu grad ridicat de pericol social (art.10). Câteodată, determinarea vârstei unei persoane poate fi dificilă. Din acest motiv, dacă există îndoieli cu privire la vârsta minorului și organul de poliție nu are suficiente elemente pentru a o determina, decizia asupra acestei probleme va fi adoptată de un judecător ordinar conform regulilor generale stabilite de Codul de procedură penală (art.2.9 din Decretul regal nr. 1774/2004).

Atingerea vârstei majoratului nu pune capăt executării măsurii impuse. Executarea măsurii se consideră încheiată când scopurile acesteia sunt atinse; dar internarea în regim închis dispusă până la împlinirea vârstei de 21 de ani va fi executată în penitenciar, în principal; aceeași regulă va fi aplicată dacă persoana va împlini 18 ani în regim închis și comportamentul său nu este conform obiectivelor propuse prin sentință ori dacă, înainte de începerea executării, cel condamnat a executat în totul sau în parte o altă sentință de condamnare cu executare sau măsura internării într-un penitenciar (art. 14). Pe de altă parte, dacă, în timpul executării măsurii, o persoană de 18 ani este pedepsită conform codului penal și simultan executarea pedepsei și a măsurii nu sunt posibile, se va acorda prioritate pedepsei; executarea pedepsei va absorbi măsurile dispuse, cu excepția măsurilor de internare și încarcerare; în acest caz, dacă judecătorul pentru minori dispune executarea măsurii, aceasta va fi executată în penitenciar și va fi însoțită de sentința executării încarcerării (art.47.7).

Art. 69 al noului Cod Penal a „pavat” calea aplicării noului sistem pentru anumite categorii de minori cu vârste până la 21 de ani (dar care au împlinit 18) care au săvârșit fapte penale. Art. 4 din Legea nr. 5/2000 a implementat noul sistem aplicat tuturor categoriilor de infracțiuni cu excepția celor cu grad ridicat de pericol social (prevăzute cu pedepse cu închisoarea mai mari de 15 ani) și a celor de terorism.

Aplicarea prevederilor art.4 a fost suspendată până în 2007 (Legea nr. 9/2002) iar ultima modificare a intervenit (Legea nr. 8/2006) după luarea în considerare a excluderii din noul sistem a infracțiunilor pedepsite cu internarea în regim închis, decizându-se în final să se limiteze sfera de aplicare al jurisdicției pentru minori asupra persoanelor cu vârste între 14 și 18 ani.

2.2. Minorii sub 14 ani care comit fapte penale nu răspund penal și vor fi tratați conform prevederilor legale și procedurilor privind protecția minorilor cuprinse în Codul Civil și în Legea nr. 1/1996 privind protecția minorilor. În consecință, art.3 din Legea nr. 5/2000 prevede ca procurorul să trimită materialul de urmărire penală autorității competente în materia protecției minorilor, pentru ca aceasta să poată promova adoptarea acelor măsuri de protecție subsumate beneficiului minorului³⁴. Fiecare autoritate publică competentă în materia protecției copiilor este obligată legal să intervină direct, imediat și efectiv în orice situație de risc sau pericol asupra condiției minorului, adoptând toate măsurile necesare și potrivite scopului educativ și interdisciplinar (art.14 din Legea nr. 1/1996). În cazurile serioase de risc asupra dezvoltării personale și sociale a minorului, separarea de familie poate fi cerută pentru a elimina influențele ce

³¹ Alastuey Dobon, 2002a, 1545.

³² Cuello Contreras, 2000, 49; Gonzales Cussac – Cuerda, Arnau, 2002, 82; totusi, Feijoo Sanchez, 2001, 24.

³³ Gonzales Cussac – Cuerda Arnau, 2002, 88; Higuera Guimera, 2002, 71.

³⁴ Lorca Martinez, 2001.

provin din mediul familial. Dacă părinții eșuează în îndeplinirea propriilor sarcini de protejare privându-l pe minor de asistența morală și materială necesară, autoritatea competentă trebuie să își asume direct și automat responsabilitatea tutellei asupra minorului, și să adopte toate măsurile necesare pentru a-i garanta protecția (art.172.1 Cod Civil).

În orice caz, intervenția trebuie să fie întotdeauna comunicată reprezentantului legal al minorului și dusă la îndeplinire conform tuturor competențelor autorităților și sub controlul procurorului și al judecătorului civil. Procurorul trebuie să fie informat cu privire la orice decizie administrativă și trebuie să verifice la fiecare 6 luni situația minorului și să propună judecătorului adoptarea oricărei măsuri necesare protecției minorului. Judecătorii civili și de familie sunt autoritățile desemnate să adopte orice fel de măsuri preventive (Art.158 Cod Civil) și să atace cu apel orice decizie administrativă.

3. Agențiile (instituțiile) specializate

Așa cum am explicat deja, procedurile penale împotriva făptuitorilor minori se desfășoară în cadrul unui proces penal (posibil este a se aprecia că acest proces are prea multe prevederi procesuale similare procesului penal desfășurat față de infractori adulți) condus de un magistrat specializat, judecătorul pentru minori. Într-adevăr, specializarea pentru diferitele instituții competente este una dintre principalele măsuri ale noului sistem stabilit în Spania prin eliminarea sistemului de tutelă, și în particular prin Legea nr. 5/2000. În acest sens, dispoziția finală nr. 4 cere specializarea judecătorilor, procurorilor și avocaților, atribuindu-le departamentelor lor obligația organizării programelor de instruire. Cursurile de specializare sunt organizate ca fiind una dintre cele mai bune metode de a garanta instruirea specializată cerută; dar poate de asemenea fi dovedită prin alte criterii obiective, cum ar fi experiența profesională în lucrul cu minorii și studiile științifice ori lucrările prezentate și publicate în această materie.

3.1. Specializarea judecătorilor

Specializarea judecătorilor pentru minori fusese deja cerută în 1995 prin legea de organizare a puterii judecătorești; prin această reglementare, pregătirea judiciară a fost completată prin cursuri de instruire în acest scop. O reformă introdusă prin Legea nr. 9/2000 (art.329.3) a întărit această cerință, stabilind o ierarhie clară în atribuirea acestor posturi. Mai întâi, magistrații este necesar să parcurgă cursurile de instruire organizate. Apoi, magistrații trebuie să fie activat cel puțin 3 ani în timpul ultimilor 5 ani în jurisdicția pentru minori. În final, în absența cerințelor menționate, regula vechimii. În orice caz, aceia care obțin un post pe această cale, înainte de a ocupa funcția, trebuie să participe la activitățile de specializare organizate de Consiliul General al Puterii Judecătorești.

3.2. Specializarea procurorilor

Specializarea procurorilor este de asemenea cerută și conform dispoziției finale nr.4 din Legea nr. 5/2000. Ministerul de Justiție nu trebuie doar să asigure ci să și organizeze, în toate Birourile Procurorilor, o secțiune specializată pentru minori.

Specializarea procurorilor este crucială, corespunzător rolului important al procurorului în procedura penală privind făptuitorii minori³⁵. Procurorul nu trebuie doar să conducă urmărirea penală, acțiunile poliției judiciare și să instrumenteze dosarul penal (art.16.1 și 23). Procurorul trebuie să garanteze drepturile minorilor, să le protejeze interesele (art.6 din Legea nr. 5/2000 și art.3.13 din Statutul Procurorului), să asigure apărarea victimei și să acționeze în interesul

³⁵ Caverro Forradelas, 1997, 73; Sancho Casajus, 2002, 137.

societății. Aceste obligații servesc aceluiași scop³⁶, fiind ușor contradictorii³⁷, îndeosebi dacă sunt concentrate asupra aceleiași persoane. Oricum, scopul de a avea doi membri diferiți din biroul Procurorului (unul care să desfășoare urmărirea penală și altul care să vegheze asupra interesului minorului) care să participe la proces nu a fost urmărit prin Legea nr. 5/2000. Cu toate acestea, cu privire la declarațiile minorului obținute în absența părinților minorului, tutorilor sau reprezentanților legali, art.17.2 impune clar participarea unui membru al biroului Procurorului, dar diferit de cel care instrumentează cazul³⁸.

Un procuror specializat pentru minori a fost numit în compunerea Curții supreme, din 2005, cu scopul de a asigura coordonarea și uniformizarea activității procurorilor pentru minori din Spania.

3.3. Specializarea cerută celorlalți participanți la procedurile penale

Prin Legea nr. 5/2000 (dispoziția finală nr.4) se cere de asemenea specializarea consilierilor legali (avocați). Consiliul General al Asociației Barourilor trebuie să adopte orice prevedere necesară care să aibă ca scop garantarea oferirii unor cursuri de instruire adecvate în toate teritoriile spaniole, pentru acei avocați care doresc să intervină în fața judecătorului pentru minori³⁹. O instruire specializată, aprobată de Consiliul General, este necesar să fie inclusă în lista avocaților autorizați să intervină ca și consilieri oficiali ai apărării în fața instanțelor pentru minori⁴⁰.

Atâta timp cât forțele de poliție sunt implicate⁴¹, dispoziția finală 3 cere Guvernului Comunităților Autonome să consolideze detașamentele specializate pentru minori ale poliției judiciare, cu scopul de a da procurorilor tot sprijinul necesar. Majoritatea forțelor poliției (cel puțin cele mai importante) au organizat unități specializate pentru a interveni în acest sector⁴².

În plus, prin Decretul Regal nr. 1774/2004 au fost reglementate cele mai importante aspecte ale intervenției poliției judiciare, care în cazul minorilor se desfășoară sub controlul procurorului (art. 2 și 3).

3.4. Serviciile sociale (ori agențiile/instituțiile similare) implicate în procedurile penale

Mai multe articole din Legea nr. 5/2000 au prevăzut clar participarea serviciilor sociale implicate în protejarea și îndreptarea minorilor. Aceasta participare are loc la executarea măsurilor (art.43-60), dar și în alte etape procesuale: adoptarea măsurilor provizorii (art.28.1 și 28.2), participarea la audieri (art.35, 41 și 42.7), dispunerea (art.7.3 și 10.4) și înlocuirea măsurii (art.13) sau la pronunțarea suspendării sentinței de executare (art.40). În ciuda importanței unei instruiți adecvate al acestui personal non-jurisdicțional⁴³, conținutul inițial al Dispozițiilor finale nr. 3 și 4, ce reglementau o nouă categorie de psihologi criminaliști, educatori și lucrători sociali, a fost modificat prin Legea nr. 9/2000 înainte de aplicarea efectivă a Legii nr. 5/2000⁴⁴.

Mai mult, procurorul poate întotdeauna să propună participarea la proces a persoanelor sau a reprezentanților instituțiilor publice sau private care pot aduce elemente noi pentru a determina interesul superior al minorului sau a se pronunța asupra oportunității măsurilor propuse (art. 30.3). Pe de-altă parte, serviciile sociale ori agențiile similare trebuie să-și dea acordul asupra măsurilor

³⁶ Tamarit Sumalla, 2001, 87.

³⁷ Gomez Colomer, 2002, 167.

³⁸ Salom Escriva, 2002, 225.

³⁹ Ponz Momdedeu, 2002, 382.

⁴⁰ Higuera Guimera, 2003, 428.

⁴¹ Anton Barbera – Colas Turegano, 2002, 413.

⁴² Bueno Arus, 1998; Clemente, 1997; Dominguez Figueirido – Balsebre Jimenez, 1998.

⁴³ Cuello Contreras, 2000, 146.

⁴⁴ Higuera Guimera, 2003, 429.

socio-educative propuse de echipa tehnică. Într-adevăr obligația echipei tehnice este aceea de a propune o intervenție socio-educativă asupra minorului, indicând aspectele demne de luat în considerare pentru această intervenție (art. 27.2).

4. Noțiuni preliminare de procedură penală aplicabile minorilor

În acord cu temeiul interesului superior al minorului (și nu pedepsirea sau represiunea) ca principiu fundamental al intervenției asupra minorului, legea spaniolă precizează clar normele procesual penale aplicabile în cazul minorilor între 14 și 18 ani.

Astfel, prin înțelesul principiului “oportunitate reglementată”⁴⁵, chiar și înainte de deschiderea cazului, art.18 permite procurorului să decidă să nu înceapă urmărirea penală cu două condiții: dacă infracțiunea săvârșită prezintă un grad redus de pericol social și dacă nu există nici o probă că minorul ar mai fi săvârșit în trecut și alte fapte penale⁴⁶. În acest caz, dacă procurorul poate decide să nu înceapă urmărirea penală, având obligația de a transmite toate informațiile autorității pentru protecția minorilor. Deși art.18 obligă aparent autoritatea să adopte măsurile de protecție prevăzute în Legea nr. 1/1996⁴⁷, decizia de a le promova este aplicată ținând cont de situația minorului⁴⁸; confidențialitatea este, la acest nivel, redusă și insuficient controlată⁴⁹.

Potrivit art.19 împăcarea părților sau tranzacția poate de asemenea determina o întrerupere a urmăririi penale de către procuror⁵⁰. În orice caz, gravitatea faptei și alte circumstanțe atenuante (în special absența de violențe serioase sau amenințări) sunt elemente foarte importante pentru adoptarea unei asemenea decizii; mai mult, în ipoteza infracțiunilor săvârșite cu violență nu sunt incidente dispozițiile împăcării părților sau ale tranzacției⁵¹. Pe de altă parte, deși participarea victimei în această procedură este importantă, împăcarea ori tranzacția nu sunt considerate ca o manifestare a „privatizării rezoluției infracționale”⁵² și pot periclita garanțiile individuale⁵³, așa încât controversata reglementare introdusă prin art.19 din Legea nr. 5/2000⁵⁴ cere intervenția diferitelor instanțe și definește ce elemente trebuie avute în vedere cu scopul de a considera împăcarea ori tranzacția realizate și procedura ce trebuie îndeplinită.

Conform art.19.2, împăcarea intervine dacă minorul recunoaște fapta și o regretă arătând compasiune pentru victimă (ori reprezentantului legal, cu aprobarea judecătorului pentru minori), accepta⁵⁵ oferta sau nu o respinge⁵⁶. Pe de altă parte, cu scopul de a accepta tranzacția (ca o modalitate de reparare independentă de răspunderea civilă)⁵⁷, un acord al minorului de a face ceva în favoarea victimei ori a comunității este cerut; și acest acord trebuie să fie urmat de o executare efectivă. Repararea poate, de asemenea, în unele cazuri, să fie verificată și prin implementarea cu succes a activității educative propuse de echipa tehnică⁵⁸.

⁴⁵ Bueno Arus, 1997.

⁴⁶ Dolz Lago, 2002, 281.

⁴⁷ Higuera Guimera, 2003, 434.

⁴⁸ Alastuey Dobon, 2002b, 203).

⁴⁹ Landrove Diaz, 2001, 287.

⁵⁰ Bernuz Beneitez, 2001, 263; Peris Riera, 2001.

⁵¹ Tamarit Sumalla, 2002, 62.

⁵² Torres Fernandez, 2003, 89.

⁵³ Carmona Salgado, 2001, 121.

⁵⁴ Herrera Moreno, 2001, 425.

⁵⁵ Gomez Rivero, 2002, 9.

⁵⁶ Marti Sanchez, 2001, 77.

⁵⁷ Richard Gonzales, 2000,4.

⁵⁸ Într-un sens critic, corespunzător posibilei confuzii dintre repararea și măsurile ce constau în servicii comunitare ori socio-educative sarcini (a se vedea Alastuey Dobon, 2002b, 207).

Cu scopul de a obține împăcarea sau repararea, prin art.19.3 sunt încredințate echipei tehnice funcțiile de mediere între minor și victimă. Este de asemenea tot o sarcină a echipei tehnice de a-l informa pe procuror asupra acordului ce a fost încheiat și asupra obligațiilor ce trebuie îndeplinite. Cu toate acestea, încheierea investigațiilor este posibilă doar dacă împăcarea ori repararea sunt efective (inclusiv dacă repararea nu a fost posibilă în ciuda eforturilor minorului). Numai atunci procurorul va închide investigația și îi va propune judecătorului să respingă cazul.

Respingerea cazului, în baza art.19.1, poate fi și consecință unei propuneri ce vine din partea echipei tehnice dacă este în concordanță cu cel mai bun interes al minorului corespunzător timpului scurs de la comiterea faptelor, sau din cauza reacției sociale pe care faptele o determină, fiind suficient expuse ca urmare a diferitelor măsuri procesuale (art.27.4). Dacă judecătorul respinge cauza, procurorul este în măsură să pună la dispoziția agențiilor publice informații complete pentru a facilita posibilitatea intervenției necesare pentru a-l proteja pe minor.

O individualizare a procedurilor aplicate poate deriva și din îndeplinirea de către procuror a cerințelor minorilor și ale consilierilor, care – dacă măsurile propuse nu conțin o internare ori o dezincredințare absolută – se supun, fără nici o altă intervenție, unei sentințe conforme (art.32-36).

Principiul flexibilității, permite și el, o dată ce hotărârea judecătorească a fost pronunțată, să suspende executarea pe timp de 2 ani și cu posibilitatea de a impune anumite condiții (art.40) ori să suspende, să modifice ori să revoce măsurile impuse (art.13 și 51), chiar să întrerupă executarea sancțiunii penale⁵⁹.

5. Procedura de evaluare individuală

Una dintre cele mai importante noutăți ale sistemului introdus prin Legea nr. 4/1992 a fost instituirea unei echipe tehnice, compusă dintr-un psiholog, un pedagog și un lucrător social, cu obligația fundamentală de a informa procurorul și judecătorul asupra situației psihologice, pedagogice și familiale a minorului și despre mediul acestuia, evaluând elementele decisive cu scopul de a defini interesul superior al minorului și să adopte orice decizie cu privire la reabilitarea și resocializarea minorului.

În Legea nr. 5/2000 rolul echipei tehnice rămâne esențial⁶⁰: nu doar investighează și raportează situația minorului, dar explorează și oportunitatea împăcării și tranzacției (eventuala mediere între minor și victimă) și propune neurmărirea penală a cazului, în interesul minorului, dacă “interesul social” a fost suficient luat în considerare ori urmărirea este considerată inadecvată corespunzător timpului scurs de la săvârșirea faptei (art.27). Raportul echipei tehnice este necesar pentru a adopta decizii fundamentale, mai ales acelea referitoare la măsurile provizorii și finale, ordinea lor de aplicare, înlocuire, revocare sau suspendare.

Decretul Regal nr. 1774/2004 dezvoltă reglementarea intervenției echipei tehnice. Art. 4.1 stabilește că echipa tehnică va fi compusă din psihologi, educători și lucrători sociali (eventual alți profesioniști se pot alătura echipei tehnice temporar sau permanent) recrutați pentru a-l asista pe procuror și judecător, conform specializării lor. Ei sunt calificați să dea asistență profesională minorului reținut, și să medieze între minor și victimă.

Independența echipei este garantată (art.4.2) și intervine sub supravegherea procurorului și a judecătorului pentru minori. Dar rapoartele sunt întocmite aplicând criteriile strict profesionale, și trebuie să fie semnate de membrii echipei. Ele pot fi de asemenea întocmite sau completate de acele entități publice ori private care, fiind active în sfera educării minorului, cunosc de la început situația presupusului făptuitor (art. 27.6 din Legea nr. 5/2000).

⁵⁹ Mena Alvarez, 2001, 221.

⁶⁰ Dolz Lago, 2001.

Compunerea echipei tehnice este hotărâtă de administrația competentă, conform nevoilor reale. Fie Ministerul Justiției fie Comunitatea Autonomă, trebuie să garanteze că fiecare procuror va dispune de staff-ul suficient și adecvat pentru a întocmi rapoartele legale cerute în timp (art.4.4 din Decretul regal nr. 1774/2004).

6. Medierea

Una dintre funcțiile încredințate echipei tehnice este aceea de a media între minor și victimă (art.19.3 din Legea nr. 5/2000; art.4.1 II din Decretul regal nr. 1774/2004).

Medierea poate juca un rol important în faze diferite ale procedurilor (unde mai multe modalități sunt puse în vedere, în special în cazul conformării minorului cu cerințele impuse de procuror ori al împăcării cu victima) fiind reglementată prin Legea nr. 5/2000 doar în relație cu respingerea cauzei ca urmare a împăcării sau a tranzacției dintre minor și victimă⁶¹. Art. 27.3 din Legea nr. 5/2000 stabilește așadar că echipa tehnică, atâta timp cât consideră că e în interesul minorului, trebuie să exploreze toate posibilitățile concilierii și ale tranzacției și trebuie să informeze procurorul cu privire la conținutul și scopul unei posibile refaceri a activității de împăcare⁶².

Procedura medierii a fost în plus dezvoltată prin art.5 din Decretul regal nr. 1774/2004. Conform cu această nouă reglementare, procedura începe fie la inițiativa echipei tehnice (așa cum e reglementat în art. 27.3 deja explicat), fie la cererea procurorului. Acesta – luând în considerare concursul de circumstanțe, cererile avocatului minorului și inițiativa echipei tehnice – poate înceta urmărirea penală; în acest caz, procurorul va întreba echipa tehnică cu privire la oportunitatea unei soluții extrajudiciare potrivite conform cu interesul minorului și al victimei.

Dupa primirea cererii procurorului, echipa tehnică trebuie să intre în legătură cu minorul, cu reprezentantul său legal și consilierul său, cu scopul de a explica oportunitatea unei măsuri extrajudiciare, și să discute pe această temă. Dacă minorul, în prezența avocatului său, acceptă una dintre soluțiile propuse, acordul reprezentantului legal este cerut.

Dacă minorul e de acord, echipa tehnică contactează victimele pentru a cerceta voința lor (dacă cel vătămat este minor sau incapabil, este necesar avizul reprezentantului legal al acestuia, iar judecătorul pentru minori trebuie informat), pentru a lua parte la procedura medierii. Dacă victima acceptă, echipa tehnică se întâlnește și cu minorul și cu victima pentru a lua la cunoștință despre aspectele particulare ale înțelegerii de a se împăca; dacă victima refuză, înțelegerea poate fi atinsă prin alte modalități.

În final, echipa tehnică trebuie să mențină procurorul informat despre rezultatul procedurii medierii, despre înțelegerea încheiată și asupra acordului deplin ori a motivelor unui posibil eşec.

Dacă împăcarea ori repararea socială directă nu este posibilă, echipa tehnică poate propune minorului fie o măsură social-educativă ori un serviciu în folosul comunității; în acest caz, îndeplinirea deplină a compromisului și a sarcinii /serviciului are aceeași valoare ca și o împăcare sau reparare cu scopul adoptării de către procuror a deciziei închiderii dosarului. În acest caz, procurorul va solicita judecătorului respingerea cauzei.

Procedura medierii este reglementată prin art.5 din Decretul regal nr. 1774/2004 care face uneori aplicare unor situații “problematice”⁶³ de împăcare care pot interveni după aplicarea măsurilor (prevăzute în art.51.4 din Legea nr. 5/2000, fără excluderea unei fapte serioase). Și aici din nou împăcarea sau repararea pot să conducă la stingerea măsurii, dacă judecătorul – ținând

⁶¹ Peris Riera, 2001.

⁶² Elicegui Gonzales – Santibanez Gruber, 2002, 189.

⁶³ Alastuey Dobon, 2002b, 217; Tamarit Sumalla, 2002, 74.

cont de propunerea procurorului sau a consilierului minorului, și după ascultarea echipei tehnice și a reprezentantului instituției publice competente în vederea protejării minorului și a îndreptării sale – consideră că împăcarea exprimă suficient respingerea faptei minorului de către societate. Oricum, în acest caz funcțiile împăcării echipei tehnice deja explicate sunt întreprinse de obicei de instituția publică. Aceasta din urmă, odată ce minorul și-a manifestat voința de împăcare/reparare, trebuie să informeze procurorul și judecătorul pentru minori și apoi să procedeze conform procedurii din art.5 din Decretul Regal, fără introducerea nici unei alte schimbări în executarea măsurii impuse. Dacă victima e minor, autorizarea judecătorului pentru minori este cerută (art.15.1 din Decretul regal nr. 1774/2004 și art.19.6 din Legea nr. 5/2000).

7. Libertatea personală

În procedurile împotriva făptuitorilor minori restrângerea libertății intervine în cazul dispunerii măsurii reținerii în oricare dintre fazele procesului penal .

7.1 Reținerea de către poliție este reglementată de art. 17 din Legea nr. 5/2000 și art.3 din Decretul regal nr. 1774/2004. Conform acestor prevederi, reținerea se impune într-o manieră cât mai puțin prejudiciabilă, în condiții adecvate, diferite de acelea pentru persoanele peste 18 ani (art.17.2); minorii reținuți trebuie să beneficieze de asistență socială, psihologică, medicală și fizică cerută conform vârstei lor, sexului și caracteristicilor individuale.

Poliția trebuie de asemenea, să informeze imediat procurorul și reprezentantul legal al minorului, indicând locul unde minorul este ținut sub custodie, iar dacă minorul are cetățenie străină cu rezidență legală în afara Spaniei, autoritățile consulare trebuie să fie și ele informate.

Durata unei asemenea rețineri trebuie redusă la timpul necesar clarificării faptelor. În mai puțin de 24 de ore, poliția trebuie să pună minorul la dispoziția procurorului. Acesta în 48 de ore de la reținere trebuie să decidă dacă îl eliberează pe minor, ori începe urmărirea penală și trimite materialul de urmărire penală judecătorului pentru minori competent, eventual propunând luarea unei măsuri provizorii.

Minorul reținut are dreptul de a fi informat imediat și într-o maniera inteligibilă și clară asupra acuzării sale și asupra drepturilor pe care le are. Un minor reținut are toate drepturile unui adult reținut , în particular, are dreptul să vorbească confidențial cu apărătorul său înainte și după darea unei declarații (art.17.2 II) și dreptul de a se adresa instanței pentru verificarea legalitatea arestării sale (art.17.6).

Orice declarație a minorului reținut trebuie să se facă în prezența apărătorului său și în prezența părinților săi, a tutorelui ori reprezentantului; dacă aceștia nu sunt de față, un reprezentant al biroului procurorului, diferit de cel care instrumentează cazul, trebuie să participe (art.17.2)⁶⁴.

7.2. În faza de urmărire penală, judecătorul pentru minori poate adopta o serie de măsuri procesuale provizorii⁶⁵: internarea, libertatea supravegheată, interzicerea de a intra în contact cu victima, cu rudele victimei ori cu alte persoane; acordarea custodiei unei persoane, familiei sau unui grup educațional. Decizia trebuie să se fundamenteze pe riscul prin care minorul poate fie să se sustragă justiției, fie să se înțeleagă cu victima (art.28.1 din Legea nr. 5/2000), și impune procurorului obligația de a audia pe apărătorul minorului și echipa tehnică. Scopul măsurilor provizorii (care pot dura până la finalul audierilor sau și în timpul apelului) este de a garanta custodia minorului și apărarea acestuia. Evident, durata măsurii provizorii este socotită ca timp petrecut din sancțiune,operând computarea pedepsei, dacă o asemenea măsură se impune în final.

⁶⁴ În sens critic, Salom Escriva, 2002, 225.

⁶⁵ Aparicio Blanco, 2000, 169; Gisbert Jorda, 2001, 103.

Internarea provizorie poate fi adoptată luând în considerare gravitatea și repercursiunile faptei și pericolul social produs. Mediul social al minorului și circumstanțele personale, la fel și urmărilor faptelor penale anterior comise de minor trebuie de asemenea luate în considerare. Judecătorul decide asupra tuturor acestora după o scurtă audiere; echipa tehnică și agențiile publice competente în protecția și îndreptarea minorului trebuie și ele să informeze judecătorul cu privire la măsurile ce se cer, ținând cont de interesul minorului și de întreaga situație. Probele pot fi de asemenea propuse în această audiere.

În mod normal, durata internării provizorii era de maxim 3 luni, dar ultima modificare (Legea nr. 8/2006) a ridicat această limită la 6 luni; această durată este hotărâtă de judecător, motivat ca urmare a cererii procurorului (art. 28.3). Internarea este aplicată în centrul desemnat de agenția publică competentă, și sub regimul de internare cerut de judecător. Prin art.29 din Decretul regal nr. 1774/2004 s-a stabilit că, în scopul de a respecta principiul prezumției de nevinovăție, programul de individualizare a sancțiunii penale va fi înlocuit de un model de intervenție conținând planul activităților adecvate caracteristicilor personale ale minorului care trebuie să fie compatibile cu regimul de internare și cu modul de evoluție a procesului.

În caz de neimputabilitate, în baza unor deficiențe mentale ori a altor circumstanțe legale definite în art.20.1-2 și 3 din Codul penal, măsurile provizorii prevăzute în Codul civil pot fi aplicate minorului. Oricum, investigarea merge mai departe și aplicarea unei măsuri terapeutice adecvate interesului minorului rămâne deschisă prin intermediul sentinței (art.29).

7.3. Restrângerea și privarea de libertate joacă un rol important în sistemul de măsuri, considerat de doctrină “sancțiune punitivă”⁶⁶ sau “pedeapsă juvenilă”⁶⁷. Oricum, așa cum Landrove Diaz (2001, 160) statuează, fiind formal sancțiuni penale, aceste măsuri au din punct de vedere material o natură sancționatorie-educativă⁶⁸.

Lista măsurilor este largă și include următoarele⁶⁹: diferite tipuri de internări terapeutice obișnuite (în regim închis, semi-deschis și deschis); tratament ambulatoriu; vizitarea unui centru de zi; arest de week-end; libertate supravegheată (eventual cu supraveghere intensivă); interzicerea de a intra în contact cu sau în comunicare cu victima, rudele victimei sau cu alte persoane; custodia unui grup familial sau educativ; servicii comunitare; avertismente; sarcini socio-educative; reținerea permisului de conducere auto sau pentru motocicletă; revocarea licenței de a vâna, sau de port-armă; interzicerea de a mai lua parte la alegeri politice ori de a mai ocupa o funcție publică (art.7.1).

Măsurile, în general, nu pot depăși (art.9.3) doi ani (serviciul în folosul comunității: 100 de ore; arestul de weekend : 8 weekend-uri). Măsurile de internare sunt împărțite în două perioade : internarea și libertatea supravegheată. Echipa tehnică sfătuiește asupra conținutului fiecărei perioade, iar judecătorul decide asupra duratei fiecărei perioade.

Sunt prevăzute, de asemenea, și câteva cazuri speciale de aplicare a acestor măsuri, după cum urmează (art.10):

a). împotriva minorilor care au peste 16 ani și au comis fie infracțiuni cu grad ridicat de pericol social, fie infracțiuni săvârșite cu violență sau de vătămare corporală, precum și față de minorii care au săvârșit infracțiuni în grup sau aparțin unei organizații criminale ori s-au asociat în vederea săvârșirii de infracțiuni, se pot dispune măsuri până la 6 ani (200 de ore în caz de serviciu în folosul comunității, și până la 16 week-end-uri de arest); dacă minorul are vârsta cuprinsă între 14 și 15 ani, măsurile se vor limita la maxim 3 ani; 150 de ore în folosul comunității, și până la 12

⁶⁶ Sanchez Garcia De Paz, 2000.

⁶⁷ Cerezo Mir, 2001, 1094; Garcia Perez, 2000, 686; Etxebarria Zarabeita, 2001b, 32.

⁶⁸ A se vedea și Gonzalez Cussac – Cuerda Arnau, 2002, 103-105.

⁶⁹ Abel Souto, 2002, 105; Carmona Salgado, 2002, 917; Munoz Oya, 2001, 185.

week-end-uri în arest. În cazuri extrem de serioase (și recidiva este întotdeauna considerată astfel) internarea se va realiza într-un regim închis pentru 1-6 ani (excluzând toate întreruperile din anul de dinainte de executarea propriu-zisă) și libertatea supravegheată cu asistența educativă pentru următorii 5 ani;

b).prin Legea nr. 7/2000 s-a introdus un sistem particular pentru infracțiunile grave și terorism; acest sistem a fost reformat din nou în 2006; astfel, în cazul infracțiunilor cu grad ridicat de pericol social (omoruri, răpiri, agresiuni sexuale violente, terorism și în general infracțiunile pentru care în Codul penal sunt prevăzute pedepse cu închisoarea de 15 ani sau mai mare);

- dacă sunt comise de minori de 16 ani, se aplica o internare în regim închis (1-5 ani) urmată de libertate supravegheată (până la 3 ani și mai mult);

- dacă sunt comise de cei de peste 16 ani, internarea în regim închis (de la 1 la 8 ani) va fi urmată de libertate supravegheată (de până la 5 ani și mai mult) și măsurile nu vor fi înlocuite, suspendate sau revocate până când jumătatea perioadei de internare nu a trecut;

- în cazul infracțiunilor de terorism, conform cu pericolul social al faptei, numărul faptelor comise și circumstanțele personale ale făptuitorului, judecătorul va putea de asemenea dispune și interzicerea unor drepturi civile: de a mai lua parte la alegeri politice ori de a ocupa o funcție publică (4-15 ani); o asemenea măsura trebuie să fie aplicată după internare.

Toate aceste criterii trebuie să fie aplicate chiar dacă minorul răspunde penal pentru o pluralitate de infracțiuni, iar măsurile vor fi executate conform ordinii stabilite în art.47(3); însă dacă infracțiunile sunt concurente sau continue, judecătorul va lua ca și punct de reper infracțiunea cea mai gravă comisă. În caz de pluralitate de infracțiuni, dacă una sau mai multe constituie o infracțiune gravă sau de terorism, internării în regim închis i se poate adăuga un spor de până la 10 ani pentru cei cu vârsta între 16 și 17 ani și până la 6 ani pentru cei sub 16 ani (art.11).

În orice caz, criteriile generale în dispunerea unei sancțiuni sunt următoarele:

- judecătorul pentru minori nu poate să dispună măsuri mai severe decât cele pe care le cere fie procurorul, fie persoana vătămată⁷⁰,

- pentru infracțiuni cu un grad redus de pericol social, pot fi aplicate doar libertatea supravegheată (până la 6 luni), avertismentul, arestul de week-end (până la 4 week-end-uri), serviciul comunitar (până la 50 de ore), ridicarea licenței (până la 1 an) și interzicerea de a intra în contact ori în comunicare cu victima, cu rudele victimei sau cu alte persoane, ori sarcini socio-educative (până la 6 luni) (art.9.1);

- măsura internării nu poate depăși duratele pedepselor cu închisoarea stabilite de Codul penal pentru aceeași faptă săvârșită de către un adult (art.8). Pot fi supuși unui regim închis doar minorii responsabili penal 1) fie de fapte cu grad ridicat de pericol social; 2) fie de fapte mai puțin grave comise cu violență sau prin constrângere ce au ca urmare un pericol iminent pentru viața ori integritatea corporală a altora; 3) fie fapte comise în participație penală ori dacă minorul s-a asociat în vederea săvârșirii de infracțiuni sau e membru al unei organizații constituite în acest scop.

Reglementarea internării într-un regim închis este, în orice caz, în principiu de natură represivă⁷¹.

În cazurile de boli mentale sau alte cauze de înlăturare a răspunderii penale a minorului, internarea medicală sau tratamentul ambulatoriu sunt singurele măsuri admise, și ele ar trebui dispuse luând în considerare riscul sau pericolul reprezentat de minor (art.9.5).

Cu scopul de a dispune măsura corespunzătoare (art.7.3) modelul adoptat prin Legea nr. 5/2000 deschide un câmp larg aprecierii judiciare⁷². Astfel, flexibilitatea măsurii este mult mai

⁷⁰ Cervello Donderis Colas Toregano, 2002, 130.

⁷¹ Cuello Contreras, 2000,45.

⁷² Gonzales Cussac – Cuerda Arnau, 2002, 105.

mare decât în procedurile pentru adulți⁷³ iar judecătorul pentru minori trebuie să ia în considerare nu doar conduita minorului, ci și recomandările echipei tehnice asupra vârstei minorului, condițiile familiale, sociale precum și personalitatea acestuia. Instituțiile publice competente pentru protecția și reeducarea minorilor pot de asemenea face recomandări judecătorului asupra acestor aspecte. Chiar dacă prevenția generală și pedepsirea sunt prezente într-un anumit sens, criteriul prevenirii speciale prevalează⁷⁴.

Disponerea a mai multe măsuri de naturi diferite pentru aceeași rezoluție infracțională este posibilă, dacă apare să fie potrivită principiului interesului superior al minorului. Dacă două sau mai multe măsuri de aceeași natură impuse în rezoluții diferite trebuie să fie executate în același timp, judecătorul le va cumula, dar durata totală nu va depăși dublul celei mai mari pedepse. Mai mult, dacă diferitele măsuri pronunțate nu pot fi simultan aplicate, judecătorul le poate înlocui pe toate (sau o parte din ele) ori poate indica ordinea aplicării lor începând cu măsura internării. Înăuntrul acestei categorii, executarea unei internări terapeutice va avea prioritate peste regimul închis (art.47). Judecătorilor le este permis, oricum, să stabilească o altă ordine dacă o consideră mai potrivită interesului superior al minorului (art.47.5e); judecătorul poate de asemenea, pe timpul executării să înlocuiască, să suspende, să revoce sau să pună capăt unei măsuri “în orice moment”, conform cu interesul superior al minorului și dacă interesul social pentru comportamentul minorului a fost suficient exprimat (art.13).

Măsurile (sub 2 ani) pot beneficia de suspendarea condiționată a executării (art.40)⁷⁵. Pe timpul suspendării condiționate minorul poate fi pus sub libertate supravegheată sau judecătorul poate dispune activități socio-terapeutice (dacă e cazul și cu participarea părinților sau a tutorilor), dacă e recomandată de echipa tehnică sau de instituția publică competentă să protejeze minorul și să-l reeduce. O suspendare condiționată a măsurii cere nu doar îndeplinirea condițiilor judiciare, ci și absența oricărei alte condamnări în timpul perioadei de probă, și angajamentul minorului de a nu mai săvârși altă faptă.

Punerea în executare a acestor măsuri⁷⁶ se află în competența Comunității autonome respective (art.45); activitatea de executare este plasată sub controlul judecătorului pentru minori (art.44) și se desfășoară conform principiului legalității (art.43). Comunitățile autonome execută măsurile direct sau prin intermediul contractelor cu alte instituții non-profit publice sau private (art.45); un specialist este desemnat (art.46.3) să își asume responsabilitatea pentru a supraveghea executarea măsurii aplicate și să raporteze periodic judecătorului, procurorului și avocatului minorului asupra îndeplinirii măsurii de către minor și asupra progresului acestuia (art.49).

Prevederi speciale sunt stabilite în ceea ce privește tratamentul minorilor care evadează în timpul executării măsurii (art.50).

Cu privire la executarea măsurii internării⁷⁷, prevederile speciale incluse în art.54-60 din Legea nr. 5/2000 sunt dezvoltate prin art.23 și art.85 din Decretul regal nr. 1774/2004.

Instituția “plasamentului” este reglementată pentru regimul sancționator aplicabil minorilor, fiind de o mai mare aplicare comparativ cu regimul procesual aplicabil infractorilor majori⁷⁸. Astfel, minorii trebuie ținuti în instituții apropiate domiciliului lor, dar judecătorul poate decide altfel dacă este în interesul minorului; minorii care s-au asociat pentru săvârșirea de infracțiuni, sau care aparțin unor organizații infracționale nu pot executa măsura în același loc (art.46.3).

⁷³ Tamarit Sumalla, 2001, 77.

⁷⁴ Cadena Serrano, 2002, 93.

⁷⁵ Alastuey Dobon, 2002b, 210.

⁷⁶ Guinarte Cabada, 2004, 405; Lopez Martin – Dolera Carrillo, 2002, 141; San Martin Larrinoa, 2001, 141.

⁷⁷ Lopez Cabello, 2001, 155.

⁷⁸ Ortiz Gonzales, 2001, 191.

Executarea internării e compusă din două perioade : internarea efectivă și libertatea supravegheată (art.7.2). Internarea efectivă trebuie să se realizeze în centre specifice, organizate de Comunitatea autonomă, direct sau prin angajamente cu alte instituții publice sau private non-profit. Aceste centre sunt diferite față de acelea prevăzute de legislația penitenciară de executare a pedepselor și a măsurilor provizorii de restrângere a libertății impuse persoanelor ce au împlinit deja 18 ani. Măsurile dispuse în cazul infracțiunilor de terorism trebuie, totuși, să fie executate sub controlul specializat al personalului și în centre ale Audienței Naționale (National Audience/Audiencia Nacional), stabilite prin Hotărâre de Guvern, direct sau prin contracte cu Comunitățile Autonome (Art.54.1).

Conform art.55, resocializarea este un principiu fundamental. De aceea, conform art.56 sunt garantate toate acele drepturi ale deținuților care nu au fost interzise prin hotărârea de condamnare, iar art.55.2 cere ca viața din interiorul centrului trebuie să fie organizată într-un mod similar celui din exterior, încercând să reducă efectele negative pe care internarea le poate produce asupra minorului sau asupra familiei sale, prin promovarea unor contacte sociale și familiale, colaborarea și participarea instituțiilor publice și private (în special, cele mai apropiate geografic și cultural) în procesul integrării sociale a minorului. Minorii au întotdeauna dreptul să fie informați prin aducerea la cunoștință într-o scriere și limba pe care să o înțeleagă asupra drepturilor lor, sarcinilor și asupra oricăror alte aspecte ale regulilor din centre; ei au de asemenea dreptul la petiționare, dreptul de a adresa plângeri, de a ataca hotărârea (de a o apela).

Art.45-52 din Decretul regal nr. 1774/2004 stabilește o reglementare completă în ceea ce privește modurile ordinare și extraordinare de plecare și liberare. Minorii în regim deschis sau semi-deschis pot beneficia în mod obișnuit de permisiu începând de la 30 de zile (regim deschis) până la 20 de zile (regim semi-deschis) în fiecare semestru (fiecare permisie neputând depăși 15 zile). Chiar și minorii din regimul închis vor putea beneficia de aceste permisiu după ce au ispășit o treime din durata internării, conform evoluției personale și procesului social de reintegrare; în acest caz, fiecare permisie nu va depăși 4 zile, durata totală pe an fiind fixată la 12 zile, iar judecătorul pentru minori competent trebuie să își dea acordul (art.25 din Decretul regal nr. 1774/2004). Pe de altă parte, minorii în regim deschis pot părăsi stabilimentul în mod obișnuit în fiecare week-end de vineri de la ora 4 p.m. până duminică la ora 8 p.m. (cu adăugarea a 24 de ore, dacă vineri și luni sunt zile de sărbătoare). Minorii în regim semi-deschis beneficiază de un week-end de permisie în fiecare lună, și după ce au ispășit o treime din durata internării, 2 permisiu pe lună; în aceleași condiții minorii în regim închis pot fi autorizați cu o permisie de un week-end pe lună (art.46). În mod extraordinar (până la 4 zile) și permisiile planificate sunt posibile, pentru maxim 48 de ore (art.47-48, la fel ca și convorbirile telefonice și scrisorile; ca și vizitele conjugale, (cel puțin una pe lună, minim o oră este rezervată aceluia care nu pot beneficia de permisiu pe durata unei perioade mai mare de o lună; și primirea de pachete („parcels”) este aprobată de asemenea (art.40-44).

Fiecare centru trebuie să aibă un regulament interior, așa cum este prevăzut în art.30 din Decretul regal nr. 1774/2004, și trebuie organizat în sectoare adecvate vârstei, nevoilor maturității și capacităților sociale ale minorului internat. Minorii au dreptul la educație, instruire, asistență religioasă și medicală (art.37-39); o dată ce au atins vârsta minimă pentru a munci, au dreptul de a efectua o activitate remunerată (sub intervenția legală a protecției sociale și în limitele necesităților instituțiilor publice); reguli speciale sunt stabilite în funcție de natura activității de muncă și în funcție de condițiile ce trebuie îndeplinite în cazul lucrătorilor sub 18 ani (Art.53). Acei minori ce au nevoie de o protecție specială vor fi separați de aceia care ar putea reprezenta un pericol sau un risc pentru ei. Mamelor le va fi permis de către judecătorul pentru minori să își țină copiii (cu vârste de până la 3 ani) cu ele dacă se constată de către instituțiile publice că nu ar putea reprezenta un risc pentru ei.

Reguli disciplinare și reguli privitoare la supraveghere și pază sunt foarte importante pentru viața din centru. Astfel, prevederile Legii nr. 5/2000 (art.59) privind securitatea sunt dezvoltate în Decretul regal nr. 1774/2004, unde supravegherea, paza și metodele sunt reglementate în mod special. Prevederi privind regimul disciplinar (art.60) sunt de asemenea detaliate în art.59-85 din acest act normativ.

Cadrul legal stabilit pentru regimul disciplinar:

- definește abaterile disciplinare clasificate pe trei niveluri : foarte grave, grave și ușoare (art.61-64)

- reproduce sancțiunile disciplinare reglementate în Legea nr. 5/2000 (Art.60.3): separarea de grup (în cazurile de agresiune, violență sau încălcarea gravă a regulilor vieții în comun), separarea în timpul week-end-urilor, restrângerea permisiilor de week-end, privarea de alte permisi, privarea de a participa la activitățile de petrecere a timpului liber

- stabilește regulile de impunere și de orientare a executării, și a procedurii de disciplină.

Demnitatea personală, dreptul la hrană, dreptul la o educație obligatorie, dreptul la vizită și dreptul de a comunica sunt întotdeauna garantate pentru minori (art.60.1 din Legea nr. 5/2000). Dreptul de ataca (apela) orice decizie disciplinară (fie în scris, fie oral) în fața judecătorului pentru minori (art.60.7) este de asemenea garantat.

Sancțiunile disciplinare pot fi întotdeauna reduse ori suspendate, iar împăcarea cu victima, restituirea, repararea și dezvoltarea activităților întreprinse în beneficiul colectivității centrului, când sunt asumate, vor fi în special luate în considerare cu scopul de a încheia procedura disciplinară ori de a lăsa fără efect sancțiunile impuse (art.60.5 din Decretul regal nr. 1774/2004).

8. Garanții ale protecției minorilor

8.1. Asistența afectivă și/ori psihologică

Dreptul minorului la asistență psihologică și afectivă în timpul privării de libertate provizorii și urmăririi penale sunt clar reglementat prin Legea nr. 5/2000; însă, nici o prevedere nu se referă la drepturile și limitările persoanelor care pot interveni în cadrul procedurilor. Doar art. 22.1 din Legea nr. 5/2000 recunoaște acest drept în cursul procedurilor penale printr-o referire la prezența părinților sau a oricărei alte persoane menționate de minor, sub autorizarea judecătorului. Pe de-altă parte, conform art.4.1 II din Decretul regal nr. 1774/2004, echipa tehnică are sarcina de a-i acorda asistență profesională minorului.

Când tratamentul psihologic este potrivit, corespunzător caracteristicilor specifice minorului care poate fi afectat de pedeapsa penală, este posibil să se dispună acele măsuri provizorii pe care Codul civil le pune în vedere (art.29). Acestea vor fi urmate în mod normal de impunerea unor măsuri terapeutice (tratament terapeutic sau ambulatoriu) în hotărârea judecătorească (Art.29); tratamentul ambulatoriu este impus în special pentru acei minori care suferă de tulburări psihologice, dar care nu necesită internare.

8.2. Prevenirea dezvăluirii identității infractorului minor.

Art.35.2 din Legea nr. 5/2000 stabilește că mass-media nu poate obține sau realiza poze minorului sau orice altă informație care i-ar dezvălui identitatea. Judecătorul și procurorul sunt obligați legal să aplice cu strictețe această regulă obligatorie; fiecare participant la proceduri este de asemenea obligat să respecte dreptul minorului la confidențialitate și nu poate difuza nici o informație personală sau orice alte informații incluse în dosar.

8.3. Alte măsuri

Pe de-altă parte, audierile sunt publice, ca regulă generală⁷⁹, dar dacă e în interesul minorului sau al victimei, art.35.2 autorizează judecătorul să permită accesul publicului în sală. Mai mult, art.37.3 din Legea nr. 5/2000 a prevăzut și protejarea martorilor sau a experților. Judecătorul este în măsură să ceară minorului să nu fie de față la audierea temporară dacă din oficiu sau la cererea părților, el consideră că este în interesul superior al minorului.

9. Concluzii

Prin Legea nr. 5/2000 a fost introdus în Spania un nou sistem de sancționare a infractorilor minori, reglementând toate aspectele relevante, inclusiv procedura penală. Au fost reglementate norme procesuale similare desfășurării proceselor penale intentate persoanelor adulte, existând însă și remarcabile diferențe. De exemplu, în această materie posibilitățile de diversificare sunt foarte largi comparativ cu aspectele din procedura pentru adulți, strict supuse principiului legalității urmăririi penale. Întărirea rolului echipei tehnice reprezintă un aspect pozitiv, chiar dacă puternice accente ar mai fi trebuit puse asupra îmbunătățirii comunicării dintre echipa tehnică și judecător.

Privitor la aspectele critice asupra procedurii penale, se pot remarca următoarele:

- procurorului i-au fost acordate atribuții mult prea complexe;
- limitări importante în privința participării victimelor;
- măsuri preventive prea restrictive : în special, durata internării preventive poate fi, în practică, prea lungă;
- absența unei reguli administrative de executare a stagiului;
- lipsa unei investiții suficiente în structurile și facilitățile, lipsa responsabilității atât a Guvernului, cât și a Comunității Autonome.

Unele dintre aceste critici au primit progresiv un răspuns. Astfel, prin Legea nr. 15/2003, s-a modificat art. 25, permițându-i-se persoanei vătămate să participe activ în procesul penal pentru minori; prin Decretul regal nr. 1774/2004 a fost dezvoltat cadrul legal instituit prin Legea nr. 5/2000; de asemenea, noua reformă survenită în 2006 a introdus o dispoziție adițională specifică în scopul de a asigura evaluarea (după 5 ani!) a costurilor și a sarcinilor impuse Comunităților Autonome prin Legea nr. 5/2000.

Cu toate acestea, cele mai criticate aspecte ale noii reglementări au privit suspendarea posibilității de a mai fi aplicată procedura derogatorie tinerilor cu vârste între 18 și 21 de ani. De asemenea, au fost criticate modificările introduse prin Legea nr. 7/2000 privind infracțiunile grave și de terorism. În special, urmărirea penală a minorilor sub 18 ani acuzați de infracțiuni de terorism înaintea Audienței Naționale (National Audience/Audiencia Nacional) este considerată ca fiind identică cu procedura aplicabilă adulților.

Modificările succesive intervenite de la intrarea în vigoare a Legii nr. 5/2000 au accentuat aspectele represive ale noului sistem. Prin Legea nr. 15/2003 o nouă Dispoziție Adițională (a 6-a) a fost introdusă promovând aplicarea măsurilor orientate către o mai aspră și mai eficientă sancționare a celor mai grave infracțiuni. De asemenea, a fost autorizată prelungirea duratei internării, consolidându-se sistemul măsurilor de securitate în centrele de executare și posibilitatea transferului condamnaților în penitenciare de îndată ce au împlinit vârsta de 18 ani.

În același mod, ultima modificare aprobată de Parlament (Legea nr. 8/2006) procedează către o semnificativă revizuire a celor mai importante aspecte ale reglementării legale cu scopul :

⁷⁹ Tome Garcia, 2001, 176.

- de a introduce noi măsuri, cum ar fi interzicerea de a intra în contact ori în legătură cu victima, cu rudele victimei sau cu alte persoane;
- de a consolida și recunoaște drepturile victimei;
- de a exclude aplicarea sistemului pentru minori persoanelor mai mari de 18 ani, în principal;
 - de a asigura o proporționalitate între sancțiuni și gravitatea sancțiunilor;
 - de a deschide noi posibilități ale impunerii tratamentului în centre educaționale închise;
 - de a extinde limitele internării (nu doar impuse ca sancțiune, ci și ca măsura de prevenție) în cazurile cele mai serioase, și
 - de a permite executarea măsurilor de internare în penitenciare de îndată ce minorul a împlinit 18 ani.

Sporirea infracțiunilor comise de minori este presupusă a fi esențială ca justificare pentru evoluția regretabilă care a transformat scopurile inițiale ale sistemului aprobat în ianuarie 2000. Mai mult, perspectivele nu pot fi optimiste în această materie : în fapt, în loc de a pune accentul pe interesul minorului (educația și resocializarea sa), ultima modificare preferă în mod clar să urmărească creșterea (sporirea) tendinței unei represiuni penale bazată mai cu seamă pe o viziune lipsită de perspective a apărării sociale.

Surse legale:

- Legea protecției legale a minorilor din 1996
- Legea organică 4/1992
- Legea organică 5/2000
- Legea organică 7/2000
- Decretul Regal 1774/2004
- Legea organică 9/2002
- Legea organică 1/1996

LEGISLATIVE AND THEORETICAL ASPECTS OF THE MONEY LAUNDERING CONTRAVENTION FORESEEN BY ART. 23, PARAGRAPH 1, LETTER B FORM THE LAW NO. 656/2002

Vasile DOBRINOIU*
Florin ENCESCU**

Abstract

The incrimination foreseen by art 23, paragraph 1, letter b form the Law no. 656/2002 tries to cover, with details, the elements of maximal subtlety of one of the most severe action of contravention that defines the actual phenomena of organized crime, the main source of financing the severe criminality. Our intercession tries, starting also from the point of view in judiciary practice and doctrine, to shade once more or form a new perspective this problem.

Keywords: *money laundering, contravention, criminal law, Romanian criminal trial*

Introduction

According to paragraph 1 of the art. 23 form the Law no.656 , from 7th December 2002 for preventing and enforcing money laundering, as well as instituting measures for preventing and disproving the financing of terrorist¹ acts, constitute in the contravention of money laundering and it is punished with imprisonment from 3 to 12 years:

a) changing or transferring goods, knowing that they come form committing of contraventions, for the purpose crimes, in the purpose of hiding or the dissimulation of the illicit origin of these or in the purpose to help the person that committed the contravention form which the goods came , withdraw himself from the pursuit, trial or execution of the punishment.

b) hiding or dissimulating the true nature of the provenience , situation, disposition, circulation or property of goods or rights, knowing that the goods come form perpetrating contraventions.

c) getting, detaining or using goods, knowing that they come form perpetrating contraventions.

According to paragraph 2 of the same article, the attempt for this contravention is punishable.

I gave the whole text of the article that incriminates the deeds of money laundering to mark out from the beginning the differences between the alternative modalities of this contravention, but also the similarities between them, conclusive aspects to situate correctly juridical this type of deeds. And also because, joining consecrate authors is easy to observe that some of the notions of some or the terms are found in defining all of these modalities of contraventions, the context of their use being different, characterizing and personifying the contravention activities incriminated.

* Professor Ph.D., "Nicolae Titulescu" University, Bucharest (e-mail: vasile.dobrinouiu@univnt.ro).

** Judge, vice-president of District Court of Gorj, Ph.D. candidate, "Nicolae Titulescu" University, Bucharest.

¹ The initial text was published in the Monitorul Oficial no.94 form 12 December 2002. This was modified and completed by the LAW no.39 form 21 January 2003; LAW no.230 form 13 July 2005; Ordonanța de urgență a Guvernului no.135 form 29 September 2005; Law no.36 from 1 March 2006; Law no.405 from 9 November 2006; Law no.306 from 13 November 2007.

And because our intercession is referring specially to the modality incriminated by the art.23, paragraph 1, letter (b) of the law, we have to observe that under the aspect of the material element of the contravention, hiding or dissimulating as actions is found also in the content of the modality regulated at letter a, in this last case being necessary that the action is headed for the purpose to help the person that committed the infraction form witch the goods came to withdraw form pursuit, trial or execution of the punishment.

Also, the modality form letter (b) and that regulated by the letter (c), condition the penal character of the deed by the fact of knowledge by the active subject of the circumstance that the good derive from committing contraventions.

Notions. Terminology controversy

The contravention modality that we analyze, as much as the other two modalities, do not contain the notion of money *expressis verbis*, the legal test talking just about the notion of goods.

In art.2 paragraph (a) and (b) from the law it is shown that through the term money laundering it is intended the contravention foreseen in the art.23, through the notion of “goods” we understand the corporal or incorporeal goods, movable or unmovable, also the juridical documents or documents that attest a title or a right regarding these.

The same article, letter (c)² defines the notion of “suspicious transaction” , through this understanding the operation which, through her nature and unusual character relating with the activities of the client of one of the persons foreseen at the art.8³, arouses the suspicion of money laundering or financing terrorist acts.

² Letter c) of art.2 was modified by point 4 of art. I from the LAW no.230 from 13 July 2005 published in Monitorul Oficial no.618 form 15 July 2005.

³ According to art. 8 from the Law 656/2002 ,enters under the incidence of the law: a)banks, foreign banks branches, credit institutions and Romanian branches of the foreign credit institutions; b)financial institutions, as follows: investment funds, investment companies, investment administration companies, depositing companies, custody, financial investment services companies, pension funds and other similar, that accomplish the following operations : crediting, including credit of consume, mortgage credit, factoring , financing commercial transactions, including contracting, financial leasing , payment operations, emitting and administration of ways of payment, credit cards, travel checks, and other like this, paying or taking guarantees and subscribing engagements, transactions on their own or for clients through the instruments of the monetary market, checks, payment orders, deposit certificates, currency exchange, financial derivate products, financial instruments connected to the currency exchange or rates of interest, mobile values, participating at emitting of stock holdings and offering services connected to these stocks, consultancy given to the enterprises in problems of capital structures, industrial strategy, consultancy and services in company merges and acquisitions, intermediating on the inter-banks markets, portfolio administration and consultancy in this domain, , custody and administration of mobile values, also the Romanian branches of foreign financial institutions; c) insurance and re-insurance companies, as well as Romanian branches of foreign insurance and re-insurance companies; d) economical agents that deploy gambling activities, gage, selling-buying of art, metals and gems, , dealers, tourism, performing services and any other similar activities that imply the circulation of values; e) auditors, natural and legal persons that give fiscal, accounting, or financial-banking consultancy; e¹) public notary, lawyers and other persons that have liberal juridical professions , in the case in which they give assistance in writing of perfecting operations for their clients regarding buying and selling of immobile goods , stocks or social parts or elements of the commerce fund, administration of financial instruments or other clients goods ,constituting or administration of bank accounts, economies, or other financial instruments, organizing the process of subscribing the necessary contribution to the constitution, function or administration of a corporation, constitution , administration or managing of a corporation, collective placement organisms in mobile values or other similar structures, as well as those who represent their clients in any operation with financial character or regarding immobile goods; f)persons with attributions in the privatization process; g) postal offices, and juridical persons that perform money transmitting services, in lei or foreign currencies; h) immobile agents; i) State

At the letter (d)⁴ is defined by the notion of “external transactions form and in the accounts” through this we intend payment operations and revenues made between persons found on the Romanian territory and persons outside the border.

Although they are not expressly enunciated in article 23’s text , notions like suspicious transactions and external transfers are contained in the notions more comprehensive of change, transfer, hiding, dissimulation, circulation of goods, defining the exterior form, perceptible of the criminal action, which hides the true nature and the real purpose of the operation.

From the tactical point of view, the establishment of the suspicious transactions by the subjects qualified by law, give birth to their obligation to notice, foreseen by article 3 from the law, according to which , as soon as the employee of an juridical person or one of the natural persons foreseen in the art.8 has suspicions that an operation that is to be effectuated has as a purpose money laundering of financing terrorist acts, will inform the person designated according to art 14, paragraph 1⁵, which will announce immediately the National Office of Preventing and Combating of Money Laundering. This will confirm the receivment pf the announcement.

The denomination “money laundering”⁶ was appreciated as inadequate⁷ in the specialty literature, claiming that these dispositions intend not only the money but any other goods come form committing contraventions. More adequate would have been, in the respective opinion the denomination “law for preventing and combating the laundering of contraventions products”.

The author of this opinion’s criticism , shows that maybe this denomination is not perfect, it’s understanding and interpretation must not be made ad litteram and in this way , limited the field of action of the law to only laundering the money that come form committing contraventions.

As an argument, these look like we anticipated, because, to oust any trace of doubt and ordeal to limit the sphere of incidence of it’s dispositions, the Law no.656/2002 through art.2 letter a) and b), defined the notion of money laundering and goods which, according to art.23 letter a), b) and c) can make the object of the action of laundering.

In the author’s opinion the denomination submitted “laundering the product of a contravention” is less justified than the one used and criticized, forasmuch it’s nature can restraint the field of action of the law at this category of goods and leave outside those gained by committing the contravention.

It is reminded in this way that they are the product of a contravention , those goods that are created by committing the deed- action or inaction- that constitute the material element of these (fake coins; fake credit titles; guns; fabricated explosion materials, etc.)⁸ , through things gained by contravention understanding those that got into the hands of the author or of a participant, by committing this (stolen things, money obtained by bribery, blackmail, deceiving etc.)⁹.

Tresorery and customs authorities; j) currency exchange houses; j¹) associations and foundations; k) any other natural or juridical person, for deeds and acts made outside of the banking financial system.

⁴ Letter d) form art. 2 was introduced by point 5 of Art I form the Law no.230 from 13 July 2005 published in Monitorul Oficial no.618 form 15 July 2005.

⁵ Art. 14: (1) juridical persons foreseen in the art. 8 will nominate one or more persons that have responsibilities in applying the present law, whose name will be communicated to the Office, together with the nature and the limits of the responsibilities mentioned.

⁶ Incrimination assumed by the art. 23 from the LAW no.21/1999, which regulated the matter initially.

⁷ H. Diaconescu, ”Infractions of corruption and those assimilated or in connection with this” , All Beck Publisher , Bucharest, 2004, p. 305, critical references to V. Dabu, A.M. Gusanu, “Juridical considerations of Money laundering contraventions, regulated in the Law no. 21/1999 in Pro Lege no. 4/2001, p. 27-28, published by The Public Ministry , Prosecutor’s Office attached to The Supreme Court of Justice.

⁸ To see: V. Dongoroz, ”Theoretical explanations of the Romanian Penal Code , General part” vol. II , by V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stanoiu, V. Rosea, Ed. Academiei, Bucharest 1970, p. 319.

⁹ To see: V Dongoroz, *op. cit.*, p. 322.

Not only the goods produced but also those gained by contravention, are part of the category of those gained by committing the contravention, the Law no.656/2002 having as an objective not only the produced ones but also those gained through it.

The categorical formulation of art.23 of the Law no. 656/2002 shows that through this it is incriminated only one contravention of money laundering, in more normative modalities and not more contraventions.

The author goes further, showing that not even the stipulation of art.17 letter e) from the Law no. 78/2000, which refers to contraventions of money laundering, foreseen by the Law no. 656/2002 for preventing and punishing money laundering, then when the goods come from committing a contravention or similarly to this, are not of nature to change the data of the problem, because, first of all, the first refers to the others, cannot create more contraventions than they contain, second of all, because the last, through art.23, incriminate, as we saw, only one contravention.

Alongside the author, we consider in our turn that this legislative un-correlation should be averted, eventually by instituting a clearly and differentially and more severe sanction treatment in the law for preventing and punishing money laundering, in the case when the goods come from committing a contravention of corruption or assimilated with this.

THE OBJECT OF THE INFRACTION

1. The juridical special object

The special juridical object of the contravention of money laundering foreseen and punished by art.23 from the Law no.656/2002, is constituted by those social relations which formation, existence and development cannot be conceived without the defense and the insurance of the legal circuit- financial, banks, commercial and civil- of money, values and goods, against the attempt of hiding or dissimulating the illicit origin of these, or favor characters involved in this type of activities or alleged that they get around the juridical consequences of their deeds¹⁰.

The infraction doesn't have, in this first opinion, notwithstanding other sustains¹¹, the same juridical object as the infractions from which the money, values or goods that are submissive to the action of laundering, come.

In another opinion¹² the juridical object specific to the contravention of money laundering is a complex one, because it contains two categories of social relations, and those are: social relations regarding doing justice and those connected with the patrimony, referring to the licit judiciary circulation of the goods. The infraction of money laundering affects, therefore, not only the legal circuit of the goods, but also the doing of justice, because it hardens the activity of re-establishing the right order broken by committing the contraventions.

In these authors's opinion, the deeds of money laundering hurts or puts in danger a distinct segment of social relations, those referring to the continuous fight against organized crime.

This last opinion seems to fully agree with the will of the law-maker, although the first opinion is not far by its content from the understanding of the law and defining de conflicted relations.

¹⁰ H. Diaconescu, *op. cit.*, p.307.

¹¹ Dem. Authors send to the opinion expressed by I. Poiana, I. Lascu, in Penal incrimination of money laundering deeds, Right no. 5/1999, p. 12.

¹² M.A.Hotca, M. Dobrinoiu, *Infractions foreseen by special laws, comments and explanations*, vol. I, Publisher C.H. Beck Bucharest 2008, p. 317.

Even the latter reference of the two authors cited at the social relations referring to the fight against organized crime is found in the disposals of art.1 of the law, according to, this institutes measures of preventing and combating the money laundering, as some measures of preventing and combating the financing of terrorist acts.

The association made by the law-maker in the same normative document, between the two categories, form which the first constituting a principal form of financing of terrorism, send to the idea that this followed a higher purpose, of national and trans-national interest and the level of implication of the nations in this fight giving birth to a single distinct segment of social relations, that is kept by these incriminatory dispositions,

We share yet the first point of view, according to whom the infraction can be included in the category of the of danger and not into the category of infractions of result, the consequences being diverse especially on the penal responsibility plan of the author or participant at the premise of committing the contravention and for the actually contravention of money laundering.

2. Material object

In account of the normative modality of committing of a specific contravention and the foresight of the art.2 letter b) form the Law no. 656/2002 the material object must be examined and differentiated.

As we shown before, according to the law through goods it is understood corporal or incorporeal goods, movable or unmovable, also the juridical documents or documents that attest a title or a right regarding these.

The notion of goods as it is defined through the art.2 letter b) is larger than the one of the civil right¹³, containing on the side of corporal or incorporeal goods, movable or unmovable, element of one person's patrimony and juridical document or documents that attest a title or a right that regards this.

Unlike the anterior regulation of the matter, realized through the stipulations of art.2 letter b) form the Law 21/1999, abrogated, the money have never been included in the given definition of goods, although these constitute in their term a good that embodies in a general way the value of the merchandise, accomplishing the functions of measuring the value, mean of circulation, mean of accumulation, treasuring and payment.

We rally to the opinion¹⁴ according to whom including this peculiar category of goods in defining the notion of goods wouldn't have been so wrong and useless, with the consequence of superseding any controversy regarding the understanding of the law but also explaining some of the modern aspects of electronic commerce and especially the electronic means of payment.

The material object of the contravention in the modality seen by the art.23 paragraph (1) letter (b) from the Law np.656/2002 is constituted by the mobile or immobile good, or by the documents that attest the property over these, against who the action of the active contravention is exercised.

Making a referral to the category "juridical documents and papers" that attest the property over the goods, there was expressed an opinion¹⁵ that the legal writing is impaired, using in an inadequate way the notion of legal paper, in the conditions in which the law-maker stamped the writings that established some rights regarding goods, making use of he meaning unspecified of the notion, respectively the one called proving instrument.

¹³ To see: Title I art. 461-474 form the Civil code, in which are enumerated and defined the principal categories of goods.

¹⁴ H. Diaconescu, *op. cit.*, p.308.

¹⁵ M.A Hotca, M. Dobrinou, *op. cit.*, p. 318.

The authors of this criticism made a proposal that the final formulation of the law must include the mention: "These are also goods according to the present law and writings, those who attest a right referring to goods in a proper sense".

We have to observe that in the latter opinion, in the same way, the author defined the material object of this contravention modality, he doesn't even refer to juridical papers, talking just about the documents that attest the property over the goods.

Examining the formulation chosen by the law-maker, we have to observe that interpreting it a logical- literary way the juridical papers and documents have to on the same way serve to attest a title or a right regarding goods, so proving the existence of these.

Nonetheless true is the fact that the phenomena of organized crime and money laundering as a form of finance supposes the existence of a secret paper, that modifies a public document, and which, according to art 1175 from the Civil Code, has power only between the contracting parts and universal succedent, not having any effects against other people.

The problem that arises from our point of view is tied not only to the corporality or incorporeity (patrimonial rights) of the goods, but also most of all to the reality of some judicial operations in sense of negotium, for whose validity the law doesn't ask a certain form.

Let's not forget that sometimes a simple re-issuance of the goods is equivalent with transmitting the right of property. In this context, thinking only about the committing modality of the analyzed contravention, the patrimonial right whose provenience is hidden or dissimulated has an clear incorporeal existence and attesting it supposes the proving of the negotium, so it is made only by writings or restraint documents.

We are talking here about the category of mobile goods as the law describes them, the importance of this classification is found also in the unconditioned or conditioned limit of the alienation blueprint.

The goods are economical values useful to satisfy a material or moral need, susceptible of seizing under the form of the patrimonial right¹⁶.

It remains essential the fact that the goods that make the object of money laundering always come from committing contraventions.

Referring to our discussion, leaving from a comparison of the material object of the contravention of hiding with the contravention of money laundering, it was expressed the opinion¹⁷ that this resembles, concluding that it is constituted only by corporal goods, mobile or immobile, argumenting that the incorporeal goods cannot have a material existence, exemplifying the valuable economical information.

We reserve the right to this opinion, the category of incorporeal goods representing those economical values with ideal existence, abstract that escapes the perception with the human senses, not being able to exclude it by tying it to its incorporeal state, their existence being an unquestioned juridical reality.

Leaving from the classification of the goods, in doctrine¹⁸ was discussed the problem of goods that are not in the civil circuit, if these can constitute an object of the contravention of money laundering, from the perspective of the possibility of instituting a measure of safety of special forfeit, the answer being an affirmative one following the existence of a legal alternative to executing the measure, confiscating their value in money or goods gained instead.

We remember here, that in this category enter according to the Constitution, the territory of Romania and land that is part of the public domain.

¹⁶ Gh. Beleiu, Romanian Civil Right. Introduction in civil right, Rd. "Sansa" Bucharest, 1995, p. 90.

¹⁷ M.A Hotca, M. Dobrinou, op.cit, p 318.

¹⁸ Idem, p318-319.

In conjunction with this discussion it wouldn't be useless to mention another category of goods, the ones with conditional civil circuit, which can be possessed, gained and alienated through judicial papers, only by fulfilling the express legal conditions, like; guns and ammunition, toxic substances and products and private property land.

THE SUBJECT OF THE CONTRAVENTION

1. Active subject

Active subject of contravention can be any person that has the capacity to face legal charges "the law imposing no other condition".

The contravention can be made by only one person or more persons in occasional participation under the form of co-author, instigation or complicity. Said so, the active subject at the contravention of money laundering is not qualified, applying to any natural person that meets the general requirements of active subject of contravention.

In another opinion¹⁹, to whom we subscribe, the participation is possible in all forms, but, usually, it is formed by the constituted plurality, and rarely, occasional plurality. Regarding their peculiarity, contraventions of money laundering exist even if the author of the primary contravention is not sanctioned penal, as a sequel to the existence of a cause that excludes the penal answer or executing punishments of penal law, obvious if it is ascertained that the fact has all the constitutive elements of a contravention.

According to the Law no. 39/2003 regarding combating of organized crime, the contravention of money laundering, with other contravention, is included in the category of severe contraventions²⁰.

The law defines the plurality constituted as felons "organized contravention group"²¹, this form of participation being considered as organized crime.

If the requirements of organized contravention group existences are met also those of the contravention of money laundering, there will be applied the rules of plurality of contraventions, the members of the same plurality of felons having the same quality at committing contraventions, or different qualities.

¹⁹ Idem, p319-320.

²⁰ According to art.1 letter b form the Law no.39/2003, severe contravention is: "the contravention that is part of one of the following categories :(....) 14. Money laundering :(....).

²¹ Organized contravention group is the group structured, made of three or more persons, which exists for a period and acts in a coordinate way with the purpose of committing one or more severe contraventions to get direct or indirect financial advantage or other material advantage. It is not considered organized contravention group the group formed occasionally for the purpose of committing immediately one or more severe contraventions and doesn't have continuity or a determined structure or pre-established roles for its members. According to art. 7 form the Law no.39/2003, initiating or constituting an organized contravention group or acceding or supporting in any way this kind of group it is punished by imprisonment form 5 to 20 years and prohibition of rights. The punishment for these deeds cannot be bigger than the sanction foreseen by the law for the most severe contravention that enters in the organized contravention group's purpose. In case that the facts were followed by committing a contravention more severe, the rules apply according to the contraventions. According to the same art.8 form the same law, initiating or constituting or acceding under any form to commit a contravention, that is not, according to the law, an organized contravention group, and is punishable, after the case, according to art. 167 (plot) or art.23 (association for committing crimes) C. pen. According to art. 9 from the law, the person is not punishable, that committing the deed of money laundering in the form of constituted plurality, informs the authorities about the organized contravention group before it's discovery and committing the severe contravention that is the purpose of the group, and the one who made object of the legal pursuit or trial, informs and facilitates the identification and trailed for penal liabilities of one or more members of an organized contravention group beneficiaries of the half of the limits foreseen by the law.

In the case in which the plurality of felons doesn't meet the requirements of existence of an organized contravention group, there will be applied the rules of occasional plurality of felons, individualizing the liabilities on the dates and circumstances of the cause, real and personal.

The main contravention, from which the goods came, cannot be an active subject of the infraction subsequent as money laundering, because he became owner of the goods committing the main deed. As another argument, it was appreciated that in other case it will be violated the principle "non bis in idem", principle according to a person can be prosecuted penal for the same deed only once.

We have reserves to this opinion, considering that the participant at committing the source contravention, main, can answer for money laundering, the principal argument being the judicial object, in which are included social relations referring to defending and assuring the legal circuit-financial, banking, commercial and civil – of money, values and goods, against the attempt of hiding or dissimulating the illicit origin of these and the social relations referring to the doing of justice. More, in this way it gets a sense of including the judicial object and those social relations referring to the fight against criminality, answering some superior commandments of national and transnational security.

This component of organized crime that defines money laundering as a severe contravention delimitates it from the simple hiding that, cannot be put upon the author or the participant.

On the other side, it has to be observed that in an essential mode, for the existence of the contravention of hiding, the author has to follow the obtainment of a material use for him or for another, under the aspect of the subjective part the intention being qualified as purpose. In other words, under the aspect of immediate following, hiding remains a contravention of result, while money laundering is a contravention of danger.

The legal person can have the quality of active subject of the contravention foreseen by art.23 from the Law 656/2002 if the conditions regarding the penal liability are met (art 19. C. pen)²².

2. Passive subject

The principal passive subject is the state, as an organizer of the activity of application and respect of the law referring to assuring to the legality and security of money, goods and values circulation.

²² The penal liability of the legal person is foreseen in the UE convention regarding money laundering, discovery, sequestration and confiscation of the product if the contraventions and financing terrorism, adopted in Warsaw at 16 may 2005, ratified through the Law 420/2006. According to art.10 from this Convention: "1. Each part will adopt the legislative measures and other measures necessary for assuring that the legal persons can be prosecuted for the contraventions of money laundering, established in conformity with the present convention, committed in their interest by any natural person that acts in their own name, or as a part of an organ of the legal person, that has a function of leading in the hierarchy of the legal person, in base of: a) a mandate of representation of the legal person; b) a attribution to take decisions in the name of the legal person; c) an attribution to exercise a control in the legal person's frame, even in the case of the involvement of such a natural person in quality of an accomplice or instigator to the contraventions mentioned earlier. 2. outside the cases foreseen at paragraph 1, each part will take the necessary measures to insure the a legal person can be prosecuted in case that lthe lack of supervising and control by a natural person foreseen in paragraph 1 made possible the committing of the penal deeds, mentioned in paragraph 1, in advantage of that legal person, by a natural person subordinated to he legal person. 3. The liability of a legal person according to the present article will not exclude the judicial penal procedures against the natural persons –authors, instigators or accomplices at committing the the penal deeds mentioned in paragraph 1. 4. each part will make sure that the liability of the legal person according to the present article will make the object of sanctions of penal of other nature, effective, proportionate and dejecting, including pecuniary sanctions.

The contravention can have a secondary passive object constituted by a natural or legal person whose interests are harmed by committing the contravention.

The premise situation

The modality foreseen in the art. 23 paragraph 1, letter (b), as the others modalities, cannot be conceived without committing previously of one or more contraventions from which the good that is being laundered.

Committing previously an infraction, from which the values, money or goods come and are being laundered, constitutes the premise situation necessary for the existence of the contravention of money laundering, the law having in sight only the action of money, values or goods laundering that come from committing the contraventions.

Money laundering is a contravention subsequent whose existence is unconceivable without the pre-existence of another contravention from which the goods come and try or achieve to be laundered²³.

Also, the aggravated modality foreseen in the art. 17 lett.(e) from the Law no. 78/2000 the infraction of money laundering cannot be conceived without the pre-existence of one of the contraventions of corruption or those assimilated to this from which the good that forms the object of laundering comes.

The premise situation of the contravention of money laundering in this modality is constituted by the committing of the contravention of corruption or assimilated by this as well by the requirement that the good that undertakes the laundering process comes from this²⁴.

CONSTITUTIVE CONTENT

1. Objective side

1.1 Material element

The material element of the objective side of the contravention is differentiated in account by the normative modalities of this.

In the modality foreseen in the art. 23 paragraph 1 letter (b), the material element of the objective side can be realized alternatively by actions of hiding or dissimulation of the true nature of provenience, situation, dispositions, circulation or property of the goods or the right over these, knowing that these goods come from committing contraventions.

Hiding supposes the action to put something or someone in a place, in which he or it cannot be seen and found, making unknown, understood by the others, hide.

Dissimulation means hiding the true nature, face of a thing, a situation, etc., giving it a deceiving appearance, camouflage, masking²⁵.

We express some reserves to the given sense, in the context of the law article, the fact of hiding by some authors²⁶, this supposing the settlement of the goods resulted from committing a contravention in a place in which he cannot be seen or found, hiding it.

²³ To see I.C.C.J., s.pen., dec. no. 622/2005; N. Cristus, Fiscal evasion and money laundering, ed. Hamangiu, Bucharest 2007, p. 205.

²⁴ H. Diaconescu, *op. cit.*, p. 309.

²⁵ See: The explicative dictionary of Romanian language, p. 65.

²⁶ H. Diaconescu, *op. cit.* p. 311.

Our remark would be that the definition given loses form the contextual point of view the fact that even the hiding must regard itself the true nature of its provenience, situation, disposition, circulation and property of the good or the right of ownership over it, so as the dissimulation supposes masking, the truth about its true origin, giving them the appearance of legality.

Also, in our opinion the differences between hiding and dissimulation are given by the public or un-public character of the author's action, dissimulating implying this last character.

We have to remind also the meaning of the term "nature", which determinates the true sense of the article, this meaning the specifically character of a thing, the characteristic feature or quality²⁷.

The hiding or dissimulating must see the true nature of provenience, situation, disposition, circulation or property of goods or rights over these.

Each of the two sanctions must see, first of all the provenience of the goods, that are hidden, masking the illicit penal character of these, provenience meaning the place from where comes or is something²⁸.

Second, the actions of hiding and dissimulating must view the situation of the goods, meaning that ties the goods that are constituted in the material object of the infraction. The situation of the goods means the action to situate, meaning to put (smth) in a special place but also indicating someone's place²⁹.

The actions of hiding or dissimulation must be canalized towards, thirdly, the disposition of the goods, this supposing the measure taken regarding the goods that come from committing a contravention.

We subscribe to the opinion³⁰ according to whom the disposition does not limit itself, as it was sustained³¹, as a disposition as an attribute of the owner right. This would mean to limit the measure to dispose goods, against the will of the law-maker, only in the frame of property right, although the felons can dispose of the goods who came from committing a contravention, outside the legal frame and limits, fact that we underlined before in this paper when we talked about the discussion over goods the are outside the civil circuit.

On the other hand, under a literary – grammatical aspect, disposition means putting some elements in a certain place, a composition, construction after a certain plan³². As the law text refers to hiding or dissimulating the true nature "of" disposition and not "over" the disposition, apparently it wouldn't exclude this kind of meaning, just this one would overwrite the meaning of the notion of "situation" in our opinion this wouldn't be what the law-maker wants.

Forth, the action of hiding of dissimulating must see the goods, property or property rights circulate, this referring in principal to moving the goods, transferring the real property right, and second the other rights over the goods or properties. We have to remember here, the sense of changing goods (through money) of transforming the money in merchandise and the merchandise in money of the term "circulation"³³.

We feel that the correct specification made by other authors³⁴ according to whom the action of hiding or dissimulating must regard the true nature "contravention" of the situation, disposition,

²⁷ The explicative dictionary of Romanian language, p. 670.

²⁸ Idem, p. 836.

²⁹ Idem p. 994.

³⁰ Idem p. 312.

³¹ See: V. Dabu, A.M Gosanu op, cit. p. 39.

³² The explicative dictionary of Romanian language, p. 309.

³³ Idem, p. 179.

³⁴ M.A. Hotca, M. Dobrinou, op. cit. 325, Authors exemplify the situation in which a foreign citizen, with the help of the custom officer, declares at the entrance in Romania an amount of money bigger than the one that he has, but when he returns he gets out of the country an equivalent amount with the declared one; also counts the operations

circulation or property of the goods or rights over these, supposing the masking of their provenience or juridical situation, usually, by complex juridical operations, economical or financial.

1.2 Immediate consequences

The immediate consequence of the contravention is the changing of the real or juridical situation of the good that forms the material object of the contravention, corresponding to the normative modality of this and of those of committing the material element of the objective side. Concomitant with this she appears as a social dangerous consequence for the social relations that form the object of protection of the penal law.

Between this and the material element of the objective side there has to be a connection of determination from cause to effect, which fills the objective side of the contravention. This will exist only in the measure in which, the immediate consequence was determinate by the action that constitutes the material element of its objective side.

2. Subjective side

Under the aspect of the subjective element, the contravention of money laundering can be committed only with intention, guilt form of the culpa, being excluded³⁵.

The form of intention- direct, qualified or indirect- is different in connection with the normative modalities of contravention, in the modality examined this could be direct or indirect.

In the doctrine there was expressed the opinion³⁶ that even in the modality foreseen by the art.23 paragraph 1 , letter(b) from the Law no.21/1999, identical text with art.23 of the Law no. 656/2002, the contravention is committed also with the qualified intention of purpose, this resulting implicit form the definition of the material element of the objective side through the terms “hiding” or dissimulating.

Unlike the stipulations of letter a), and letter b) of art.23 paragraph 1 that defines the subjective side of the contravention, they don't establish the requirement that the active subject must act with direct intention qualified by the purpose.

When the law-maker wanted to qualify the direct intention through the purpose in which the deeds stipulated by the penal law must be committed, he established this doubtful fact, using terms or adequate expressions as” in the purpose of” or “ to realize the pursued purpose” . On the other hand, the legislative technique in penal matter consecrated this procedure.

As long as the law doesn't contain this kind of stipulations, it cannot be added to this, especially because in penal matter the principle of strict interpretation operates. Otherwise, it is not understood how the cited authors of the book ended up with this conclusion, using terms like” hiding” and “dissimulating”, not having even the literal sense of purpose, defining only a pattern of action characterized by facts particularities.

For the same consideration, the subjective side of the contravention in this variant, stipulated by art.17 let. (e) Law no.78/2000 is characterized and defined by intention, differentiated in this way by the modality of committing of the examined contravention, stipulated by art.23 of the Law no. 656/2002 as we shown.

through which payment without counter – performance, overweight payment of some external invoices to get the money out of the country, etc.

³⁵ M. Mutu, op. cit. p. 24, cited in M. A. Hotca, M. Dobrinou, op. cit. p 326. The author mentions the incrimination of the contravention of money laundering even if the deed is made from guilt by some European penal legislations , exemplifying Germany or Liechtenstein.

³⁶ V. Dabu, A. M. Gosanu, op. cit. p. 36-39.

3. Sanction regime

The contravention stipulated and punished by art.23 of the Law no. 656/2002, can remain in the form of attempt that is incriminated by the stipulations of art.23 paragraph 3.

Having the same treatment, the modality stipulated by art.17 lett. (e) Law no.78/2000 is susceptible to remain in the form of attempt that is incriminated through the stipulations of art.23 of the Law no. 656/2002, to which it refers.

Consuming the contravention takes place only when, being realized the material element of the objective side produces immediate consequences.

The contravention can be committed through one action and also in a continuous form, in this last situation, on the side of the consuming, the contravention having also a moment of depletion, when the last executing act is stopped.

As we shown before, through the stipulations of art.17 lett. (e) Law no.78/2000, it was incriminated a distinct modality of contravention, when the money, goods and values come from committing a contravention of corruption or similar to this.

This settlement arise the problem of the connection between the contravention of money laundering those of hiding and favoritism stipulated by the art.17 lett. (e) Law no.78/2000.

According to the stipulations and the art 221 C. pen, it constitutes the contravention of hiding, in a severe modality receiving, getting or transforming a good or the facilitation of valorifying it, knowing that the good comes from committing a contravention of corruption or assimilated to this

We subscribe to the opinion³⁷ according to which the two reglementations created an indisputable and unwanted submission of these two contraventions and which obviously and necessary determines the establishment of connections between these and those incidents.

For the same reasons of differentiation between the contravention of hiding and that of money laundering previously presented in the work, we share the point of view from the same author, that money laundering have as source one of the contraventions stipulated in art.23 paragraph 1, letter(a) from the Law no.656/2002 or art.17 lett. (e) Law no.78/2000 constituting a different contravention puts aside in the given cases the existence of the contravention of hiding.

It was stated, the active subject must act only in the purpose of hiding values, that came from committing a corruption contravention, or assimilated to this, and not as it was sustained³⁸, in the purpose stipulated by the art.17 lett. (a) Law no.78/2000, in connection with the art. 221 C. pen, that of obtaining a material benefit for himself or for another.

Once again we remind that money laundering is an more aggravating form of hiding values, money or goods that came from committing contraventions of corruption or assimilated to this, in this case the law-maker incriminating it distinctively, under another denomination.

The hiding doesn't disappear from the penal illicit sphere, this continuing to remain a distinct, correlative and subsequent contravention, but only regarding other contraventions than those stipulated in art. 23 paragraph 1, letter(a) from the Law no.656/2002 and art.17 lett. (e) Law no.78/2000³⁹.

We find the same situation even concerning aggravating modality of the favoritism contravention stipulated by the art.17 lett. (a) Law no.78/2000 regarding that of money laundering stipulated by art. 17 lett. (e) from the same Law, determining that only real favoritism, existing when the action of the one that makes the favor is realized to assure to the felon the use or the

³⁷ H. Diaconescu. *op. cit.*, p. 316.

³⁸ See: V. Dabu, A.M. Guseanu, *op. cit.*, p. 33.

³⁹ H. Diaconescu, *op. cit.*, p. 317.

product of the contravention it is found in the contravention stipulated by the art.17 lett. (e) Law no.78/2000, having subsidiary, character in connection to this, fact that leads to the seizing of its existence, the personal form keeping its existence in the aggravates modality stipulated by art. 17 lett. (a) Law no.78/2000.

The main punishment for the contravention of money laundering stipulated by art.23 paragraph 1, letter (b) form the Law no.656/2002 is imprisonment form 3 to 12 years.

For the aggravated modality of money laundering contravention stipulated by the art.17 lett. (e) Law no.78/2000 according to the forecast art. 18 paragraph 2 form the same law, the special maxim of the punishment foreseen by art.23 paragraph 1, letter (b) form the Law no.656/2002 increases with 3 years.

ASPECTE LEGISLATIVE ȘI TEORETICE ALE INFRAȚIUNII DE SPĂLARE A BANILOR PREVĂZUTĂ DE ART. 23 ALIN. 1 LITERA B DIN LEGEA NR. 656/2002

Vasile DOBRINOIU*
Florin ENCESCU**

Abstract

Incrimnarea prevăzută de art. 23 alin. 1 litera b din Legea nr. 656/2002 încearcă să acopere, prin detalieri, elementele de maximă subtilitate ale uneia dintre cele mai grave acțiuni infracționale ce definește fenomenul actual al criminalității organizate, principala sursă de finanțare a criminalității grave. Demersul nostru încercă, pornind și de la opiniile exprimate în practica și doctrina judiciară, să nuanțeze încă odată sau dintr-o nouă perspectivă această problematică.

Cuvinte cheie: *spălarea banilor, infracțiune, lege penală, Codul penal român*

Introducere

Potrivit aliniatului 1 al art. 23 din Legea nr. 656 din 7 decembrie 2002 pentru prevenirea și sancționarea spălării banilor, precum și pentru instituirea unor măsuri de prevenire și combatere a finanțării actelor de terorism¹, constituie infracțiunea de spălare a banilor și se pedepsește cu închisoare de la 3 la 12 ani:

a) schimbarea sau transferul de bunuri, cunoscând că provin din săvârșirea de infracțiuni, în scopul ascunderii sau al disimulării originii ilicite a acestor bunuri sau în scopul de a ajuta persoana care a săvârșit infracțiunea din care provin bunurile să se sustragă de la urmărire, judecată sau executarea pedepsei;

b) ascunderea sau disimularea adevăratei naturi a provenienței, a situației, a dispoziției, a circulației sau a proprietății bunurilor ori a drepturilor asupra acestora, cunoscând că bunurile provin din săvârșirea de infracțiuni;

c) dobândirea, deținerea sau folosirea de bunuri, cunoscând că acestea provin din săvârșirea de infracțiuni.

Potrivit aliniatului 2 al aceluiași articol, tentativa la această infracțiune se pedepsește.

Am redat întregul text al articolului care încriminează faptele de spălare de bani pentru a fi evidente de la bun început diferențele dintre modalitățile alternative ale acestei infracțiuni, dar și similitudinile dintre ele, aspecte decisive pentru realizarea unei corecte încadrări juridice a acestui gen de fapte.

Este ușor de observat astfel că anumite noțiuni sau unii termeni se regăsesc în definirea tuturor acestor modalități ale infracțiunii, contextul folosirii lor fiind însă diferit, caracterizând și individualizând activitățile infracționale incriminate.

* Profesor universitar doctor, Facultatea de Drept, Universitatea "Nicolae Titulescu", București (e-mail: vasile.dobrinouiu@univnt.ro).

** Judecător, vice-președintele Tribunalului Gorj, doctorand în cadrul Facultății de Drept a Universității "Nicolae Titulescu", București.

¹ Textul inițial a fost publicat în Monitorul Oficial nr. 904 din 12 decembrie 2002. Au fost aduse modificări și completări prin Legea nr. 39 din 21 ianuarie 2003; Legea nr. 230 din 13 iulie 2005; Ordonanța de urgență a Guvernului nr. 135 din 29 septembrie 2005; Legea nr. 36 din 1 martie 2006; Legea nr. 405 din 9 noiembrie 2006; Legea nr. 306 din 13 noiembrie 2007. Titlul legii a fost modificat de pct. 1 al art. I din Legea nr. 230 din 13 iulie 2005, publicată în Monitorul Oficial nr. 618 din 15 iulie 2005.

Și pentru că demersul nostru se referă în special la modalitatea incriminată de art.23 alin.1 litera b) din lege, trebuie să observăm că sub aspectul elementului material al infracțiunii, ascunderea sau disimularea ca acțiuni se regăsesc și în conținutul modalității reglementate la litera a), în acest ultim caz fiind necesar ca acțiunea să fie îndreptată în scopul de a ajuta persoana care a săvârșit infracțiunea din care provin bunurile să se sustragă de la urmărire, judecată sau executarea pedepsei.

De asemenea, atât modalitatea de la litera b) cât și aceea reglementată la litera c), condiționează caracterul penal al faptei de faptul cunoașterii de către subiectul activ a împrejurării că bunurile provin din săvârșirea de infracțiuni.

Noțiuni. Controverse terminologice

Atât modalitatea infracțională supusă analizei noastre cât și celelalte două modalități, nu conțin *expressis verbis* noțiunea de bani, textul legal vorbind numai despre noțiunea de bunuri.

În art. 2 alin.(1) lit. a) și b) din lege se arată astfel că prin spalarea banilor se înțelege infracțiunea prevăzută la art. 23, prin noțiunea de „bunuri” înțelegându-se bunurile corporale sau necorporale, mobile ori imobile, precum și actele juridice sau documentele care atestă un titlu ori un drept cu privire la acestea.

Același articol, la litera (c)² definește noțiunea de „tranzacție suspectă”, prin aceasta înțelegându-se operațiunea care, prin natura ei și caracterul neobișnuit în raport cu activitățile clientului uneia dintre persoanele prevăzute la art. 8³, trezește suspiciunea de spălare a banilor sau de finanțare a actelor de terorism.

² Litera c) a art. 2 a fost modificată de pct. 4 al art. I din Legea nr. 230 din 13 iulie 2005, publicată în Monitorul Oficial nr. 618 din 15 iulie 2005.

³ Potrivit art.8 din Legea 656/2002, intră sub incidența prezentei legi: a) băncile, sucursalele băncilor străine, instituțiile de credit și sucursalele din România ale instituțiilor de credit străine; b) instituțiile financiare, cum sunt: fonduri de investiții, societăți de investiții, societăți de administrare a investițiilor, societăți de depozitare, de custodie, societăți de servicii de investiții financiare, fonduri de pensii și alte asemenea fonduri, care îndeplinesc următoarele operațiuni: creditarea, incluzând creditul de consum, creditul ipotecar, factoringul, finanțarea tranzacțiilor comerciale, inclusiv forfetarea, leasingul financiar, operațiuni de plăți, emiterea și administrarea unor mijloace de plată, cărți de credit, cecuri de călătorie și altele asemenea, acordarea sau asumarea de garanții și subscrierea de angajamente, tranzacții pe cont propriu sau în contul clienților prin intermediul instrumentelor pieței monetare, cecuri, ordine de plată, certificate de depozite, schimb valutar, produse financiare derivate, instrumente financiare legate de cursul valutar ori de rata dobânzilor, valori mobiliare, participarea la emiterea de acțiuni și oferirea de servicii legate de aceste emisii, consultanță acordată întreprinderilor în probleme de structură a capitalului, strategia industrială, consultanță și servicii în domeniul fuziunilor și al achizițiilor de întreprinderi, intermedierea pe piețele interbancare, administrarea de portofolii și consultanță în acest domeniu, custodia și administrarea valorilor mobiliare, precum și sucursalele din România ale instituțiilor financiare străine; c) societățile de asigurări și reasigurări, precum și sucursalele din România ale societăților de asigurări și reasigurări străine; d) agenții economice care desfășoară activități de jocuri de noroc, amanet, vânzări-cumpărări de obiecte de artă, metale și pietre prețioase, dealeri, turism, prestări de servicii și orice alte activități similare care implică punerea în circulație a valorilor; e) auditorii, persoanele fizice și juridice care acordă consultanță fiscală, contabilă ori financiar-bancară; e¹) notarii publici, avocații și alte persoane care exercită profesii juridice liberale, în cazul în care acordă asistență în întocmirea sau perfectarea de operațiuni pentru clienții lor privind cumpărarea ori vânzarea de bunuri imobile, acțiuni sau părți sociale ori elemente ale fondului de comerț, administrarea instrumentelor financiare sau a altor bunuri ale clienților, constituirea sau administrarea de conturi bancare, de economii ori de instrumente financiare, organizarea procesului de subscriere a aporturilor necesare constituirii, funcționării sau administrării unei societăți comerciale, constituirea, administrarea ori conducerea societăților comerciale, organismelor de plasament colectiv în valori mobiliare sau a altor structuri similare, precum și în cazul în care își reprezintă clienții în orice operațiune cu caracter financiar ori vizând bunuri imobile; f) persoanele cu atribuții în procesul de privatizare; g) oficiile poștale și persoanele juridice care prestează servicii de transmitere de bani, în lei sau în valută; h) agenții

La litera (d)⁴ este definită noțiunea de „transferuri externe în și din conturi”, prin aceasta înțelegându-se operațiunile de plăți și încasări efectuate între persoane aflate pe teritoriul României și persoane aflate în străinătate.

Deși nu se regăsesc expres enunțate în textul art.23, noțiunile de tranzacție suspectă și transferuri externe sunt conținute în noțiunile mai cuprinzătoare de schimbare, transfer, ascundere, disimulare, circulație a bunurilor, definind forma exterioară, perceptibilă a acțiunii criminale, care ascunde adevărata natură și scopul real al operațiunii.

Din punct de vedere tactic, constatarea tranzacției suspecte de către subiecții calificați prin lege, dă naștere obligației acestora de sesizare prevăzută de art. 3 din lege, potrivit căreia, de îndată ce salariatul unei persoane juridice sau una dintre persoanele fizice prevăzute la art. 8 are suspiciuni că o operațiune ce urmează să fie efectuată are ca scop spălarea banilor sau finanțarea actelor de terorism, va informa persoana desemnată conform art. 14 alin.1⁵, care va sesiza imediat Oficiul Național de Prevenire și Combatere a Spălării Banilor. Acesta va confirma primirea sesizării.

Denumirea „spălarea banilor”⁶ a fost apreciată ca inadecvată⁷ în literatura de specialitate, susținându-se că aceste dispoziții au în vedere nu numai banii, ci și oricare bunuri provenite din săvârșirea de infracțiuni. Mai adecvată ar fi fost, în opinia respectivă denumirea „Legea pentru prevenirea și combaterea spălării produsului unor infracțiuni”.

Autorul criticii acestei opinii, arată că deși poate că această denumire nu este perfectă, înțelegerea și interpretarea ei nu trebuie făcută însă *ad litteram* și astfel, limitat câmpul de acțiune al legii la spălarea numai a banilor proveniți din săvârșirea de infracțiuni.

Ca argument, acesta arată așa cum am anticipat și noi că, pentru a înlătura orice îndoială și încercare de limitare a sferei de incidență a dispozițiilor sale, Legea nr. 656/2002 prin art. 2 lit. a) și b), a definit noțiunea de spălarea banilor și de bunuri care, potrivit art. 23 lit. a), b) și c) pot face obiectul acțiunii de spălare.

În opinia autorului, denumirea propusă „spălarea produsului unor infracțiuni” este și mai puțin justificată decât aceea întrebuintată și criticată, întrucât ea ar fi de natură să restrângă câmpul de acțiune al legii la această categorie de bunuri și să le lase în afara acestuia pe cele dobândite prin săvârșirea infracțiunii.

Este amintit astfel faptul că sunt produse prin infracțiune, acele bunuri care sunt create prin săvârșirea faptei - acțiune sau inacțiune - care constituie elementul material al acesteia (monede false, titluri de credit false, arme, materii explozive fabricate etc.)⁸, prin lucruri dobândite prin infracțiune înțelegându-se acelea care au ajuns în mâinile autorului ori a unui participant, prin săvârșirea acesteia (lucrurile furate, banii obținuți prin luare de mită, șantaj, înșelăciune etc.)⁹.

imobiliari; i) Trezoreria Statului și autoritățile vamale; j) casele de schimb valutar; j¹) asociațiile și fundațiile; k) orice altă persoană fizică sau juridică, pentru acte și fapte săvârșite în afara sistemului financiar-bancar.

⁴ Litera d) a art. 2 a fost introdusă de pct. 5 al art. 1 din Legea nr. 230 din 13 iulie 2005, publicată în M. Of. nr. 618 din 15 iulie 2005.

⁵ Art. 14: (1) Persoanele juridice prevăzute la art. 8 vor desemna una sau mai multe persoane care au responsabilități în aplicarea prezentei legi, ale căror nume vor fi comunicate Oficiului, împreună cu natura și cu limitele responsabilităților menționate.

⁶ Incriminare preluată de art. 23 din Legea nr. 21/1999, care a reglementat inițial materia.

⁷ H. Diaconescu, *Infrațiunile de corupție și cele asimilate sau în legătură cu acestea*, Editura All Beck, București, 2004, p. 305, referiri critice la V. Dabu, A.M. Gusanu, *Considerații de ordin juridic asupra infracțiunilor de spălarea banilor, reglementate în Legea nr. 21/1999* în Pro Lege nr. 4/2001, p. 27-28.

⁸ A se vedea: V. Dongoroz, în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Ilescu, C. Bulai, R. Stănoiu, V. Roșea, *Explicații teoretice ale Codului penal român. Partea generală*, vol. II, Ed. Academiei, București, 1970, p. 319.

⁹ A se vedea: V. Dongoroz et alii, *op. cit.*, p. 322.

Atât bunurile produse cât și cele dobândite prin infracțiune, fac parte din categoria celor provenite din săvârșirea acesteia, Legea nr. 656/2002 având în vedere nu numai pe cele produse ci și pe cele dobândite prin aceasta.

Formularea categorică a art. 23 din Legea nr. 656/2002 arată că prin acestea a fost incriminată o singură infracțiune de spălare a banilor murdari, în mai multe modalități normative și nu mai multe infracțiuni.

Autorul merge mai departe, arătând că nici prevederile art. 17 lit. e) din Legea nr. 78/2000, care se referă la infracțiunile de spălare a banilor, prevăzute de Legea nr. 656/2002 pentru prevenirea și sancționarea spălării banilor, atunci când bunurile provin din săvârșirea unei infracțiuni de corupție sau asimilată cu acestea, nu sunt de natură să schimbe datele problemei, pentru că, în primul rând, primele fiind de trimitere la celelalte, nu pot crea mai multe infracțiuni decât dispun ele, iar în al doilea rând, pentru că acestea din urmă, prin art. 23, incriminează, așa cum am văzut, o singură infracțiune.

Alături de reputatul autor, considerăm la rândul nostru că această necorelare legislativă ar trebui înlăturată, eventual prin instituirea clară și diferențiată a unui tratament sancționator mai grav în Legea pentru prevenirea și sancționarea spălării banilor, în cazul când bunurile provin din săvârșirea unei infracțiuni de corupție sau asimilată cu acestea.

OBIECTUL INFRACTIUNII

1. Obiectul juridic special

Obiectul juridic special al infracțiunii de spălare a banilor prevăzută și pedepsită de art. 23 din Legea nr. 656/2002, îl constituie acele relații sociale a căror formare, existență și dezvoltare nu pot fi concepute fără apărarea și asigurarea circuitului legal - financiar, bancar, comercial și civil - al banilor, valorilor și bunurilor, împotriva încercării de ascundere sau disimulare a originii ilicite a acestora, ori de favorizare a persoanelor implicate în asemenea activități sau presupuse că s-ar sustrage consecințelor juridice ale faptelor lor¹⁰.

Infracțiunea nu are, în această primă opinie, în pofida altor susțineri¹¹, același obiect juridic ca infracțiunile din care provin banii, valorile sau bunurile supuse acțiunii de spălare.

Într-o altă opinie¹² obiectul juridic specific al infracțiunii de spălare a banilor este unul complex, deoarece cuprinde două categorii de relații sociale, și anume: relațiile sociale privind înfăptuirea justiției și cele în legătură cu patrimoniul, referitoare la circulația juridică licită a bunurilor. Infracțiunea de spălare a banilor afectează, așadar, nu numai circuitul juridic legal al bunurilor, ci și înfăptuirea justiției, deoarece îngreunează activitatea de restabilire a ordinii de drept încălcate prin săvârșirea infracțiunilor.

În opinia aceluiași autori, faptele de spălare a banilor vatămă sau periclitează un segment distinct de relații sociale, acelea referitoare la lupta contra crimei organizate.

Această ultimă opinie pare în deplin acord cu voința legiuitorului, deși nici prima opinie menționată nu se îndepărtează prin conținut de înțelesul legii și definirea relațiilor de conflict.

Chiar și referirea ulterioară a celor doi autori citați la relațiile sociale referitoare la lupta împotriva crimei organizate se regăsește în dispozițiile art.1 din lege, potrivit căroră, aceasta

¹⁰ H. Diaconescu, *op. cit.*, p. 307

¹¹ Idem. Autorul trimite la opinia exprimată de I. Poiana, I. Lascu, în *Încriminarea penală a unor fapte de spălare a banilor*, Dreptul nr. 5/1999, p. 12

¹² M.A.Hotca, M.Dobrinoiu, *Infracțiuni prevăzute în legi speciale, Comentarii și explicații*, vol. I, Editura C.H. Beck, București 2008, p. 317.

instituie măsuri de prevenire și combatere a spălării banilor, precum și unele măsuri privind prevenirea și combaterea finanțării actelor de terorism.

Asocierea efectuată de legiuitor în cadrul aceluiași act normativ, între cele două categorii de activități, dintre care prima constituind o formă principală de finanțare a terorismului, trimite la ideea că acesta a urmărit un scop mult mai înalt, deopotrivă de interes național și transnațional, cadrul legal internațional și nivelul de implicare al națiunilor în această luptă dând naștere unui segment distinct de relații sociale, a căror ocrotire este realizată și prin aceste dispoziții de incriminare.

Împărtășim însă primul punct de vedere, potrivit căruia infracțiunea poate fi inclusă în categoria celor de pericol și nu în categoria infracțiunilor de rezultat, consecințele fiind deosebite mai ales în planul răspunderii penale a autorului sau participantului la săvârșirea infracțiunii premisă și pentru infracțiunea subsecventă de spălarea banilor.

2. Obiectul material

În raport de modalitatea normativă de săvârșire a infracțiunii specifică și de prevederile art. 2 lit. b) din Legea nr. 656/2002 obiectul material trebuie examinat și diferențiat.

Așa cum am mai arătat, potrivit legii prin bunuri se înțelege bunurile corporale sau necorporale, mobile sau imobile, precum și actele juridice sau documentele care atestă un titlu ori un drept cu privire la acestea.

Noțiunea de bunuri astfel cum este definită prin prevederile art. 2 lit. b), este mai largă decât aceea proprie dreptului civil¹³, cuprinzând pe lângă valorile corporale sau necorporale, mobile ori imobile, element al patrimoniului unei persoane și actele juridice sau documentele care atestă un titlu ori un drept cu privire la acestea.

Spre deosebire de reglementarea anterioară a materiei, realizată prin prevederile art. 2 lit. b) din Legea nr. 21/1999, abrogată, banii nu au mai fost incluși în definiția dată noțiunii de bunuri, deși aceștia constituie la rândul lor un bun ce întruchiează în mod general valoarea mărfurilor, îndeplinind funcțiile de măsură a valorii, mijloc de circulație, mijloc de acumulare, de teaurizare și de plată.

Ne raliem opiniei¹⁴ potrivit căreia includerea acestei categorii aparține de bunuri în definirea noțiunii de bunuri nu ar fi fost atât greșită și nici inutilă, cu consecințe în sensul înlăturării oricăror controverse privind înțelesul legii dar și asupra explicării unor aspecte moderne ale comerțului electronic și mai ales cu mijloace de plată electronică.

Obiectul material al infracțiunii în modalitatea prevăzută de art. 23 alin. (1) lit. b) din Legea nr. 656/2002 este constituit de bunul mobil sau imobil, ori documentele care atestă proprietatea asupra acestora, împotriva cărora este exercitată acțiunea subiectului activ al infracțiunii.

Cu referire la categoria „actele juridice sau documentele” care atestă proprietatea asupra bunurilor, s-a exprimat opinia¹⁵ că redactarea legală este defectuoasă, folosindu-se în sens impropriu noțiunea de act juridic, în condițiile în care legiuitorul a vizat înscrisurile constatatoare ale unor drepturi privitoare la bunuri, utilizând înțelesul nespecific al noțiunii de act juridic, respectiv cel de instrument de probațiune.

Autorii criticii au propus ca formularea definiției legale să includă mențiunea: „Sunt bunuri în accepțiunea prezentei legi și înscrisurile care atestă un drept referitor la bunuri în sens propriu”.

¹³ A se vedea Titlul I, art.461-474 din Codul Civil, în care sunt enumerate și sunt definite principalele categorii de bunuri.

¹⁴ H. Diaconescu, *op. cit.*, p. 308.

¹⁵ M.A. Hotca, M. Dobrinou, *op.cit.*, p. 318.

Trebuie să observăm că în opinia anterioară, în același sens, autorul definind obiectul material al acestei modalități infracționale, nici nu se mai referă la acte juridice, vorbind doar despre documentele care atestă proprietatea asupra bunurilor.

Examinând formularea aleasă de legiuitor, trebuie să remarcăm că într-o interpretare logico-literară actele juridice și documentele trebuie deopotrivă să servească atestării unui titlu ori un drept cu privire la bunuri, deci probării existenței acestora.

Nu mai puțin adevărat este însă și faptul că fenomenul criminalității organizate și spălării banilor ca formă de finanțare a acestuia presupune acțiuni ascunse, simulația presupunând existența unui act secret, care modifică un act public, și care, potrivit art.1175 din Codul Civil, nu poate avea putere decât între părțile contractante și succesorii lor universali, fără a putea avea efecte în contra altor persoane.

Problema care se pune în opinia noastră este legată nu numai de corporalitatea sau incorporalitatea (drepturile patrimoniale) bunului, cât mai ales de realitatea unor operațiuni juridice în sens de *negotium*, pentru a căror validitate nu sunt instituite prin lege anumite cerințe de formă.

Să nu uităm că uneori simpla remitere a bunului echivalează cu transmiterea dreptului de proprietate. În acest context, raportându-ne la modalitatea de săvârșire a infracțiunii analizată, dreptul patrimonial a cărui proveniență este ascunsă sau disimulată are clar o existență incorporală și atestarea sa presupune dovedirea *negotium*-ului, altfel decât cu înscrisuri sau documente în sens restrâns.

Vorbim aici de categoria bunurilor mobile prin determinarea legii, importanța clasificării regăsindu-se și în planul necondiționării sau condiționării limitate a operațiilor de înstrăinare.

Bunurile sunt valori economice utile satisfacerii unei nevoi materiale sau morale, susceptibile de însușire sub forma dreptului patrimonial¹⁶.

Esențial rămâne faptul că bunurile care fac obiectul spălării banilor provin întotdeauna din săvârșirea de infracțiuni.

Referitor la discuția noastră, plecând de la o comparație a obiectului material al infracțiunii de tănuire cu infracțiunea de spălare a banilor, s-a exprimat opinia¹⁷ că acesta este asemănător, concluzionându-se că îl constituie doar bunurile corporale, mobile sau imobile, argumentându-se că bunurile incorporale nu pot avea o existență materială, dându-se exemplul informațiilor economice valoroase.

Ne exprimăm rezerve față de această opinie, categoria bunurilor incorporale, reprezentând acele valori economice cu existență ideală, abstractă care scapă percepției ca atare cu ajutorul simțurilor omului, neputând fi exclusă prin simpla raportare la imaterialitatea sa, existența acestora fiind o realitate juridică de necontestat.

Plecând tot de la clasificarea bunurilor, în doctrină¹⁸ s-a pus în discuție problema bunurilor care nu sunt în circuitul civil, dacă acestea pot constitui obiect al infracțiunii de spălarea banilor, din perspectiva posibilității de instituire a măsurii de siguranță a confiscării speciale, răspunsul fiind afirmativ ca urmare a existenței alternativei legale la executarea măsurii, confiscarea echivalentului lor bănesc sau a bunurilor dobândite în loc.

Amintim aici că, în această categorie intră, potrivit Constituției, teritoriul României și terenurile care fac parte din domeniul public.

În legătură cu această discuție nu ar fi inutil de menționat și o altă categorie de bunuri, cele cu circuit civil condițional, care pot fi deținute, dobândite și înstrăinate prin acte juridice, numai cu

¹⁶ Gh. Beleiu, *Drept civil român. Introducere în dreptul civil.Subiectele*, Ed. „Șansa”, București, 1995, p. 90

¹⁷ M.A. Hotca, M. Dobrinou, *op.cit.*, p. 318.

¹⁸ *Idem*, p. 318-319.

îndeplinirea condițiilor expres prevăzute de lege, cum ar fi: armele și munițiile, produsele și substanțele toxice și terenurile proprietate privată.

SUBIECTII INFRACTIUNII

1. Subiectul activ

Subiect activ al infracțiunii, poate fi orice persoană care are capacitatea de a răspunde penal „legea neimpunând nici o altă condiționare”.

Infrațiunea poate fi săvârșită de o singură persoană sau de mai multe persoane în participație ocazională sub forma coautoratului, instigării sau complicității. Altfel spus, subiectul activ al infracțiunii de spălare a banilor nu este calificat, acesta putând fi orice persoană fizică care îndeplinește condițiile generale ale subiectului activ al infracțiunii.

Într-o altă opinie¹⁹, la care subscriem, participația este posibilă în toate formele, dar, de regulă, aceasta îmbracă forma pluralității constituite și, mai rar, a pluralității ocazionale. Având în vedere specificul lor, infracțiunile de spălarea banilor sunt săvârșite în general în participație. Infrațiunea de spălare a banilor subzistă chiar dacă autorul infracțiunii primare nu este sancționat penal, ca urmare a existenței unei cauze care exclude răspunderea penală sau executarea sancțiunilor de drept penal, evident dacă se constată că fapta premisă întrunește elementele constitutive ale unei infracțiuni.

Potrivit Legii nr. 39/2003 privind combaterea criminalității organizate, infracțiunea de spălarea banilor, alături de alte infracțiuni, este inclusă în categoria infracțiunilor grave²⁰.

Legea denumește pluralitatea constituită de infractori ca „grup infracțional organizat”²¹, această formă de participație fiind considerată criminalitate organizată.

Dacă sunt realizate atât condițiile de existență ale grupului infracțional organizat, cât și cele ale infracțiunii de spălare a banilor, se vor aplica regulile pluralității de infracțiuni, membrii pluralității de infractori putând avea aceeași calitate la săvârșirea infracțiunii, sau calități diferite.

În cazul în care pluralitatea de infractori nu îndeplinește condițiile de existență ale unui grup infracțional organizat, se vor aplica regulile pluralității ocazionale de infractori,

¹⁹ Idem, p. 319-320.

²⁰ Potrivit art. 1 lit. b) din Legea nr. 39/2003, infracțiune gravă este: „infracțiunea care face parte din una dintre următoarele categorii: (...) 14. spălarea banilor; (...)”.

²¹ Grupul infracțional organizat este grupul structurat, format din trei sau mai multe persoane, care există pentru o perioadă și acționează în mod coordonat în scopul comiterii uneia sau mai multor infracțiuni grave, pentru a obține direct sau indirect un beneficiu financiar sau alt beneficiu material. Nu constituie grup infracțional organizat grupul format ocazional în scopul comiterii imediate a uneia sau mai multor infracțiuni și care nu are continuitate sau o structură determinată ori roluri prestabilite pentru membrii săi în cadrul grupului. Conform art. 7 din Legea nr. 39/2003, inițierea sau constituirea unui grup infracțional organizat ori aderarea sau sprijinirea sub orice formă a unui astfel de grup se pedepsește cu închisoare de la 5 la 20 de ani și interzicerea unor drepturi. Pedepsa pentru faptele de mai sus nu poate fi mai mare decât sancțiunea prevăzută de lege pentru infracțiunea cea mai gravă care intră în scopul grupului infracțional organizat. În cazul în care faptele au fost urmate de săvârșirea unei infracțiuni grave, se aplică regulile de la concursul de infracțiuni. Potrivit art. 8 din aceeași lege, inițierea sau constituirea ori aderarea sau sprijinirea sub orice formă a unui grup în vederea săvârșirii de infracțiuni, care nu este, potrivit prezentei legi, un grup infracțional organizat, se pedepsește, după caz, potrivit art. 167 (complot) sau art. 323 (asocierea pentru săvârșirea de infracțiuni) C. pen. Conform art. 9 din lege, nu se pedepsește persoana care, săvârșind fapta de spălare a banilor în forma pluralității constituite, denunță autorităților grupul infracțional organizat mai înainte de a fi fost descoperit și de a se fi început săvârșirea infracțiunii grave care intră în scopul acestui grup, iar cea care în cursul urmăririi penale sau al judecății, denunță și facilitează identificarea și tragerea la răspundere penală a unuia sau mai multor membri ai unui grup infracțional organizat beneficiază de reducerea la jumătate a limitelor pedepsei prevăzute de lege.

individualizarea răspunderii făcându-se în funcție de datele și împrejurările cauzei, reale și personale.

Cu toate acestea, s-a exprimat și opinia²² potrivit căreia participantul la infracțiunea principală din care provine bunul „albit”, nu poate fi subiect activ al infracțiunii subsecvente de spălare a banilor, deoarece a devenit deținător al bunului prin comiterea faptei principale. Ca un alt argument, s-a apreciat că, în caz contrar ar fi încălcat principiul *non bis in idem*, principiu conform căruia o persoană poate fi trasă la răspundere penală pentru aceeași faptă numai o singură dată.

Avem rezerve față de această opinie, considerând că participantul la comiterea infracțiunii sursă, principale, poate răspunde deopotrivă pentru săvârșirea infracțiunii subsecvente de spălarea banilor, argumentul principal constituindu-l chiar obiectul juridic, în care sunt incluse pe lângă relațiile sociale referitoare la apărarea și asigurarea circuitului legal - financiar, bancar, comercial și civil - al banilor, valorilor și bunurilor, împotriva încercării de ascundere sau disimulare a originii ilicite a acestora și relațiile sociale referitoare la înfăptuirea justiției. Mai mult, în această privință capătă sens includerea în obiectul juridic și a acelor relații sociale referitoare la lupta împotriva criminalității, răspunzând unor comandamente superioare de siguranță națională și transnațională.

Această componentă de criminalitate organizată care definește spălarea banilor ca infracțiune gravă o delimitează de simpla tănuire, care nu ar putea fi imputată și autorului sau participantului.

Pe de altă parte, trebuie constatat că în mod esențial, pentru existența infracțiunii de tănuire, autorul acesteia trebuie să urmărească obținerea unui folos material pentru sine ori pentru altul, sub aspectul laturii subiective intenția fiind calificată prin scop. Cu alte cuvinte, sub aspectul urmării imediate, tănuirea rămâne o infracțiune de rezultat, în timp ce spălarea banilor este o infracțiune de pericol.

Persoana juridică poate avea calitatea de subiect activ al infracțiunii prevăzute de art. 23 din Legea nr. 656/2002 dacă sunt îndeplinite condițiile privind răspunderea penală a acesteia (art. 19 C. pen.)²³

²² M.A. Hotca, M. Dobrinou, *op. cit.*, p. 319. Autorii trimit și la M. Mutu, *Spălarea banilor-aspecte juridico-penale*, teză de doctorat, Chișinău, 2005, p. 117, exemplificând legislația Principatului Liechtenstein, potrivit căreia bunurile pot fi spălate numai de către o persoană care nu a participat la infracțiunea premisă. Persoana care a comis infracțiunea primară poate fi trasă la răspundere numai pentru această infracțiune, nu și pentru alte fapte ulterioare privitoare la bunurile obținute din săvârșirea infracțiunii premisă. Autorii citând aceeași sursă menționează, de asemenea exemplificativ legea americană (SUA) care nu sancționează persoana care a comis fapta principală (§1957) și, într-o opinie, nici legea germană nu incriminează fapta participantului la infracțiunea principală, cu excepția complicelui, care poate fi sancționat dacă pentru fapta primară este sancționat mai aspru. De asemenea, practica judiciară franceză, o decizie din 14 ianuarie 2004, criticată de doctrină, prin care Curtea de Casație a apreciat că poate fi subiect activ al infracțiunii de spălare a banilor și autorul infracțiunii principale. În cauza în care a fost pronunțată hotărârea de mai sus, o persoană fizică condamnată pentru delict de muncă clandestină și fraudă fiscală, care a fost urmărită pentru fapta de participare la operațiunea de disimulare a produsului acestor infracțiuni, a fost condamnată și pentru transferul clandestin în străinătate a produsului acestor infracțiuni. Este exemplificată totodată, practica din Federația Rusă, unde potrivit unei decizii a Plenului Curții Supreme a Federației Ruse, infracțiunea principală intră în concurs cu infracțiunea de spălare a banilor.

²³ Răspunderea penală a persoanei juridice este prevăzută și în Convenția Consiliului Europei privind spălarea, descoperirea, sechestrarea și confiscarea produselor infracțiunii și finanțarea terorismului, adoptată la Varșovia la 16 mai 2005, ratificată prin Legea 420/2006. Potrivit art. 10 din această Convenție: „1. Fiecare parte va adopta măsurile legislative și alte măsuri necesare pentru a se asigura că persoanele juridice pot fi trase la răspundere pentru infracțiunile de spălare de bani, stabilite în conformitate cu prezenta convenție, comise în interesul lor de orice persoană fizică ce acționează fie în nume propriu, fie ca parte a unui organ al persoanei juridice, care deține o funcție de conducere în cadrul persoanei juridice, în baza: a) unei împuterniciri de reprezentare a persoanei juridice; b) unei atribuții de a lua decizii în numele persoanei juridice; c) unei atribuții de a exercita un control în cadrul persoanei juridice respective, precum și, în cazul implicării unei astfel de persoane fizice în calitate de complice sau

2. Subiectul pasiv

Subiect pasiv principal este statul, ca organizator al activității de aplicare și respectare a prevederilor legale referitoare la asigurarea legalității și securității circulației banilor, valorilor și bunurilor.

Infrațiunea poate avea și un subiect pasiv secundar constituit de persoana fizică sau juridică ale căror interese sunt vătămate prin săvârșirea infrațiunii.

Situația premisă

Modalitatea prevăzută de art. 23 alin. (1) lit. b), ca de altfel și celelalte modalități, nu pot fi concepute fără săvârșirea prealabilă a uneia sau mai multor infracțiuni din care să provină bunul a cărui spălare se efectuează.

Săvârșirea prealabilă a unei infracțiuni, din care să provină valorile, banii sau bunurile supuse apoi acțiunii de spălare, constituie situația premisă necesară pentru existența infracțiunii de spălare a banilor în toate modalitățile infracțiunii, legea având în vedere numai acțiunea de spălare a valorilor, banilor sau bunurilor provenite din săvârșirea de infracțiuni.

Spălarea banilor este o infracțiune subsecventă a cărei existență este de neconceput fără preexistența altei infracțiuni din care trebuie să provină bunurile a căror spălare se încearcă sau realizează²⁴.

De asemenea, în modalitatea agravată prevăzută de art. 17 lit. e) din Legea nr. 78/2000 infracțiunea de spălare a banilor nu poate fi concepută fără preexistența uneia dintre infracțiunile de corupție sau a celor asimilate acestora din care să provină bunul care formează obiectul operațiunii de spălare.

Situația premisă a infracțiunii de spălare a banilor în această modalitate este constituită atât de săvârșirea unei infracțiuni de corupție sau asimilată acestora cât și de cerința ca bunul supus operațiunii de spălare să provină din aceasta²⁵.

CONȚINUTUL CONSTITUTIV

1 Latura obiectivă

1.1. Elementul material

Elementul material al laturii obiective a infracțiunii este diferențiat în raport de modalitățile normative ale acesteia.

În modalitatea prevăzută de art. 23 alin. (1) lit. b), elementul material al laturii obiective a infracțiunii poate fi realizat alternativ prin acțiuni de ascundere sau disimulare a adevăratei naturi a

instigator la infracțiunile menționate mai sus. 2. în afară de cazurile prevăzute la parag. 1, fiecare parte va lua măsurile necesare pentru a se asigura că o persoană juridică poate fi trasă la răspundere în cazul în care lipsa de supraveghere și control de către o persoană fizică prevăzută în parag. 1 a făcut posibilă comiterea faptelor penale, menționate la parag. 1, în avantajul persoanei juridice respective, de către o persoană fizică subordonată persoanei juridice respective. 3. Răspunderea unei persoane juridice în conformitate cu prezentul articol nu va exclude procedurile judiciare penale împotriva persoanelor fizice care sunt autori, instigatori sau complici la comiterea faptelor penale menționate în parag. 1. 4. Fiecare parte se va asigura că persoanele juridice răspunzătoare conform prezentului articol vor face obiectul unor sancțiuni penale sau de altă natură, efective, proporționale și descurajatoare, inclusiv sancțiuni pecuniare.

²⁴ A se vedea Î.C.C.J., s.pen., dec. nr. 622/2005; N. Cristuș, *Evaziunea fiscală și spălarea banilor*, Ed. Hamangiu, București, 2007, p. 205.

²⁵ H. Diaconescu, *op. cit.*, p. 309.

provenienței, a situației, a dispoziției, a circulației sau proprietății bunurilor sau a dreptului asupra acestora, cunoscând că aceste bunuri provin din săvârșirea de infracțiuni.

Ascunderea presupune acțiunea de a așeza ceva sau pe cineva într-un loc, în care să nu poată fi văzut și găsit, a face să nu fie cunoscut, știut, înțeles de alții, a tăinui.

Disimularea constă în a ascunde adevărata față a unui lucru, a unei situații etc, dându-i aparență înșelătoare, a camufla, a masca²⁶.

Ne exprimăm unele rezerve față de înțelesul dat, în contextul articolului de lege, faptului ascunderii de către unii autori²⁷, acesta presupunând așezarea bunului provenit din săvârșirea unei infracțiuni într-un loc în care să nu poată fi văzut și găsit, tănuirea sa.

Remarca noastră ar fi că definirea dată pierde din vedere contextual faptul că și ascunderea trebuie să privească la rândul său adevărata natură a provenienței, situației, dispoziției, circulației sau proprietății bunului ori a dreptului de proprietate asupra lui, așa cum disimularea presupune mascarea, camuflarea adevărului cu privire la natura originii, dându-le aparența de legalitate.

De asemenea, în opinia noastră diferențierea dintre ascundere și disimulare este dată de caracterul nepublic sau public al acțiunii autorului, disimularea implicând acest ultim caracter.

Trebuie să amintim totodată și înțelesul termenului „natură”, care determină adevăratul sens al articolului, acesta însemnând caracterul specific al unui lucru, înșușirea caracteristică sau calitatea sa²⁸.

Ascunderea sau disimularea trebuie să privească natura reală a provenienței, a situației, dispoziției, circulației sau a proprietății bunurilor ori a drepturilor asupra acestora.

Fiecare dintre cele două acțiuni principale trebuie să privească, în primul rând proveniența bunurilor, să fie exercitate în direcția ascunderii, mascării caracterului ilicit penal al acesteia, proveniența însemnând locul de unde vine sau provine ceva²⁹.

În al doilea rând, acțiunile de ascundere sau disimulare trebuie să privească situarea bunurilor, adică ceea ce leagă în fapt bunurile care constituie obiectul material al infracțiunii. Situarea bunurilor înseamnă acțiunea de a situa, adică de a așeza (n.n. ceva) într-un anumit loc dar și indicarea, desemnarea locului cuiva³⁰.

Acțiunile de ascundere sau disimulare trebuie să se îndrepte, în al treilea rând, spre dispoziția bunurilor, aceasta presupunând măsura luată cu privire la bunurile provenite din săvârșirea unei infracțiuni.

Subscriem opiniei³¹ potrivit căreia dispoziția nu se limitează, cum s-a susținut³², la dispoziție ca atribut al dreptului de proprietate. Aceasta ar însemna să se limiteze măsura de a dispune cu privire la bunuri, împotriva voinței legiuitorului, numai la cadrul dreptului de proprietate, deși infractorii pot dispune cu privire la bunurile provenite din săvârșirea unei infracțiuni, în afara cadrului și limitărilor legale, fapt pe care l-am mai subliniat pe parcursul acestei lucrări când am abordat discuția asupra situației bunurilor aflate în afara circuitului civil.

Pe de altă parte, sub aspect literar-gramatical, dispoziția mai înseamnă așezarea unor elemente într-un anumit loc, o alcătuire, construcție după un anumit plan³³. Cum textul de lege se referă la ascunderea sau disimularea adevăratei naturi „a” dispoziției și nu „asupra” dispoziției, aparent nu ar fi exclus și un astfel de înțeles, numai că acesta s-ar suprapune înțelesului noțiunii de „situație”, în opinia noastră nefiind acesta voința legiuitorului.

²⁶ A se vedea: Dicționarul explicativ al limbii române, p. 65.

²⁷ H. Diaconescu, *op. cit.*, p. 311.

²⁸ Dicționarul explicativ al limbii române, p. 670.

²⁹ *Idem*, p. 836.

³⁰ *Idem*, p. 994.

³¹ *Idem.*, p. 312.

³² A se vedea: V. Dabu, A.M. Gușanu, *op. cit.*, p. 39.

³³ Dicționarul explicativ al limbii române, p. 309

În al patrulea rând, acțiunea de ascundere sau disimulare trebuie să privească circulația bunurilor sau a proprietății ori a drepturilor asupra acestora, aceasta referindu-se în principal la mișcarea bunurilor, transferarea dreptului real de proprietate, iar în al doilea rând la celelalte drepturi asupra bunurilor sau proprietății. Mai trebuie amintit, aici, și sensul de schimb de bunuri (prin intermediul banilor) sau de transformare a banilor în mărfuri și a mărfurilor în bani al termenului „circulație”³⁴.

Ni se pare corectă precizarea făcută de alți autori³⁵ potrivit cărora acțiunea de ascundere sau disimulare trebuie să privească natura reală „infracțională” a situației, a dispoziției, a circulației sau a proprietății bunurilor ori a drepturilor asupra acestora, presupunând mascarea provenienței sau situației sale juridice, de regulă, prin operațiuni complexe juridice, economice sau financiare.

1.2 Urmarea imediată

Urmarea imediată a infracțiunii constă în schimbarea situației de fapt sau juridică a bunurilor care formează obiectul material al infracțiunii, corespunzător modalității normative a acesteia și a celei de săvârșire a elementului material al laturii obiective. Concomitent cu aceasta și din ea apare urmarea socialmente periculoasă pentru relațiile sociale care formează obiectul protecției legii penale.

Între aceasta și elementul material al laturii obiective trebuie să existe raportul de determinare de la cauză la efect, care întregește latura obiectivă a infracțiunii. Aceasta va exista numai în măsura în care, urmarea imediată a fost determinată de acțiunea care constituie elementul material al laturii ei obiective.

2. Latura subiectivă

Sub aspectul elementului subiectiv, infracțiunea de spălare a banilor poate fi săvârșită numai cu intenție, forma de vinovăție a culpei, fiind exclusă³⁶.

Forma intenției - directă, calificată sau indirectă - este diferită în raport de modalitățile normative ale infracțiunii, în modalitatea examinată aceasta putând fi directă sau indirectă.

În doctrină s-a exprimat opinia³⁷ că și în modalitatea prevăzută de art. 23 alin. (1) lit. b) din Legea nr. 21/1999, text identic cu cel al art. 23 alin. (1) lit. b) din Legea nr. 656/2002, infracțiunea se săvârșește tot cu intenție calificată de scop, aceasta rezultând implicit din definirea elementului material al laturii obiective prin termenii „ascunderea” sau „disimularea”.

Spre deosebire de prevederile de sub lit. a), cele cuprinse sub lit. b) ale art. 23 alin. (1) definind latura subiectivă a infracțiunii nu mai stabilesc cerința ca subiectul activ să acționeze cu intenție directă calificată de scop.

Atunci când legiuitorul a vrut să califice intenția directă prin scopul în care trebuie săvârșite faptele prevăzute de legea penală, a stabilit acest fapt neechivoc, prin folosirea unor termeni sau expresii adecvate precum „în scopul” sau „în vederea realizării scopului urmărit”. Pe de altă parte, tehnica legislativă în materie penală, a consacrat acest procedeu.

³⁴ Idem, p. 179.

³⁵ M.A. Hotca, M. Dobrinou, *op. cit.*, p. 325. Autorii exemplifică situația în care un cetățean străin, cu ajutorul vameșilor, declară la intrarea în România o sumă de bani mai mare decât cea pe care o are, dar la întoarcere scoate din țară o sumă echivalentă cu cea declarată; enumeră, de asemenea operațiunile prin care se efectuează plăți fără contraprestație, plata supraevaluată a unor facturi externe pentru a scoate bani din țară etc.

³⁶ M. Mutu, *op. cit.*, p. 24, *apud* M. A. Hotca, M. Dobrinou, *op. cit.*, p. 326. Autorul menționează încriminarea infracțiunii de spălarea banilor chiar dacă fapta este săvârșită din culpă de către unele legislații penale europene, exemplificând Germania sau Liechtenstein.

³⁷ V. Dabu, A.M. Gușanu, *op. cit.*, p. 36-39.

Atâta vreme cât legea nu conține astfel de prevederi, nu se poate adăuga la aceasta, mai ales că în materie penală acționează principiul strictei interpretări. De altfel, este de neînțeles cum autorii citați au ajuns la această concluzie, folosirea termenilor „ascunderea” sau „disimularea”, neavând nici literal înțelesul de scop, definind numai un tipar de acțiune caracterizată de anumite particularități factive.

Pentru aceleași considerente, latura subiectivă a infracțiunii în varianta prevăzută de art. 17 lit. e) din Legea nr. 78/2000 este caracterizată și definită așadar de intenție, diferențiată în acest sens în modalitatea de săvârșire a infracțiunii examinate, prevăzută de art. 23 alin. (1) lit. b) din Legea nr. 656/2002 după cum am arătat.

3. Regim sancționator

Infracțiunea prevăzută și pedepsită de art. 23 alin. (1) lit. b) din Legea nr. 656/2002, poate rămâne în forma tentativei care este incriminată prin prevederile art. 23 alin. 3.

Având același tratament modalitatea prevăzută de art. 17 lit. e) din Legea nr. 78/2000 este susceptibilă de rămânere în forma tentativei care este incriminată prin prevederile art. 23 alin. (3) din Legea nr. 656/2002 la care face trimitere.

Consumarea infracțiunii are loc atunci când, fiind realizat elementul material al laturii obiective se produce urmarea imediată.

Infracțiunea poate fi săvârșită atât printr-o singură acțiune cât și în formă continuată, în această ultimă situație, pe lângă momentul consumării, infracțiunea având și un moment al epuizării, la încetarea ultimului act de executare.

Așa cum am mai arătat, prin prevederile art. 17 lit. e) din Legea nr. 78/2000 a fost incriminată o modalitate distinctă a infracțiunii, atunci când banii, bunurile sau alte valori provin din săvârșirea unei infracțiuni de corupție sau asimilată acestora.

Această reglementare a ridicat problema raporturilor dintre infracțiunea de spălarea banilor și acelea de tănuire și favorizare prevăzute de art. 17 lit. a) din Legea nr. 78/2000.

Potrivit acestor prevederi raportate la art. 221 C. pen., constituie infracțiunea de tănuire, în modalitatea agravată primirea, dobândirea sau transformarea unui bun ori înlesnirea valorificării acestuia cunoscând că bunul provine din săvârșirea unei infracțiuni de corupție sau asimilată acestora.

Subscriem opiniei³⁸ potrivit căreia cele două reglementări au creat o indiscutabilă și nedorită suprapunere a celor două incriminări și care determină firesc, necesar, stabilirea raporturilor dintre acestea și a celei incidente.

Pentru aceleași rațiuni de diferențiere între infracțiunea de tănuire și cea de spălarea banilor arătate anterior în lucrare, împărtășim punctul de vedere al aceluiași autor, că spălarea banilor având ca sursă una dintre infracțiunile prevăzute la art. 23 alin. (1) lit. a) din Legea nr. 656/2002 sau art. 17 lit. e) din Legea nr. 78/2000 constituind o infracțiune distinctă, înlătură în cazurile date existența infracțiunii de tănuire

S-a opinat că subiectul activ trebuie să acționeze numai în scopul tănuirii valorilor provenite din săvârșirea unei infracțiuni de corupție sau asimilată acestora și nu, așa cum s-a susținut,³⁹ în scopul prevăzut de art. 17 lit. a) din Legea nr. 78/2000 raportat la art. 221 C. pen., acela al obținerii unui folos material, pentru sine sau pentru altul.

Amintim și aici că spălarea banilor este o formă mai gravă de tănuire a valorilor, banilor sau bunurilor provenite din săvârșirea unor infracțiuni de corupție sau asimilate acestora, în acest caz, legiuitorul incriminând-o distinct, sub o altă denumire.

³⁸ H. Diaconescu, *op. cit.*, p. 316.

³⁹ A se vedea: V. Dabu, A.M. Gușanu, *op. cit.*, p. 33.

Tăinuirea nu dispare din sfera ilicitului penal, aceasta continuând să rămână infracțiune distinctă, corelativă și subsecventă, dar numai cu privire la alte infracțiuni decât cele prevăzute în art. 23 alin. (1) lit. a) din Legea nr. 656/2002 și art. 17 lit. e) din Legea nr. 78/2000⁴⁰.

Aceși situație o regăsim și în ceea ce privește modalitatea agravată a infracțiunii de favorizare prevăzută de art. 17 lit. a) din Legea nr. 78/2000 în raport cu aceea de spălare a banilor prevăzută de art. 17 lit. e) din aceeași lege, cu precizarea că numai favorizarea reală, existentă atunci când acțiunea favorizatorului este realizată pentru a asigura infractorului folosul sau produsul infracțiunii⁴¹ se regăsește în infracțiunea prevăzută de art. 17 lit. e) din Legea nr. 78/2000, având caracter subsidiar în raport de aceasta, fapt care conduce la încetarea existenței acesteia, forma personală păstrându-și existența în modalitatea agravată prevăzută de art. 17 lit. a) din Legea nr. 78/2000⁴².

Pedeapsa principală pentru infracțiunea de spălare a banilor, prevăzută de art. 23 alin. (1) lit b) și din Legea nr. 656/2002 este închisoarea de la 3 la 12 ani.

Pentru modalitatea agravată a infracțiunii de spălare a banilor prevăzută de art. 17 lit. e) din Legea nr. 78/2000 în conformitate cu prevederile art. 18 alin. (2) din aceeași lege, maximul special al pedepsei prevăzută de art. 23 alin. (1) lit. b) din Legea nr. 656/2002 se majorează cu 3 ani.

⁴⁰ H. Diaconescu, *op. cit.*, p 317.

⁴¹ A se vedea: N. Iliescu, în V. Dongoroz, I. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Explicații teoretice ale Codului penal român. Partea specială*, vol. IV, Ed. Academiei, București, 1972, p. 215.

⁴² H. Diaconescu, *op. cit.*, p. 318.

THE APPEAL IN THE INTEREST OF LAW IN THE DRAFTS OF THE NEW ROMANIAN PROCEDURE CODES

Dan Lupașcu*

Abstract

The unifying role of the High Court of Cassation and Justice in Romania is also accomplished – among other instruments – by mean of the appeal in the interest of law. Designed as a procedural instrument intended to contribute to the unitary interpretation and implementation of the law nationwide, it consolidates the position of leader of the judicial order held by the Supreme Court.

The drafts of the new Procedure Codes – Civil and Criminal – substantially improve the regulations in this matter, but in a limited and non-unitary manner, as we will try to further demonstrate.

Key words: *case-law, consistency, appeal in the interest of law, High Court of Cassation and Justice, drafts of the new Procedure Codes.*

Introduction

The lack of a unitary approach of the judicial practice is a problem that not only the Romanian judiciary faces, but the current dimension of this phenomenon represents a serious reason of concern, as also underlined by the documents of the European Commission¹ and by the decisions rendered by the European Court of Human Rights².

The non-unitary and inconsistent case-law generates legal insecurity and deepens the distrust in the judicial system.

This issue affects the entire judicial system and equally concerns both Romanian litigants and foreign nationals that come across Romanian courts of law. Moreover – as a famous German magistrate³ was underlining relatively recently – “for observers who are not completely aware of the real causes of this problem, it feeds the widely spread assumption that Romanian courts of law change their case-law randomly, as a result of the influence of political factors and corruption”.

Some of the possible causes of non-unitary practice, which will be evaluated by the current study, are “the normative inflation”⁴, instability⁵ and the questionable quality of certain laws, the

* Judge, Associate Professor, Ph.D., Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: mihaihotca@gmail.com).

¹ See also, e.g. Country Reports, or, if necessary, interim reports in 2003, June 2005, December 2005, March, May and September 2006, April and June 2007, July 2008 and February 2009.

² See also, e.g. the European Court of Human Rights. Third Section, Decision of 6 December, Case Beian vs. Romania, published in the Official Journal, Part I, No. 616 of 21 August 2008; the European Court of Human Rights. Section Three, Decision of 21 of February 2008, Case Driha vs. Romania (unpublished), the European Court of Human Rights, Third Section, Decision of 27 January 2009. Case Ștefan and Ștef vs. Romania (unpublished).

³ Judge Dr. Dieter Schlafen, Court of Appeal of Koln, resident twinning adviser at the Superior Council of Magistracy of Romania - Law draft on maintaining a unitary case-law. Background (unpublished)

⁴ From the registers of the Legislative Council results that until 1st of March 2009 were into force 18.634 main legal acts, supplemented by their amending acts, and also a series of international treaties to which Romania became part, passed before 22nd of December 1989.

⁵ There are many legal acts with 20 – 30 amendments in a short period of time. As an example it may be mentioned the Criminal Procedure Code, which, after the last republication in 1996, it has suffered 24 amendments. Some provisions of this code were ephemeral, being into force for just one day. To see in this respect: Law

large number of pending⁶ files, the insufficient specialization of certain magistrates or the improper understanding of such specialization⁷, the absence of efficient instruments for the unitary interpretation and implementation of the law and mainly the current organizational scheme of the courts of law and the distribution of panels⁸.

The Romanian Constitution from 1991, revised in 2003, grants the Supreme Court the role to unify the case law⁹. Article 126, paragraph (3) provides that: “The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence.”

The pre-requisite of the above mentioned Constitutional provision is the presumed stability of the Supreme Court in interpreting and implementing the law. The Supreme Court is called to regulate the jurisprudential contradictions at the level of lower courts of law. Such a conclusion is strengthened by the existence of a special procedure regarding the change of the case-law of the Sections within the High Court of Cassation and Justice¹⁰.

Unfortunately, sometimes the same law issue¹¹ generates divergent views between the Sections of the High Court of Cassation and Justice or even within the same Section¹², which exceptionally, turns the country’s highest judicial authority into a “source of legal instability”¹³. This is an unfortunate situation – which was also experienced by other judicial systems¹⁴ on

no.356/2006 (published in the Official Gazette, Part I, no.677 of 7th August 2006) and Government Emergency Ordinance no.60/2006 (published in the Official Gazette, Part I, no. 764 of 7th September 2006).

⁶ For example, in 2008 the Romanian courts (with a total scheme of personnel of 4486 positions of judges, of which are filled about 4000 positions) had to solve a number of 2.042.500 files, of which have been solved 1.521.769.

⁷ In practice there are courts in which the number of specialized panels is greater than the number of judges. For example: at Murgeni First Instance Court function 1 judge and 6 specialized panels, at Darabani First Instance Court the 2 judges are part of 4 specialized panels, at Câmpeni First Instance Court 8 judges are part 14 specialized panels; at Videle First Instance Court function 5 judges and 11 specialized panels, etc;

⁸ For example, excepting the first instance court and the military tribunal all the other courts also judge second appeals.

⁹ In order to prove the role of a court in setting the contradictions of case-law, see also: European Court of Human Rights, Great Chamber, Case of Zielinski and Pradal and Gonzales and others against France no.24846/94 and 34156/96 at 37173/96 §59, 1999 – VII.

¹⁰ See also: article 26 letter b) and article 26 of Law 304/2004 on the judicial organization, republished, in the Official Gazette, Part I, no.827 of 13th September 2005, as further amended and supplemented. According to our knowledge, in the last two decades existed only a case on which the United Sections settled in favor to change the case-law. This is the Decision no.1 of 28th September 2009 by which it has returned in favor of case-law settled by Decision no.1 of 2nd February 1995 on the matter of actions for restitution of property.

¹¹ As an example, as regards the possibility to evaluate the financial value of some civil or commercial cases there were different opinions between the Civil and Intellectual Property Section for and the Commercial Section. The existence of wide non-unitary practice on this matter determined the initiation of an appeal in the interest of law, solved by Decision no.32 of 9th June 2008 of the High Court of Cassation and Justice – Joint Sections, published in the Official Gazette, Part I, no.830 of 10th December 2008.

¹² As, for example: decisions adopted according to Law 309/2002 on the recognizing and granting of some rights to persons who have made the military traineeship within the General Directorate of the Service for Labor during 1950 – 1951, as mentioned in ECHR Decision of 6th December 2007 adopted in the case of Beian against Romania (above mentioned works); decisions adopted according to Law 138/1999 on the remuneration and other rights of the military personnel within the public institutions of national defense, public order and national security, and on granting of several rights for the civil personnel within this institutions, as mentioned in the ECHR Decision of 21st February 2008 adopted in the case of Driha against Romania (above mentioned works); decisions adopted according to Law 51/1995 on organization and exertion of the profession of lawyer, adopted in the case of Ștefan and Ștef against Romania (above mentioned works).

¹³ See also: ECHR Decision of 6th December 2007 in the case of Beian against Romania (above mentioned works)

¹⁴ As regards the problems faced by the Tunisian Court of Cassation in the process on the unification of case-law, see also: M.L. Hachem – La fonction unificatrice de la Cour de cassation tunisienne, in “Les cours judiciaires suprême dans le monde arabe”, Colloque de Beyrouth des 13 et 14 mai 1999, Bruylant, 2001.

isolated occasions – that shades the significant efforts made by the Supreme Court¹⁵ for unifying case law.

The mission of the High Court of Cassation and Justice is to guarantee the unitary interpretation and implementation of law throughout the entire Romanian territory. In our opinion, this does not preclude the involvement of other institutions, within the limits of their own competences, either for preventing non-unitary practice or for initiating or supporting the process of clarifying the divergent case-law. We envisage, for example, the other courts of law, the Public Ministry, the Ministry of Justice and Civic Freedoms, the National Institute of Magistracy, the Superior Council of Magistracy¹⁶, etc.

“The researches” in this field have outlined a series of remedies – legislative or of different nature; some of them are already implemented, other are in the stage of project.

In the following chapters we will give a brief description of the appeal in the interest of law, focusing on the provisions of the drafts of the new Civil and Criminal Procedure Codes, such as they were approved by the Government on the 25th of February 2009.

THE APPEAL IN THE INTEREST OF LAW

1. Brief history¹⁷

The first time the appeal in the interest of law was regulated in our legal system was by the Law from January 24, 1861¹⁸ establishing the Court of Cassation and Justice. Title I, Chapter III, Article 11 of this law established the following: “The Public Ministry, directly or upon agreement with the justice department, will attack before the Court of Cassation, for the wrong interpretation of law, the final judgments and the acts of the other courts of law in civil cases, even if the interested parties shall not attack them, but only in the interest of law and after the expiry of the deadline for appeal.

The cassation decision that shall be rendered in such cases shall have no effect for the persecutors that did not appeal in cassation the nullified decision of the lower court”.

The Law for the Court of Cassation and Justice of February 17th, 1912¹⁹ maintained the appeal in the interest of law within Article 12, which had the following content: “The Public Ministry, directly or upon agreement with the justice department, will attack before the Court of Cassation, for the wrong interpretation of law, the final judgments and the acts of the other courts

¹⁵ As an example, during 2004 – 2009 the High Court of Cassation and Justice passed 195 appeals in the interest of law.

¹⁶ Within the Superior Council of Magistracy functions the Commission on the unification of the judiciary practice, this, during 2008, has organized 8 meetings with the presidents of sections of the High Court of Cassation and Justice and of the courts of appeals, and also with the representatives of the Prosecutor’s Office attached to the High Court of Cassation and Justice. Within those meetings there were discussed 299 controversial law issues (of which: 56 in criminal matter, 167 in civil matter, labor and social insurances and 76 in commercial matter). In 21 of those cases it was decided to notify the Prosecutor General of the Prosecutor’s Office attached to the High Court of Cassation and Justice in order to appreciate on the necessity to initiate appeals in the interest of law).

¹⁷ See also: I. Leș – Course of Civil Procedure Law. Third Edition, „All Beck” Publishing House, Bucharest, 2005, page 668. For a brief historical view on the appeal in the interest of law in criminal procedure, see also: Gr. Theodoru – Course of Criminal Procedure Law, “Hamangiu” Publishing House”, Bucharest, 2007, page 882.

¹⁸ The text of this law with amendments of 1864, 1870, 1886, 1890, 1896, 1905 and 1906 is published in “The Romanian Judiciary”, vol. II, “Universul Juridic” Publishing House, Bucharest, 2008, page 443 and the following (edition prepared by S. Popescu and D. Lupașcu).

¹⁹ See: S. Popescu, D. Lupașcu – above mentioned works, page 461 and the following.

of law in civil cases, even if the interested parties shall not attack them, but only in the interest of law and after the expiry of the deadline for second appeal .

The cassation decision that shall be rendered in such cases shall have no effect for the parties”.

We find the same provision in the Law regarding the Court of Cassation and Justice dated December 20th, 1925²⁰. Starting with 1932 the content of the legal text was the following: “The Public Ministry attached to the Court of Cassation, directly or upon the request of the Minister of Justice, has the right to appeal before the Court of Cassation, for breaches of law:

- a) all final judgments and the acts of the courts of law in any matter, and
- b) all judgments rendered by the special cassation courts.

The existence of an ordinary second appeal of the interested party can not impede the right exercised by the Public Ministry, even if a decision was already rendered in the case, if the ground pleaded by the general prosecutor was not debated during the trial of the second appeal of the party.

The cassation shall be disposed solely in the interest of the law and shall have no effect concerning the litigant parties.

The appeal in the interest of law is judged in all cases by the competent section”²¹.

The appeal in the interest of law in criminal matter was introduced in the Criminal Procedure Code from 1936²². For the others fields of law, the enforceable regulation was the Law regarding the Supreme Court²³. Similar provisions were subsequently inserted in the Civil Procedure Code.

The Constitution adopted in 1948²⁴ provided the obligation for the Supreme Court to supervise “the judicial activity of courts and judicial bodies”. In the exercise of this competence, the Decree no. 132/1949²⁵ provided for the prime-president of the Supreme Court or the general prosecutor of the People’s Republic of Romania the right to notify the Supreme Court with a claim in judicial redress against final and irrevocable judgments or judicial acts, contrary to the law or unjust. The effects of this mean of judicial redress extended over the position of the litigant parties. The same normative act annulled the provisions regarding the appeal in the interest of law.

Article 41 of the Law no.5/1952 regarding judicial organization²⁶ established that the Supreme Tribunal supervises the judicial activity of courts, both by judging the claims in judicial redress and trough “guidance to courts of law, based on their case law, regarding the just implementation of laws”. The Plenum of the Supreme Tribunal reunited at least once every three months, in the presence of the minister of justice.

The guiding decisions rendered by the Plenum of the Supreme Tribunal in view of the unitary implementation of laws became constitutional in 1965²⁷ and lasted until the 8th of December 1991, when the current Constitution²⁸ came into force.

²⁰ See: article 21 of this law, S. Popescu, D. Lupaşcu – above mentioned works, page 477 and the following.

²¹ See: article 21 of Law on the Court of Cassation and Justice of 1925, as further amended by Law no.54/1932, published in the Official Gazette no.77 of 31st March 1932.

²² See: article 496 and 497 (text of year 1939).

²³ See, e.g.: Law 539/1939 on the High Court of Cassation and Justice, published in the Official Gazette no.159 of 13th July 1939 (art.41).

²⁴ Published in the Official Gazette, Part I, no.87 second version of 13th April 1948.

²⁵ Published in the Official Gazette, no.15 of 2nd April 1949.

²⁶ See: S. Popescu, D. Lupaşcu – above mentioned works, page 86 and the following

²⁷ See: article 104 paragraph (2) of the Constitution of Socialist Republic of Romania of 1965, published in the Official Gazette, no.1 of 21st August 1965.

²⁸ See: Constitution of 1991, published in the Official Gazette no.233 of 21st November 1991.

The appeal in the interest of law was reintroduced in the two procedure codes in 1993²⁹, when the Law no. 56/1993 granted the Supreme Court of Justice³⁰ the competence to judge the appeal s in the interest of law.

2. Comparative law

The appeal in the interest of law is also provided for in other legislative systems.

For example, the Dutch system provides for the appeal in the interest of law, which can be filed by the General Prosecutor from the Supreme Court. Its objective is to ensure the unity of judicial practice and legal certainty. The object of this procedure may be a matter of principle or a decision rendered by a lower court of law. The appeal in the interest of law may be filed only after all means of judicial redress are exhausted. The decision rendered has no effect upon the decision of the lower court of law and over the rights and obligations of parties; it only gives a solution for the future to the non-unitary law issue.

The Slovak legislation provides for two means of appeal in the interest of law: the appeal in the interest of law and the extraordinary appeal in the interest of law. The appeal in the interest of law may be filed by the General Prosecutor, *ex officio* or upon request. The extraordinary appeal in the interest of law has a broader range of initiators, namely the General Prosecutor, the Minister of Justice and the defendant (in criminal matters). The extraordinary appeal in the interest of law can only be filed in the cases expressly provided by law, such as: breach of incompatibility; the illegal dismissal of the right to second appeal; situations when the court is not competent, etc. This last version has a similar content to the former second appeal in annulment provided for by the Romanian legislation.

In Luxemburg, the appeal in the interest of law is provided in civil and commercial³¹ matters and in criminal³² matter as well. In both cases the exercise of this mean of judicial redress is of the competence of the General Prosecutor. The parties can not avail themselves of the decision rendered following the appeal in the interest of law.

In Bulgaria, both the Supreme Court of Cassation and the Supreme Administrative Court are granted the role of judicial³³ supervision regarding the implementation of law by the courts within their range of competence. This particular role also implies the right to render decisions for the interpretation of the law when there is an unjust or divergent/conflicting³⁴ case-law. The individuals authorized by law to request a decision in interpretation are: the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, the General Prosecutor, the Minister of Justice, the Ombudsman and the President of the Supreme Council Bar Associations.

The Cypriot legislation provides that in situations where there are contradictory decisions of the Supreme Court rendered in the exercise of its initial jurisdiction, the United Sections of this court have the ability to try the problem by mean of a decision compulsory for all courts.

The Czech Supreme Court follows and evaluates the final decisions of courts rendered in civil and criminal cases. Based on these decisions and in the interest of unifying case-law, the

²⁹ See: Law 45/1993 on the amending and supplementing of the Criminal Procedure Code, published in the Official Gazette, Part I, no.147 of 1st of July 1993.

³⁰ Law 56/1993 on the Supreme Court of Justice, published in the Official Gazette, Part I, no.159 of 13th July 1993.

³¹ See: article 4 of Law of 18th February 1885 on the second appeal and the procedure in cassation.

³² See: article 422 of the Criminal Instruction Code.

³³ See: articles 124 and 125 of the Bulgarian Constitution.

³⁴ See: Law on the judiciary, published in the Official Gazette no64 of 7th August 2007, as further amended.

Supreme Court adopts opinions/notices regarding the case-law of courts in cases of a certain type³⁵. The same competence is also granted to the Supreme Administrative Court in the field of administrative justice³⁶.

The appeal in the interest of law is also provided for in the French³⁷, Spanish, Italian and Hungarian law. Other countries, such as Sweden, United Kingdom, Austria and others don't have such provisions.

3. Legal nature

Unlike the draft of the Civil Procedure Code³⁸, the draft of the Criminal Procedure Code qualifies the appeal in the interest of law as an “extraordinary mean of judicial redress”³⁹.

As agreed upon by other authors⁴⁰, we consider that the appeal in the interest of law is not actually a mean of judicial redress because it doesn't envisage the cassation, reformation or withdrawal of a given decision. On the other hand, the procedural framework for the trial of the appeal in the interest of law is different from the one provided for the trial of a mean of judicial redress⁴¹.

Despite the specific of this subject, there is no reason for the appeal in the interest of law in criminal procedure to be considered as an “extraordinary mean of judicial redress”.

Its legal nature is engaged by the envisaged purpose and the effect it may generate. To conclude, the second in the interest of law represents of procedural mean for the unification of case law.

4. Purpose

The purpose of the appeal in the interest of law is to “ensure the unitary interpretation and implementation of law” by courts of law⁴².

We deem fit to make some observations concerning this purpose defined by law.

First of all, the use in this context of the verb “to ensure” may lead to the conclusion that the appeal in the interest of law is the sole instrument for the unification of case law. Moreover, the Constitutional Court considers that: “The sole procedural instrument meant to ensure the unification of case law, deriving from the obligation of the Supreme Court to clear up law issues, is the appeal in the interest of law (...)”⁴³.

The fact is that it represents the “ultimate solution”, by which one may preclude the maintaining of the “harm done”. We feel that the “preventive measures”, such as the appeal in cassation or the preliminary ruling (both of the competence of the Supreme Court) are more important ways to this end.

³⁵ See: Article 14 paragraph 3 of Law 6/2002 on courts and judges, as further amended.

³⁶ See: Article 12 paragraph 2 of Law 150/2002 – Code of Administrative Justice, as further amended.

³⁷ See: Law 67 – 523/1967. In the support of the idea the Romanian legislator has been inspired by the French legislation - see: I. Leş – Course of Civil Procedure Law, above mentioned works, page 668.

³⁸ See: Title II, Chapter III and Title III.

³⁹ See: article 465 paragraph (1).

⁴⁰ See, e.g.: V. M. Ciobanu, G. Boroi, M. Nicolae – Amendments to the Civil Procedure Code made by Government Emergency Ordinance no.138/2000, (II) in “Law” Review no.2/2001, pages 20 – 21.

⁴¹ Thus, in the literature on juridical issues it has been stated this rather constitutes a “doctrinaire second appeal” (see: I. Deleanu – Course of Civil Procedure, second part, “All Beck” Publishing House, Bucharest 2005, page 415).

⁴² See: I. Neagu – Criminal Procedure Law. Course, “Global Lex” Publishing House, Bucharest, 2002, pages 739 – 740.

⁴³ See also: Decision no.104 / 20th January 2009 of the Constitutional Court, published in the Official Gazette, Part I, no.73 / 6th February 2009.

The second observation concerns the meaning of the term “law”. Although the draft of the Civil Procedure Code, unlike the other project, does not contain express provisions, it is undoubtedly that both the substantial laws and procedural laws are being considered. On the other hand, as we have had the chance to express in different other occasion⁴⁴, we consider that the appeal in the interest of law can be applied not only for the wrong interpretation or enforcement of the Romanian law, but also for those of the foreign laws that can be applied as *lex causae* (for cases of international private law)⁴⁵. We invoke the following reasons favorable to our opinion:

- a) the foreign law is a legal element that fundamentals the decision of the Romanian court;
- b) the wrong interpretation or enforcement of the foreign law represents, in the same time, a violation of the Romanian norms of conflict;
- c) there is a practical interest of not repeating such mistakes, and the solution given to the law issues is compulsory for courts;
- d) both the Constitution and the two procedure codes refer to the “unitary interpretation and enforcement of law”, without any distinction as for the Romanian or for the foreign law;
- e) the lack of direct interest of the parties is valid in all the circumstances of promoting the appeal in the interest of law;
- f) the solutions must be rendered according to the international regulations, involving harmonization of the case-law, too;
- g) the fact that the appeal in the interest of law can be promoted for such reasons as the wrong interpretation or enforcement of the Romanian norms of conflict does not represent a sufficient remedy for redressing the mistrials regarding the foreign law.

A last remark regards the courts for which this procedural instrument is called to unify the case-law.

The Constitutional text presented above might lead to the conclusion that the involved courts are “all the other courts excepting for the High Court of Cassation and Justice”. The draft of the Civil Procedure Code regards “all the judicial courts”, while the draft of the Criminal Procedure Code refers to the “entire territory of the country”.

We believe that the process of unifying the case-law using as instrument the appeal in the interest of law could not avoid the case-law of the High Court.

5. Object

The object of the appeal in the interest of law consists of “law issues” to which there have been given different solutions in courts, by “definitive judicial decisions”⁴⁶. Thus, this is not the way of verifying the facts⁴⁷, but only the way of verifying the aspects concerning the interpretation and the enforcement of law. In connection with these last aspects the question rising is the following: what is the meaning of “solving cases in different ways”. Since the law has to have the

⁴⁴ See also: D. Lupaşcu – International Private Law, Universul Juridic “Publishing House, Bucharest, 2008, page 75.

⁴⁵ In the support of the theory that the second appeal can not be lodged for the wrong interpretation or enforcement of a foreign law, see also: D. A. Sitaru – International Private Law. Course, “Lumina Lex” Publishing House, Bucharest, 2001, pages 101 – 102; T. Prescure, C. N. Savu – International Private Law, “Lumina Lex” Publishing House, Bucharest, 2005, page 94; O. Ungureanu, C. Jogastru, A. Circa – Course of International Private Law, “Hamangiu” Publishing House, Bucharest, 2008, page 142. The mentioned authors generally state the following grounds: a) the role of the Supreme Court is to ensure the unitary interpretation and enforcement of the Romanian law, on the entire territory of the country; b) the parties do not have a direct interest to require lodging of this appeal, because the decision has no effect on the examined judgment.

⁴⁶ It must be pointed out the terminological unification within the two projects as regards the sense of notion “final judgment”.

⁴⁷ See: I. Leş – Course of Civil Procedure Law, above mentioned works, page 671.

same meaning and must produce the same effects, regardless of the court that applies it, we believe that the meaning that must be accepted is the one with the widest sense for these differences and not only the meaning regarding the diametrically opposed solutions.

The situation becomes complicated in the case of the “legislative lacuna which, logically, is not subject of interpretation but subject of elimination”. In such a situation the Supreme Court has to verify whether “its own recipe” coincides with the solutions that the lower courts have rendered, and finally to render the “compulsory solution”.

Definitive judgments can be rendered by any court, the sort of these judgments and the way of achieving the definitive character having no relevance. Though, the decisions of solving remedies, especially those pronounced in solving the appeal (in cassation) have a high significance.

There can not be excluded the situations where the definitive decisions belong to the same court, since the wide meaning of court includes any judicial panel vested with cases to be solved.

Decisions rendered by other bodies with judicial tasks (such as: arbitral courts, administrative bodies with judicial activity etc) can be subject of examination of appeal in the interest of law, but only if there had been proceeded a judicial control in that case and the legal issue have been solved differently by the courts.

Rightly, there has been noted that: “the mere existence of two decisions that state differently regarding legal issues does not justify by itself the appeal in the interest of law”⁴⁸. The purpose of this institution is to unify the “case-law”, meaning situations such as “habit, custom, routine”⁴⁹, the isolate cases being out of the question.

The Supreme Court has the exclusive competence in assessing whether the situation represents a non-unitary case-law.

6. Legal standing

There are several differences within the two draft codes regarding the legal standing. Thus, while the civil procedure provides as holders of the appeal in the interest of law the general prosecutor of the Prosecutors’ Office attached to the High Court of Cassation and Justice (who can act *ex officio* or at the request of the minister of justice and citizenship freedoms), the leading board of the High Court of Cassation and Justice, the leading boards of the courts of appeal and the Ombudsman, the criminal procedure does not include the Ombudsman, but includes the leading boards of the prosecutors’ offices attached to the courts of appeal.

Does the specific nature of the two legal matters justify this difference?

In our opinion, the answer can only be a negative one, since the legal standing must be given according to the substance of their competence that law provides for each institution.

While in the case of the general prosecutor of the Prosecutors’ Office attached to the High Court of Cassation and Justice, the solution of the Romanian law is a traditional one and it takes in account the role and the duties given to the Public Ministry by the Law no. 304/2004, regarding the judiciary organization⁵⁰, there can be made some assertions regarding the other institutions.

Previously, it is necessary to mention that the minister of justice and citizenship freedoms is not able to directly initiate this procedure, he can only request to the general prosecutor of the Prosecutors’ Office attached to the High Court of Cassation and Justice to act.

⁴⁸ See: I. Leş – Course of Civil Procedure Law, above mentioned works, page 672.

⁴⁹ See: Explanatory Dictionary of Romanian Language, “Academy of the Socialist Republic of Romania” Publishing House, Bucharest, 1984, page 730.

⁵⁰ Specially taking into consideration the provisions of article 4 paragraph (1), according to which “In the judicial activity the Public Ministry represents the general interests of society and protects the rule of law and the rights and liberties of citizens” and those of article 6 of the above mentioned law.

The Constitutional authority of the minister upon prosecutors⁵¹ or the right to control their activity, provided by the law⁵², can not lead to the conclusion that the general prosecutor must comply unconditionally with this request⁵³, but he has the right to assess.

Regarding the leading boards, neither the law⁵⁴, nor the regulations⁵⁵ give any duties in the field of unifying the case-law.

Within a court of appeal, the leading boards “decide in the matter of the general leadership issues” (...) ⁵⁶. Within a prosecutors’ office attached to a court of appeal the leading board “endorse the general leadership issues (...) ⁵⁷”.

The duties in this field are held by the president (directly), the vice-president and the presidents of the sections within the courts. Within the prosecutors’ offices, prosecutors from the judicial section “identify the cases of non-unitary enforcement of law and make reasoned proposals for initiating the appeal in the interest of law⁵⁸”, that are than presented to the chief prosecutor.

This is why we consider that not the leading boards, but the president of the court of appeal/the general prosecutor of the prosecutors’ office attached to the court of appeal could initiate the appeal in interest in law before the court of cassation.

The general prosecutor of the prosecutors’ office attached to the court of appeal should have this legal standing in the field of civil law, too, for the cases where the Public Ministry participates as party in the civil trial⁵⁹.

We use the word “to initiate” because, in our view, they should address to the general prosecutor of the Prosecutors’ Office attached to the High Court of Cassation and Justice, since he is the one who can overtake all the aspects of this procedure.

We have some supplementary observations regarding the legal standing given to the leading board of the High Court of Cassation and Justice⁶⁰. This body is composed, according to the law, of the President, the Vice-president and of 9 judges elected by the general assembly. The appeal in the interest of law is tried by the United Sections of the High Court of Cassation and Justice, which is composed of all the judges of this court.

By adopting the decision of promoting the appeal in the interest of law, the members of the leading board are not being restricted to just ascertain the existence of the non-unitary case-law, but (as the draft Criminal Procedure Code expressly provides) they come to propose solutions.

⁵¹ See: article 131 paragraph (1) of the Constitution, republished.

⁵² See: article 69 paragraph (1) of Law 304/2004 on the judicial organization, republished, as further amended and supplemented.

⁵³ In this respect, see also: I. Leş – Course of Civil Procedure Law, above mentioned works, page 670.

⁵⁴ Law 304/2004 on the judicial organization, republished, in the Official Gazette, Part I, no.827 of 13th September 2005, as further amended and supplemented.

⁵⁵ As regards: a) Regulation on the organization and administrative functioning of the High Court of Cassation and Justice, republished on the grounds of Decision no.01/2005 of the Leading Board of the High Court of Cassation and Justice, published in the Official Gazette, Part I, no.855 of 22nd September 2005; b) Regulation on the internal order of courts, passed by Decision no.387/2005 of Superior Council of Magistracy, published in the Official Gazette, Part I, no.958 of 28th October 2005; c) Regulation on the internal order of prosecutors’ offices, passed by Order no.529/C/2007 of the Minister of Justice, published in the Official Gazette, Part I, no.154/5th March 2007.

⁵⁶ See: article 49 paragraph (1) of Law 304/2004 on the judicial organization, republished, as further amended and supplemented.

⁵⁷ See: article 96 paragraph (1) of Law 204/2004 on the judicial organization, republished, as further amended and supplemented.

⁵⁸ See, e.g.: article 78 paragraph (1) letter c) of the Regulation on the internal order of prosecutors’ offices.

⁵⁹ See: article 87 of the Draft Civil Procedure Code.

⁶⁰ Also, other authors are reserved as regards this proposal. See, for example: I. Leş – “Ensuring a unitary case-law in the perspective of the future Civil Procedure Code”, “Law” Review no.11/2008, pages 25 – 33.

This means that they express their opinion previously to the judgment that they should be part after this procedure, making them incompatible. We don't believe that the solution of removing the President (the authority who convokes and chairs the United Sections), the Vice-president and of the others members of the leading boards is useful.

Thus, both drafts provide the duty of all the judges to participate within meeting of the United Sections, "except for those who can not participate for objective reasons". And the participation within the leading board can not be – in our opinion – "an objective reason" as the text above mentions.

There are some other aspects that rise different questions regarding this task of the leading board of the High Court of Cassation and Justice. For example, the President of the High Court of Cassation and Justice – as president of the leading board – should sign the claim for appeal in the interest of law and also receive it and assign the judges in charge with drafting the report; for preparing the report - in the criminal procedure – there should be taken into account all the documentary elements of the claim etc.

A proposal that has already been accepted⁶¹ is to include the Ombudsman⁶² into the circle of the holders, according to the draft Criminal Procedure Code, taking into consideration its constitutional role of "protector of the rights and freedoms of the individuals"⁶³.

For similar reasons, this solution should be extended for the criminal law, too.

Related to the same issue of the legal standing, we point out different views of the two draft codes, meaning that, while in the criminal procedure the institutions have the possibility to decide whether to initiate or not this mean, in the civil procedure they "are obliged" to initiate it.

In our opinion, this last solution is better, for the social compulsory nature of the consistency of case-law.

7. Term

The analyzed draft codes - so as the codes in force – do not provide a deadline to exercise the appeal in the interest of law. Therefore, the appeal in the interest of law can be exercised anytime⁶⁴, but the entitled institutions have the obligation to act every time they become aware of the existence of a non-unitary case-law, for the period when the legal provisions, that had been differently rendered, have not been modified or repealed.

8. The content of the claim

While the draft Civil Procedure Code "remains silent" regarding this aspect, the other draft code states an almost identical content to those of the report.

If we accept that the institution with legal standing to sue the court of cassation should also propose a solution, than it would have to argue on reasons – on a basis of a solid documentation – for its proposal. This documentation should take into account not only the relevant case-law of the

⁶¹ To this end, see: I. Leş - "Ensuring a unitary case-law in the perspective of the future Civil Procedure Code", above mentioned works, page 28.

⁶² Also, in several countries such as: Spain, Bulgaria etc, the Ombudsman may lodge the appeal in the interest of law.

⁶³ See: article 58 paragraph (1) of the Constitution, republished.

⁶⁴ Also, the French legislation does not provide a term for lodging the appeal in the interest of law. In other law systems it is provided such a term, for example: the Spanish law on the civil procedure, which provides a term of one year since the date of the last judgment or the Argentinean Civil Procedure Code providing a term of 10 years (see I. Leş – Course of Civil Procedure Law, above mentioned works, page 673).

Constitutional Court, of the European Court of Human Rights or, that of the European Court of Justice and the opinion expressed by the doctrine that are relevant for this subject⁶⁵, but also the case-law of the High Court of Cassation and Justice.

Therefore, the claim should comprise the different solutions given to the law issue and their motivation and also the proposed solution and its reasons to be rendered, by indicating, if necessary, the aspects mentioned above.

In both matters the claim for appeal in the interest of law must be accompanied by copies of the definitive judgments that certify that the law issue representing the object of the judgment has been differently solved⁶⁶. If the different way of solving the legal problem can not be proved, the claim for appeal in the interest of law would be repelled as inadmissible.

9. The jurisdiction

Both draft codes keep the current solution, meaning the judgment of the appeal in the interest of law within the United Sections of the High Court of Cassation and Justice.

Is this the most proper formula? As far as we are concerned, we seriously doubt, for reasons such as the following.

Presently, within the High Court of Cassation and Justice (according to the staff scheme) 121 judges⁶⁷ are working (including the President and the Vice-president) and during 2008 they had to solve 39 241 files⁶⁸. Reuniting the United Sections of the Supreme Court is not easy to realize, under the given circumstances and especially under the circumstances of coming into force of the new codes, when the estimated volume of activity will considerably increase so as the number of the staff of the court. On the other hand, the principle of specialization functions at this level. Since the quorum for meetings is at least of 2/3, for each of the four legal matters, it is possible to have the situation when not even a judge from the section having the legal nature of the legal issue subject of the discussions, to be present at the meeting.

Even if all the judges of the respective section participate at the meeting, they wouldn't ever be able to form the majority of the judges in order to give the solution according to their opinion. Thus – excepting the cases where the legal issue would be the same for two sections – the decisions rendered for solving the appeal in the interest of law could be made by judges who are not specialized for that matter of law.

These are only a few reasons for which we consider properly to return to the solution given by the Romanian legislator in 1932, meaning the judgment of the appeal in the interest of law by the specialized section. When the legal issue is common for many sections a joint⁶⁹ section could be formed, of an equal number of judges from the involved sections, in order to reach together the effect of one single section.

⁶⁵ As mentioned by article 465 paragraph (3) of the Draft Criminal Procedure Code.

⁶⁶ We propose the removal of paragraph (4) of article 465 of Draft Criminal Procedure Code because it has the same content as article 466.

⁶⁷ Distributed by sections, as follows: Civil and Intellectual Property Section – 35; Criminal Section; Commercial Section – 24, Administrative Legal Claims and Fiscal Section – 25.

⁶⁸ The highest volume of activity was recorded at the High Court of Cassation and Justice in 2005, namely 55.959 cases.

⁶⁹ In the judicial doctrine of Tunisia it was appreciated that for the unification of practice the best solution it is not represented by the Joint Section of High Court of Cassation, but “the setting of Mixed Sections according to the model of French system or the Superior Civil Chamber of the Supreme Court in Germany”. See also: M. L. Hachem – *op. cit.*

Favorable to our opinion we invoke the fact that both regulations provide that the information of the Prosecutors' Office attached to the High Court of Cassation and Justice, in order to give a preliminary decision for solving a legal issue, is being tried by the adequate section or by the common sections⁷⁰. The decision rendered within this procedure is compulsory for courts as much as it is the solution rendered in the case of appeal in the interest of law.

10. Pre-trial measures

According to the provisions of the new Procedure Codes, when receives the claim, the president of the High Court of Cassation and Justice shall appoint three judges, specialized in the subject matter of debate, in order to elaborate a report upon the appeal in the interest of law.

The appointment of the three judges seems justified by the need of properly prepare the judgment. Their suggestion is considered more useful than the opinion of a single person. Spite all of these, it must not be ignored the fact that this framework can also lead to difference of opinions and the division of the responsibility among more than one person is not always advisable.

There are reasons to consider that it is better to appoint only a judge and we believe that it would be the best solution if this person shall be the chief magistrate-assistant, who participates at the sessions of the Joined Sections.

When, from the analysis of the copies of the enclosed definitive decisions, it results that the law issue was not treated differently, other verifications are futile and the conclusions of the report should be for rejecting the claim as inadmissible.

In the other cases, the judges in charge with drafting the report shall carry on their own documentation upon the same issues underlined in the claim. Additionally, it is provided that "specialists recognized" in the subject matter shall be consulted. But, while in the criminal matters this is mentioned as a possibility of the president of the High Court of Cassation and Justice, at the request of the judges who were appointed to draft the report, in civil matters, without any provision on the involvement of the appointed judges, the president of the supreme court "shall ask" the specialist opinion.

It is possible that this measure shall not be necessary in all cases, that is why we believe that the expression used by the new Criminal Procedure Code is adequate⁷¹

Another issue is the meaning of the expression "recognized specialists". In the absence of a legal limitation we subscribe to the opinion that, in principle, they can be from any judicial field⁷², regardless if they express (in doctrine) or not their opinion with respect to the issue in question.

An exception shall be the magistrates⁷³ and the professional categories equated to them, for which the law provide the interdiction of exercising any other public or private function, except for the academics from faculties, National Institute of Magistracy and National School of Clerks⁷⁴.

With regard to the assertion that expressing an opinion is not the same thing with exercising a function, we may answer that, in the present case, the provisions of art.318 paragraph.3 of the

⁷⁰ See: articles 503 and 504 of the Draft Civil Procedure Code and article 469 of the Draft Criminal Procedure Code.

⁷¹ In the respect that the option expressed by the authors of Draft Civil Procedure Code is wise "taking into consideration the relative low number of the appeals in the interest of law and their special importance for the unity of case-law" - see: I. Leş - "Ensuring a unitary case-law in the perspective of the future Civil Procedure Code", above mentioned works, page 29.

⁷² To this end, see: I. Leş - "Ensuring a unitary case-law in the perspective of the future Civil Procedure Code", "Law" Review no.11/2008, page 29.

⁷³ For reasons linked to the "esteem" professor Leş is also reserved as regards the consultation of magistrates, without „de plano" exclusion of this possibility.

⁷⁴ See: article 5 paragraph (1) of Law 303/2004 on the statute of judges and prosecutors, republished, as further amended and supplemented.

new Civil Procedure Code and of art.170 paragraph 8 of the new Criminal Procedure Code regard a form of judicial expertise. With the exceptions provided by the two new codes and with the ones imposed by this procedure, any other rules on the judicial expertise, including the payment of the experts, shall apply accordingly.

With respect to the “recognition”, we consider that this concerns the notoriety and the professional reputation of the respective person, being no result of a selection administrative process (e.g. official evidence of the Ministry of Justice and Civic Freedoms).

As the law makes no distinctions, we believe that the foreign specialist cannot be excluded.

One or more specialists may be consulted and their opinion shall be expressed in writing. This shall be taken into consideration when the report shall be drafted, being mentioned within it. The opinion of the specialists may be imposed only by the force of their grounds.

The specialist mission shall be concluded when his opinion shall be transmitted to the court - without any legal provision - being impossible to call him before the Joined Section, in order to give additional explanations⁷⁵.

Apart from the report, the judges in charge with drafting the report have the obligation to draft and ground the “solution which might be given in the appeal in the interest of law”. In fact, it is the draft of the proposed solution (minute of the decision) and the grounds on which it stands. The possible difference of opinion shall be solved upon the common rules of law.

After the president receives the report and the draft of the proposed solution, he shall fix the term of judgment and with at least 20 days before this term he shall summon the Joined Section session.

With the summoning address, the report and the draft of the proposed solution shall be transmitted to each judge. The parties to whom the enclosed decisions refer to shall not be summoned, the procedure being not of a contradictory nature.

11. The hearings of the appeal in the interest of law

All the judges in office within the High Court of Cassation and Justice shall participate at the sessions of the Joined Section, only the judges who, due to objective reasons, cannot participate, are excused. The law doesn't describe the “objective reasons”; these shall be at the evaluation of the president of the court. Shall be the case of the judges who is on leave (rest, sick leave etc) or who is member of a Central Election Bureau, is abroad etc.

The session shall be legally assembled if at least two thirds of the judges in office are present.

The president of the High Court of Cassation and Justice shall chair the session and if he's missing, the vice-president or a section president shall replace him.

At the Joined Section shall participate the chief magistrate-assistant or, in his absence, the chief magistrate-assistant appointed by the president of the High Court of Cassation and Justice.

The new codes propose that the appeal in the interest of law shall be plead by the holder or by the representative of the entity which exercise this procedure. In the civil procedure are mentioned the general prosecutor of the Prosecutor Office attached to the High Court of Cassation and Justice or the prosecutor designated by him, the judge appointed by the leading board of the High Court of Cassation and Justice or of the Court of Appeal, or the Ombudsman or a representative of his. The other project mentions the general prosecutor of the Prosecutor Office attached to the High Court of Cassation and Justice or the prosecutor designated by the general prosecutor, the judge appointed by the leading board of the High Court of Cassation and Justice or

⁷⁵ In this respect, see: I. Leş idem, page 29.

of the Court of Appeal or the prosecutor appointed by the leading board of the prosecutor office attached to the court of appeal.

While concerning the prosecutor general and the Ombudsman (or the persons designated by them) we have no objection, it is inappropriate (for reasons related to the nature and function of the entity represented) that a judge or a prosecutor appointed by the leading board to plead for appeal in the interest of law. In these cases, we suggest that the general prosecutor of the Prosecutor Office attached to the High Court of Cassation and Justice or the prosecutor appointed by him shall plead for the appeal in the interest of law.

With regard to the court hearings, unless an exemption in the law is provided on the matter, the general rule shall apply, namely the hearings will be public.

In order to speed up the clarification of the issue regarding the non-unitary case-law, the authors of the two drafts propose a term no longer than 3 months, calculated from the date of the notification of the court, for solving the appeal in the interest of law, proposal that we consider to be justified.

The decision solving the appeal in the interest of law is a collective act belonging to the High Court of Cassation and Justice, and not to a part of the judges who compose it⁷⁶. As a result, judges who have different opinions shall join the majority opinion, abstentions being not allowed from the vote.

Decision shall be adopted by the majority of present judges.

12. Content of the decision and its effects

The judgment solving the claim is a decision delivered only in interest of law, having no effect on the examined judgments or on the parties involved in the case.

"Satisfaction" is minimal while the uniform application of law for the past gives up in the confrontation with the authority of the issues already judged, in the interest of conserving the stability of legal relations. That is why we consider as improper the name of this legal institutions which, on the one hand, there is not an "appeal "(within the meaning of appeal) and, on the other hand, serves only partly" the interest of law".

We can not ignore the fact that the legislature was careful using the phrase "the interpretation and the **non-unitary** application of the law" and not "interpretation and **correct** application of law". The interpretation given by the Supreme Court is presumed to be correct (but only in a relative way).

When deciding upon the case, the Joined Sections have the freedom of appreciation, being possible to admit or not the claim of the holder or of the persons in charge with drafting the report. Also, the Court is not bind by the solutions given in the decisions enclosed to the claim, having the freedom to adopt a new solution. It cannot be any solution, because when interpreting the law, the judge can not generate an effect which might surpass "the intention expressed by the law"⁷⁷. In other words, the solution can not be either *extra law* or *against the law*.

The grounds of the decision must be given within 30 days of its passing and shall be published in the Official Journal of Romania Part I. If the decision is not grounded within the above mentioned term, the disciplinary liability may be brought upon the guilty person.

⁷⁶ See: article 26 of the Regulation on the organization and administrative functioning of the High Court of Cassation and Justice.

⁷⁷ See: G. Hirsch - The Concept of Separations of Powers in State, and also the "levers and counterbalances" - Relevance for the case-law, in "Justiția în actualitate" Review no.3/2008, pages 38 – 41 (republishing rights granted by Deutsche Richterzeitung).

The draft of the Civil Procedure Code provides also a publication term, no more than 15 days from the date when its grounds were given, provision which should be reflected in the other project. This means that the decision shall be transmitted immediately to the Official Journal, a legal provision being necessary in this respect.

The solutions given to the law issues subject to judgment are mandatory for the courts, starting with their publication in the Official Journal of Romania, Part I.

The final provision is able to end the controversy created by the fact that the regulations, in force in criminal matters, states that this decision shall be published also “on the web page of the High Court of Cassation and Justice”⁷⁸.

The issue regarding the binding nature, under the provisions in force, of the decision passed within this procedure generated strong discussions⁷⁹.

This dispute has been amplified by the hesitation of the legislator and by the different measures within these two matters.

In essence, several authors have considered - not without arguments – that the binding nature of such decisions violates the constitutional principles regarding the achievement of justice in the name of law, the independence of judges and their submission only to the law⁸⁰.

Being notified with this issue (lodged in civil matters), the Constitutional Court dismissed the unconstitutionality objection, considering that the invoked principles were not infringed and that the legislative solution does not contravene to the case-law of the European Court of Human Rights concerning the right of every person to a fair trial⁸¹.

In order to remove any ambiguity in this respect – observing that not every judge shows always a full attachment towards the decisions of the High Court of Cassation and Justice - we subscribe to the proposal that the binding nature of the decisions passed in the procedure of the appeal in the interest of law⁸² shall be provided by the Constitution, as done in other states⁸³.

With regard to the “compulsoriness”, we feel that these legal decisions have judicial efficiency only while the law is in force and has not been changed. How sometimes the will of the legislator is questionable, we find suitable the proposal that the law shall provide the obligation of the Joined Sections to notify themselves once they became aware of the legislative intervention that affected the interpreted provision and to rule that the respective decision ends its effects⁸⁴.

Even if, by law, this requirement concerns only the courts, the decision passed in an appeal in the interest of law is not devoid of any legal significance for other institutions or persons, but has a guideline value, being imposed by the force of the grounds on which its based.

This decision is not “law” but is able to orientate in the same direction the courts case-law, when solving law issues.

⁷⁸ See: article 414² paragraph (2) of Criminal Procedure Code.

⁷⁹ See also, e.g.: I. Deleanu – Implicit or explicit amendments and supplements of the Civil Procedure Code, in “Curierul Judiciar” “Review no.9/2005 and the following: H. Diaconescu – Discussions on the unconstitutionality of setting as compulsory for the courts of the solving on the law issues as passed by the decisions adopted by the High Court of Cassation and Justice – Joint Sections on the appeal in the interest of law, in “Law” Review no.12/2006, pages 90 – 113.

⁸⁰ See, e.g.: I. Deleanu, V. Deleanu – The Judgment, Servo – Sat Publishing House, Arad, 1998, pages 408 – 409; H. Diaconescu – above mentioned works, pages 90 – 112.

⁸¹ See: Decision no.93/2000 of the Constitutional Court, published in the Official Gazette, Part I, no.44 of 8th September 2000.

⁸² In this respect see also: G. I. Chiuzbaian – The System of Court Power, “Continent” XXI Publishing House, Bucharest, 2002, page 359.

⁸³ e.g.: Hungary.

⁸⁴ In this respect see also: Note of the editorial staff on the article “Discussions on the method to set the liability of the insurer within the framework of the compulsory civil insurance for damages incurred due to car accidents” (author A. C. Rus), in “Law” Review no.7/2006, page 57.

Finally, the judge is called to interpret and to apply correctly the law, being responsible for how is doing that.

Conclusions

From those mentioned above, it can be concluded that:

- 1) the constitutional guarantor of the unitary case-law is the High Court of Cassation and Justice;
- 2) unification of the case-law is a guarantee of the equality before the law and ensure security of legal relations;
- 3) the unification of the case-law is complex process which requires a combined effort of several institutions;
- 4) the appeal in the interest of law is only one procedural way meant to unify the case-law;
- 5) the decision passed in the appeal in the interest of law procedure, despite its compulsoriness, does not represent the law and doesn't have judicial efficiency **extra law** or **against the law** or over the time limitation of the interpreted provision;
- 6) the drafts of the new Civil Procedure Code and Criminal Procedure Code improve - limited and non-unitarily - the provisions concerning the appeal in the interest of law.

RECURSUL ÎN INTERESUL LEGII ÎN PROIECTELE NOILOR CODURI DE PROCEDURĂ DIN ROMÂNIA

Dan LUPAȘCU*

Abstract

Rolul unificator al Înaltei Curți de Casație și Justiție din România se realizează – printre altele – și prin soluționarea recursului în interesul legii. Conceput ca un mijloc procedural menit să contribuie la interpretarea și aplicarea unitară a legii pe întreg teritoriul țării, el consolidează poziția de lider al ordinii judiciare a instanței supreme.

Proiectele noilor coduri de procedură – civilă, și, respectiv penală – îmbunătățesc substanțial reglementările în materie, însă în mod limitat și neuniform, după cum vom încerca să demonstrăm în continuare.

Cuvinte-cheie: *jurisprudență, unificare, recurs în interesul legii, Înalta Curte de Casație și Justiție, proiectele noilor coduri de procedură.*

Introducere

Lipsa de unitate a practicii judiciare nu este o problemă exclusivă a justiției din România, însă dimensiunea actuală a acestui fenomen constituie temei serios de îngrijorare, fapt semnalat inclusiv în documentele Comisiei Europene¹ și în hotărârile ale Curții Europene a Drepturilor Omului².

Practica neunitară și contradictorie generează insecuritate juridică și adâncește neîncrederea în justiție.

Această chestiune afectează întregul sistem judiciar și îi privește, în egală măsură, atât pe justițiabilii români, cât și pe cei străini, care vin în contact cu instanțele judecătorești din țara noastră. Mai mult – după cum sublinia relativ recent un reputat magistrat german³ – „pentru observatorii care nu sunt pe deplin conștienți de cauzele reale ale problemei, alimentează o prezumție larg răspândită că instanțele din România își schimbă jurisprudența în mod aleatoriu, rezultat al influenței politicului sau al corupției”.

* Judecător, conferențiar universitar, Facultatea de Drept, Universitatea “Nicolae Titulescu”, București (e-mail: dan.lupașcu@univnt.ro).

¹ A se vedea, de exemplu: Rapoartele de țară sau, după caz, Rapoartele intermediare din 2003; iunie 2005; decembrie 2005; martie, mai și septembrie 2006; aprilie și iunie 2007; iulie 2008 și februarie 2009.

² A se vedea, exemplu: Curtea Europeană a Drepturilor Omului, Secția a treia, Hotărârea din 6 decembrie 2007, pronunțată în Cauza Beian împotriva României, publicată în Monitorul Oficial, Partea I, nr. 616 din 21 august 2008; Curtea Europeană a Drepturilor Omului, Secția a treia, Hotărârea din 21 februarie 2008, pronunțată în Cauza Driha împotriva României (nepublicată); Curtea Europeană a Drepturilor Omului, Secția a treia, Hotărârea din 27 ianuarie 2009, pronunțată în Cauza Ștefan și Ștef împotriva României (nepublicată).

³ judecător dr. Dieter Schlafen, Curtea de Apel din Köln, consilier rezident de twinning la Consiliul Superior al Magistraturii din România – Proiect de lege pentru menținerea practicii unitare. Fundamentare (nepublicat)

„Inflația normativă”⁴, instabilitatea⁵ și calitatea discutabilă a unor legi, numărul mare de dosare aflate pe rol⁶, insuficienta specializare a unor magistrați sau înțelegerea greșită a specializării⁷, absența unor mijloace eficiente pentru interpretarea și aplicarea unitară a legii, dar mai cu seamă organizarea actuală a instanțelor judecătorești și distribuția competențelor⁸ constituie câteva dintre posibilele cauze ale practicii neunitare, a căror analiză nu face obiectul studiului de față.

Constituția României din 1991, revizuită în 2003, conferă instanței supreme rolul de unificator al practicii judiciare⁹ prin art. 126 alin. (3), care prevede că: „Înalta Curte de Casație și Justiție asigură interpretarea și aplicarea unitară a legii de către celelalte instanțe judecătorești, potrivit competenței sale”.

Dispoziția constituțională reprodusă mai sus are ca premisă prezumata statornicie a instanței supreme în interpretarea și aplicarea legii, aceasta fiind chemată să regleze contradicțiile de jurisprudență la nivelul instanțelor inferioare. O atare concluzie este întărită de existența unei proceduri speciale privind schimbarea jurisprudenței secțiilor Înaltei Curți de Casație și Justiție¹⁰.

Din păcate, uneori există divergențe între secțiile Înaltei Curți de Casație și Justiție asupra aceluși probleme de drept¹¹ sau chiar în cadrul aceleiași secții¹², ceea ce, în mod excepțional,

⁴ Din evidențele Consiliului Legislativ rezultă că la 1 martie 2009 erau în vigoare 18.634 acte normative de bază, la care se adaugă actele modificatoare, precum și o serie de acte internaționale la care România a devenit parte, adoptate anterior datei de 22 decembrie 1989.

⁵ Sunt multe acte normative care au suferit peste 20-30 de modificări într-un interval scurt de timp. Cu titlu exemplificativ menționăm Codul de procedură penală, care, după ultima republicare din 1996, a suferit 24 de modificări. Unele dispoziții ale acestui cod au fost efemere, fiind în vigoare doar o zi. A se vedea, în acest sens: Legea nr. 356/2006 (publicată în Monitorul Oficial, Partea I, nr. 677 din 7 august 2006) și Ordonanța de Urgență a Guvernului nr. 60/2006 (publicată în Monitorul Oficial, Partea I, nr. 764 din 7 septembrie 2006).

⁶ De pildă, în anul 2008 instanțele române (cu o schemă totală de 4.486 posturi de judecători, din care sunt ocupate cca. 4000 posturi) au avut de soluționat 2.042.500 dosare, din care au soluționat 1.521.769.

⁷ În practică sunt instanțe la care numărul de complete specializate este mai mare decât numărul de judecători. De exemplu: la Judecătoria Murgeni funcționează 1 judecător și 6 complete specializate; la Judecătoria Darabani cei doi judecători fac parte din 4 complete specializate; la Judecătoria Câmpeni cei 8 judecători fac parte din 14 complete specializate; la Judecătoria Videle funcționează 5 judecători și 11 complete specializate, etc.

⁸ De exemplu, cu excepția judecătoriei și tribunalului militar toate celelalte instanțe judecă și recursuri.

⁹ În sensul că rolul unei instanțe supreme este să regleze contradicțiile de jurisprudență, a se vedea: Curtea Europeană a Drepturilor Omului, Marea Cameră, Cauza Zielinski și Pradal și Gonzales și alții împotriva Franței, nr. 24846/94 și 34165/96 la 37173/96, §59, 1999 – VII.

¹⁰ A se vedea: art. 25 lit. b) și art. 26 din Legea nr. 304/2004 privind organizarea judiciară, republicată, în Monitorul Oficial, Partea I, nr. 827 din 13 septembrie 2005, cu modificările și completările ulterioare. După știința noastră, în ultimele două decenii s-a înregistrat un singur caz în care Secțiile Unite s-au pronunțat asupra schimbării jurisprudenței. Este vorba de Hotărârea nr. 1 din 28 septembrie 1997 prin care s-a revenit asupra jurisprudenței stabilite prin Hotărârea nr. 1 din 2 februarie 1995 în materia acțiunilor în revendicare imobiliară.

¹¹ De pildă, în ce privește caracterul evaluabil sau neevaluabil în bani al unor litigii civile sau comerciale au existat vederi diferite între Secția civilă și de proprietate intelectuală și Secția comercială. Existența unei practici neunitare răspândite cu privire la această problemă a determinat promovarea unui recurs în interesul legii, soluționat prin Decizia nr. 32 din 9 iunie 2008 a Înaltei Curți de Casație și Justiție – Secțiile Unite, publicată în Monitorul Oficial, Partea I, nr. 830 din 10 decembrie 2008.

¹² Cum ar fi, de exemplu: deciziile pronunțate în aplicarea Legii nr. 309/2002 privind recunoașterea și acordarea unor drepturi persoanelor care au efectuat stagiul militar în cadrul Direcției Generale a Serviciului Muncii în perioada 1950 – 1961, citate în Hotărârea CEDO din 6 decembrie 2007, pronunțată în Cauza Beian împotriva României (op. cit.); deciziile pronunțate în aplicarea Legii nr. 138/1999 privind salarizarea și alte drepturi ale personalului militar din instituțiile publice de apărare națională, ordine publică și siguranță națională, precum și acordarea unor drepturi salariale personalului civil din aceste instituții, citate în Hotărârea CEDO din 21 februarie 2008, pronunțată în Cauza Driha contra României (op. cit.); deciziile pronunțate în aplicarea Legii nr. 51/1995 pentru organizarea și exercitarea profesiei de avocat, pronunțate în Cauza Ștefan și Ștef împotriva României (op. cit.).

transformă cea mai înaltă autoritate judiciară a țării într-o „sursă de insecuritate juridică”¹³. Este o situație regretabilă – întâlnită izolat și în alte sisteme judiciare¹⁴ – care pune în umbră eforturile notabile de unificare a practicii întreprinse de instanța supremă¹⁵.

Garantul interpretării și aplicării unitare a legii pe întreg teritoriul României este Înalta Curte de Casație și Justiție. Aceasta nu exclude, în opinia noastră, implicarea și a altor instituții, în limitele competențelor proprii, fie pentru a preveni apariția practicii neunitare, fie de a iniția sau sprijini procesul de lămurire a divergențelor de jurisprudență. Avem în vedere, de exemplu: celelalte instanțe judecătorești, Ministerul Public, Ministerul Justiției și Libertăților Cetățenești, Institutul Național al Magistraturii, Consiliul Superior al Magistraturii¹⁶, etc.

„Căutările” în domeniu au conturat o serie de remedii legislative sau de altă natură; unele dintre acestea se aplică deja, iar altele sunt în faza de proiect.

În continuare vom face o scurtă prezentare a recursului în interesul legii, cu accent pe reglementările cuprinse în proiectele noilor coduri de procedură civilă și, respectiv, procedură penală, astfel cum au fost aprobate în ședința Guvernului din 25 februarie 2009.

RECURSUL ÎN INTERESUL LEGII

1. Scurt istoric¹⁷

În sistemul nostru de drept recursul în interesul legii a fost reglementat pentru prima dată prin Legea pentru înființarea Curții de Casație și Justiție din 24 ianuarie 1861¹⁸, care, în Titlul I, Capitolul III, art. 11 stabilea următoarele: „Ministerul Public, de-a dreptul, sau luând înțelegere cu departamentul dreptății, va ataca, pentru reaua interpretare a legii înaintea Curții de Casație, hotărârile desăvârșite și actele celorlalte instanțe judecătorești în pricini civile, chiar când nu se vor ataca de părțile interesate, însă numai în interesul legii și după expirarea termenului de apel.

Hotărârea de casație, ce va interveni la asemenea caz, n-are nici un efect pentru prigonitorii care n-au atacat în casație hotărârea casată a instanței de jos”.

Legea pentru Curtea de Casație și Justiție din 17 februarie 1912¹⁹ a menținut recursul în interesul legii în art. 12, în următoarea cuprindere: „Ministerul Public, de-a dreptul sau luând înțelegere cu departamentul dreptății, va ataca, pentru reaua interpretare a legii, înaintea Curții de

¹³ A se vedea: Hotărârea CEDO din 6 decembrie 2007, pronunțată în Cauza Beian împotriva României (op. cit.).

¹⁴ Cu privire la problemele întâmpinate de Curtea de Casație Tunisiană în procesul de unificare a jurisprudenței, a se vedea: M.L. Hachem – La fonction unificatrice de la Cour de cassation tunisienne, în „Les cours judiciaires suprêmes dans le monde arabe”, Colloque de Beyrouth des 13 et 14 mai 1999, Bruylant, 2001.

¹⁵ De exemplu, în perioada 2004 – 2009 Înalta Curte de Casație și Justiție a admis 195 de recursuri în interesul legii.

¹⁶ La nivelul Consiliului Superior al Magistraturii funcționează Comisia de unificare a practicii judiciare, care, în cursul anului 2008, a organizat 8 întâlniri cu președinții de secție de la Înalta Curte de Casație și Justiție și curțile de apel, precum și reprezentanții Parchetului de pe lângă Înalta Curte de Casație și Justiție. În cadrul acestora au fost discutate 299 de probleme de drept controversate (din care: 56 în materie penală, 167 în materie civilă, conflicte de muncă și asigurări sociale și 76 în materie comercială. În 21 de cazuri s-a decis sesizarea Procurorului general al Parchetului de pe lângă Înalta Curte de Casație și Justiție pentru a aprecia asupra promovării unor recursuri în interesul legii).

¹⁷ A se vedea: I. Leș – Tratat de drept procesual civil. Ediția 3, Editura „All Beck”, București, 2005, pag. 668. Pentru o scurtă privire istorică privind recursul în interesul legii în procedura penală, a se vedea: Gr. Theodoru – Tratat de drept procesual penal, Editura „Hamangiu”, București, 2007, pag. 882.

¹⁸ Textul acestei legi cu modificările din 1864, 1870, 1886, 1890, 1896, 1905 și 1906 este publicat în lucrarea „Sistemul judiciar din România”, vol. II, Editura „Universul Juridic”, București, 2008, pag. 443 și urm. (ediție îngrijită de S. Popescu și D. Lupașcu).

¹⁹ Vezi: S. Popescu, D. Lupașcu – op. cit., pag. 461 și urm.

Casațiune hotărârile desăvârșite și actele celorlalte instanțe judecătorești în pricini civile, chiar când nu se vor ataca de părțile interesate, însă numai în interesul legii și după expirarea termenului de recurs.

Deciziunea de casare ce va interveni în asemenea cazuri nu va avea nici un efect pentru părți”.

Aceeași dispoziție exista și în Legea pentru Curtea de Casație și Justiție din 20 decembrie 1925²⁰. Din 1932 conținutul reglementării a fost următorul „Ministerul Public de pe lângă Curtea de Casație, direct sau la cererea ministrului de justiție, are dreptul să atace înaintea Curții de Casație pentru violare de lege:

- a) toate hotărârile desăvârșite sau actele instanțelor judecătorești date în orice materie, și
- b) toate hotărârile date de instanțele speciale de casare.

Existența unui recurs regulat al părții interesate nu poate constitui o împiedicare a exercitării dreptului Ministerului Public, chiar în cazul când s-ar fi dat o deciziune asupra ei, dacă motivul invocat de procurorul general n-a fost discutat cu prilejul recursului părții.

Casarea se va face în interesul exclusiv al legii și nu va avea nici un efect în privința părților litigante.

Recursul în interesul legii se judecă în toate cazurile de secțiunea competentă”²¹.

În materie penală, recursul în interesul legii a fost introdus în Codul de procedură penală din 1936²², iar pentru celelalte materii s-a păstrat pentru un timp reglementarea în Legea privind instanța supremă²³. Ulterior, dispoziții similare au fost inserate și în Codul de procedură civilă.

Constituția din 1948²⁴ a instituit pentru Curtea Supremă obligația de a supraveghea „activitatea judiciară a instanțelor și organelor judiciare”. În exercitarea acestei atribuții, prin Decretul nr. 132/1949²⁵ s-a prevăzut că primul-președinte al Curții Supreme sau procurorul general al Republicii Populare Române putea sesiza instanța supremă cu o cerere de îndreptare făcută împotriva hotărârilor sau actelor judecătorești definitive și irevocabile, contrare legii sau vădit nedrepte. Această cale de atac avea efecte asupra situației părților din proces. Prin același act normativ au fost abrogate dispozițiile privitoare la recursul în interesul legii.

Prin art. 41 din Legea nr. 5/1952 pentru organizarea judecătorească²⁶ s-a stabilit că Tribunalul Suprem supraveghează activitatea judiciară a instanțelor atât prin judecarea cererilor de îndreptare, cât și prin „îndrumările pe care le dă instanțelor judecătorești, pe baza practicii judiciare a acestora, cu privire la justa aplicare a legilor”, caz în care Plenul Tribunalului Suprem se întrunea cel puțin o dată la trei luni, în prezența ministrului justiției.

Emiterea deciziilor de îndrumare de către Plenul Tribunalului Suprem în vederea aplicării unitare a legilor a dobândit caracter constituțional în 1965²⁷, dăinuind până la 8 decembrie 1991, când a intrat în vigoare actuala Constituție²⁸.

²⁰ Vezi: art. 21 din această lege, S. Popescu, D. Lupașcu – op. cit., pag. 477 și urm.

²¹ Vezi: art. 21 din Legea pentru Curtea de Casație și Justiție din 1925, astfel cum a fost modificat prin Legea nr. 54/1932, publicată în Monitorul Oficial nr. 77 din 31 martie 1932.

²² Vezi: art. 496 și 497 (în forma din 1939).

²³ Vezi, de exemplu: Legea nr. 539/1939 pentru Înalta Curte de Casație și Justiție, publicată în Monitorul Oficial nr. 159 din 13 iulie 1939 (art. 41).

²⁴ Publicată în Monitorul Oficial, Partea I, nr. 87 bis din 13 aprilie 1948.

²⁵ Publicat în Buletinul Oficial, nr. 15 din 2 aprilie 1949.

²⁶ Vezi: S. Popescu, D. Lupașcu – op. cit., pag. 86 și urm.

²⁷ Vezi: art. 104 alin. (2) din Constituția Republicii Socialiste România din 1965, publicată în Buletinul Oficial, nr. 1 din 21 august 1965.

²⁸ Vezi: Constituția din 1991, publicată în Monitorul Oficial nr. 233 din 21 noiembrie 1991.

Recursul în interesul legii a fost reintrodus în cele două coduri de procedură în 1993²⁹, an în care prin Legea nr. 56/1993 a Curții Supreme de Justiție³⁰ s-a dat în competența acesteia judecarea recursurilor în interesul legii.

2. Drept comparat

Recursul în interesul legii este reglementat și în alte legislații.

De exemplu, dreptul olandez reglementează recursul în interesul legii, care poate fi formulat de procurorul general de pe lângă Curtea Supremă. El are ca scop asigurarea unității practicii judecătorești și a siguranței juridice și privește fie o chestiune de principiu, fie o hotărâre a unei instanțe inferioare. Recursul în interesul legii poate fi formulat doar după epuizarea tuturor căilor de atac, iar hotărârea pronunțată nu are niciun efect asupra hotărârii instanței inferioare și asupra drepturilor și obligațiilor părților, ci doar soluționează pentru viitor problema de practică neunitară.

Legislația slovacă prevede două forme de recurs în interesul legii: recurs în interesul legii (propriu-zis) și recurs în interesul legii extraordinar. Recursul în interesul legii poate fi promovat de procurorul general, din oficiu sau în urma unei sesizări. Recursul în interesul legii extraordinar are o sferă mai largă de titulari, și anume: procurorul general, ministrul justiției și acuzat (în penal). Recursul în interesul legii extraordinar poate fi exercitat doar în cazuri determinate de lege, cum ar fi: încălcarea incompatibilității; respingerea nelegală a dreptului la recurs; necompetența instanței, etc. Această a doua formă are un conținut asemănător fostului recurs în anulare din legislația română.

În Luxemburg, recursul în interesul legii există atât în materie civilă și comercială³¹, cât și în materie penală³². Exercițarea acestei căi de atac este de competența procurorului general în ambele situații. Părțile nu se pot prevala de decizia intervenită în urma judecării recursului în interesul legii.

În Bulgaria, atât Curtea Supremă de Casație, cât și Curtea Supremă Administrativă au rol de supraveghere judiciară³³ în ceea ce privește aplicarea legii de către instanțele aflate în sfera lor de competență. Acest rol presupune inclusiv emiterea unor decizii interpretative privind interpretarea legii când se constată o jurisprudență incorectă sau conflictuală³⁴. Sunt abilitați de lege să solicite o decizie de interpretare: președintele Curții Supreme de Casație, președintele Curții Supreme Administrative, procurorul general, ministrul justiției, Avocatul Poporului și Președintele Consiliului Suprem al Barourilor.

Legislația cipriotă prevede că atunci când există hotărâri contrare ale Curții Supreme pronunțate în exercitarea jurisdicției sale inițiale, Secțiunile Unite ale acestei instanțe soluționează problema printr-o hotărâre obligatorie pentru toate instanțele.

În Cehia, Curtea Supremă urmărește și evaluează deciziile finale ale instanțelor pronunțate în procesele civile și penale și, pe baza acestora, în interesul uniformizării jurisprudenței, adoptă

²⁹ Vezi: Legea nr. 45/1993 pentru modificarea și completarea Codului de procedură penală, publicată în Monitorul Oficial, Partea I, nr. 147 din 1 iulie 1993.

³⁰ Legea nr. 56/1993 a Curții Supreme de Justiție, publicată în Monitorul Oficial, Partea I, nr. 159 din 13 iulie 1993.

³¹ Vezi: art. 4 al Legii din 18 februarie 1885 privind recursul și procedura în casație.

³² Vezi: art. 422 din Codul de instrucție criminală.

³³ Vezi: art. 124 și 125 din Constituția Bulgariei.

³⁴ Vezi: Legea sistemului judiciar, publicată în Monitorul Oficial nr. 64 din 7 august 2007, cu modificările ulterioare.

avize referitoare la jurisprudența instanțelor în cauzele de un anumit tip³⁵. Aceeași atribuție revine Curții Administrative Supreme în materia justiției administrative³⁶.

De asemenea, dreptul francez³⁷, dreptul spaniol, dreptul italian, dreptul ungar, etc. reglementează recursul în interesul legii. Alte țări, cum ar fi: Suedia, Marea Britanie, Austria, ș.a. nu au asemenea dispoziții.

3. Natura juridică

Spre deosebire de proiectul Codului de procedură civilă³⁸, proiectul Codului de procedură penală califică recursul în interesul legii drept o „cale extraordinară de atac”³⁹.

În acord cu alți autori⁴⁰, considerăm că recursul în interesul legii nu este o cale de atac propriu-zisă, nefiind vizată o hotărâre a cărei casare, reformare sau retractare să o determine. Pe de altă parte, cadrul procesual în care este judecat recursul în interesul legii este diferit de cel în care se judecă o cale de atac⁴¹.

În pofida specificului materiei, nu există nicio rațiune ca în procedura penală recursul interesul legii să fie considerat „cale extraordinară de atac”.

Natura sa juridică este atrasă de scopul urmărit și efectul pe care îl poate produce. În consecință, recursul în interesul legii reprezintă un mijloc procedural de unificare a practicii judiciare.

4. Scop

Recursul în interesul legii are drept scop „asigurarea interpretării și aplicării unitare a legii” de către instanțele judecătorești⁴².

În legătură cu acest scop – definit de lege – găsim de cuviință să formulăm unele observații.

În primul rând, utilizarea în context de către legiuitor a verbului „a asigura” ar putea conduce la concluzia că recursul în interesul legii este unicul instrument pentru unificarea practicii judiciare. De altfel, chiar Curtea Constituțională consideră că: „Singurul instrument procedural prin care se asigură unificarea practicii judiciare, pornind de la obligativitatea dezlegării problemelor de drept de către instanța supremă, este recursul în interesul legii(...)”⁴³.

În realitate, el reprezintă „ultima soluție”, prin care se pune stavilă perpetuării „răului produs”. Mult mai importante sunt – credem noi – „mijloacele preventive”, cum ar fi, de pildă, recursul în casație ori pronunțarea unei hotărâri prealabile, ambele în competența instanței supreme.

A doua observație vizează accepțiunea termenului „lege”. Deși Proiectul Codului de procedură civilă, spre deosebire de celălalt Proiect, nu prevede expres este indubitabil faptul că

³⁵ Vezi: art. 14 paragraful 3 din Legea nr. 6/2002 referitoare la instanțe și judecători, modificată.

³⁶ Vezi: art. 12 paragraful 2 din Legea nr. 150/2002 – Codul justiției administrative, modificat.

³⁷ Vezi: Legea nr. 67-523/1967. În sensul că legiuitorul român de la 1861 s-a inspirat din legislația franceză – vezi: I. Leș – Tratat de drept procesual civil, op. cit., pag. 668.

³⁸ Vezi: Titlul II, Capitolul III și Titlul III.

³⁹ Vezi: art. 465 alin. (1).

⁴⁰ Vezi, de exemplu: V.M. Ciobanu, G. Boroi, M. Nicolae – Modificările aduse Codului de procedură civilă prin Ordonanța de urgență a Guvernului nr. 138/2000, (II), în Revista „Dreptul” nr. 2/2001, pag. 20-21.

⁴¹ De altfel, în literatura de specialitate s-a apreciat că este vorba mai degrabă de un „recurs doctrinar” (Vezi: I. Deleanu – Tratat de procedură civilă, vol. II, Editura „All Beck”, București, 2005, pag. 415).

⁴² Vezi: I. Neagu – Drept procesual penal. Tratat, Editura „Global Lex”, București, 2002, pag. 739 – 740.

⁴³ A se vedea: Decizia Curții Constituționale nr. 104 din 20 ianuarie 2009, publicată în Monitorul Oficial, Partea I, nr. 73 din 6 februarie 2009.

sunt avute în vedere atât legile substanțiale, cât și legile procedurale. Pe de altă parte, după cum ne-am exprimat și cu altă ocazie⁴⁴, considerăm că recursul în interesul legii poate fi promovat nu numai pentru greșita interpretare sau aplicare a legii române, ci și a legii străine aplicabile în calitate de *lex causae* (în cazul litigiilor de drept internațional privat)⁴⁵. În favoarea opiniei noastre invocăm următoarele argumente:

- a) legea străină este un element de drept, ce fundamentează hotărârea instanței române;
- b) greșita interpretare sau aplicare a legii străine semnifică implicit o încălcare a normei conflictuale române;
- c) există un interes practic de a nu se repeta asemenea greșeli, iar dezlegarea dată problemelor de drept este obligatorie pentru instanțe;
- d) atât Constituția, cât și cele două coduri de procedură fac vorbire de „interpretarea și aplicarea unitară a legii” fără nicio distincție după cum este vorba de legea română sau legea străină;
- e) lipsa interesului direct al părților este valabilă pentru toate situațiile în care se promovează recurs în interesul legii;
- f) soluțiile pronunțate trebuie să fie în acord cu reglementările internaționale, ceea ce presupune armonizarea inclusiv sub aspect jurisprudențial;
- g) faptul că poate fi promovat recurs în interesul legii pentru greșita interpretare sau aplicare a normei conflictuale române nu constituie un remediu suficient pentru îndreptarea erorilor de judecată privind legea străină.

O ultimă observație se referă la instanțele pentru care acest instrument procedural este chemat să le unifice practica.

Textul constituțional reprodus mai sus poate conduce la concluzia că sunt vizate „celelalte instanțe judecătorești”, nu și Înalta Curte de Casație și Justiție. Proiectul Codului de procedură civilă face însă vorbire de „toate instanțele judecătorești”, în vreme ce Proiectul Codului de procedură penală trimite la „întreg teritoriul țării”.

Suntem de părere că procesul de unificare a practicii judiciare prin intermediul recursului în interesul legii nu poate ocoli practica instanței supreme.

5. Obiect

Constituie obiect al recursului în interesul legii „chestiunile (problemele) de drept” care au fost soluționate diferit de instanțele judecătorești, prin „hotărâri judecătorești definitive”⁴⁶. Așadar, pe această cale nu sunt supuse verificării elementele de fapt⁴⁷, ci doar cele privitoare la interpretarea și aplicarea legii. În legătură cu acestea din urmă se pune problema ce se înțelege prin „soluționarea diferită”? Întrucât legea trebuie să aibă același înțeles și să producă aceleași efecte indiferent de instanța care o aplică, opinăm că trebuie acceptat sensul cel mai larg al acestor diferențe și nu doar soluțiile diametral opuse.

⁴⁴ A se vedea D. Lupașcu – Drept internațional privat, Editura „Universul Juridic”, București, 2008, pag. 75.

⁴⁵ În sensul că recursul în interesul legii nu poate fi promovat pentru greșita interpretare sau aplicare a legii străine, a se vedea: D. A. Sitaru – Drept internațional privat. Tratat, Editura „Lumina Lex”, București, 2001, pag. 101-102; T. Prescure, C. N. Savu – Drept internațional privat, Editura „Lumina Lex”, București, 2005, pag. 94; O. Ungureanu, C. Juguștru, A. Circa – Manual de drept internațional privat, Editura „Hamangiu”, București, 2008, pag. 142. Autorii citați invocă, în general, următoarele argumente: a) rolul instanței supreme este de a asigura interpretarea și aplicarea unitară a legii române, pe întreg teritoriul țării; b) părțile nu au interes direct să solicite promovarea acestei căi de atac, întrucât soluția nu are efect asupra hotărârii supuse examinării.

⁴⁶ Semnalăm unificarea terminologică în cele două proiecte cu privire la semnificația noțiunii „hotărâre definitivă”.

⁴⁷ Vezi: I. Leș – Tratat de drept procesual civil, op. cit., pag. 671.

Situația se complică în cazul „lacunelor legislative care, în mod logic, nu se interpretează, ci se înlătură”. Într-o atare situație instanța supremă are de verificat dacă, eventual „rețeta proprie” coincide cu ceea ce au statuat instanțele inferioare și, în final, să pronunțe „dezlegarea obligatorie”.

Hotărârile judecătorești definitive pot să provină de la orice instanță, neavând relevanță felul acestora și modalitatea în care au dobândit caracter definitiv. O semnificație aparte o au însă hotărârile prin care se soluționează căile de atac, îndeosebi cele pronunțate în soluționarea recursului (în casație).

Nu este exclusă nici varianta ca hotărârile definitive să aparțină aceleiași instanțe, întrucât, în sens larg, prin „instanță de judecată” se înțelege orice complet de judecată investit cu soluționarea unei cauze.

Hotărârile pronunțate de alte organe cu atribuții jurisdicționale (cum ar fi: instanțele arbitrale; organele administrative cu activitate jurisdicțională, etc.) pot fi supuse examinării pe calea recursului în interesul legii numai în măsura în care s-a exercitat controlul judecătoresc asupra lor și problema de drept a fost soluționată diferit de instanțele judecătorești.

Pe bună dreptate, s-a remarcat că: „Simpla existență a două hotărâri care să fi statuat în mod diferit asupra unor probleme de drept nu justifică prin ea însăși exercitarea recursului în interesul legii”⁴⁸. Aceasta pentru că scopul instituției este să unifice „practica”, adică ceea ce poate fi calificat drept „deprindere, obicei, rutină”⁴⁹, fiind excluse cazurile izolate.

Cade în competența exclusivă a instanței supreme să aprecieze dacă este vorba sau nu de o practică neunitară.

6. Calitate procesuală

Există unele diferențe în cele două proiecte cu privire la legitimarea procesuală activă. Astfel, în timp ce procedura civilă prevede ca titulari procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție (care poate acționa din oficiu ori la cererea ministrului justiției și libertăților cetățenești), colegiul de conducere al Înaltei Curți de Casație și Justiție, colegiile de conducere ale curților de apel și Avocatul Poporului, procedura penală elimină Avocatul Poporului și adaugă colegiile de conducere ale parchetelor de pe lângă curțile de apel.

Este oare justificată această diferență de specificul celor două materii?

În opinia noastră răspunsul nu poate fi decât negativ, iar acordarea calității procesuale trebuie să țină cont de substanța atribuțiilor conferite de lege fiecăruia dintre titulari.

Dacă în cazul procurorului general al Parchetului de pe lângă Înalta Curte de Casație și Justiție soluția este tradițională în dreptul românesc și are în vedere rolul și atribuțiile conferite Ministerului Public de Legea nr. 304/2004 *privind organizarea judiciară*⁵⁰, unele discuții se pot face în legătură cu ceilalți titulari.

În prealabil însă este necesară precizarea că ministrul justiției și libertăților cetățenești nu poate declanșa direct această procedură, ci doar poate cere procurorului general al Parchetului de pe lângă Înalta Curte de Casație și Justiție să acționeze.

⁴⁸ Vezi: I.Leș – Tratat de drept procesual civil, op. cit., pag. 672.

⁴⁹ Vezi: Dictionarul explicativ al limbii române, Editura „Academiei Republicii Socialiste România”, București, 1984, pag. 730.

⁵⁰ Avem în vedere îndeosebi dispozițiile art. 4 alin. (1) potrivit cărora: „În activitatea judiciară Ministerul Public reprezintă interesele generale ale societății și apără ordinea de drept, precum și drepturile și libertățile cetățenilor” și cele ale art. 63 din legea menționată.

Autoritatea constituțională a ministrului asupra procurorilor⁵¹ ori dreptul de control conferit de lege⁵² asupra activității acestora nu pot întemeia concluzia că procurorul general trebuie să se conformeze necondiționat acestei cereri⁵³, ci are un drept de apreciere.

În privința colegiilor de conducere, nici legea⁵⁴, nici regulamentele⁵⁵ nu le conferă atribuții în domeniul unificării practicii judiciare.

La curtea de apel colegiul de conducere „hotărăște cu privire la problemele generale de conducere (...)”⁵⁶, iar la parchetul de pe lângă curtea de apel „avizează problemele generale de conducere (...)”⁵⁷.

Atribuții în domeniu au președintele (indirect), vicepreședintele și președinții de secție de la instanțe. La parchete, procurorii din secția judiciară „identifică cazurile de aplicare neunitară a legii și fac propuneri motivate pentru promovarea recursului în interesul legii”⁵⁸, pe care le prezintă conducătorului parchetului.

Iată de ce considerăm că nu colegiile de conducere, ci președintele curții de apel, respectiv procurorul general al parchetului de pe lângă curtea de apel ar putea să inițieze declanșarea unui recurs în interesul legii. Această posibilitate ar trebui să o aibă deopotrivă procurorul general al parchetului de pe lângă curtea de apel și în materie civilă, în acele situații în care Ministerul Public participă în procesul civil.⁵⁹

Spunem „inițieze” pentru că, în concepția noastră, ei ar trebui să se adreseze procurorului general al Parchetului de pe lângă Înalta Curte de Casație și Justiție care, dispunând de aparatul necesar, poate acoperi toate aspectele acestei proceduri.

Obiecțiuni suplimentare avem cu privire la conferirea legitimității procesuale active colegiului de conducere al Înaltei Curți de Casație și Justiție⁶⁰. Acesta, potrivit legii, este format din președinte, vicepreședinte și 9 judecători aleși în adunarea generală. Recursul în interesul legii se judecă de Secțiile Unite ale Înaltei Curți de Casație și Justiție, din care fac parte toți judecătorii în funcție ai instanței.

Adoptând, în colegiul de conducere, hotărârea de promovare a recursului în interesul legii membrii acestui organ de conducere nu se limitează doar la constatarea practicii neunitare, ci (după cum o spune expres Proiectul Codului de procedură penală) propun o soluție. Cu alte cuvinte își exprimă părerea anterior judecării pe care inclusiv ei ar trebui să o facă, ceea ce îi face

⁵¹ Vezi: art. 131 alin. (1) din Constituție, republicată.

⁵² Vezi: art. 69 alin. (1) din Legea nr. 304/2004 privind organizarea judiciară, republicată, cu modificările și completările ulterioare.

⁵³ În același sens, vezi: I. Leș – Tratat de drept procesual civil, op. cit., pag. 670.

⁵⁴ Legea nr. 304/2004 privind organizarea judiciară, republicată, în Monitorul Oficial, Partea I, nr. 827 din 13 septembrie 2005, cu modificările și completările ulterioare.

⁵⁵ Avem în vedere: a) Regulamentul privind organizarea și funcționarea administrativă a Înaltei Curți de Casație și Justiție, republicat în temeiul Hotărârii nr. 1/2005 a Colegiului de conducere al Înaltei Curți de Casație și Justiție, publicat în Monitorul Oficial, Partea I, nr. 855 din 22 septembrie 2005; b) Regulamentul de ordine interioară al instanțelor judecătorești, aprobat prin Hotărârea Consiliului Superior al Magistraturii nr. 387/2005, publicată în Monitorul Oficial, Partea I, nr. 958 din 28 octombrie 2005; c) Regulamentul de ordine interioară al parchetelor, aprobat prin Ordin al ministrului justiției nr. 529/C/2007, publicat în Monitorul Oficial, Partea I, nr. 154 din 5 martie 2007.

⁵⁶ Vezi: art. 49 alin. (1) din Legea nr. 304/2004 privind organizarea judiciară, republicată, cu modificările și completările ulterioare.

⁵⁷ Vezi: art. 96 alin. (1) din Legea nr. 304/2004 privind organizarea judiciară, republicată, cu modificările și completările ulterioare.

⁵⁸ A se vedea, de exemplu: art. 78 alin. (1) lit. c) din Regulamentele de ordine interioară al parchetelor.

⁵⁹ A se vedea: art. 87 din Proiectul Codului de procedură civilă.

⁶⁰ Și alți autori au rezerve în legătură cu această propunere. Vezi, de exemplu: I. Leș – Asigurarea unei jurisprudențe unitare în perspectiva viitorului Cod de procedură civilă, Revista „Dreptul” nr. 11/2008, pag. 25 – 33.

incompatibili. Nu credem că îndepărtarea de la judecată a președintelui (cel care convoacă și prezidează Secțiunile Unite), vicepreședintelui și celorlalți membri ai colegiului de conducere ar fi de dorit.

De altfel, ambele proiecte prevăd obligația tuturor judecătorilor în funcție să participe la ședința Secțiunilor Unite, „cu excepția celor care din motive obiective nu pot participa”. Or participarea la ședința colegiului de conducere nu este – în opinia noastră – un „motiv obiectiv” în sensul dispoziției enunțate.

Sunt și alte aspecte care ridică semne de întrebare în privința acestei atribuții a colegiului de conducere al Înaltei Curți de Casație și Justiție. De exemplu, președintele Înaltei Curți de Casație și Justiție – în calitate de președinte al colegiului de conducere – ar trebui să semneze cererea de recurs în interesul legii și tot el să o primească și să desemneze judecătorii raportori; la întocmirea raportului – în procedura penală – ar trebui să fie avute în vedere toate elementele de documentare din cerere, ș.a.

O propunere deja salută⁶¹ este includerea în sfera subiectelor cărora Proiectul Codului de procedură civilă le atribuie calitate procesuală a Avocatului Poporului⁶², în considerarea rolului constituțional al acestuia de apărător al „drepturilor și libertăților persoanelor fizice”⁶³.

Pentru identitate de rațiune soluția ar trebui să fie extinsă și în materie penală.

Tot în legătură cu legitimarea procesuală semnalăm o viziune diferită între cele două proiecte, în sensul că dacă în penal titularii au posibilitatea să aprecieze dacă promovează sau nu acest mijloc procedural, în civil „au îndatorirea” să o facă.

În opinia noastră această din urmă formulă este mai potrivită, dat fiind imperativul social al unității jurisprudențiale.

7. Termen

Proiectele analizate – la fel ca și codurile în vigoare – nu prevăd un termen de exercitare a recursului în interesul legii. Drept urmare, acesta poate fi introdus oricând⁶⁴, cu precizarea că titularii menționați au îndatorirea de a acționa ori de câte ori au cunoștință de existența unei practici neunitare, atâta timp cât dispoziția legală interpretată diferit nu a fost modificată sau abrogată.

8. Conținutul cererii

În vreme ce Proiectul Codului de procedură civilă „tace” referitor la acest aspect, celălalt proiect impune cererii un conținut aproape identic cu cel al raportului.

Dacă acceptăm că autorul cererii trebuie să propună și o soluție, atunci el trebuie să-și susțină cu argumente – extrase dintr-o documentare temeinică – propunerea pe care o face. Această documentare ar trebui să aibă în vedere nu numai jurisprudența relevantă a Curții Constituționale, a Curții Europene a Drepturilor Omului sau, după caz, a Curții de Justiție a

⁶¹ În acest sens, vezi: I. Leș – Asigurarea unei jurisprudențe unitare în perspectiva viitorului Cod de procedură civilă, op. cit., pag. 28.

⁶² Și în alte țări, cum ar fi: Spania, Bulgaria, etc., Avocatul Poporului poate promova recurs în interesul legii.

⁶³ Vezi: art. 58 alin. (1) din Constituție, republicată.

⁶⁴ Nici legislația franceză nu prevede un termen de exercitare a recursului în interesul legii. În alte sisteme de drept este stabilit un astfel de termen, cum ar fi, de exemplu: legea spaniolă de procedură civilă, care prevede termenul de un an de la data ultimei hotărâri sau Codul de procedură civilă argentinian, unde termenul este de 10 ani. (A se vedea: I. Leș – Tratat de drept procesual civil, op. cit., pag. 673).

Comunităților Europene, și a opiniilor exprimate în doctrină, relevante în domeniu⁶⁵, ci și a jurisprudenței Înaltei Curți de Casație și Justiție.

Prin urmare, cererea ar trebui să cuprindă soluțiile diferite date problemei de drept și motivarea acestora, precum și propunerea motivată cu privire la soluția ce urmează a fi pronunțată, cu indicarea, după caz, a datelor de mai sus.

În ambele materii, cererea de recurs în interesul legii trebuie să fie însoțită de copii ale hotărârilor judecătorești definitive din care rezultă că problema de drept care formează obiectul judecății a fost soluționată diferit⁶⁶. Dacă nu se probează rezolvarea diferită în modul arătat, cererea va fi respinsă ca inadmisibilă.

9. Competența

Ambele proiecte mențin soluția actuală, constând în judecarea recursului în interesul legii de Secțiile Unite ale Înaltei Curți de Casație și Justiție.

Este oare aceasta cea mai potrivită formulă? În ce ne privește, avem îndoieli serioase, pentru motivele pe care le vom arăta în continuare.

Astfel, în prezent la Înalta Curte de Casație și Justiție (potrivit schemei de personal) funcționează 121 de judecători⁶⁷ (inclusiv președintele și vicepreședintele), care în cursul anului 2008 au avut de soluționat 39.241 dosare⁶⁸. Constituirea în Secții Unite a instanței supreme nu este ușor de realizat în condițiile date și cu atât mai puțin după intrarea în vigoare a noilor coduri, când se estimează că volumul de activitate va crește considerabil și, în mod corespunzător, numărului personalului. Pe de altă parte, principiul specializării funcționează inclusiv la acest nivel. Întrucât cvorumul de ședință este de cel puțin 2/3, în oricare dintre cele patru materii este posibil ca la Secțiile Unite să nu participe niciun judecător de la secția corespunzătoare naturii problemei de drept supusă dezbaterii.

Chiar în ipoteza în care ar participa toți judecătorii secției, în nicio situație nu ar putea forma majoritatea celor prezenți, pentru a impune opinia lor. Așadar – cu excepția cazurilor în care problema de drept ar fi comună pentru două sau mai multe secții – deciziile prin care se soluționează recursurile în interesul legii ar putea fi adoptate și numai de judecători nespecializați în materia respectivă.

Sunt doar câteva dintre argumentele pentru care socotim potrivită revenirea la soluția legiutorului român din 1932, adică judecarea recursului în interesul legii de către secția de specialitate. Când problema de drept ar fi comună pentru mai multe secții s-ar putea crea o secție mixtă⁶⁹, formată dintr-un număr egal de judecători de la fiecare dintre secțiile implicate, astfel încât împreună să atingă efectivul unei secții.

În favoarea propunerii noastre invocăm și faptul că în ambele reglementări sesizarea Parchetului de pe lângă Înalta Curte de Casație și Justiție în vederea pronunțării unei hotărâri prealabile pentru dezlegarea unor probleme de drept este judecată de secția corespunzătoare sau,

⁶⁵ La care fac referire art. 465 alin. (3) din Proiectul Codului de procedură penală.

⁶⁶ Propunem eliminarea alin. (4) al art. 465 din Proiectul Codului de procedură penală deoarece are același conținut ca și art. 466.

⁶⁷ Împărțiți pe secții astfel: Secția civilă și de proprietate intelectuală – 35; Secția penală – 35; Secția comercială – 24; Secția de contencios administrativ și fiscal – 25.

⁶⁸ Cel mai ridicat volum de activitate s-a înregistrat la Înalta Curte de Casație și Justiție în anul 2005, respectiv 55.959 dosare.

⁶⁹ În doctrina juridică din Tunisia s-a apreciat că pentru unificarea practicii cea mai bună soluție nu o reprezintă Secțiile Reunite ale Curții de Casație, ci „crearea de Secții Mixte după modelul sistemului francez sau Camera Superoară Civilă de la Curtea Supremă din Germania”. A se vedea: M.L. Hachem – op. cit.

după caz, de secțiile comune⁷⁰. Decizia pronunțată în această procedură este obligatorie pentru instanțe cel puțin în aceeași măsură ca și cea rezultată în urma unui recurs în interesul legii.

10. Măsură premergătoare judecării

Potrivit proiectelor, la primirea cererii, președintele Înaltei Curți de Casație și Justiție desemnează trei judecători, specializați în materia supusă dezbaterii, pentru a întocmi un raport asupra recursului în interesul legii.

Desemnarea celor trei raportori pare să se justifice prin nevoia de a pregăti corespunzător judecata. Propunerea lor are o „greutate” superioară cazului în care ar fi un singur raportor. Cu toate acestea, nu trebuie ignorat faptul că inclusiv în acest cadru se poate ajunge la divergențe, iar partajarea răspunderii între mai multe persoane nu este întotdeauna benefică.

Sunt motive pentru care agreăm varianta desemnării unui raportor și credem că ar fi de preferat ca el să fie prim – magistratul asistent, care participă la ședința Secțiilor Unite.

Când, din analiza copiilor hotărârilor judecătorești definitive care au fost anexate, rezultă că problema de drept nu a fost soluționată diferit, nu sunt necesare alte verificări, iar concluzia raportului ar trebui să fie de respingere ca inadmisibilă a cererii.

În celelalte cazuri, raportorii efectuează o documentare proprie ce vizează aceleași aspecte ca și cele menționate în cuprinsul cererii. Suplimentar se prevede consultarea unor „specialiști recunoscuți” în materia respectivă. Numai că, dacă în materie penală aceasta este prevăzută ca posibilitate a președintelui Înaltei Curți de Casație și Justiție, la solicitarea judecătorilor desemnați cu întocmirea raportului, în civil, fără vreo mențiune cu privire la implicarea judecătorilor desemnați, președintele instanței supreme „va solicita” opinia specialiștilor.

Este posibil ca acest demers să nu fie necesar în toate cazurile, fapt pentru care formula din Proiectul Codului de procedură penală credem că este cea corespunzătoare⁷¹.

O altă problemă este semnificația sintagmei „specialiști recunoscuți”. În absența vreunei limitări în lege ne raliem la opinia că, în principiu, ei pot proveni din orice domeniu juridic⁷², indiferent de faptul dacă anterior și-au exprimat sau nu (în doctrină) opinia cu privire la problema pusă în discuție.

O excepție o constituie – credem noi – magistrații⁷³ și categoriile profesionale asimilate acestora, pentru care este prevăzută interdicția de a exercita orice altă funcție publică sau privată, cu excepția funcțiilor didactice din învățământul superior, precum și a celor de instruire din cadrul Institutului Național la Magistraturii și Școlii Naționale de Grefieri⁷⁴.

Eventualului reproș că exprimarea unei opinii nu înseamnă exercitarea unei funcții i-am răspunde în sensul că, în cazul analizat, suntem în prezența unei forme a „expertizei” la care fac referire dispozițiile art. 318 alin. (3) din Proiectul Codului de procedură civilă, și, respectiv, art. 170 alin. (8) din Proiectul Codului de procedură penală. Cu excepțiile pe care cele două proiecte la

⁷⁰ Vezi: art. 503 și 504 din Proiectul Codului de procedură civilă și art. 469 din Proiectul Codului de procedură penală.

⁷¹ În sensul că opțiunea manifestată de autorii Proiectului Codului de procedură civilă este judicioasă „având în vedere numărul relativ redus al recursurilor în interesul legii și importanța lor deosebită pentru unitatea jurisprudenței” – vezi: I. Leș – Asigurarea unei jurisprudențe unitare în perspectiva viitorului Cod de procedură civilă, op. cit., pag. 29.

⁷² În acest sens, vezi: I. Leș – Asigurarea unei jurisprudențe unitare în perspectiva viitorului Cod de procedură civilă, op. cit., pag. 29.

⁷³ Din considerente legate de „prestigiu” și prof. Leș are rezerve cu privire la consultarea magistraților, fără să-i excludă de plano. Vezi: I. Leș - op. cit., pag. 29.

⁷⁴ Vezi: art. 5 alin. (1) din Legea nr. 303/2004 *privind statutul judecătorilor și procurorilor*, republicată, cu modificările și completările ulterioare.

prevăd și cele impuse de specificul acestei proceduri, toate celelalte reguli privind expertiza, inclusiv plata specialiștilor, se aplică în mod corespunzător.

Cât privește „recunoașterea”, apreciem că aceasta ține de notorietatea și reputația profesională a persoanei respective, nefiind rezultatul unei operațiuni administrative de selecție (cum ar fi, de exemplu o evidență oficială la nivelul Ministerului Justiției și Libertăților Cetățenești).

Cum legea nu distinge, credem că de la consultare nu pot fi excluși specialiștii străini.

Pot fi consultați unul sau mai muți specialiști, care trebuie să-și exprime opinia în scris. Aceasta este avută în vedere la întocmirea raportului, fiind menționată în conținutul acestuia. Opinia specialiștilor se poate impune doar prin forța argumentelor care o susțin.

Misiunea specialistului se încheie în momentul transmiterii opiniei la instanță, nefiind posibil – în lipsa unor prevederi în acest sens – ca el să fie chemat în fața Secțiilor Unite, pentru a da explicații suplimentare⁷⁵.

Separat de raport, judecătorii raportori au obligația de a întocmi și motiva „proiectul soluției ce se propune a fi dată recursului în interesul legii”. Practic este vorba de proiectul minutei propuse și al considerentelor pe care se sprijină. Eventualele divergențe de opinii se rezolvă după regulile dreptului comun.

După primirea raportului și a proiectului soluției propuse, președintele Înaltei Curți de Casație și Justiție fixează termenul de judecată și, cu cel puțin 20 de zile înainte de termenul sorocit, convoacă ședința Secțiilor Unite.

Odată cu adresa de convocare, fiecărui judecător i se înmânează o copie a raportului și a proiectului soluției propuse.

Părțile la care se referă hotărârile anexate cererii nu se citează, procedura fiind lipsită de contradictorialitate.

11. Judecarea recursului în interesul legii

La ședința Secțiilor Unite sunt obligați să participe toți judecătorii în funcție ai Înaltei Curți de Casație și Justiție, cu excepția celor care din motive obiective nu pot participa. Legea nu arată ce se înțelege prin „motive obiective”; acestea urmează a fi apreciate de către președintele instanței. Se găsește în această situație, de exemplu, judecătorul care se află în concediu (de odihnă, medical, etc.), face parte din Biroul Electoral Central, este într-o delegație în străinătate, ș.a.

Ședința este legal constituită dacă sunt prezenți cel puțin 2/3 din numărul judecătorilor în funcție.

Secțiile Unite sunt prezidate de președintele Înaltei Curți de Casație și Justiție, iar în lipsa acestuia, de vicepreședinte sau de un președinte de secție.

La ședințele Secțiilor Unite participă prim – magistratul – asistent sau, în lipsa acestuia, magistratul – asistent șef desemnat de președintele Înaltei Curți de Casație și Justiție.

Susținerea recursului în interesul legii în fața Secțiilor Unite se propune să se facă, după caz, de titularul sau reprezentantul entității care exercită acest mijloc procedural. Concret, în procedura civilă sunt menționați procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție sau procurorul desemnat de acesta, judecătorul desemnat de colegiul de conducere al Înaltei Curți de Casație și Justiție, respectiv al curții de apel ori de Avocatul Poporului sau un reprezentant al acestuia. Celălalt proiect se referă la procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție sau procurorul desemnat de acesta,

⁷⁵ În același sens, vezi: I. Leș – idem, pag. 29.

judecătorul desemnat de colegiul de conducere al Înaltei Curți de Casație și Justiție, respectiv al curții de apel ori procurorul desemnat de colegiul de conducere al parchetului de pe lângă curtea de apel.

Dacă în privința procurorului general și a Avocatului Poporului (sau a persoanelor desemnate de aceștia) nu avem nicio obiecțiune, considerăm că este nepotrivită (din rațiuni legate de natura funcției și a entității pe care o reprezintă) susținerea recursului în interesul legii de către judecătorul sau procurorul desemnat de colegiul de conducere. În aceste situații propunem ca susținerea cererii să se realizeze tot de procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție sau procurorul desemnat de acesta.

Cu privire la caracterul ședinței de judecată, în absența unei derogări în lege se aplică regula în materie, adică publicitatea.

Pentru a urgenta lămurirea problemei de practică neunitară autorii celor două proiecte propun un termen de cel mult 3 luni, calculat de la data sesizării instanței, pentru soluționarea recursului în interesul legii, propunere pe care o apreciem ca fiind justificată.

Hotărârea prin care se soluționează recursul în interesul legii este un act colectiv al Înaltei Curți de Casație și Justiție, iar nu a unei părți din numărul judecătorilor care o compun⁷⁶. Drept consecință, judecătorii care au alte opinii se vor alătura opiniei majoritare, nefiind admise abțineri de la vot.

Hotărârea se adoptă cu majoritatea voturilor judecătorilor prezenți.

12. Conținutul hotărârii și efectele ei

Hotărârea prin care se soluționează cererea este o decizie, pronunțată numai în interesul legii, în sensul că nu are efecte asupra hotărârilor judecătorești examinate și nici cu privire la situația părților din acele procese.

„Satisfacția” este minimă câtă vreme aplicarea unitară a legii pentru trecut pălește în confruntarea cu puterea lucrului judecat, în interesul conservării stabilității raporturilor juridice. Iată de ce socotim impropriu denumirea acestei instituții juridice, care, pe de o parte, nu este un „recurs” (în înțelesul de cale de atac), iar pe de altă parte servește doar parțial „interesul legii”.

Nu putem ignora nici faptul că legiuitorul a fost prudent folosind sintagma „interpretarea și aplicarea **neunitară** a legii” și nu „interpretarea și aplicarea **corectă** a legii”. Interpretarea dată de instanța supremă este prezumată a fi corectă (doar în mod relativ).

În luarea deciziei Secțiunile Unite au libertatea de apreciere, putând să primească sau nu propunerea de soluționare a titularului cererii ori cea a raportorilor. De asemenea, nu sunt ținute de dezlegările date problemei de drept prin hotărârile anexate cererii, având libertatea să adopte o soluție nouă. Aceasta nu poate fi orice soluție, întrucât interpretând legea judecătorul nu poate genera un efect care să treacă „peste intenția exprimată de lege”⁷⁷. În alți termeni, soluția nu poate fi nici **extra lege**, nici **contra legem**.

Decizia trebuie motivată în cel mult 30 de zile de la pronunțare și se publică în Monitorul Oficial al României, Partea I. Neredactarea în termen a deciziei poate atrage răspunderea disciplinară a persoanei vinovate.

Proiectul Codului de procedură civilă prevede un termen pentru publicare de cel mult 15 zile de la motivare, dispoziție care ar trebui să se regăsească și în celălalt proiect. Aceasta

⁷⁶ Vezi: art. 26 din Regulamentul privind organizarea și funcționarea administrativă a Înaltei Curți de Casație și Justiție.

⁷⁷ Vezi: G. Hirsch – Conceptul de separare a puterilor în stat, precum și „pârghii și contraponderi” – Relevanța pentru jurisprudență, în Revista „Justiția în actualitate” nr. 3/2008, pag. 38 – 41 (articol publicat prin bunăvoința Deutsche Richterzeitung).

presupune transmiterea de îndată a deciziei motivate către Monitorul Oficial, fiind de preferat un text de lege în acest sens.

Dezlegarea dată problemelor de drept judecate este obligatorie pentru instanțe de la data publicării deciziei în Monitorul Oficial al României, Partea I.

Precizarea finală este de natură să curme controversa creată de faptul că reglementarea în vigoare în materie penală prevede că această decizie se publică „și pe pagina de internet a Înaltei Curți de Casație și Justiție”⁷⁸.

Dezbateri aprinse a generat problema obligativității deciziei pronunțată în această procedură sub imperiul codurilor în vigoare⁷⁹.

Această dispută a fost amplificată de ezitățile legiuitorului și măsurile diferite în cele două materii.

În esență, mai mulți autori au considerat – nu fără argumente – că obligativitatea acestor decizii încalcă principiile constituționale de înfăptuire a justiției în numele legii, al independenței judecătorilor și supunerii lor numai legii⁸⁰.

Fiind sesizată cu această problemă (invocată în materie civilă), Curtea Constituțională a respins excepția de neconstituționalitate, apreciind că nu se aduce atingere principiilor invocate și că soluția legislativă nu contravine nici jurisprudenței Curții Europene a Drepturilor Omului referitoare la dreptul oricărei persoane la un proces echitabil⁸¹.

Pentru a se înlătura orice echivoc în această privință – în condițiile în care nu întotdeauna toți judecătorii manifestă un atașament deplin la unele decizii ale Înaltei Curți de Casație și Justiție – achiesăm la propunerea consacării constituționale a forței obligatorii a deciziilor pronunțate în soluționarea recursurilor în interesul legii⁸², după modelul altor state⁸³.

În legătură cu „obligativitatea”, suntem de părere că aceste decizii au eficiență juridică doar pe durata cât legea pe care o interpretează este în vigoare și nu a suferit modificări. Cum uneori voința legiuitorului este îndoielnică, găsim potrivită propunerea de a se stabili prin lege obligația Secțiilor Unite ale Înaltei Curți de Casație și Justiție de a se autosesiza, de îndată ce au luat cunoștința de intervenția legislativă care a afectat dispoziția interpretată și de a statua că respectiva decizie încetează să-și mai producă efectele⁸⁴.

Chiar dacă, prin lege, obligativitatea vizează doar instanțele de judecată, decizia pronunțată într-un recurs în interesul legii nu este lipsită de orice semnificație juridică pentru alte instituții sau persoane, ci are o valoare orientativă, putându-se impune prin forța argumentelor care o întemeiază.

⁷⁸ Vezi: art. 414² alin. (2) din Codul de procedură penală.

⁷⁹ A se vedea, de exemplu: I. Deleanu – Modificări și completări, implicite sau explicite, ale Codului de procedură civilă, în Revista „Curierul Judiciar” nr. 9/2005, pag. 94 și urm.; H. Diaconescu – Discuții privind neconstituționalitatea instituirii caracterului obligatoriu pentru instanțele judecătorești al dezlegărilor date problemelor de drept prin deciziile emise de Înalta Curte de Casație și Justiție – Secțiile Unite în recursul în interesul legii, în Revista „Dreptul” nr. 12/2006, pag. 90 – 113.

⁸⁰ Vezi, de exemplu: I. Deleanu, V. Deleanu – Hotărârea judecătorească, Editura Servo – Sat, Arad, 1998, pag. 408 – 409; H. Diaconescu – op. cit., pag. 90 – 112.

⁸¹ Vezi: Decizia nr. 93/2000 a Curții Constituționale, publicată în Monitorul Oficial, Partea I, nr. 444 din 8 septembrie 2000.

⁸² Vezi în acest sens: G.I. Chiuzbaian – Sistemul puterii judecătorești, Editura „Continent” XXI, București, 2002, pag. 359.

⁸³ Ca, de exemplu: Ungaria.

⁸⁴ Vezi în acest sens: Nota redacției la articolul „Discuții privitoare la modul de angajare a răspunderii asigurătorului în cadrul asigurării obligatorii de răspundere civilă pentru pagube produse prin accidente de autovehicule” (autor A. C. Rus), în Revista „Dreptul” nr. 7/2006, pag. 57.

Această decizie nu este „lege”, ci are doar menirea de a orienta în aceeași direcție practica instanțelor judecătorești în dezlegarea unor probleme de drept.

În ultimă instanță, judecătorul este cel chemat să interpreteze și să aplice în mod corect legea și este răspunzător de modul în care o face.

Concluzii

Din cele ce preced se poate conchide că:

- 1) garantul constituțional al practicii unitare este Înalta Curte de Casație și Justiție;
- 2) unificarea practicii judiciare este o garanție a egalității în fața legii și asigurării securității raporturilor juridice;
- 3) procesul de unificare a practicii judiciare este complex și presupune un efort conjugat al mai multor instituții;
- 4) recursul în interesul legii este doar unul dintre mijloacele procedurale chemate să unifice practica judiciară;
- 5) decizia pronunțată în recursul în interesul legii, în pofida obligativității sale, nu se confundă cu legea și nu are eficiență juridică **extra lege** ori **contra legem** sau peste limitele temporale ale textului de lege pe care-l interpretează;
- 6) proiectele noilor coduri de procedură civilă și, respectiv, penală îmbunătățesc – limitat și neunitar – reglementarea recursului în interesul legii.

ARE THE DECISIONS OF THE INTERNATIONAL BODIES IN ALTERNATIVE DISPUTE RESOLUTION (ADR) BASED ON THE UNIFORM DISPUTE RESOLUTION POLICY (UDRP) FOR DOMAIN NAMES SUBJECT OF THE COURT APPLICATION PROVIDED BY ARTICLE 364 ROMANIAN CIVIL PROCEDURE CODE?

Beatrice ONICA JARKA*

Abstract

The alternative dispute resolution (ADR) for domain name disputes based on Uniform Dispute Resolution Policy (UDRP) adopted by ICANN in 1999 provides for administrative proceedings. The decisions awarded in these proceedings shall be implemented directly by the domain names Registrars. The implementation is, according to paragraph 4 (k) of the UDRP subject to stay if a Court proceeding in a competent jurisdiction is initiated in a 10 business days term from the date the domain name Registrar is informed about the Administrative Panel decision. The nature of the Court proceedings available under the local jurisdiction is not clear under UDRP, ICANN Rules for UDRP or the procedural rules adopted by the different UDRP procedure providers. This body of rules does not specify if the local proceedings subject the Administrative Panel decision to direct review or only provides for a procedural mean to stop the enforcement of such decision by obtaining a contrary Court decision. This amounts to a degree of uncertainty for the proceedings under the local law especially in countries where there is no legislation in connection to domain name, as it is Romania. The possibility to subject an Administrative Panel decision in an UDRP proceeding to the application to cancel an arbitration award provided by article 364 from the Romanian Civil Procedure Code is a tempting one. On the other side, the application provided by article 364 from the Romanian Civil Procedure Code may be founded only on limited legal grounds, some expressly provided by the said article being incompatible with the alternative dispute resolution (ADR) for domain name disputes based on Uniform Dispute Resolution Policy adopted by ICANN in 1999 and is limited only to arbitration award.

Keywords: domain names, UDRP decision, mutual jurisdiction Court, review,

Introduction

This study is intended to cover briefly the proceedings available under Romanian law by which an Administrative Panel decision awarded in an alternative dispute resolution for domain names based on UDRP may be challenged in a Romanian court and if a review of such decision is provided by the Romanian law under article 364 from the Romanian Civil Procedure Code.

The study addresses the dispute resolution mechanism under ICANN Uniform Domain Name Dispute Resolution Policy (UDRP) and clarifies the procedural opportunities a party in the UDRP based alternative dispute resolution has to challenge an Administrative Panel decision in case it is not satisfied with such decision. The importance of the study matter resides in providing guidelines in a legislative and doctrinal vacuum as it is the enforcement of the domain names rights under the Romanian jurisdiction. For this purpose the provisions of the UDRP shall be examined together with the principles of New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the provisions of article 364 from the Romanian Civil Procedure Code. The study intends to conclude on the possibility to challenge an Administrative Panel Decision UDRP based on the action for cancellation provided by the said

* Lecturer, Ph.D., Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: beatrice.onicajarka@cunescu.ro).

article, and implicitly on the jurisdiction of the Romanian courts to review an UDRP based Administrative Panel Decision

Literature Review

Konstantinos Komaitis, PhD Student, University of Strathclyde, Glasgow, UK, Pandora's Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration, A. Michael Froomkin, Comments on ICANN Uniform Dispute Policy, Gary Soo B.Sc, Domain Names for the Asian Markets), Colm Brannigan, The UDRP: How Do You Spell Success?

UDRP procedure presentation

UDRP had been adopted by ICANN (International Corporation for Assigned Names and Numbers) in 1999, in order to serve as an accessible mechanism for the resolution of certain types of disputes between registrants and third parties over the registration and use of domain names.

UDRP¹ is a body of material and procedural rule incorporated by reference in the Registration Agreement between the Registrar and the Registrant of the domain name.

The UDRP² provides for mandatory administrative proceedings terms and conditions in a connection to that type of dispute when a third party asserts to an UDRP provider that:(i) a certain registered domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and(ii)the registrant of the said domain name have no rights or legitimate interests in respect of the domain name; and (iii) the said domain name has been registered and is being used in bad faith. Therefore, the UDRP is limited to those cases of 'cyber squatting' or those of 'cyber piracy'.³

The UDRP procedures are to be conducted before one of the administrative-dispute-resolution service providers listed on ICANN website. In 2008, the providers listed on the ICANN website⁴ are Asian Domain Name Dispute Resolution Centre (ADNDRC) (approved effective 28 February 2002). The National Arbitration Forum (NAF) (approved effective 23 December 1999), World Intellectual Property Organization (WIPO) (approved effective 1 December 1999) and The Czech Arbitration Court (CAC) has been approved in January 2008 as a UDRP provider and plans to start accepting Complaints before the end of 2008.

The complainant may opt between a one-member and a three-member panel.⁵ Each panel decides definitively the case. If the complainant chooses a one-member panel, the domain name holder (the respondent) has the choice of disregarding his decision and opting, instead, to have the dispute heard by a three-member panel.⁶

¹ Uniform Dispute Resolution Policy, paragraph 1 available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (accessed May 20, 2008)

² Uniform Dispute Resolution Policy, paragraph 4 available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (accessed May 20, 2008)

³ Kelley, Patrick, D., Intellectual Property: Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute Resolution Policy, 17 Berkley Tech. L.J. 181 (2002).

⁴ The ICANN Approved Providers for Uniform Domain Dispute Resolution, available at <http://www.icann.org/dndr/udrp/approved-providers.htm> (accessed on May 20, 2008)

⁵ The ICANN Rules, paragraph 3 (b) (iv) available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, (accessed on May 20, 2008)

⁶ The ICANN Rules, paragraph 3 (b) (iv), available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, (accessed on May 20, 2008)

The respondent has a twenty-day deadline to respond to the complaint as raised by the trademark owner and submit a written response to the Provider.⁷ In case the respondent fails to submit a timely response, the panel will almost certainly decide the action based solely on the complainant's arguments.⁸

The only remedies available under the UDRP are cancellation of the infringing domain name or transfer of its registration to the trademark holder⁹. There is no possibility for damage recovery under the UDRP. This means that in case the Administrative Panel rejects the complaint the situation of the disputed domain name registration remains unchanged.

Court proceedings

Pursuing a claim under the UDRP does not prevent either party from pursuing traditional means of litigation or arbitration¹⁰.

The mandatory administrative proceeding shall not prevent the respondent or the complainant from submitting the dispute to a Court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded¹¹.

Both UDRP and the Rules for UDRP¹² provide also for the case in which a party initiates any legal proceedings during a pending administrative proceeding in respect of a domain-name¹³.

The Court proceedings may be initiated in a competent Court or in a Court of mutual jurisdiction as provided by both UDRP and the Rules for UDRP. While the competent Court is not defined expressly in either UDRP or Rules for UDRP, mutual jurisdiction is considered, according to Rules for UDRP¹⁴, a Court jurisdiction at the location of either the principal office of the Registrar provided the domain-name holder has submitted in its Registration Agreement to that jurisdiction for Court adjudication of disputes concerning or arising from the use of the domain name or the domain-name holder's address as shown for the registration of the domain name in Registrar's Whois database at the time the complaint is submitted to the Provider.

Therefore, the UDRP is not exclusive, and the dispute can be submitted to a Court prior to a UDRP decision, during an UDRP procedure or after a proceeding has been concluded.

⁷ Ibid.

⁸ Konstantinos Komaitis, PhD Student, University of Strathclyde, Glasgow, UK, Pandora's Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration - <http://www.bileta.ac.uk/Document%20Library/1/Pandora%E2%80%99s%20Box%20is%20Finally%20Opened%20The%20Uniform%20Domain%20Name%20Dispute%20Resolution%20Process%20and%20Arbitration.doc> (accessed on May 20, 2008)

⁹ Uniform Dispute Resolution Policy, paragraph 4 (i) available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (accessed May 20, 2008)

¹⁰ A. Michael Froomkin, Comments on ICANN Uniform Dispute Policy, at the address <http://personal.law.miami.edu/%7Eamf/icann-udp.htm> (accessed on May, 20th, 2008)

¹¹ Uniform Dispute Resolution Policy, paragraph 4 k available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (accessed May 20, 2008)

¹² The ICANN Rules available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, (accessed on May 20, 2008).

¹³ The ICANN Rules paragraph 18 available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, (accessed on May 20, 2008)

¹⁴ The ICANN Rules paragraph 1 available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, (accessed on May 20, 2008)

UDRP based decision challenge in the courts

For the purpose of this study; we further note that the case of filing Court proceedings in a competent mutual jurisdiction is expressly provided in both UDRP and Rules for UDRP.

Nevertheless, one may question the nature of the Court proceedings in a competent mutual jurisdiction under UDRP after the UDRP decision had been awarded.

There are two possible characterizations of these proceedings depending on the object of these proceedings.

First refers to a separate Court proceeding depending on procedural means available under the local law in which the parties try to establish and enforce their domain name or trademark rights in connection with a disputed domain name. In this case the Court proceedings shall not refer to the UDRP procedure or decision, being limited to the enforcement of local law rights in connection to the disputed domain name. Such proceedings shall not subject the UDRP proceedings and decision to a direct review by the local court. The outcome of such proceedings shall nevertheless block the enforcement of an UDRP decision of transfer or cancellation of a domain name by the Registrar, if the local mutual jurisdiction Court findings are different from those of the UDRP Administrative Panel. In the same time, an UDRP decision which finds the complaint unfounded by be contradicted by a Court decision which considers that the disputed domain name should be transferred or cancelled. The explanation for a different finding by the Court in comparison with the Administrative Panel is that the Court is under no obligation to apply the material provisions provided by UDRP and there is no binding effect of the UDRP decision on the local Courts.

The second characterization would consider a Court proceeding having as object the direct review of UDRP decision.

UDRP and Rules for UDRP support both characterizations of the available local (mutual jurisdiction as defined Rules for UDRP) Court proceedings, after the UDRP procedure had been concluded. At a first sight and based on the lack of clarity of the text, one could even say that both types of proceedings are available from the point of view of the parties in the UDRP procedure which obtain an unsatisfying solution.

If the possibility to opt for a distinct procedure under the local law for the enforcement of the domain name rights or trademark rights in connection to a disputed domain name, considering the available local procedural and material law means is the easiest to support with UDRP and Rules for UDRP text arguments, the direct challenge of an UDRP based decision in a local Court is a real dare to consider under jurisdictions¹⁵ which do not provide directly for such a review and lack any special material or procedural legal provisions in relation to UDRP proceedings or even with domain names in general. Romania is such a case.

ICANN Rules for UDRP¹⁶ refers to the challenge of a decision by stating in relation to the UDRP complaint content that the complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction.

¹⁵ In USA, it was enacted in 1999, the Anticybersquatting Consumer Protection Act (also known as *Truth in Domain Names Act*), a United States federal law as a part of *A bill to amend the provisions of title 17, United States Code, and the Communications Act of 1934, relating to copyright licensing and carriage of broadcast signals by satellite (S. 1948)*

http://en.wikipedia.org/wiki/Anticybersquatting_Consumer_Protection_Act, (accessed on may, 20, 2008)

¹⁶ The ICANN Rules paragraph 3 (b) (xiii) available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, (accessed on May 20, 2008)

In the same time, UDRP¹⁷ provides for the possibility to put a stay to an Administrative Panel decision enforcement. Before implementing the decision, the registrar of the disputed domain name shall wait ten business days in order to give the adversely affected registrant the opportunity to file a complaint in a court of mutual jurisdiction. If such an action is brought by a domain name holder, the registrar may not transfer or cancel the name until the conclusion of that suit.. In order to block the registrar's transfer or cancellation of the domain name while the challenge is pending, the domain name holder must provide official documentation (e.g. a copy of the complaint, file-stamped by the clerk of the court) to the registrar within the ten-day term.

In the created doctrine, the term of 10 days had been criticized and raised the question of "Parity" of Appeal¹⁸. Even if the length of the term is not the concern of this study, we cannot refrain to notice that such element is one of the aspects which should be taken in consideration when considering a review of the UDRP decision under the Romanian procedural legislation.

Applicability of article 364 from the Romanian Civil Procedure Code in case of an Administrative Panel UDRP based decision

a. Scope of article 364 from the Romanian Civil Procedure Code

Article 364 from the Romanian Civil Procedure Code provides for a court application for the cancellation of an arbitration award. The application for the cancellation of an arbitration award is provided in Book IV of the Romanian Civil Procedure Code – About Arbitration and provides for limited grounds for the cancellation of a arbitration award. In addition, article 365 (2) from the Romanian Civil Procedure Code provides for 1 month term from the date the arbitration award is communicated to the parties, term within the application for cancellation shall be submitted to the Court. In this sense, the application under article 364 from Romanian Civil Procedure Code has been qualified¹⁹ as an extraordinary appeal against an arbitration award.

Therefore the essential conditions to apply subject article 364 from the Romanian civil Procedure Code to a UDRP based decision are:

1. such decision is an arbitral award
2. the legal grounds for which a party ask for the cancellation of such decision are compatible with the legal grounds provided by article 364.
3. there is a compatibility between the challenge term provided by UDRP, paragraph 4 (k) and the term provided by article 365 (2)

b. The nature of UDRP

The first condition imposed by article 364 of the Romanian Civil Procedure Code is that the Administrative Panel Decision awarded under UDRP is an arbitration award.

In order to have an arbitration award, one has to question the arbitration nature of the UDRP. About the nature of UDRP, it has been debated many times²⁰. The conclusion of such

¹⁷ Uniform Dispute Resolution Policy, paragraph 4 (k) available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (accessed May 20, 2008)

¹⁸ See for more details A. Michael Froomkin, Comments on ICANN Uniform Dispute Policy, at the address <http://personal.law.miami.edu/%7Eamf/icann-udp.htm> (accessed on May, 20th, 2008)

¹⁹ Viorel Mihai Ciobanu, Again about the juridical nature of the application for cancellation of an arbitral award, available in the internet program LEX EXPERT, (accessed on May, 20th, 2008)

²⁰ See Gary Soo B.Sc, Domain Names for the Asian Markets), Web Journal of Current Legal Issues, (2005) at <http://webjcli.ncl.ac.uk/2005/issue5/soo5.html> (accessed on May, 20th, 2008), Colm Brannigan, The UDRP: How Do You Spell Success? In Digital Tehnology Journal (2004), at <http://www.austlii.edu.au/au/journals/DTLJ/2004/2.html> (accessed on May, 20th, 2008),

debates is usually that UDRP is not arbitration proceedings in common usage. Even according to ICANN, UDRP is not arbitration. UDRP is considered to be a quasi form of arbitration, an administrative proceeding. No further interpretation of what administrative proceedings mean under UDRP exists.

The difference between the UDRP and the arbitration procedure shall result from a simple comparison of UDRP with the principles of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

The New York convention does not contain an express definition of arbitration. Nevertheless, the provisions of the New York convention supports the basis of arbitration as being the contract by which the parties have agreed to submit a dispute for a decision by a third party. The essence of the arbitration is that the agreement is concluded by the parties to the future arbitration.

On contrary, in the case of the UDRP, between the parties participating in the resolution process there is no such agreement. According to the Policy a 'Party means a Complainant or a Respondent'²¹, the Registration Agreement, as indicated within the Policy, "*is the agreement between a Registrar and a domain name holder*".²² Therefore the contractual agreement in UDRP is the Respondent and the Registrar of the disputed domain name. It has to be noted that the Registrar is not participating in the UDRP proceedings.

The absence of an agreement between the parties participating in the UDRP procedure is a direct contradiction to the New York Convention principle. One may argue that the contradiction is apparent and that the filling of the application by the Complainant in an UDRP procedure may be considered direct acceptance of this agreement between a Registrar and a domain name holder.

On the other side, there are also other differences between UDRP and arbitration as provided by the New York Convention. The doctrine²³ summarised them as follows:

a. According to the New York Convention, if the decision falls outside the scope of the arbitral process, then either of the parties can declare it void. Before the second WIPO Report was published²⁴, it was decided that disputes dealing with geographical indications and personal names will not fall within the range of the UDRP, because national trademark laws concerning those issues vary. However, panellists have not refrained from accepting such cases, every time they were brought before them.²⁵

b. Default cases under UDRP had been considered by panellists as indication of bad faith and thus the domain name should be transferred to the trademark owner. The default cases are those where the respondent fails to meet the 20 days deadline and has not responded to the alleged receipt of the complaint. Default cases are only being considered on the respondent's behalf, since it is the complainant that initiates the procedure; therefore it is impossible for him to default.²⁶ New York Convention does not recognize or mention the status of default cases.

²¹ See, ICANN Rules, Definitions found at <http://www.icann.org/dndr/udrp/uniform-rules.htm>, accessed on the 1st of March, 2004

²² Ibid.

²³ Konstantinos Komaitis, PhD Student, University of Strathclyde, Glasgow, UK, Pandora's Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration - <http://www.bileta.ac.uk/Document%20Library/1/Pandora%E2%80%99s%20Box%20is%20Finally%20Opened%20The%20Uniform%20Domain%20Name%20Dispute%20Resolution%20Process%20and%20Arbitration.doc> (accessed on May 20, 2008)

²⁴ For more information please look at 2nd WIPO Report, at <http://wipo2.wipo.int/process2/report/html/report.html>, accessed on the 1st of March, 2004

²⁵ Amongst the most illustrative are the Barcelona.com and the Jeannete Winterson cases.

²⁶ Konstantinos Komaitis, PhD Student, University of Strathclyde, Glasgow, UK, Pandora's Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration - <http://www.bileta.ac.uk/Docu>

c. Arbitration affords to the parties the discretionary power to insert clauses that will allow them to ensure and achieve the enforceability of the decisions, something that cannot take place in the case of the UDRP. The enforceability of the UDRP decision exists only in relationship to the registrar and may be put to a stay by the simple fact of filling a court application by the Respondent in a 10 days term

d. According to UDRP only the complainant, the party not involved in the original contract which leads to this proceedings, has the option to decide at their own discretion, which arbitration centre will deal with the dispute, which contradicts with the principle of controlling forum shopping²⁷.

e. UDRP does not allow the choice of law, which is determined by the panelists.

f. The use of UDRP allows and even encourages the use of precedent²⁸.

Based on these differences the obvious conclusion would be that UDRP is certainly no arbitration.

Nevertheless, one may rebut such conclusion with the simple argument that, the classic concept of arbitration has evolved to different stages and suffers transformation according to the needs of the users of such proceedings; so, any procedure sharing the same conceptual background and solving the disputes before a third party is a form of arbitration, based on a contractual relationship in a private adjudicative process.

On the other side, if such reasoning shall be used this has to be done in accordance with the national legislation on arbitration. It is more than obvious under Book IV of the Romanian Civil Procedure law that the classic concept of arbitration as provided by New York convention has been considered and at this moment the UDRP departs too much for this classical concept to be qualified as subject of these provisions.

c. Incompatibility of the UDRP procedure with the grounds provided by article 364 for the cancellation of an arbitral award

Even considering the Administrative Panel decision an arbitral award, article 364 may not be applicable to such award. Several grounds provided in article 364 of the Romanian Civil Procedure Code contradicts with the very essence of the UDRP which provides for an on-line procedure in which the parties are not summoned for hearings and cannot be present to the hearings. If the applicability of article 364 from the Romanian Civil Procedure Code shall be accepted, an Administrative Panel UDRP based decision shall always be cancelled on the ground provided by article 364 (d) for the case in which a party was absent to the discussion on merits and its was not summoned for such hearing.

A strict interpretation of article 343 from the Romanian Civil Procedure Code as to the definition of the arbitration clause shall also lead always to a cancellation of the Administrative Panel UDRP based decision on the ground provided by article 364 (b), for the case in which the arbitral convention does not exist.

ment%20Library/1/Pandora%E2%80%99s%20Box%20is%20Finally%20Opened%20The%20Uniform%20Domain%20Name%20Dispute%20Resolution%20Process%20and%20Arbitration.doc (accessed on May 20, 2008)

²⁷ Ibid.

²⁸ David Wotherspoon and Alex Cameron, Reducing Inconsistency in UDRP cases, Canadian Journal of Law & Technology Volume 2 Number 1, March 2003 at http://cjlt.dal.ca/vol2_no1, (accessed on May 20, 2008)

The listing of the cancellation grounds of an arbitral award are specific to the classical concept of arbitration which is applicable only at a very conceptual level to UDRP.

d. Obvious incompatibility between the 10 days term provided by UDRP 4 (k) and the 1 month term provided by article 365 (2) from the Romanian Civil Procedure Code

The term within the UDRP decision may be put to stay, by a court application is 10 business days from the moment the Registrar had received the communication of the Administrative Panel.

The term within which an application for the cancellation of an arbitral award shall be submitted to the Court is 1 month from the moment the arbitral award was communicated to the parties.

If just to a first look, not only that the two terms length and the moment they start running is different but also the purpose of the Court proceedings differ.

In the case of the UDRP, the Court proceedings are intended to stop the enforcement of the UDRP decision in the only way possible, by communicating to the Registrar that a court application has been submitted. The Registrar shall further not take any action according to paragraph 4 (k), unless we will take no further action, until it receives (i) evidence satisfactory to it of a resolution between the parties; (ii) evidence satisfactory to it that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing the lawsuit or ordering that the Respondent does not have the right to continue to use the disputed domain name.

None of the purposes expressly stated in the UDRP may not be found in the submission of a application for cancellation of an arbitral award provided by article 364 from the Civil Procedure Code. The arbitral award is enforceable under the Romanian law²⁹ and a suspension of its enforceable effects may be considered by the Court only in a specific application for suspension.

Conclusions

The conclusions of this study impose by themselves.

UDRP has little in connection with classical concept of arbitration which was intended to be regulated by Book IV of the Romanian Civil Procedural Code and any attempt to use article 364 from this Book as a procedural mean to challenge an Administrative Panel decision has to be denied by the Romanian Courts. There are too many essential and determining differences and incompatibilities between the arbitration envisaged by Book IV and UDRP, to even consider article 364 for challenging an Administrative Panel decision

The denial of the application of article 364 to an Administrative Panel decision does not leave the party from the mutual jurisdiction Romania, which is unsatisfied with an UDRP based Administrative Panel decision, with no choice to challenge it. The Registrar is under contractual obligation to put to stay the enforcement of the UDRP decision if the party decides to start litigation in the mutual jurisdiction Romania according to paragraph 4 (k) from UDRP. What are the ways to exercise such right to litigate under the Romanian jurisdictions and legislation remains

²⁹ The arbitral award communicated to the parties has the effects of a definitive Court award according to article 363(2) Romanian Civil Procedural Code, while the foreign arbitral awards are enforceable by the specific procedure of exequatur according to law no.105/1992 regarding the international law relationship regulation as further modified by OUG no. 52/2008.

for the parties to decide and for the Courts to judge such decision. The actual stage of the Romanian legislation does not offer many possibilities to challenge the UDRP decision and the application for the cancellation of an arbitral award is not among them.

Nevertheless, we are confident that the Romanian Courts will settle the best way to achieve the exercise of its rights by a party unsatisfied with an UDRP decision, together with the challenge of the first decision in front of Romanian Court³⁰ being either a direct challenge or an indirect one.

³⁰ At the time this article had been written, Bucharest Tribunal, Civil Section IV, was first seized with an application for the cancellation of the WIPO Arbitration and Mediation Center decision awarded in the case no. DRO2007-0008 and after the parties conclusion, the court remained to decide on the preliminary exception and merits of such application - file no. 1969/3/2008.

SUNT DECIZIILE ORGANISMELOR INTERNAȚIONALE DE SOLUȚIONARE ALTERNATIVĂ A LITIGIILOR (SAL) FUNDAMENTATE PE POLITICA DE SOLUȚIONARE UNIFORMĂ A LITIGIILOR (PSUL) CU PRIVIRE LA NUMELE DE DOMENII SUPUSE ACȚIUNII ÎN ANULARE PREVĂZUTE DE ART. 364 CODUL ROMÂN DE PROCEDURĂ CIVILĂ ?

Beatrice ONICA JARKA*

Abstract

Soluționarea alternativă a litigiilor (SAL) privind numele de domeniu se bazează pe Politica de Soluționare Uniformă a Litigiilor (PSUL) adoptată de Corporația Internațională pentru Nume și Numere Atribuite (CINNA) în anul 1999 care prevede o procedură administrativă în acest sens. Deciziile pronunțate în cadrul acestor proceduri vor fi implementate direct de către Registratorii numelui de domeniu. Implementarea este, în conformitate cu paragraful 4 (k) din PSUL, suspendată dacă este inițiată o procedura la o instanță competentă în decursul a 10 zile lucrătoare de la data la care Registratorul este informat despre decizia Completului Administrativ numit în temeiul PSUL. Natura procedurilor ce au loc în fața instanței de drept comun din jurisdicția locală nu este foarte clară nici potrivit PSUL, nici sub Regulile PSUL sau potrivit regulilor procedurale adoptate de către diferiți furnizori de proceduri PSUL. Acest set de reguli nu specifică dacă prin procedura de drept comun, decizia Completului Administrativ se revizuieste direct sau dacă prevederile art. 4 (k) sunt doar un mijloc procedural prin care se suspendă punerea în executare a unei asemenea decizii prin obținerea unei decizii contrare dată de către instanță. Această situație creează un grad de nesiguranță în ceea ce privește procedurile desfășurate în conformitate cu dreptul local mai ales în statele unde nu există legislație care să reglementeze numele de domeniu, cum este România. Posibilitatea ca decizia Completului Administrativ adoptată într-o procedură PSUL să fie desființată conform prevederilor art. 364 din Codul de Procedură Civilă este una tentantă. Pe de altă parte, nu se poate formula o cerere în temeiul art. 364 din Codul Român de Procedură Civilă decât pentru un număr limitat de motive, aplicabilitatea acestui articol fiind limitată la hotărârile arbitrale. În plus, unele dintre motivele pentru care se poate solicita anularea hotărârii arbitrale sunt evident incompatibile cu soluționarea alternativă a litigiilor cu privire la numele de domenii bazată pe Politica de Soluționare Uniformă a Litigiilor adoptată de către CINNA în 1999.

Cuvinte cheie: nume de domenii, decizii, PSUL, instanță de jurisdicție comună, revizuire

Introducere

Studiul intenționează să acopere pe larg procedurile disponibile potrivit legislației române prin care decizia dată de Completul Administrativ într-o procedură alternativă de soluționare a litigiilor bazată pe PSUL poate fi contestată într-o instanță din România și dacă desființarea unei asemenea decizii este prevăzută de către legea română conform articolului 364 din Codul de procedură civilă.

Studiul abordează mecanismul de soluționare a litigiilor în lumina PSUL cu privire la numele de domenii și clarifică ce oportunități procedurale are o parte dintr-o procedură alternativă de soluționare a litigiilor să conteste o decizie pronunțată de Completul Administrativ în situația în

* Lector universitar doctor, Facultatea de Drept, Universitatea "Nicolae Titulescu" University, București (e-mail: beatrice.onicajarka@cunescu.ro).

care nu este mulțumită de aceasta. Importanța studiului rezidă în stabilirea unor linii directoare pentru punerea în executare a drepturilor cu privire la numele de domenii sub jurisdicția română în care există un vacuum doctrinal și legislativ cu privire la aceste aspecte. Pentru această finalitate, prevederile PSUL vor fi examinate împreună cu principiile Convenției de la New York din 1958 cu privire la recunoașterea și punerea în aplicare a sentințelor arbitrale străine și prevederile art. 364 din Codul Român de Procedură Civilă. Studiul intenționează să se pronunțe asupra posibilității de a ataca o decizie a Completului Administrativ PSUL în temeiul articolului menționat, și implicit asupra competenței instanțelor romane de a revizui o decizie dată de un Complet Administrativ în baza PSUL, conform art. 364 din Codul de procedură civilă.

Literatura de Specialitate

Konstantinos Komaitis, Doctorand, Universitatea Strathclyde, Glasgow, Marea Britanie, Cutia Pandorei a fost în sfârșit deschisă: Procedura Politicii de soluționare Uniforme a Litigiilor în și Arbitrajul, A.Michael Froomkin, Comentarii cu privire la Politica CINNA de rezolvare Uniformă a litigiilor, Gary Soo B.Sc, Numele de domeniu pentru piețele asiatice, Colm Brannigan, PSUL: Cum se scrie succesul?

Prezentarea procedurii PSUL

PSUL¹ a fost adoptată de către CINNA în 1999, în scopul de a servi ca mecanism pentru soluționarea diverselor tipuri de litigii dintre cei care își înregistrează un nume de domeniu și terțe părți cu privire la înregistrarea și folosirea numelor de domeniu.

PSUL² este un set de reguli de drept material și procedural încorporate prin trimitere la ele în Contractul de Înregistrare pentru numele de domeniu dintre Registrator și titularii înregistrării numelor de domeniu.

PSUL prevede termenii și condițiile de desfășurare a procedurilor administrative obligatorii în legătură cu diferitele tipuri de litigii când o terță parte pretinde unui Furnizor de PSUL că:

1. Un anume nume de domeniu înregistrat este identic sau similar putând duce la confuzie cu o marcă de comerț sau cu o marcă pentru servicii în care reclamantul are drepturi
2. Titularul respectivului de domeniu nu are drepturi sau interese legitime cu privire la respectivul nume de domeniu, și
3. Respectivul nume de domeniu a fost înregistrat și folosit cu rea credință.

În consecință PSUL este limitat la acele cazuri de „piratare pe internet ” și „ utilizare abuzivă³”

Procedurile PSUL se desfășoară în fața unuia dintre furnizorii de servicii de soluționare administrativă a litigiilor listat pe pagina de internet a CINNA. În 2008, furnizorii afișați pe pagina de internet⁴ a CINNA erau Centrul Asiatic de Soluționare a Litigiilor cu privire la Numele de Domenii (CASLND)(aprobat efectiv la 28 Februarie 2002), Forumul Național de Arbitraj (FNA) (aprobat efectiv la 23 Decembrie 1999), Organizația Mondială a Proprietății Intelectuale (OMPI)

¹ Politica pentru Soluționarea Uniformă a Litigiilor, paragraful 1 disponibilă la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008).

² Politica pentru Soluționarea Uniformă a Litigiilor, paragraful 1 disponibilă la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008).

³ Kelley, Patrick, D., Proprietate Intelectuală: Tipologii în dezvoltare sub politica pentru soluționarea Uniformă a Litigiilor 17 Berkley Tech. L.J. 181 (2002).

⁴ Lista furnizorilor aprobați pentru soluționarea uniformă a litigiilor ICANN, disponibilă la adresa de internet <http://www.icann.org/dndr/udrp/approved-providers.htm> (accesată la 20 mai 2008)

(aprobată efectiv la 1 Decembrie 1999) și Curtea de Arbitraj Cehă (CAC) care a fost aprobată în ianuarie 2008 și ca furnizor PSUL și acceptă plângerile întemeiate pe PSUL.

Reclamantul poate să opteze între un complet administrativ constituit dintr-un membru sau din trei membrii⁵. Fiecare complet administrativ decide în mod definitiv în fiecare caz. Dacă reclamantul optează pentru un complet alcătuit dintr-un singur membru, titularul numelui de domeniu (pârâtul) poate să ignore alegerea reclamantului și să aleagă ca plângerea acestuia să fie discutată în fața unui Complet Administrativ compus din trei membrii⁶.

Pârâtul are la dispoziție în termen de 20 de zile în care trebuie să răspundă plângerii depuse de către titularul mărcii și să depună în acest sens un răspuns scris Furnizorului⁷ de servicii de soluționare a litigiilor privind numele de domeniu, ales de către reclamant. În cazul în care pârâtul nu depune în termen răspunsul la plângere, completul va soluționa dosarul exclusiv în baza apărărilor⁸ reclamantului.

Singurele soluții disponibile sub PSUL sunt anularea numelui de domeniu respectiv sau transferul înregistrării sale pe numele titularului de marcă⁹. Nu există nicio posibilitate ca în conformitate cu PSUL să se solicite și să se obțină acoperirea prejudiciului cauzat prin înregistrarea și utilizarea abuzivă a numelui de domeniu în litigiu.. Acesta înseamnă că în cazul în care Completul Administrativ respinge plângerea, situația numelui de domeniu în litigiu rămâne neschimbată.

Procedura în fața instanței

Depunerea unei plângeri în baza PSUL nu împiedică niciuna dintre părți să urmeze căile tradiționale de rezolvare a litigiilor prin intermediul instanțelor de judecată sau al arbitrajului.¹⁰

Caracterul obligatoriu al procedurii administrative nu va împiedica reclamantul sau pârâtul să aducă litigiul în fața unei instanțe într-o jurisdicție competentă pentru soluționare independentă înainte ca o asemenea procedură administrativă obligatorie în fața unui Complet Administrativ în baza PSUL să fie începută, sau după ce acesta este încheiată.¹¹

Atât PSUL cât și Regulile pentru PSUL¹² acoperă situația în care una dintre părți inițiază orice procedură legală cu privire la un nume de domeniu în timp ce o procedură administrativă este pe rol.¹³

⁵ Regulile ICANN, paragraful 3 (b) (iv) disponibile la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

⁶ Regulile ICANN paragraful 3 (b) (iv) disponibile la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

⁷ Ibid

⁸ Konstantinos Komaitis, Doctorand, Universitatea Strathclyde, Glasgow, Marea Britanie, Cutia Pandorei a fost în sfârșit deschisă: Procedura Politicii de Soluționare Uniforme a Litigiilor și Arbitrajul disponibil la adresa de internet <http://www.bileta.ac.uk/Document%20Library/1/Pandora%E2%80%99s%20Box%20is%20Finally%20Opened%20The%20Uniform%20Domain%20Name%20Dispute%20Resolution%20Process%20and%20Arbitration.doc> (accesat pe 20 Mai 2008).

⁹ Politică pentru Soluționarea Uniformă a Litigiilor, paragraful 4 (i) disponibilă la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

¹⁰ A. Michael Froomekin, Comentarii asupra Politice pentru soluționarea uniform a litigiilor ICANN, disponibil la adresa de internet <http://personal.law.miami.edu/%7Eamf/icann-udp.htm> (accesată la 20 mai 2008)

¹¹ Politică pentru Soluționarea Uniformă a Litigiilor, paragraful 4 k, disponibilă la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

¹² Regulile ICANN, disponibile la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> accesată la 20 mai 2008)

¹³ Regulile ICANN, paragraful 18 disponibile la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

Procedura în fața unei instanțe de judecată poate fi inițiată în fața unei instanțe competente sau în fața unei instanțe cu jurisdicție comună după cum este prevăzut atât de PSUL cât și de Regulile PSUL. În timp ce instanța competentă nu este definită expres în niciunul dintre seturile de reguli menționate, jurisdicția comună este definită, în conformitate cu Regulile PSUL¹⁴, ca fiind jurisdicția unei instanțe de la sediul fie al Registratorului la care a fost înregistrat numele de domeniu, cu condiția ca titularul numelui de domeniu să fi menționat în contractul de înregistrare al acestuia acea jurisdicție ca fiind cea în care se vor soluționa litigiile referitoare la utilizarea numelui de domeniu, sau de la sediul sau domiciliul titularul numelui de domeniu după cum este indicat în data de baze WHOIS.

Prin urmare PSUL nu este exclusivă, și litigiul poate fi înaintat unei instanțe înaintea emiterii unei decizii pronunțată în temeiul PSUL, în timp ce o asemenea procedură administrativă PSUL este în progres sau după ce procedura a fost încheiată.

Contestarea în instanță unei decizii pronunțate în temeiul PSUL

Pentru scopul acestui studiu facem mențiunea că situația în care se recurge la o procedura în fața instanței este expres prevăzută atât potrivit PSUL cât și potrivit Regulilor PSUL.

Cu toate acestea, ce apare în discuție este natura unei proceduri într-o jurisdicție comună după cum este ea definită de PSUL și de Regulile PSUL, după ce o decizie a fost dată în cauză.

Sunt două posibile tipuri de proceduri în funcție de obiectul lor.

Primul se referă la procedura separată în fața instanței ce depinde de mijloacele procedurale disponibile potrivit dreptului local în care părțile încearcă să stabilească și să pună în aplicare drepturile la marcă pe care le dețin în legătură cu un nume de domeniu în litigiu. În acest caz procedura în fața instanței nu va face referire la procedura sau decizia fundamentată pe aceeași PSUL, fiind limitată la punerea în aplicare a drepturilor conferite de dreptul local în legătură cu numele de domeniu în litigiu. Asemenea proceduri nu vor avea ca obiect revizuirea de către instanța locală a deciziei pronunțate în baza PSUL și nici a procedurii PSUL în sine. Cu toate acestea, rezultatul unei asemenea proceduri nu va bloca punerea în aplicare a unei decizii PSUL prin care se transferă sau se anulează înregistrarea unui nume de domeniu de către Registrator, dacă soluția dată de instanța din jurisdicția comună este aceeași cu cea pronunțată de Completul Administrativ care soluționează litigiul în temeiul PSUL. În același timp, o decizie pronunțată în temeiul PSUL prin care se respinge cererea reclamantului ca nefondată poate fi în contradicție cu o decizie a instanței care consideră că numele de domeniu trebuie să fie transferat sau anulat. Explicația pentru soluțiile contradictorii date de instanță de judecată și de Completul Administrativ, rezidă în faptul că instanța nu este obligată să aplice prevederile de drept material ale PSUL și nu există efect obligatoriu al deciziei pronunțate în baza PSUL în fața instanțelor locale.

Cel de-a doua tip de procedură posibilă desfășurată în fața instanțelor locale, ca jurisdicție competentă comună, are în vedere situația în care procedura în fața instanței are ca obiect contestarea directă a deciziei PSUL.

Atât PSUL cât și Regulile PSUL susțin ambele tipuri de proceduri în fața instanțelor locale ce sunt disponibile după cum le-am prezentat și noi (jurisdicție comună după cum este definită de Regulile PSUL), după ce procedura în temeiul PSUL a fost finalizată. La prima vedere și din cauza lipsei de claritate a textului PSUL și a Regulilor PSUL, s-ar putea spune că ambele tipuri de proceduri sunt disponibile pentru părțile din procedura PSUL care obțin o soluție nesatisfăcătoare.

¹⁴ Regulile ICANN, paragraful 1 disponibile la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

Dacă posibilitatea de a opta pentru o procedură distinctă în conformitate cu dreptul local pentru punerea în aplicare a drepturilor asupra unui nume de domeniu sau a drepturilor de marcă în legătură cu un nume de domeniu în litigiu, având în vedere dreptul procedural și material local cel mai ușor se poate susține cu argumente din textul PSUL și din Regulile PSUL, atacarea directă într-o instanță locală a unei decizii pronunțate în temeiul PSUL. Totuși această contestare care să conducă practica la revizuirea deciziei fundamentată pe PSUL este o adevărată provocare mai ales în cadrul anumitor jurisdicții¹⁵ care nu prevăd în mod direct o asemenea revizuire și în care lipsesc dispozițiile de drept material sau procedural în ceea ce privește procedurile PSUL sau numele de domeniu în general. România este una dintre aceste jurisdicții.

Regulile CINNA pentru PSUL¹⁶ fac referire la posibilitatea de contestare a unei decizii prin inserarea între elementele ce vor fi conținute într-o plângere a faptului că în ceea ce privește orice acțiune împotriva unei decizii date în cadrul procedurii administrative prin care se anulează sau se transferă numele de domeniu, acesta va fi adresată jurisdicției unei instanțe în cel puțin una dintre jurisdicțiile comune.

În același timp, PSUL¹⁷ prevede posibilitatea suspendării executării unei decizii a Completului Administrativ. Înainte de implementarea deciziei, Registratorul numelui de domeniu în litigiu va aștepta 10 zile lucrătoare pentru a da posibilitatea părții care este afectată de decizia fundamentată pe PSUL, de a depune o acțiune într-una dintre jurisdicțiile comune. Dacă o asemenea acțiune este depusă de către titularul numelui de domeniu, Registratorul nu poate să transfere sau să anuleze numele până la soluționarea acțiunii respective. Pentru a bloca transferul sau anularea înregistrării numelui de domeniu în timp ce acțiunea judiciară este pe rol, titularul înregistrării numelui de domeniu trebuie să furnizeze Registratorului documentele doveditoare (o copie de pe plângere purtând viza registraturii instanței) în termen de 10 zile lucrătoare de la data comunicării către el a deciziei Completului Administrativ..

În doctrină, termenul de 10 zile lucrătoare a fost criticat și au fost ridicate întrebări cu privire la „egalitatea apelului”¹⁸. Chiar dacă durata acestui termen nu face obiectul acestui studiu, menționăm că un asemenea element ar trebui să fie luat în considerare când se va pune în discuție contestarea unei decizii date în baza PSUL potrivit legislației române.

Aplicabilitatea art. 364 din Codul de Procedură Civilă Român în cazul unei decizii date de către Completul Administrativ în temeiul PSUL

a. Scopul art. 364 din Codul de procedură civilă

Art. 364 din Codul de procedură civilă român prevede posibilitatea adresării instanței de judecată cu o cerere de anulare a unei sentințe arbitrale. Solicitarea anulării unei sentințe arbitrale este prevăzută de Cartea IV din Codul de procedură civilă român - Despre Arbitraj, și care prevede

¹⁵ În Statele Unite ale Americii a fost adoptat în 1999 Actul de protecție a consumatorilor împotriva ocupării abuzive (cunoscut și sub denumirea de Adevărul în Actul cu privire la numele de domeniu), o Lege federală a Statelor Unite ca parte dintr-un proiect de lege care să modifice dispozițiile titlului 17, Codul statelor Unite, și Actul cu privire la comunicații din 1934, cu privire la licența pentru drepturi de autor și transmiterea de semnale prin satelit (S) 1948 ,http://en.wikipedia.org/wiki/Anticybersquatting_Consumer_Protection_Act (accesată la 20 mai 2008)

¹⁶ Regulile ICANN, paragraful 3 (b) (xiii) disponibile la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

¹⁷ Politica pentru soluționarea Uniformă a Litigiilor, paragraful 4 (k) disponibilă la adresa de internet <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (accesată la 20 mai 2008)

¹⁸ A. Michael Froomkin, Comentarii asupra Politice pentru Soluționarea Uniformă a Litigiilor ICANN, disponibil la adresa de internet <http://personal.law.miami.edu/%7Eamf/icann-udp.htm> (accesată la 20 mai 2008)

această posibilitate pentru un număr limitat de motive. În plus, art. 365 alin. (2) din Codul de procedură civilă român impune ca această acțiune în anulare să fie înaintată instanței în termen de o lună de la data la care sentința arbitrală este comunicată părților. În acest sens, o cerere bazată pe art. 364 din Codul de procedură civilă român a fost calificată¹⁹ ca o acțiune în anulare împotriva unei sentințe arbitrale.

Prin urmare condițiile esențiale pentru aplicarea art. 364 din Codul de procedură civilă român în cazul unei decizii pronunțate în temeiul PSUL sunt:

1. Decizia să fie o sentință arbitrală
2. Temeiurile legale pentru care partea solicită desființarea unei asemenea sentințe să fie compatibile cu cele prevăzute de art. 364 Codul de procedură civilă român.
3. Să existe compatibilitate între termenul PSUL în care se poate ataca decizia pronunțată de Completul Administrativ prevăzut de paragraful 4(k) din PSUL și termenul prevăzut de articolul 365 alin. (2) din Codul de procedură civilă român.

b. Natura PSUL

Prima condiție impusă de art. 364 din Codul de procedură civilă român este ca decizia Completului Administrativ pronunțată în temeiul PSUL să fie o sentință arbitrală.

Pentru a califica decizia Completului Administrativ ca fiind o sentință arbitrală, trebuie pus în discuție în ce măsură PSUL constituie reguli de arbitraj. În ceea ce privește natura PSUL, aceasta a făcut de multe ori subiectul dezbaterilor²⁰ în doctrină. Concluzia unor asemenea dezbateri este adesea aceea că PSUL nu reglementează o procedură arbitrală în înțelesul ei comun. Chiar și abordarea CINNA este că PSUL nu reglementează arbitrajul. PSUL este considerată a fi o formă de cvasi arbitraj, o procedură administrativă. Nu există nicio interpretare a ceea ce este procedura administrativă potrivit PSUL.

Diferența între procedura prevăzută de PSUL și procedura arbitrală în înțelesul ei comun rezultă dintr-o simplă comparație a acesteia cu principiile Convenției de la New York din 1958 cu privire la recunoașterea și punerea în aplicare a sentințelor arbitrale.

Convenția de la New York nu conține o definiție a arbitrajului. Cu toate acestea, dispozițiile Convenției de la New York susțin ideea că fundamentul arbitrajului este constituit de contractul prin care părțile au consimțit să defere un litigiu dintre ele soluționării de către o terță persoană. De esență arbitrajului este contractul în care părțile consimt asupra unui potențial arbitraj viitor.

Pe de cealaltă parte, în cazul procedurii prevăzute de PSUL, între părțile ce participă la procedura PSUL nu există un asemenea contract. Conform cu PSUL o „Parte înseamnă Reclamant și Pârât”²¹, în timp ce contractul de înregistrare, după cum este prevăzut de PSUL „este contractul dintre Registrator și titularul numelui de domeniu”²². Prin urmare în înțelegerea contractuală după cum este ea definită în PSUL, părțile sunt pârâtul și Registratorul numelui de domeniu în litigiu. Trebuie subliniat faptul că Registratorul nu participă în procedurile PSUL.

Absența unui contract între părțile care participă la procedura prevăzută de PSUL este în contradicție directă cu principiul menționat din Convenția de la New York. Se poate argumenta ca

¹⁹ Viorel Mihai Ciobanu, Din nou despre natura juridică a acțiunii în anulare a hotărârii arbitrale - disponibil pe programul de internet LEX EXPERT- (accesat 20 mai 2008)

²⁰ Vezi Garz Soo B. Sc, Numele de domeniu pentru Piața Asiatică, Revistă de drept online cu problem de actualitate disponibilă la <http://webjcli.ncl.ac.uk/2005/issue5/soo5.html>, Colm Brannigan, PSUL: Cum se scrie succesul? În revista de tehnologie digitală (2004) disponibil la adresa de internet <http://www.austlii.edu.au/au/journals/DTLJ/2004/2.html> (accesată la 20 mai 2008)

²¹ Vezi, Regulile ICANN, definiții ce pot fi găsite la adresa de internet <http://www.icann.org/dndr/udrp/uniform-rules.htm> (accesate la 1 mai 2008)

²² Ibid

acesta contradicție este aparentă și că depunerea unei cereri de către reclamant într-o procedură PSUL ar putea fi considerată ca o acceptare directă de către Reclamant a acestui contract dintre Registrator și titularul numelui de domeniu.

Pe de cealaltă parte, există diferențe între procedura PSUL și arbitraj după cum este el prevăzut în Convenția de la New York. Doctrina²³ a inventariat aceste diferențe după cum urmează:

a. Conform Convenției de la New York, dacă decizia arbitrală depășește sfera clauzei arbitrale, atunci oricare dintre părți poate să o declare nulă. Înainte ca cel de al doilea Raport OMPI să fie publicat²⁴ se decisese că litigiile care vizau indicațiile geografice și nume personale să nu intre în aria de acoperire a PSUL, deoarece legile privind naționale care reglementau aceste probleme variau. Cu toate acestea, cei care au fost numiți în completele administrative au acceptat asemenea cazuri ori de câte ori le-au fost deferite.²⁵

b. Cazurile în care nu au fost îndeplinite obligațiile procedurale potrivit PSUL au fost considerate de către membrii completelor administrative ca fiind semne de rea credință și prin urmare numele de domeniu în aceste cazuri de cele mai multe ori au fost transferate titularului dreptului de marcă, reclamantul în procedura PSUL. Cazurile în care nu sunt îndeplinite obligațiile procedurale sunt de regulă acelea în care pârâtul nu respectă termenul de 20 de zile și nu răspunde pretențiilor procedurale ale reclamantului. Aceste cazuri implică neglijența pârâtului deoarece reclamantul este cel care inițiază procedura și prin urmare este imposibil ca acesta să fie considerat în culpă²⁶. Convenția de la New York nu recunoaște și nici nu menționează statutul cazurilor în care nu au fost îndeplinite obligațiile procedurale

c. Arbitrajul lasă la discreția părților posibilitatea de a introduce în contractul dintre ele clauze care să le asigure sau să le permită să execute deciziile arbitrale ceea ce nu este posibil potrivit PSUL. Executarea deciziilor PSUL există doar în legătură cu Registratorul și poate fi suspendată prin simpla introducere a unei acțiuni procedurale în acest sens de către pârât în un termen de 10 zile

d. Conform PSUL, numai reclamantul, partea terță față de contractul inițial care conduce la această procedură, are opțiunea de a decide, la discreția sa, care este centrul de arbitraj care va soluționa litigiul, ceea ce e în contradicție cu principiul de alegere de către ambele părți prin clauza arbitrală a regulamentului arbitral aplicabil și a membrilor Completului Administrativ.²⁷

e. PSUL nu permite alegerea dreptului aplicabil, acesta fiind determinat de către membrii Completului Administrativ

f. În procedura PSUL este utilizat și chiar încurajat precedentul judiciar²⁸

²³ Konstantinos Komaitis, Doctorand, Universitatea Strathclyde, Glaskow, Marea Britanie. Cutia pandorei a fost în final deschisă: Procedura Politicii de Soluționare Uniformă a Disputelor și Arbitrajul disponibil la adresa de internet <http://www.bileta.ac.uk/Document%20Library/1/Pandora%E2%80%99s%20Box%20is%20Finally%20Opened%20The%20Uniform%20Domain%20Name%20Dispute%20Resolution%20Process%20and%20Arbitration.doc> (accesat pe 20 Mai 2008)

²⁴ Pentru mai multe informații puteți consulta cel de al doilea raport al OMPI, disponibil la adresa de internet <http://wipo2.wipo.int/process2/report/html/report.html>, accesat la 1 Mai 2008

²⁵ Dintre cele mai ilustrative cazuri menționăm Barcelona.com

²⁶ Konstantinos Komaitis, Doctorand, Universitatea Strathclyde, Glaskow, Marea Britanie. Cutia pandorei a fost în final deschisă: Procedura Politicii de Soluționare Uniformă a Disputelor și Arbitrajul Unhttp://www.bileta.ac.uk/Document%20Library/1/Pandora%E2%80%99s%20Box%20is%20Finally%20Opened%20The%20Uniform%20Domain%20Name%20Dispute%20Resolution%20Process%20and%20Arbitration.doc (accesat pe 20 Mai 2008)

²⁷ Ibid.

²⁸ David Wotherspoon și Alex Cameron, Reducerea lipsei de uniformitate în cazurile PSUL, Revista canadiană de drept și tehnologie Volumul 2 Numărul 1, Martie 2003 disponibil la adresa de internet http://ejlt.dal.ca/vol2_no1 (accesată la 20 Mai 2008)

În baza acestor diferențe concluzia evidentă este ca procedura prevăzută de PSUL nu poate fi catalogată ca o procedură de arbitraj în sensul clasic al cuvântului.

Totuși, acesta concluzie poate fi combătută cu simplul argument că, noțiunea clasică de arbitraj a evoluat la diferite nivele și încă este supusă diferitelor transformări în conformitate cu nevoile utilizatorilor unei asemenea proceduri. Prin urmare, orice procedura care împărtășește fundamentul conceptual al arbitrajului și este soluționată de către o parte ce este terță de litigiu este o forma de arbitraj, bazată pe relația contractuală într-un proces privat de soluționare a unui litigiu.

Pe de altă parte folosirea unui astfel de raționament trebuie făcută în concordanță cu legislația națională existentă cu privire la arbitraj în diferite jurisdicții. Este mai mult decât evident că potrivit Cărții a IV-a CRPC conceptul clasic de arbitraj prevăzut de Convenția de la New York este cel avut în vedere la acest moment și că PSUL este mult prea departe de acest concept clasic pentru a face obiectul acestei reglementări naționale.

c. Incompatibilitatea procedurii PSUL cu temeiurile prevăzute de articolul 364 pentru desființarea unei sentințe arbitrale.

Chiar dacă nu considerăm decizia Completului Administrativ ca fiind o decizie arbitrală, art. 364 din Codul de procedură civilă român nu poate fi în continuare aplicabil unei asemenea decizii. Mai multe dintre temeiurile prevăzute în art. 364 din Codul de procedură civilă român sunt în contradicție chiar cu esența PSUL care prevede că procedura se desfășoară prin intermediul canalelor de internet online, iar părțile nu sunt citate pentru audieri și nici nu pot fi prezente fizic la audierile acestei cauze. Dacă aplicabilitatea art. 364 din Codul de procedură civilă român ar fi acceptată, atunci fiecare decizie dată de către Completul Administrativ ar fi întotdeauna anulată pe motivul prevăzut de articolul 364 alin. (4) din Codul de procedură civilă român, și anume că partea a fost absentă la dezbaterile pe fond și nu a fost citată pentru asemenea dezbateri.

O interpretare strictă a art. 343 din Codul de procedură civilă român în ceea ce privește definiția clauzei arbitrale va conduce de asemenea la anularea deciziei date de Completul administrativ în baza PSUL pentru motivul prevăzut la art. 364 lit. b) din Codul de procedură civilă român, potrivit căruia convenția arbitrală nu există.

Lista cu motivele pentru care poate fi anulată o decizie arbitrală prevăzute de art. 364 din Codul de procedură civilă român sunt specifice conceptului clasic de arbitraj care este aplicabil doar la nivel conceptual procedurii prevăzute de PSUL.

d. Evidenta incompatibilitate dintre termenul de 10 zile prevăzut de PSUL paragraful 4 litera (k) și termenul de o lună prevăzut de art. 365 alin. (2) din Codul de procedură civilă român

Termenul în care executarea deciziei PSUL poate fi suspendată printr-o cerere introdusă la instanță este de 10 zile lucrătoare de la momentul la care Registrarul a primit comunicarea de la Completul administrativ.

Termenul în care se poate solicita instanței de judecată desființarea unei sentințe arbitrale este de o lună de la momentul la care acesta a fost comunicată părților.

Dacă la o primă vedere, nu numai lungimea celor două termene diferă, dar și momentul de la care acestea curg este diferit, trebuie să precizăm că de asemenea și scopul procedurilor în fața instanței diferă.

În cazul PSUL, procedurile în fața instanței au ca scop să oprească punerea în executare a deciziei PSUL în singura modalitate posibilă, prin comunicarea către Registrator că o cerere a fost depusă la instanță în acest sens. Registratorul, prin urmare nu va mai întreprinde nicio acțiune în conformitate cu paragraful 4 (k) PSUL, decât dacă va primi (i), dovadă suficientă că există o

tranzacție între părți (ii) o dovadă suficientă că cererea a fost retrasă sau respinsă, sau (iii) o copie de pe decizia unei asemenea instanțe prin care este respinsă cererea sau prin care se dispune că pârâțul nu are dreptul de a continua utilizarea numelui de domeniu.

Niciunul dintre motivele menționate în mod expres în PSUL nu coincide cu motivele în baza cărora poate fi formulată o cerere de anulare a unei decizii arbitrale în temeiul art. 364 din Codul de procedură civilă român. Sentința arbitrală poate fi pusă în aplicare sub legislației române²⁹ și o suspendare a efectelor sale poate fi luată în considerare de către instanță doar în cazurile specifice reglementate pentru care se poate solicita suspendarea.

Concluzii

Concluziile acestui studiu se impun singure.

PSUL are foarte puține puncte în comun cu conceptul clasic de arbitraj care este reglementat de Cartea IV din Codul de procedură civilă român și orice încercare de a aplica art. 364 ca mijloc procedural pentru a anula o decizie a unui Complet Administrativ va fi respinsă de către instanțele române. Sunt prea multe diferențe esențiale și determinante și prea multe incompatibilități între arbitraj așa cum este reglementat prin Cartea IV și PSUL, pentru a lua în considerare anularea deciziei Completului Administrativ în temeiul art. 364 din Codul de procedură civilă român.

Refuzul aplicării art. 364 din Codul de procedură civilă român unei decizii a Completului Administrativ, nu lasă partea din jurisdicția comună a României care este nemulțumită de decizia pronunțată de Completul Administrativ în temeiul PSUL, fără nicio posibilitate de a o contesta. Registratorul este sub obligația contractuală de a suspenda executarea deciziei dacă o parte potrivit procedurii prevăzute de PSUL decide să pornească un litigiu în jurisdicția comună a României în conformitate cu paragraful 4(k) din PSUL. Care sunt modalitățile de a exercita un asemenea drept de a începe un litigiu în jurisdicția și potrivit legislației române rămâne la latitudinea părților să decidă. Stadiul actual al legislației române nu oferă multe posibilități contestării deciziei PSUL iar solicitarea desființării acesteia conform art. 364 din Codul de procedură civilă român nu este una dintre ele.

Cu toate acestea suntem încrezători ca instanțele române vor găsi cea mai bună modalitate prin care partea care nu este mulțumită de decizia pronunțată în temeiul psul să își apere dreptul, împreună cu contestarea acesteia în fața instanțelor române³⁰ fie direct, fie indirect.

²⁹ Decizia arbitrală comunicată părților are efectele unei decizii definitive pronunțate de o instanță de judecată în conformitate cu articolul 363 (2) CRPC, în timp ce o decizie arbitrală străină poate fi pusă în aplicare prin procedura de exequatur în conformitate cu Legea 105/1992 cu privire la relațiile de drept internațional privat care a fost ulterior modificată prin OUG nr. 52/2008.

³⁰ La momentul ca care acest articol a fost scris 2008, Tribunalul București, Secția a-IV-a civilă fusese sesizat cu o cerere de anulare a unei decizii pronunțate de Centru de Arbitraj și Mediere al OMPI în cazul nr. DRO2007-0008, și după ce părțile au pus concluzii pe fond, instanța a rămas în pronunțare cu privire la excepțiile ridicate și pe fondul cauzei, Dosar nr. 1969/32008, pronunțându-se în sensul respingerii cererii de anulare ca nefiind de competența instanțelor de judecată naționale.

THE PRINCIPLE *PACTA SUNT SERVANDA*: DOCTRINE AND PRACTICE

Daniela Nicoleta POPESCU*

Abstract

The treaty concluded in conformity with the international law becomes after its entering into force, an international juridical instrument with compulsory value for the contracting parties. But in the doctrine there is discussed the ground of this obligation, the foundation of obligations that devolve from a treaty, of the juridical norms comprised by this in order to be put into application by the contracting parties. The answer to this problem however has been different in the doctrine of international law.

Keywords: *pacta sunt servanda, treaty, doctrine, good-faith*

Introduction

Treaties have constituted since the most ancient times, the object of a preoccupation sustained within the action of codifying of the international law. As the norms and rules of international law constitute the basis on which is built the entire system of relations within the international community, being the foundation itself of the international law. A feature of the principal international treaties is equivalent with an evoking of the cardinal points of the history traveled by mankind, or with a synthetic expression of the problems of contemporaneous world, the destiny of mankind being emphasized, in good or in evil by the texts of treaties that were concluded during time, or that are also concluded at present.

The treaty is the privileged instrument of international relations, to which states resort in all domains and the major means by which states manifest the will to create juridical relations. Instrument of relations between states, the treaty records the understandings agreed upon through a freely expressed agreement of will, thus sanctioning the guarantee of its applicability by the signing states in good faith.

According to the opinion of professor I.M.Anghel, the treaty conclusion represents the ensemble of activities that should be developed, procedures that must be fulfilled and rules that must be observed in order that the treaty to form, to become obligatory for parties, to enter into force, otherwise spoken to exist in conformity with the international law.

The principle *pacta sunt servanda*: doctrine and practice

Treaties are documents designated to produce determined juridical effects that consist in creation of rights and obligations for the subjects of international law it concluded, for the confirmation or consolidation of a juridical situation or attribution of a juridical statute. Thus, the treaty sanctions through the parties' agreement of will norms of international law meant to be applied in the relevant domain of juridical regulation formulating rights which the parties convene to exercise in the juridical relations between them and international obligations which they assume in order to be fulfilled in good faith. These norms regarding to the conclusion and fulfilling of treaties have appeared since the most ancient times and have evolved within the common

* Lecturer, Ph.D., Law Faculty, "Gheorghe Cristea" Romanian University of Science and Arts, Bucharest.

international law generating the necessity of a process of codification designated to systematize, to emphasize and develop the juridical principles and norms applicable in this domain.

The Commission of International Right of 1961, has finalized its works through a project of convention that has been submitted to negotiations of states and has been adopted on 23 May 1969 with the denomination of the Vienna Convention on treaties.[1]. According to this convention, the states that became parties to a treaty are obliged to put into application and to fulfil in good faith the obligations assumed and juridical norms endorsed, thus constituting the most important principle of international law, yet formulated since antiquity through the expression “*pacta sunt servanda*” (treaties should be respected).

The Convention of 1969 provides for in the III-rd part, denominated “the Respect, application and interpretation of treaties”, at art. 26 entitled “*pacta sunt servanda*” that any treaty being into force binds the parties and should be executed by these in good faith.

According to this principle, the concept of good faith has represented an essential element of this that has been widely debated in the doctrine [2].

The treaty concluded in conformity with the international law becomes after its entering into force, an international juridical instrument with obligatory value for the contracting parties. But in the doctrine there is discussed the ground of this obligation, the foundation of obligations that devolve from a treaty, of juridical norms included by this in order to be put into application by the contracting parties. But the answer to this problem has been different in the doctrine of international law.

The adepts of natural law recognize the existence of an international positive right, with voluntary character, being created through treaties and common laws on basis of states’ will, but this is subordinated to the natural law in the sense that the obligation of these norms, of treaties concluded is founded on respecting of the word given as principle of natural right [3]. According to H. Grotius, that has largely founded this theory, other authors, for example, S. Pufendorf, consider that the voluntary and positive law is entirely subordinated to the natural one [4]. With a diminished influence in the XIX and XX centuries, when dominant has become the positivist doctrine, the theory of natural right is re-actualized in the postwar period, becoming influent in the present juridical thinking, with respect, mostly, to the obligatory nature of international treaties and juridical norms devoted by these. The French L. de Fur, L. Delbez, P.Reuter, the English J.L. Brierly, the Austrian Al. Verdross, the Swiss P. Guggenheim, the Italians G. Savioli, R. Monaco or R. Ago and still others have formed a new school of the natural law.

These have resumed the classical distinction of Grotius between the natural law and positive international law, devoted in treaties and commons, sustaining that the former constitutes the foundation of the latter. The international law is formed from the states’ agreement, but its validity, the obligatory force of its norms devolves from factors exterior to the states’ will: the basic, hypothetical norm, the moral or juridical conscience of peoples etc.

For P. Reuter, for example, “*the moral foundation of law confers to this value, life and obligatory force*” [5]. J.L. Breirly criticizes the voluntarist positivism (expression of the anarchy generated by the state sovereignty) and underlines: “... *the obligatory force of any law consist in that that the human being, taken individually or associated within the state, is constrained as reasonable being to believe that the order and not the chaos constitutes the principle of governing the world in which should live*” [6]. In order to remove the critics made to jus-naturalism that introduces the subjectivism (“*human reason*”) and the confusion between morale and law, the new adepts define the natural law as an application of justice in international relations and a manifestation of some essential principles as would be: respecting of obligations assumed (*pacta sunt servanda*) and repair of prejudices caused unjustly.

As against the reality of the existence of a positive international law, whose norms are created and respected by states only on basis of consent and free agreement of will, some authors consider that the moral values and principles become relevant only through their incorporation into the positive law, for example: principles of good-faith, of humanitarian right, the natural right to legitimate defense and other. Among these, P. Guggenheim considers that the obligation of positive right norms devolves from an fundamental, hypothetical norm, corresponding to the “*moral conscience of peoples*” [7].

But since the XVII-th century begins also to be elaborated the positivist doctrine according to which the positive international law is formed through treaties and common laws as a positive international system of juridical norms, whose obligation character devolves from just the sovereign will of states and not from criteria or extra-state factors. It is about the taking over of a part of the doctrine of H.Grotius and its transforming into a self standing, developed and widely argued theory until nowadays. The idea of will agreement between states as foundation of treaties’ (and commons) obligation character and of norms devoted by these as a positive international law becomes an essential element of the positivist juridical thinking, in the XVII and XVIII centuries.

The Swiss jurist Em. De Vattel (1714-1768) is that who, by his work “on the peoples’ right” (*le droit des gens*) from 1758 has put the bases of the positivist doctrine in the modern science of international law [8].

Vattel acknowledges the existence of a natural and necessary right of peoples, from which devolve the inherent rights and obligations of these in relations among them. But, unlike Grotius he affirms the state’s freedom to appreciate according to its interests the contents of this in every given situation. Entering into relations among them, states create by their will obligatory norms that confer to the principles of natural right a character acceptable for all.

The international law is distinguished from the natural right by that it is exclusively a positive and voluntary right, expressed in treaties and commons, being able to modify at need the natural right, in order to facilitate the understanding between states. Thus, according to Vattel, the law of nations as positive law is no longer bound to the natural law and is superior to the latter, that can be interpreted and even modified by the sovereign will of states. Its positive conception is illustrated by the contents itself of his work, in which is analyzed the international law in force in the XVIII century with respect to territory and treaties, to war and diplomatic representation.

The positivism found another representative in G.F. de Martens (1756 – 1821) who published in 1788, in French, the “Handbook of modern law of Europe peoples based on treaties and common laws” [9].

Thus crystallized in this period, the positivist doctrine does not break completely from the natural law which, otherwise, subordinates it and restrains its validity; becomes dominant in the XIX-XX centuries, when breaks any connection with the natural law, constituting the theoretical expression of affirmation of sovereign states of their will as exclusive basis of formation and obligation of treaties and common laws, of norms of international law devoted through these formal springs. Such basic ideas are affirmed, in a form or another, at the end of XIX century by authors as G. Jelinek or H.Tripel, significant components of the German juridical school, by D. Anzilotti, Italian representative specially influent in the XX century in the European positivist doctrine. He affirms that the theory of natural law has lost its influence by its aprioric character, too abstract in confrontation with the reality of formation of the international law through the agreement between states, by means of treaties and common laws [10].

But the classic positivism has been submitted to some serious critics mostly in the period after the first world war, when some authors have considered that the pre-war interstate system and the positive international law based on treaties created by the states will have failed in their finality, being not able to prevent the beginning of the war. From here also the search of some

criteria outside of states' will in order to explain the obligation character of treaties and of international law in force.

The *neo-positivist doctrine* has constituted an important critical reaction as against the traditional positivism. In the conception of H.Kelsen and of other participants to the "Vienna School", from between wars period (A. Feodross, J. Knuz), the law, in general, international law specially, forms a system of juridical norms whose validity is determined outside of states' will. The norm of international law is analyzed in itself, outside of any meta-judicial considerations (of political, social, moral order) and within a "*pure theory*" of law. Conceived in a hierarchical juridical system, the norms of international law ("international juridical order") devolve from a superior common principle – *pacta sunt servanda* for the conventional law and from a basic, hypothetical norm (*die Grundnorme*) for common law, being prioritary and superior as against the internal law ("state juridical order") whose validity it determines and delimitates. For Kelsen, the state does not exist as such, it is confounded with the system of law in force and becomes a "state of right"; nor the state sovereignty exists as objective reality, being replaced by a competence, an amount of attributions conferred and delimited by the international law. Sovereign can be considered only the international juridical order, whose obligation character can be achieved through a "world state". In this way is also founded the idea of the pre-eminence of international law on the internal one [11].

The normativism has also been called neo-positivism, for it takes over the idea of existence of juridical norms within the positive law, but removes the volitional, consensual ground of that.

The normativism, although has as rational premise the recognition of the norm of law and of the two juridical systems – "state order" and "international order" – it remains a doctrine that, based on aprioric concepts ("pure theory of law, basic norm, competence and others), is being in obvious contradiction with the existence of state in interstate relations and of a social context as actual phenomena and features that determine and explain the formation and development of the international law, its juridical nature and its finality.

With all these critics, the positivist doctrine, adapted to the present international normative realities, remains the only that can explain realistically and juridically argued the process of formation of international law through the agreement of the will of states and on this basis – the obligation of treaties concluded by states. The free consent of states in all phases of treaty conclusion and as regards the entering into force is and remains, according to the Vienna Convention of 1969, the decisive criterion of the validity and obligation character of treaties, of producing of juridical effects which the state parties have had in view. The ignoring of the free consent, the vitiation of it under various forms (error, dole, constraint, etc) confer to treaties illicit character, constitute causes of nullity provided for expressly by the convention at art. 46-51, to which is also added the situation of the conflict between a treaty and an imperative norm of international law (art. 53). And formation of such norm does not take place outside of the will agreement, but through the acceptance and acknowledgement by the "international community of states in its ensemble", as is provided for at the same article 53.

Under the aspect of the level of obligation character and its normative function in the doctrine has been sometimes made distinction between law-treaties and contract-treaties; considered equally obligatory for states; at the same time was established to law-treaties only a normative role, of juridical regulation and of law formation, while the latter would comprise only technical rules, of restrained applicability and without a normative character (for example, bilateral treaties) [12]. Although, the Vienna Convention of 1969 did not retain such a classification, considering that any bi- or multilateral treaty is similarly obligatory, having also without any distinction a normative function, creative of law for state parties. This also corresponds to the conventional practice of states, within which, the same treaty comprises also technical rules, without normative character and general or particular juridical norms, accepted by state parties

(new or preexisting norms). In the light of the 1969 Convention could be retained under the aspect of obligatory effects of the treaty the classification into valid licit treaties concluded in conformity with the international law and illicit treaties, of which has been made mention above.

In the doctrine is also made distinction between written treaties and not-written treaties called according the English terminology and practice *gentlemen's agreements*. The obligatory force of not written treaties is controversial, denied by some authors [13]. The controversy is generated also from the fact that in the 1969 Convention, the treaty is defined as "an international agreement concluded in writing between states", drawing the conclusion that such an agreement in oral form would not have value and effects as a treaty. But such conclusion would be inaccurate even in the light of Convention that further on, at art. 3 emphasizes that the application of its dispositions only to written agreements does not bring touching to the juridical value of those "*which have not been concluded in written form*".

Among multilateral treaties, a multiple normative function fulfill the statutes of international organizations, for example, the UNO Charter [14]. Such international instruments include both obligatory general rules for member states within the organization, and in some cases, for example, of UNO Charter, with universal obligation character, and as well juridical norms that regulates the purposes and principles, the composition and structure, the organization competence and its relations with other international organizations, with member states. At the same time, the treaties concluded by international organizations between them or with states comprise, according to Vienna Convention of 1969, in the matter, juridical norms applicable to relations between states.

The treaty gives expression to the stage of juridical relations between states in a determined domain and corresponds to the necessity to provide by its obligation character, also the stability in these relations and parties' will to define as clear as possible and more accurate. The principal juridical consequence of the treaty is thus that to regulate the relations between state parties. The obligatory character of the treaty is the essential feature of this but it is manifested differently as against the state parties or as against third states.

From here devolves another feature of the treaty, manifested by the principle of stability and continuity of conventional obligations. Any treaty is concluded by a state (or another subject of international law) and its obligation character is manifested within the conditions and terms convened. Any change of leaders or of governments has juridical consequences only on national plane, in the internal law, remaining without effects on international plane with respect to conventional obligations assumed. The same considerations are valid also as regards to international organizations and to obligations assumed by these through treaties concluded.

The treaty is by its nature the expression of the consent and sovereign will of states. Thus, its effects, its obligation character, is fully and directly manifested only for the states (or other subjects) that have given their consent to be bound by the treaty and thus have become parties to this.

Thus, at basis of treaties' obligatory character there is the principle of relative effect of them in the sense that they cannot produce juridical effects with regards to those entities – subjects of international law that did not express such a will, the consent to become parties to treaty. Not less, in certain conditions and with character of exception, a treaty can produce determined juridical effects also as against thirds, but with tacit or express consent of these. But the general rule that govern the treaties' effects is and remains that of relativity of obligatory character of treaty [15].

The principle of relative juridical effects of treaties between contracting parties can be considered as an application in this matter of the traditional rule formulated by the Latin adagio: *res inter alios acta aliis nec nocet prodest* [16]. The principle is also valid in the internal law, with

respect to contracts concluded and to juridical decisions that don't normally produce effects as regards thirds. The obligatory force of treaties define the juridical contents of a fundamental principle of the right of treaties generalized as such in the present international right: *pacta sunt servanda* (treaties must be respected) [17].

The obligation of rigorous observance of treaties concluded appeared in the most ancient times in the practice of formation and application of treaties, has crystallized and generalized in the course of centuries once with the extension of this practice. Prior to any juridical recognition, at basis of this principle has been since beginning the general moral rule according to which in contractual relations each party must respect the word given.

Crystallized in antiquity, the principle of treaties observance (*pacta sunt servanda*) can be considered as one among the oldest principles of international law. It can be found at Caldean, at Egyptians, at Chinese and, later on, at Greeks and Romans [18]. Characteristic for this principle in older historical periods is its close connection with religion. At the same time, at peoples of antiquity begin to be manifested juridical features and of juridical conception referring to this principle formulated by Romans by the maxim: *pacta sunt servanda*. At basis of this obligatory character is the idea of good faith (*bona fides*), recognized by the antiquity peoples as giving expression to honesty of parties' obligation to a contract to respect the word given.

Since the oldest times, in texts of treaties were inscribed clauses referring to means that guarantee the execution, preventing at the same time their violation [19]. Such guarantees were: the religious oath, taking of hostages, mortgage, peaceful military occupation of a determined territory, mostly in case of some peace treaties, the financial pledge of some incomes and others. Such means do not represent nowadays but a historical interest.

In the Middle Ages, the observance of treaties is inscribed in the honor code of knights. The Koran contained also prescriptions regarding the observance of obligations "assumed in the presence of Allah". Among feudals, treaties were concluded most of times through a religious solemnity, sometimes with intervention of the Pope as guarantor of fulfilling of the stipulations in the treaties. The treaty observance was considered as a personal obligation of that who concluded it.

The doctrine of international law in the XIX century, as also in continuation, in the XX century, affirms the principle *pacta sunt servanda*. This principle has found a devotion ever larger and repeated mostly in international documents adopted after the first and the second world wars, with general or special character with respect to international treaty.

Thus, in the preamble of the pact of the Society of Nations, at Versailles in 1919, there was provided as a principal purpose of this organization, to promote international cooperation and to achieve international peace and security through maintaining the justice and a scrupulous respect for all obligations devolving from treaties in relations between peoples of the organization thus strengthening the inviolability and sacred character of international treaties.

The juridical and arbitrary decisions in between-wars period contribute, as interpretative acts, to the emphasizing and concretizing of this principle in connection with situations and differences in relations between states.

Thus, in a difference regarding the "free zones in Gex region", judged in 1932 at International Permanent Justice Court between France and Switzerland, the Court admitted that the Versailles Treaty of 1919, invoked by France was not opposable to Switzerland as this was not part and could not abrogate the Treaty of 1815, at which the latter was a party. In consequence, Switzerland could not be obliged by the dispositions of a treaty at which refused to become party and could not be lacking, without its consent, of the benefit of dispositions of a treaty accepted previously [20].

Through devotion in the UNO Charter (1945) of this principle, has appeared and formed in time of centuries on common law way, is being codified and developed, acquiring a more wide sphere of application. Thus, even in the preamble of the Charter there is indicated that the United Nations pursue the creation of some conditions “*in which to be ensured justice and respect of obligations devolving from treaties and other sources of international law*”(our underlining). And art. 2, line 2 of the Charter includes a disposition with character of fundamental principle with universal value according to which all members of the Organization “should fulfill in good faith the obligations assumed according to the present Charter”. Such a principle is obligatory as well for non-member states, according to art. 2 line 6, obliged “*to take action in conformity with these principles, to the extent necessary for maintaining of international peace and security*”

These dispositions still general as formulation and as definition of the juridical contents of the principle *pacta sunt servanda*, are interpreted and emphasized in the Declaration of the UNO General Assembly of 1970 regarding to principles of international right of friendly relations and of cooperation between states [21]. The principle according to which “states should fulfill in good faith the obligations assumed according to the Charter” is interpreted in the following essential juridical aspects:

a). fulfillment in good faith of obligations assumed (resuming of art. 2 line 2 of the Charter);

b). fulfillment in good faith of obligations that devolve from the principles and rules generally admitted of international right;

c). of obligations devolving from international agreements concluded in conformity with the principles and rules generally accepted of international right;

d). in case of conflict between the obligations of international agreements and the obligations of UNO members devolving from the Charter, the latter prevail. This provision resumes art. 103 of the Charter indicating not only the priority of Charter principles as imperative norms in relation with the conventional obligations of states, but as well the invalidity of the effects of these agreements of states that have been concluded with violation of these principles.

Essentially similar dispositions are included as well in the Declaration of principles integrated in the Final Act from Helsinki of 1975, the X-th principle being entitled: “*The fulfillment in good faith of obligations assumed according to international law*”.

From those stated above it is obvious that in the contemporaneous right the principle *pacta sunt servanda* has extended its application sphere from the domain of international treaties to the obligations devolving from other sources (for example, with common character) as well as generally to principles and norms generally recognized of international right. At the same time there is underlined the states’ duty to fulfill their international obligations in good faith; there is delimited the application of the principle only to those treaties that are concluded “in conformity with international right”, having, in other words, licit character in opposition with illicit treaties, invalidated of their validity and effects through vices of consent, through violation of the imperative norms of international law.

As regards the domain of application, this (it means the principle) dominates mainly the matter of international treaties as it constitutes nowadays the primordial spring of obligations assumed by states and of the norms of international right endorsed by these through agreements between them or having universal character, unanimously recognized. In this sense, the two Vienna Conventions: of 1969 regarding treaties concluded between states and of 1986 – on treaties concluded by other subjects of international right (international organizations) devoted without equivocal to the principle *pacta sunt servanda*. In the III-rd part of the 1969 Convention denominated “the Respect, application and interpretation of treaties”, there is provided at art. 26

entitled *pacta sunt servanda* “any treaty in force binds the parties and should be executed by them in good faith; and at art. 27 with the title “Internal right and interpretation of treaties”: “One party cannot invoke the dispositions of its internal right for justifying non-execution of a treaty. This rule does not prejudice the application of art. 46”, according to which a treaty can be invalidated, submitted to nullity if it has been concluded with violation of some essential dispositions of internal right, thus vitiating the consent of a state party, on condition of a usual conduct and of good faith at execution of the acts of treaty conclusion [22].

The principle *pacta sunt servanda* bears in its juridical contents and in its practical application the essential feature of good faith, the fulfillment in good faith of treaties in force, concluded according to international right. Thus there arise the problem of good faith at conclusion of treaties, of the emphasizing of this principle in the conduct of state parties to an international treaty in force. The concept of good faith is widely debated in the juridical doctrine [23]. Considered as a principle that regulates the ensemble of international life, the rule of good faith has acquired a specific devotion in the domain of treaties, as an essential element of the *pacta sunt servanda* principle.

The endorsing given to the good faith in some international documents as being the trust of the word given cannot be accepted as a criterion sufficiently clear and conclusive in order to appreciate if a state fulfils in good faith its conventional obligations. It is necessary to examine the concrete circumstances regarding the execution of the treaty in the light of requirements of a scrupulous and concrete conduct in conformity with the letter and spirit of the treaty, constituting the essence of good faith as integrating element of the principle *pacta sunt servanda* [24]. Thus the execution in good faith of treaties means, before all, the respecting and application of these in their spirit and letter.

Every state executes the treaty provisions in the virtue of its competence and responsibility, without interference from outside, being responsible on the plane of international right as against the other contracting parties, of the manner it accomplishes its conventional obligations assumed.

The concept of good faith refers, in other words, to the manner or spirit in which conventional obligations should be fulfilled, to the degree of consciousness and of strictness with which these are respected. This also means that the execution of the treaty must be made correctly, without subterfuges and as possible as accurate in relation with the possibilities of the contracting party. From this point of view it is not permitted that a state to contribute through its action or abstention to the delay of fulfillment, to embezzlements of the treaty’s purpose and object or even to total removal of this. The Vienna Convention of 1969 itself provides at art. 18: *a state should refrain from developing some acts that would lack a treaty of its object and purpose*”.

Under another aspect, in the situation when a party benefited already of the dispositions executed by the other parties, would be inadmissible and contrary to the good faith that this party to put an end to the obligations accepted (through the respective treaty) and that represents the counterpart of dispositions fulfilled for treaty execution [25].

The problem of good faith can be also arisen in connection with the fulfillment of a treaty whose dispositions are considered imprecise and difficult or impossible to execute. In this situation, the ceasing by a party of the fulfillment of the treaty without a previous consultation with the other party can be considered a conduct that contravenes with the good faith in the fulfillment of the treaty. According to the good faith, in such a situation the parties should convene on the means of interpretation and of emphasizing of controversial dispositions even in the process of their application or through additional agreement of interpretation and application. The exhaust of these means without favorable results can justify the attitude of a party for non-fulfillment of some dispositions for the reason of imprecision of respective text.

Both the doctrine and the practice in the international right have demonstrated that this principle **pacta sunt servanda** should be applied by every state separately, with the obligation to be fully respected and in good faith all international engagements, for the purpose to live in peace and good understanding with the other peoples.

Conclusions

The importance of the principle **pacta sunt servanda** strengthens the fundamental role as a foundation stone in the vital and peaceful life of all times at international level between all states mostly in the context of the present international situation. The stability of international relations depends on respecting in good faith of the principle **pacta sunt servanda** – sole guarantor of the international peace and security.

References

- [1] A se vedea "Conference des N.U. sur le droit des traites", Vienne, 26 mars-24 mai 1968 et 9 avril- 22 mai 1969, Doc officiels de la Conf. N.U. New YORK, 1971, P.311-323 (Doc.A/Conf.39/27)
- [2] De exemplu: E.Zoller, La bonne foi en droit international, Pedone, Paris, 1977; M. Ladis, Some Thoughts on the Role of Good Faith in International Law, Mel Roling, 1977, p.47-55
- [3] H. Grotius, Despre dreptul războiului și al păcii (traducerea lucrării apărute în 1625), București, 1968, p. 81-87
- [4] S. Pufendorf (1632 - 1694), De jure naturae et gentium, apărută în 1672
- [5] P. Reuter, Principes de droit international public, RCADI, II - 1961, p. 482-484
- [6] J.L. Brierly, The Law of Nations, London, 1963, p. 56
- [7] P. Guggenheim, Traité de droit international public, RCADI, 1967, p. 37-38, 39-40
- [8] Emeric de Vattel, Le droit des gens, 1758
- [9] Lucrarea este intitulată: "Précis du droit des gens modern de l'Europe fondé sur les traités et l'usage", fiind însoțită de o listă a principalelor tratate încheiate după anul 1748
- [10] D. Anzilotti, Cours de droit international, Paris, 1929, p. 48 și urm. (trad. din limba italiană)
- [11] H. Kelsen, La théorie pure du droit, Paris, 1962, p. 425, 442 - 444; H.K. Théorie du droit international public, RCADI, III-1953, p. 7-14, 33; A. Verdross, Le fundament du droit international, RCADI, I-1927; Gh. Moca, Drept internațional public, Editura ERA, București, 1999, p. 65-69
- [12] De pildă, Ch. Rousseau, Droit international public, Dalloz, Paris, 1970, p. 24
- [13] De exemplu, Ch. Rousseau, op. cit.
- [14] În acest sens G.Chivu, Organizații interstatale contemporane, Editura Argonaut, Cluj-Napoca, 2002, p. 19-37; Gh. Moca, Dreptul organizațiilor internaționale, Editura ERA, București, 2000, p. 15-24
- [15] În acest sens se pronunță marea majoritate a autorilor; vezi de exemplu, S. Dreyfus, Droit des relations internationales, Paris, 1987, p. 132-133; Gh. Moca, Drept internațional public, 1999, Editura ERA, p. 431; V. Duculescu, N. Ecobescu, Dreptul tratatelor, Editura Continent XXI, București, 1995, p. 56-64
- [16] Într-o traducere liberă ar însemna: *actele făcute între anumite persoane nici nu aduc prejudicii și nici nu folosesc altora.*
- [17] J. Kunz, The Meaning and the Range of the Norm Pacta sunt Servanda, AJIT, vol. 19, 1945; H. Wehberg, Pacta sunt Servanda, AJIT, 1959; M. Niciu, drept internațional public, Editura Servosat, Arad, 1997, p. 42-43
- [18] A se vedea J.B. Whetton, The Sanctity of Treaties (Pacta sunt Servanda), 1935
- [19] Mc Nair, Law of Treaties, London, 1961, p. 239-254; V. Duculescu, N. Ecobescu, OP. cit., p. 76-77
- [20] CPJ, Arrêt du 7 juin 1932
- [21] Rezoluția nr. 2625 din 24 oct. 1970 a Adunării Generale (Assemblée Générale, Resolutions, 1971, p. 131-134
- [22] A se vedea textul Convenției în "Culegere de documente de drept internațional public", de M.I. Niciu ș.a., Editura Lumina Lex, București, 1997, vol. I, p. 362-390
- [23] Vezi, de exemplu, M. Iachs, Some Thoughts on the Role of Good Faith in International Law, Mél. Röling, 1977, p. 47-55; E. Zoller, Le bonne foi en droit international, Pédone, Paris, 1977
- [24] G. Geamănu, Drept internațional public, vol. I, 1981, p. 252
- [25] C.I.J., Arrêt de 2 février 1973, Recueil, 1973, p. 18 (în Afacerea competenței în materie de pescuit între Marea Britanie și Islanda)

PRINCIPIUL PACTA SUNT SERVANDA: DOCTRINĂ ȘI PRACTICĂ

Daniela Nicoleta POPESCU*

Abstract

Tratatul încheiat în conformitate cu dreptul internațional devine, după intrarea sa în vigoare, un act juridic internațional cu valoare obligatorie pentru părțile contractante. În doctrină se discută însă temeiul acestei obligativități, fundamentul obligațiilor care decurg dintr-un tratat, al normelor juridice cuprinse de acesta pentru a fi puse în aplicare de părțile contractante. Răspunsul la această problemă a fost însă diferit în doctrina dreptului internațional.

Cuvinte cheie: *pacta sunt servanda, tratat, doctrină, bună-credință.*

Introducere

Tratatele au constituit încă din cel mai vechi timpuri, obiectul unei preocupări susținute în cadrul acțiunii de codificare a dreptului internațional. Întrucât normele și regulile dreptului internațional apar ca rezultat al acordurilor dintre state, tratatul internațional constituie baza pe care se clădește întregul sistem de relații din cadrul comunității internaționale, fiind temelia însăși a dreptului internațional. O înșiruire a principalelor tratate internaționale echivalează cu o evocare a punctelor cardinale ale istoriei parcurse de omenire, ori cu o exprimare sintetică a problematicii lumii contemporane, destinul omenirii fiind acentuat, în bine sau în rău prin textele tratatelor care sau încheiat în decursul timpului, ori care se încheie și în prezent.

Tratatul este instrumentul privilegiat al raporturilor internaționale, la care statele recurg în toate domeniile și mijlocul principal prin care statele își manifestă voința de a crea raporturi juridice. Instrument al raporturilor dintre state, tratatul consemnează înțelegerile survenite printr-un acord de voință liber exprimat, consfințind astfel garanția aplicabilității sale de către statele semnatare cu bună credință.

Conform opiniei profesorului I.M. Anghel, încheierea tratatului reprezintă ansamblul de activități ce trebuie desfășurate, proceduri ce trebuie îndeplinite și reguli ce trebuie respectate pentru ca tratatul să se formeze, să devină obligatoriu pentru părți, să intre în vigoare, altfel spus să existe în conformitate cu dreptul internațional.

Principiul *pacta sunt servanda*: doctrină și practică

Tratatele sunt documente destinate să producă efecte juridice determinate, care constau în crearea de drepturi și obligații pentru subiectele de drept internațional care le încheie, în confirmarea sau consolidarea unei situații juridice ori în atribuirea unui statut juridic. Astfel, tratatul consacră prin acordul de voință al părților norme de drept internațional menite să fie aplicate în domeniul respectiv de reglementare juridică formulând drepturi pe care părțile convin să le exercite în raporturile juridice dintre ele și obligații internaționale pe care și le asumă pentru a fi îndeplinite cu bună credință. Aceste norme privitoare la încheierea și îndeplinirea tratatelor au apărut din cel mai vechi timpuri și au evoluat în cadrul dreptului cutumiar internațional generând necesitatea unui proces de codificare destinat să sistematizeze, să precizeze și să dezvolte principiile și normele juridice aplicabile în acest domeniu.

* Lector universitar doctor, Facultatea de Drept, Universitatea "Gheorghe Cristea", București.

Comisia de Drept Internațional din 1961, și-a finalizat lucrările printr-un proiect de convenție care a fost supus negocierilor statelor și a fost adoptat în 23 mai 1969 cu denumirea de Convenția de la Viena asupra tratatelor.[1] Conform acestei convenții, statele care au devenit părți la un tratat sunt obligate să-l pună în aplicare și să îndeplinească cu bună credință obligațiile asumate și normele juridice acceptate, constituind astfel, cel mai important principiu fundamental de drept internațional, formulat încă din antichitate prin expresia „pacta sunt servanda”(tratatele trebuie respectate).

Convenția din 1969 prevede în partea a III-a, denumită „Respectul, aplicarea și interpretarea tratatelor”, în art.26 intitulat „pacta sunt servanda” că orice tratat aflat în vigoare leagă părțile și trebuie să fie executat de acestea cu bună credință,

Potrivit acestui principiu, conceptul bunei credințe a reprezentat un element esențial acestuia care a fost dezbătut pe larg în doctrină[2]

Tratatul încheiat în conformitate cu dreptul internațional devine, după intrarea sa în vigoare, un act juridic internațional cu valoare obligatorie pentru părțile contractante. În doctrină se discută însă temeiul acestei obligativități, fundamentul obligațiilor care decurg dintr-un tratat, al normelor juridice cuprinse de acesta pentru a fi puse în aplicare de părțile contractante. Răspunsul la această problemă a fost însă diferit în doctrina dreptului internațional.

Adepții dreptului natural recunosc existența unui drept pozitiv internațional, cu caracter voluntar, fiind creat prin tratate și cutume pe baza voinței statelor, dar acesta este subordonat dreptului natural în sensul că obligativitatea acestor norme, a tratatelor încheiate se întemeiază pe respectarea cuvântului dat ca principiu al dreptului natural[3]. După H. Grotius, care a fundamentat pe larg această teorie, alți autori, de pildă, S. Pufendorf, consideră că dreptul voluntar și pozitiv este în întregime subordonat celui natural[4]. Cu o influență diminuată în secolele XIX și XX, când dominantă devine doctrina pozitivistă, teoria dreptului natural este reactualizată în perioada postbelică, devenind influentă în gândirea juridică actuală, cu privire, mai ales, la natura obligatorie a tratatelor internaționale și a normelor juridice consacrate de acestea. Francezii L. de Fur, L. Delbez, P. Reuter, englezul J.L. Brierly, austriacul Al. Verdross, elvețianul P. Guggenheim, italienii G. Savioli, R. Monaco sau R. Ago și încă alții au format noua școală a dreptului natural.

Aceștia au reluat deosebirea clasică a lui Grotius între dreptul natural și dreptul internațional pozitiv, consacrat în tratate și cutume, susținând că primul constituie **fundamentul** celui din urmă. Dreptul internațional este format din acordul statelor, dar validitatea sa, forța obligatorie a normelor sale decurge din factori exteriori voinței statelor: normă de bază, ipotetică, conștiința morală sau juridică a popoarelor etc.

Pentru P. Reuter, de pildă, "*fundamentul moral al dreptului îi conferă acestuia valoare, viață și forță obligatorie*"[5]. J.L. Brierly critică pozitivismul voluntarist (expresie a anarhiei generate de suveranitatea statală) și subliniază: "*... forța obligatorie a oricărui drept constă în aceea că ființa umană, luată individual sau asociată în cadrul statului, este constrânsă ca ființă rezonabilă să creadă că ordinea și nu haosul constituie principiul de guvernare al lumii în care trebuie să trăiască*"[6]. Pentru a se înlătura criticile făcute jusnaturalismului care introduce subiectivismul ("*rațiunea umană*") și confuzia între morală și drept, noii adepți definesc dreptul natural ca o aplicare a justiției în relațiile internaționale și o manifestare a unor principii fundamentale cum ar fi: respectarea obligațiilor asumate (*pacta sunt servanda*) și repararea prejudiciilor injust cauzate.

Față de realitatea existenței unui drept internațional pozitiv, ale cărui norme sunt create și respectate de state numai pe baza consimțământului și acordului liber de voință, unii autori consideră că valorile morale și principiile devin relevante numai prin încorporarea lor în dreptul pozitiv, de pildă: principiile bunei-credințe, ale dreptului umanitar, dreptul natural la legitimă

apărare ș.a. Între aceștia, P. Guggenheim consideră că obligativitatea normelor dreptului pozitiv decurge dintr-o normă fundamentală, ipotetică, corespunzător "*conștiinței morale a popoarelor*"[7].

Din secolul al XVII-lea începe să se elaboreze însă și doctrina pozitivistă potrivit căreia dreptul internațional pozitiv se formează prin tratate și cutume ca un sistem internațional pozitiv de norme juridice, a căror obligativitate decurge din chiar voința suverană a statelor și nu din criterii sau factori extrastatali. Este vorba de preluarea unei părți a doctrinei lui H. Grotius și transformarea ei într-o teorie de sine stătătoare, dezvoltată și larg argumentată până în zilele noastre. Ideea acordului de voință dintre state ca fundament al obligativității tratatelor (și cutumei) și a normelor consacrate prin acestea ca un drept internațional pozitiv devine un element esențial al gândirii juridice pozitivistă, în secolele XVII și XVIII.

Juristul elvețian Em. De Vattel (1714-1768) este acela care, prin lucrarea sa "despre dreptul popoarelor" (*Le droit des gens*) din 1758 a pus bazele doctrinei pozitvistă în știința modernă a dreptului internațional[8].

Vattel recunoaște existența unui drept natural și necesar al popoarelor, din care decurg drepturile și obligațiile inerente ale acestora în relațiile dintre ele. Spre deosebire, însă, de Grotius, el afirmă libertatea statului de a aprecia după interesele sale conținutul acestuia în fiecare situație dată. Intrând în relații între ele, statele creează prin voința lor norme obligatorii care conferă principiilor dreptului natural un caracter acceptabil pentru toți.

Dreptul internațional se deosebește de dreptul natural prin aceea că este în exclusivitate un drept pozitiv și voluntar, exprimat în tratate și cutumă, putând modifica la nevoie dreptul natural, pentru a înlesni înțelegerile între state. Astfel, după Vattel, dreptul ginților ca drept pozitiv nu mai este legat de dreptul natural și este superior acestuia din urmă, care poate fi interpretat și chiar modificat prin voința suverană a statelor. Concepția sa pozitivistă este ilustrată prin însuși cuprinsul lucrării sale, în care este analizat dreptul internațional în vigoare în secolul al XVIII-lea cu privire la teritoriu și tratate, la război și reprezentarea diplomatică.

Pozitivismul își găsește un alt reprezentant în G.F. de Martens (1756 - 1821) care publică în 1788, în franceză, "Manualul dreptului modern al popoarelor Europei bazat pe tratate și cutume"[9].

Astfel cristalizată în această perioadă, doctrina pozitivistă nu rupe complet legătura cu dreptul natural pe care, însă, îl subordonează și-i restrânge valabilitatea; devine dominantă în secolele XIX-XX, când rupe orice legătură cu dreptul natural, constituind expresia teoretică a afirmării statelor suverane și a voinței lor ca bază exclusivă a formării și obligativității tratatelor și cutumei, a normelor de drept internațional consacrate prin aceste izvoare formale. Asemenea idei de bază sunt afirmate, într-o formă sau alta, la sfârșitul secolului al XIX-lea de autori ca G. Jellinek sau H. Tripel, componenți de seamă ai școlii juridice germane, de D. Anzilotti, reprezentant italian deosebit de influent în secolul al XX-lea în doctrina pozitivistă europeană. El afirmă că teoria dreptului natural și-a pierdut influența prin caracterul său aprioric, prea abstract în confruntarea cu realitatea formării dreptului internațional prin acordul dintre state, cu ajutorul tratatelor și cutumei[10].

Pozitivismul clasic a fost supus însă unor critici serioase mai ales în perioada de după primul război mondial, când unii autori au considerat că sistemul interstatal antebelic și dreptul internațional pozitiv bazat pe tratate create prin voința statelor au eșuat în finalitatea lor, neputând să prevină declanșarea războiului. De aici și căutarea unor criterii în afara voinței statelor pentru a explica obligativitatea tratatelor și a dreptului internațional în vigoare.

Doctrina neo-pozitivistă a constituit o reacție critică importantă față de pozitivismul tradițional. În concepția lui H. Kelsen și a altor participanți ai "Școlii de la Viena", din perioada interbelică (A. Feodorov, J. Knuz), dreptul, în general, dreptul internațional, în special, formează

un sistem de norme juridice a căror validitate se determină în afara voinței statelor. Norma de drept internațional este analizată în ea însăși, în afara oricăror considerații metajuridice (de ordin politic, social, moral) și în cadrul unei "teorii pure" a dreptului. Concepute într-un sistem juridic ierarhizat, normele dreptului internațional ("*ordinea juridică internațională*") decurg dintr-un principiu cutumiar superior - *pacta sunt servanda* pentru dreptul convențional și dintr-o normă de bază, ipotetică (*die Grundnorme*) pentru dreptul cutumiar, fiind prioritare și superioare față de dreptul intern ("*ordinea juridică statală*") a cărei validitate o determină și o delimitează. Pentru Kelsen, statul nu există ca atare, el se confundă cu sistemul dreptului în vigoare și devine un "stat de drept"; nici suveranitatea de stat nu există ca realitate obiectivă, fiind înlocuită printr-o **competență**, o sumă de atribuții conferite și delimitate de către dreptul internațional. Suverană poate fi considerată doar ordinea juridică internațională, a cărei obligativitate se poate realiza printr-un "stat mondial". În acest fel se fundamentează și ideea primatului dreptului internațional asupra celui intern[11].

Normativismul a mai fost numit și *neopozitivism*, pentru că el preia ideea existenței normelor juridice în cadrul dreptului pozitiv, dar înlătură temeiul volitiv, consensual al acestuia.

Deși are ca premisă rațională recunoașterea normei de drept și a celor două sisteme juridice - "ordinea statală" și "ordinea internațională" -, normativismul rămâne o doctrină care, bazată pe concepte apriorice ("teoria pură" a dreptului, norma de bază, competența ș.a.), se află în vădită contradicție cu existența statului în relațiile interstatale și a unui context social ca fenomene și aspecte reale care determină și explică formarea și dezvoltarea dreptului internațional, natura sa juridică și finalitatea sa.

Cu toate aceste critici, doctrina pozitivistă, adaptată realităților normative internaționale actuale, rămâne singura care poate să explice realist și argumentat juridicește procesul formării dreptului internațional prin acordul de voință al statelor și pe această bază - obligativitatea tratatelor încheiate de state. Liberul consimțământ al statelor în toate fazele încheierii tratatului și în ce privește intrarea în vigoare este și rămâne, potrivit Convenției de la Viena din 1969, criteriul hotărâtor al validității și obligativității tratatelor, al producerii efectelor juridice pe care statele părți le-au avut în vedere. Nesocotirea liberului consimțământ, vicierea acestuia sub diferite forme (eroare, dol, constrângere etc.) conferă tratatelor caracter ilicit, constituie cauze de nulitate prevăzute în mod expres de convenție în art. 46-51, cărora li se adaugă și situația conflictului dintre un tratat și o normă imperativă a dreptului internațional (art. 53). Iar formarea unei asemenea norme nu are loc în afara acordului de voință, ci prin acceptarea și recunoașterea de către "comunitatea internațională a statelor în ansamblul său", cum se prevede în același articol 53.

Sub aspectul nivelului de obligativitate și al funcției sale normative s-a făcut uneori în doctrină distincție între tratate-lege și tratate-contract; considerate egal de obligatorii pentru state, totodată s-a stabilit doar tratatelor-lege un rom normativ, de reglementare juridică și de formare a dreptului, în timp ce ultimele ar cuprinde doar reguli tehnice, de aplicabilitate restrânsă și fără un caracter normativ (de exemplu, tratatele bilaterale)[12]. Totuși, Convenția de la Viena din 1969 nu a reținut o asemenea clasificare, considerând că orice tratat bi sau multilateral este la fel de obligatoriu, având fără nici o deosebire și o funcție normativă, creatoare de drept pentru statele părți. Aceasta corespunde și practicii convenționale a statelor, în cadrul căreia, același tratat cuprinde și reguli tehnice, fără caracter normativ și norme juridice generale sau particulare, acceptate de statele părți (norme noi sau preexistente). În lumina Convenției din 1969 s-ar putea reține sub aspectul efectelor obligatorii ale tratatului clasificarea în tratate licite, valide încheiate în conformitate cu dreptul internațional și tratate ilicite, de care s-a făcut mențiune mai sus.

În doctrină se mai face deosebirea între tratate scrise și tratate nescrise numite după terminologia și practica engleză *gentleman's agreements*. Forța obligatorie a tratatelor nescrise este controversată, negată de unii autori[13]. Controversa este izvorâtă și din faptul că în

Convenția din 1969, tratatul este definit ca "*un acord internațional încheiat în scris între state*", trăgându-se concluzia că un asemenea acord în formă orală nu ar avea valoare și efecte de tratat. O asemenea concluzie însă ar fi inexactă chiar în lumina Convenției care mai departe, în art. 3, precizează că aplicarea dispozițiilor sale doar la acordurile scrise nu aduce atingere valorii juridice a acestora "*care nu au fost încheiate în formă scrisă*".

Dintre tratatele multilaterale, o funcție normativă multiplă îndeplinesc statutele organizațiilor internaționale, de exemplu, Carta ONU[14]. Asemenea acte internaționale cuprind atât reguli generale obligatorii pentru statele membre în cadrul organizației, iar în unele cazuri, de exemplu, al Cartei ONU, cu obligativitate universală, cât și norme juridice care reglementează scopurile și principiile, componența și structura, competența organizației și relațiile sale cu alte organizații internaționale, cu statele membre. Totodată, tratatele încheiate de organizațiile internaționale între ele sau cu statele cuprind, potrivit Convenției de la Viena din 1969, în materie, norme juridice aplicabile relațiilor dintre părți.

Tratatul dă expresie stadiului raporturilor juridice între state într-un domeniu determinat și corespunde necesității de a se asigura prin obligativitatea sa, stabilitatea în aceste raporturi și voinței părților de a le defini cât mai clar și mai precis. Consecința juridică principală a tratatului este deci aceea de a reglementa relațiile dintre statele părți. Caracterul obligatoriu al tratatului este trăsătura esențială a acestuia și ea se manifestă însă diferit față de statele părți sau față de statele terțe.

De aici decurge o altă trăsătură a tratatului, manifestată prin principiul stabilității și continuității obligațiilor convenționale. Orice tratat este încheiat de un stat (sau alt subiect de drept internațional) și obligativitatea sa se manifestă în cadrul condițiilor și termenelor convenite. Orice schimbare de conducători sau de guverne are consecințe juridice doar pe plan național, în dreptul intern, rămânând fără efecte pe plan internațional cu privire la obligațiile convenționale asumate. Aceleași considerații sunt valabile și cu privire la organizațiile internaționale și la obligațiile asumate de acestea prin tratatele încheiate.

Tratatul este prin natura sa expresia consimțământului și a voinței suverane a statelor. De aceea, efectele sale, obligativitatea sa, se manifestă deplin și direct numai pentru statele (sau alte subiecte) care și-au dat consimțământul de a fi legate de tratat și au devenit astfel părți la acesta.

Astfel, la baza obligativității tratatelor se află principiul efectului relativ al acestora în sensul că ele nu pot produce efecte juridice cu privire la acele entități - subiecte de drept internațional care nu și-au exprimat o asemenea voință, consimțământul de a deveni părți la tratat. Nu mai puțin, în anumite condiții și cu caracter de excepție, un tratat poate să producă efecte juridice determinate și față de terți, însă cu consimțământul tacit sau expres al acestora. Regula generală care guvernează însă efectele tratatelor este și rămâne aceea a relativității caracterului obligatoriu al tratatului[15].

Principiul efectelor juridice relative ale tratatelor între părțile contractante poate fi considerat ca o aplicare în această materie a regulii tradiționale formulate prin adagiul latin: *res inter alios acta aliis nec nocet prodest*[16]. Principiul este valabil și în dreptul intern, cu privire la contractele încheiate și la deciziile judiciare care nu produc în mod normal efecte cu privire la terți. Forța obligatorie a tratatelor definește conținutul juridic al unui principiu fundamental al dreptului tratatelor generalizat ca atare în dreptul internațional actual: *pacta sunt servanda* (tratatele trebuiesc respectate)[17].

Obligația respectării riguroase a tratatelor încheiate a apărut din cele mai vechi timpuri în practica formării și aplicării tratatelor, s-a cristalizat și s-a generalizat în decursul secolelor odată cu extinderea acestei practici. Înainte de orice recunoaștere juridică, la baza acestui principiu s-a aflat de la început regula morală generală potrivit căreia în raporturile contractuale fiecare parte trebuie să-și respecte cuvântul dat.

Cristalizat în antichitate, principiul respectării tratatelor (*pacta sunt servanda*) poate fi considerat ca unul dintre cele mai vechi principii ale dreptului internațional. El poate fi întâlnit la caldeeni, la egipteni, la chinezi și, mai târziu, la greci și romani[18]. Caracteristic pentru acest principiu în perioadele istorice mai vechi este legătura lui strânsă cu religia. Totodată, la popoarele antichității încep să se manifeste aspecte juridice și de concepție juridică referitoare la acest principiu formulat de romani prin maxima: *pacta sunt servanda*. La baza acestei obligativități se află ideea de bună-credință (*bona fides*), recunoscută de popoarele antichității ca dând expresie onestității obligației părților la un contract de a respecta cuvântul dat.

Din cele mai vechi timpuri, în textele tratatelor erau însemnate clauze referitoare la mijloacele care să le garanteze executarea, prevenind totodată încălcarea lor[19]. Astfel de garanții erau: jurământul religios, luarea de ostatici, ipoteca, ocuparea, militară pașnică a unui teritoriu determinat, mai ales în cazul unor tratate de pace, gajul financiar asupra unor venituri ș.a. Asemenea mijloace nu mai prezintă astăzi decât un interes istoric.

În Evul Mediu, respectarea tratatelor este înscrisă în codul de onoare al cavalerilor. Coranul conținea și el prescripții privind respectarea obligațiilor "asumate în prezența lui Allah". Între feudali, tratatele se încheiau de cele mai multe ori printr-o solemnitate religioasă, uneori cu intervenția papei ca garant al îndeplinirii stipulațiilor din tratate. Respectarea tratatului era considerată ca o obligație personală a celui care l-a încheiat.

Doctrina dreptului internațional din secolul al XIX-lea, ca și în continuare, în secolul al XX-lea, afirmă principiul *pacta sunt servanda*. Acest principiu își găsește o consacrare tot mai largă și repetată mai ales în documente internaționale adoptate după primul și cel de-al doilea război mondial, cu caracter general sau special privitor la tratatul internațional.

Astfel, în preambulul Pactului Societății Națiunilor, de la Versailles din 1919, se prevedea ca un scop principal al acestei organizații, de a promova cooperarea internațională și a realiza pacea și securitatea internațională prin menținerea justiției și un respect scrupulos pentru toate obligațiile decurgând din tratate în relațiile dintre popoarele organizației întărind astfel, inviolabilitatea și sacralitatea tratatelor internaționale .

Deciziile juridice și arbitrale din perioada interbelică contribuie, ca acte interpretative, la precizarea și concretizarea acestui principiu în legătură cu situații și diferende în relațiile dintre state.

Astfel, într-un diferend privind "zonele libere din regiunea Gex", judecat în 1932 de Curtea Permanentă de Justiție Internațională între Franța și Elveția, Curtea a admis că tratatul de la Versailles din 1919, invocat de Franța nu era opozabil Elveției deoarece aceasta nu era parte și nu putea să abroge Tratatul din 1815, la care aceasta din urmă era parte. Prin urmare, Elveția nu putea fi obligată prin dispozițiile unui tratat la care refuza să devină parte și nu putea să fie lipsită, fără consimțământul său, de beneficiul dispozițiilor unui tratat acceptat anterior[20].

Prin consacrarea în Carta ONU (1945) acest principiu, apărut și format în timp de secole pe cale cutumiară, este codificat și dezvoltat, căpătând o sferă mai largă de aplicare. Astfel, în chiar preambulul Cartei se arată că Națiunile Unite urmăresc crearea unor condiții "*în care să poată fi asigurate justiția și respectul obligațiilor decurgând din tratate și alte izvoare ale dreptului internațional*" (sublinierea noastră). Iar art. 2, al. 2 al Cartei cuprinde o dispoziție cu caracterul unui principiu fundamental cu valoare universală potrivit căreia toți membrii Organizației "*trebuie să-și îndeplinească cu bună-credință obligațiile asumate potrivit prezentei Carte*". Un asemenea principiu este obligatoriu și pentru statele nemembre, conform art. 2 al. 6, obligate "*să acționeze în conformitate cu aceste principii, în măsura necesară menținerii păcii și securității internaționale*".

Aceste dispoziții încă generale ca formulare și ca definire a conținutului juridic al principiului *pacta sunt servanda*, sunt interpretate și precizate în Declarația Adunării Generale a ONU din 1970 privind principiile de drept internațional ale relațiilor amicale și de cooperare între state[21]. Principiu potrivit căruia "statele trebuie să îndeplinească cu bună-credință obligațiile asumate conform Cartei" este interpretat în următoarele aspecte juridice esențiale:

- a) îndeplinirea cu bună-credință a obligațiilor asumate (reluarea art. 2, al. 2 al Cartei);
- b) îndeplinirea cu bună-credință a obligațiilor care decurg din principiile și regulile general admise ale dreptului internațional;
- c) a obligațiilor decurgând din acorduri internaționale încheiate în conformitate cu principiile și regulile general recunoscute ale dreptului internațional;
- d) în caz de conflict între obligațiile din acorduri internaționale și obligațiile membrilor ONU decurgând din Cartă, ultimele vor prevala. Această prevedere reia art. 103 al Cartei indicând nu numai prioritatea principiilor Cartei ca norme imperative în raport cu obligațiile convenționale ale statelor, dar și invaliditatea efectelor acestor acorduri ale statelor care au fost încheiate cu violarea acestor principii.

Dispoziții în esență similare sunt cuprinse și în Declarația de principii integrată în Actul final de la Helsinki din 1975, al X-lea principiu fiind intitulat: "*îndeplinirea cu bună-credință a obligațiilor asumate conform dreptului internațional*".

Din cele de mai sus reiese că în dreptul contemporan principiul *pacta sunt servanda* și-a extins sfera sa de aplicare de la domeniul tratatelor internaționale la obligațiile decurgând din alte izvoare (de exemplu, cu caracter cutumiar) precum și în general la principiile și normele general recunoscute ale dreptului internațional. Se subliniază totodată datoria statelor de a-și îndeplini obligațiile internaționale cu bună-credință; se delimitează aplicarea principiului numai la acele tratate care sunt încheiate "în conformitate cu dreptul internațional", având, cu alte cuvinte, caracter licit în opoziție cu tratatele ilicite, invalidate în valabilitatea și efectele lor prin vicii de consimțământ, prin încălcarea normelor imperative ale dreptului internațional.

Acest principiu, domină în principal materia tratatelor internaționale deoarece constituie și astăzi izvorul primordial al obligațiilor asumate de state și al normelor de drept internațional acceptate de către acestea prin acordurile dintre ele sau având caracter universal, unanim recunoscut. În acest sens, cele două Convenții de la Viena: din 1969 privind tratatele încheiate între state și din 1986 - asupra tratatelor încheiate de alte subiecte ale dreptului internațional (organizațiile internaționale) consacră fără echivoc principiul *pacta sunt servanda*. În Partea a III-a a Convenției din 1969 denumită "**Respectul, aplicarea și interpretarea tratatelor**", se prevede în art. 26 intitulat *Pacta sunt servanda* "orice tratat în vigoare leagă părțile și trebuie să fie executat de ele cu bună-credință; iar în art. 27 cu titlul "Dreptul intern și respectarea tratatelor": "O parte nu poate să invoce dispozițiile dreptului său intern pentru a justifica neexecutarea unui tratat. Această regulă nu prejudiciază aplicarea art. 46", potrivit căruia un tratat poate fi invalidat, supus nulității dacă s-a încheiat cu violarea unor dispoziții esențiale ale dreptului intern, viciindu-se astfel consimțământul unui stat parte, cu condiția unei conduite obișnuite și a bunei-credințe în săvârșirea actelor de încheiere a tratatului[22].

Ideile exprimate de delegația României din cadrul Conferinței Internaționale din 1968, conform cărora principiul *pacta sunt servanda* constituie piatra de temelie a dreptului internațional la o coexistență pașnică între statele lumii, se regăsesc și astăzi în **Constituția României** în art.11, „**Dreptul internațional și dreptul intern**”, alin 1, conform căruia „statul român se obligă să îndeplinească întocmai și cu bună-credință obligațiile ce-i revin din tratatele la care este parte” cât și în **Legea 590/2003 privind tratatele**, care în capitolul III, **Aplicarea, modificarea și încetarea valabilității tratatelor**, la secțiunea 1, „**Aplicarea tratatelor**”, în art.31, alin 1 și 5, se prevede că statul român trebuie să respecte dispozițiile tratatelor în vigoare, iar obligațiile prevăzute de aceste tratate să se execute întocmai și cu bună-credință, neputându-se invoca prevederile legislației interne .

Principiul *pacta sunt servanda* comportă în conținutul său juridic și în aplicarea sa practică aspectul esențial al bunei-credințe, **îndeplinirea cu bună-credință a tratatelor în vigoare**, încheiate conform dreptului internațional. Se ridică astfel problema bunei-credințe în îndeplinirea tratatelor, a precizării acestui principiu în comportarea statelor părți la un tratat internațional în vigoare.

Conceptul bunei-credințe este larg dezbătut în doctrina juridică[23]. Considerat ca un principiu care reglementează ansamblul vieții internaționale, regula bunei-credințe a dobândit o consacrare specifică în domeniul tratatelor, ca un element esențial al principiului *pacta sunt servanda*.

Accepțiunea dată bunei-credințe în unele documente internaționale ca fiind încrederea în cuvântul dat nu poate fi acceptată ca un criteriu suficient de clar și de concludent, pentru a aprecia dacă un stat își îndeplinește cu bună-credință obligațiile sale convenționale. Este necesar să se examineze împrejurările concrete privind executarea tratatului în lumina cerințelor unei comportări scrupuloase și concrete în conformitate cu litera și spiritul tratatului, constituind esența bunei-credințe ca element integrant al principiului *pacta sunt servanda*[24]. Executarea cu bună-credință a tratatelor înseamnă, deci, înainte de toate, respectarea și aplicarea acestora în spiritul și litera lor.

Fiecare stat execută prevederile tratatului în virtutea competenței și responsabilității sale, fără imixiuni din afară, fiind răspunzător pe planul dreptului internațional față de celelalte părți contractante, de modul cum își îndeplinește obligațiile convenționale asumate.

Conceptul bunei-credințe se referă, cu alte cuvinte, la modul sau spiritul în care obligațiile convenționale trebuie să îndeplinite, la gradul de conștiinciozitate și de strictețe cu care acestea sunt respectate. Aceasta mai înseamnă că executarea tratatului trebuie făcută în mod concret, fără subterfugii și cât mai exact cu putință în raport cu posibilitățile părții contractante. Nu este permis din acest punct de vedere ca un stat să contribuie prin acțiunea sau abstențiunea sa la întârzierea îndeplinirii, la deturnarea scopului și obiectului tratatului sau chiar la înlăturarea totală a acestuia. Însăși Convenția de la Viena din 1969 prevede în art. 18: "*un stat trebuie să se abțină de la săvârșirea unor acte care ar lipsi un tratat de obiectul și scopul său*".

Sub un alt aspect, în situația în care o parte a beneficiat deja de dispozițiile executate de celelalte părți, ar fi inadmisibil și contrar bunei-credințe ca această parte să pună capăt obligațiilor acceptate (prin tratatul respectiv) și care reprezintă contrapartida dispozițiilor îndeplinite în executarea tratatului[25].

Problema bunei-credințe se poate ridica și în legătură cu îndeplinirea unui tratat ale cărui dispoziții sunt considerate imprecise și dificil sau imposibil de executat. În această situație, încetarea de către o parte a îndeplinirii tratatului fără o prealabilă consultație cu cealaltă parte poate fi considerată o conduită care contravine bunei-credințe în îndeplinirea tratatului. Potrivit bunei-credințe, într-o asemenea situație părțile trebuie să convină asupra mijloacelor de interpretare și de precizare a dispozițiilor controversate în chiar procesul aplicării lor sau prin acord adițional de interpretare și aplicare. Epuizarea acestor mijloace fără rezultate favorabile poate justifica atitudinea unei părți de neîndeplinire a unor dispoziții pentru motiv de imprecizie a textului respectiv.

Atât doctrina cât și practica din dreptul internațional, au demonstrat că acest principiu **pacta sunt servanda** trebuie să fie aplicat de fiecare stat în parte, cu obligația de a se respecta pe deplin și cu bună-credință toate angajamentele internaționale, în scopul de a trăi în pace și în bună înțelegere cu celelalte popoare.

Concluzii

Importanța principiului **pacta sunt servanda** întărește rolul fundamental ca piatră de temelie în existența vitală și pașnică din toate timpurile la nivel internațional între toate statele mai ales în contextul situației actuale internaționale. Stabilitatea relațiilor internaționale depinde de respectarea cu bună-credință a principiului **pacta sunt servanda** - unic garant al păcii și securității internaționale.

References

- [1] A se vedea "Conference des N.U. sur le droit des traités", Vienne, 26 mars-24 mai 1968 et 9 avril- 22 mai 1969, Doc officiels de la Conf. N.U. New YORK, 1971, P.311-323 (Doc.A/Conf.39/27)
- [2] De exemplu: E.Zoller, La bonne foi en droit international, Pedone, Paris, 1977; M.Ladis, Some Thoughts on the Role of Good Faith in International Law, Mel Roling, 1977, p. 47-55
- [3] H. Grotius, Despre dreptul războiului și al păcii (traducerea lucrării apărute în 1625), București, 1968, p. 81-87
- [4] S. Pufendorf (1632 - 1694), De jure naturae et gentium, apărută în 1672
- [5] P. Reuter, Principes de droit international public, RCADI, II - 1961, p. 482-484
- [6] J.L. Briery, The Law of Nations, London, 1963, p. 56
- [7] P. Guggenheim, Traité de droit international public, RCADI, 1967, p. 37-38, 39-40
- [8] Emeric de Vattel, Le droit des gens, 1758
- [9] Lucrarea este intitulată: "Précis du droit des gens modern de l'Europe fondé sur les traités et l'usage", fiind însoțită de o listă a principalelor tratate încheiate după anul 1748
- [10] D. Anzilotti, Cours de droit international, Paris, 1929, p. 48 și urm. (trad. din limba italiană)
- [11] H. Kelsen, La théorie pure du droit, Paris, 1962, p. 425, 442 - 444; H.K. Théorie du droit international public, RCADI, III-1953, p. 7-14, 33; A. Verdross, Le fondement du droit international, RCADI, I-1927; Gh. Moca, Drept internațional public, Editura ERA, București, 1999, p. 65-69
- [12] De pildă, Ch. Rousseau, Droit international public, Dalloz, Paris, 1970, p. 24
- [13] De exemplu, Ch. Rousseau, op. cit.
- [14] În acest sens G.Chivu, Organizații interstatale contemporane, Editura Argonaut, Cluj-Napoca, 2002, p. 19-37; Gh. Moca, Dreptul organizațiilor internaționale, Editura ERA, București, 2000, p. 15-24
- [15] În acest sens se pronunță marea majoritate a autorilor; vezi de exemplu, S. Dreyfus, Droit des relations internationales, Paris, 1987, p. 132-133; Gh. Moca, Drept internațional public, 1999, Editura ERA, p. 431; V. Duculescu, N. Ecobescu, Dreptul tratatelor, Editura Continent XXI, București, 1995, p. 56-64
- [16] Într-o traducere liberă ar însemna: *actele făcute între anumite persoane nici nu aduc prejudicii și nici nu folosesc altora*
- [17] J. Kunz, The Meaning and the Range of the Norm Pacta sunt Servanda, AJIT, vol. 19, 1945; H. Wehberg, Pacta sunt Servanda, AJIT, 1959; M. Niciu, drept internațional public, Editura Sevosat, Arad, 1997, p. 42-43
- [18] A se vedea J.B. Whetton, The Sanctity of Treaties (Pacta sunt Servanda), 1935
- [19] Mc Nair, Law of Treaties, London, 1961, p. 239-254; V. Duculescu, N. Ecobescu, op. cit., p. 76-77
- [20] CPJI, Arrêt du 7 juin 1932
- [21] Rezoluția nr. 2625 din 24 oct. 1970 a Adunării Generale (Assemblée Générale, Resolutions, 1971, p. 131- 134
- [22] A se vedea textul Convenției în "Culegere de documente de drept internațional public", de M.I. Niciu ș.a., Editura Lumina Lex, București, 1997, vol. I, p. 362-390
- [23] Vezi, de exemplu, M. Lachs, Some Thoughts on the Role of Good Faith in International Law, Mél. Rölting, 1977, p. 47-55; E. Zoller, Le bonne foi en droit international, Pedone, Paris, 1977
- [24] G. Geamănu, Drept internațional public, vol. I, 1981, p. 252
- [25] C.I.J., Arrêt de 2 février 1973, Recueil, 1973, p. 18 (în Afacerea competenței în materie de pescuit între Marea Britanie și Islanda)

AWARDING THE ATTORNEY'S FEES IN THE ROMANIAN CIVIL TRIAL, CREATING CONSISTENCY IN THE ROMANIAN COURTS PRACTICE

Beatrice Onica Jarka*

Abstract

The article focuses on the practice of the Romanian Courts in awarding the attorneys' fees of the awarded litigating party in the Romanian civil trial and the dichotomy between the different approaches of the attorney's fees incurred by the awarded litigating party. An analysis of the criteria used for obliging the default litigating party to pay the attorneys' fees of the awarded litigating party as judicial expenses shall be made to show the interdependence of the material provisions governing the legal assistance contract and the procedural relation created between the default litigating party and the awarded litigating party in the civil trial. The article shall consider the lack of substance of the abuse of law and the delictual liability as a reasoning used by the Romanian Courts in decreasing or not awarding the attorneys' fees as judicial expenses for the awarded party and the criteria applied by the European Court of Human Rights for such cases as an instrument of creating consistency in the Romanian Courts practice in this field.

Key words: attorneys, fees, decreasing, Courts, practice

INTRODUCTION

The relevance and applicability of article 274 para. 3 from the Romanian Civil Procedural Code (RCPC) is still a matter of controversy left at the subjective will of the judges in the Romanian Civil Trial.

According to article 274 para.3 RCPC *“the judges have the right to increase or decrease the attorney's fees, according to the fees provided in the table of the minimal attorneys, whenever they shall consider with reasoning that the attorneys fees are in an inappropriate disproportion small or high with the value of the claim or the work done by the lawyer”*. Article 274 para.3 RCPC is applicable only for the attorney's fees of the awarded litigating party in the Romanian civil trial to be paid by the losing litigating party.

The application of the said provisions in the sense of increasing the attorney's fees requested by the awarded litigating party is not an issue, as it probably never happened. A reason may be that the courts do not feel tempted to extra value the attorneys work.

On contrary, the decreasing of the attorney's fees by the courts according to article 274 para.3 RCPC has become one of the most practiced judge action in the Romanian civil trial. Such action has resulted many times in arbitrary application of this article in the mentioned sense and has materialized in an inconsistency of practice at the different level of civil jurisdiction and in the infringement of fundamental procedural warranties, as we shall further present.

The paper has a strong relevance from the point of view of the existing practice and the possibility to create consistency in such practice in relation to the existing legal instruments for creating consistency.

* Lecturer, Ph.D., Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: beatrice.onicajarka@cunescu.ro).

LITERATURE REVIEW

In the specific doctrine, the subject of the right of the Courts to decrease the attorneys' fee has been few times approached. We make this qualification based on the fact that, the content of article 274 para.3 RCPC has existed in this form since early 1989. There are several articles written on this aspect, which concentrate on elements of material law used in the appreciation of the criteria presented by article 274 para.3 RCPC by the Courts. The doctrine as such is expressed within this paper, as it is the point for starting the analysis of the Courts' practice in this sense.

THE CONTENT OF ARTICLE 274 PARA.3 RCPC

Article 274 para.3 RCPC provides for a right of the judges to increase or reduce the attorneys' fees of the awarded litigating party to be supported by the losing litigating party. An opinion in the doctrine¹ is that the courts are not obliged to reduce or increase automatically the attorneys' fees and they can opt in doing so at their own discretion. Such interpretation is giving rise to different procedural aspects regarding the exercise of this right by the court *ex - officio* or at the request of the parties in the trial and the rights to a fair trial by providing the necessary evidences. We shall further comment on this aspect.

Article 274 para.3 RCPC provides also for the following criteria of appreciation to be used by the Courts in exercising the said right as:

- a). the table of minimal attorneys' fees which does not longer exist, and
- b). the appreciation of an inappropriate disproportion between the attorneys' fees and the value of the claim or the work done by the attorney.

The application of the mentioned criteria is a very controversial issue, which gives room to the court to use arbitrary in applying article 274 para.3 RCPC as we further shall see.

Article 274 paragraph 3 RCPC stipulates also that any decision based on this article has to be reasoned by the court.

THE MAIN TRENDS IN A AWARDING THE ATTORNEYS FEES AS JUDICIAL EXPENSES IN THE ROMANIAN CIVIL TRIAL

The main trends in applying article 274 para.3 RCPC are the following:

Non-applicability of article 274 para.3 RCPC with the reasoning that the relationship between the client and the attorney, including the quantum of the fee, represents the rule of the parties with the consequence that the judge cannot reduce the quantum of such fee.

Applicability of article 274 para.3 RCPC in the sense that the judges are entitled to decrease the attorney's fees and that by doing so the judge does not interfere with the juridical relationship existing between the attorney and his client, but only disposes in connection to what will be the extent to which such fees shall be supported by the losing litigating party in the trial.

A. The first trend has been confirmed in practice in 1996 by the Supreme Court of Justice Commercial Section decision no. 914/1996 and followed further in the practice of lower or higher Courts.

¹ See Victor Ursa, Valentina Deleanu, The Rights of the Courts to increase or decrease the judicial expenses represented by the attorneys' fees (Dreptul instanțelor de judecată de a mări sau micșora cheltuielile de judecată reprezentând onorariul de avocat), published in the monthly Review „The Law” no 6/1978, p. 14-18.

Such opinion criticized by doctrine² is reasoned on the provisions of Law no. 51/1995 regulating the lawyer's profession and the Statute of lawyer's profession which provides according to article 30 that, the contract between the attorney and his client cannot be interfered or controlled, directly or indirectly by no state organ and that, the complainants regarding the attorney's fees may be solved by the Bar Association organs, only.

The critics to such opinion were in the sense that in the civil trial the attorney's fees of the awarded litigating party issue gives birth to two different juridical relations. The first is a material law contractual relation between the attorney and his client. The second is a procedural relationship born between the losing litigating party and the awarded litigating party based on procedural default, according to which defaulting litigating party has to support the legal expenses including attorneys' fees, incurred by the awarded litigating party. The two relations are separate one of another and the reducing of the attorney's fees by the judge in the trial does not modify or otherwise impede the contractual relation between the attorney and his client which establishes such fees.

We do not fully agree with the opinions expressed in the criticism to the first trend Court practice. It is true that within the procedural relation between the parties, the judges award fully or partially the attorneys' fees of the awarded litigating party, but implicitly by doing so, the judge also considers the contractual relation between the attorney and his client. The very criteria provided by article 274 para.3 RCPC are criteria according to which the relationship between the attorney and his client is evaluated by the judge. The Court, in appreciating the inappropriate disproportion between the attorney's fees and the value of the claim or the work of the attorney, analysis the main elements of the legal assistance contract the object of the price established by the attorney and his client. By awarding fully or partially the attorney's fees, as judicial expenses to be supported by the losing litigating party, the Court is actually appreciating on the evaluation of the attorneys' work agreed by the attorney and his client by the very contract, which establishes according to the law of lawyers' profession a relation free of interference by the authorities.

According to article 132 para.2 from the Statute of lawyers' profession the attorney's fees are to be established according to the difficulty, the complexity or the duration of the case. Further, according to para.3 of the same article 132, the attorney's fees are to be established depending of each of the following elements: time and the volume of work for the fulfillment of the attorney's mandate or the activity requested by the client, the nature, novelty or difficulty of the case, the importance of the interests of the case, the situation that the acceptance of the mandate given by the client stops the attorney to accept a similar mandate from another person, the notoriety, titles, work experience, reputation and the specialization of the attorney, the cooperation with other experts and specialists imposed by the nature, object, complexity of the case, advantages and results obtained for the profit of the client following the attorney's work, financial situation of the client, time limits within which the attorney performs the legal services.

As such elements provided in the Statute of lawyers' profession are sufficient legal grounds for the establishment of the attorney's fees, it seems that the Courts are using a double standard specific to the procedural framework created by article 274 para.3 RCPC when it decides on the reduction of the attorneys' fees or, are in fact censoring the attorneys' fees based on the very specific legal criteria used by the attorney to establish his fees in the legal assistance contract.

² See Șerban Beligradeanu, The right of the Court to apply article 274 para.3 from the Civil Procedural Code after the entry into force of Law no. 51/1995 (Dreptul instanțelor judecătorești de a aplica art. 274 alin.3 Codul de Procedura Civilă după intrarea în vigoare a Legii nr. 51/1995), published in the monthly Review „The Law” no 6/1997, p. 31-35, see also Gabriel Boroi, Octavia Spineanu – Matei, Commented Codes – The Civil Procedural Code, Editura Ch Beck, București 2005, p 426 – 429,

We are inclined to consider that Courts by reducing the attorneys' fees are reviewing actually the legality of the way in which the attorney and his clients applied the core elements of article 132 from the Statute of lawyers' profession when they concluded the legal assistance contract.

B. The second trend in the Court practice³ in this field is in the favor of increasing or reducing the attorney's fees by application of article 274 paragraph 3 RCPC. The reasoning supporting such findings is either a simple reference to the said article, a basic review of the criteria provided in the said article or an elaborated explanation which includes the abuse of right theory⁴.

THE EXERCISE OF THE COURT'S RIGHT TO DECREASE THE ATTORNEYS' FEES OF THE AWARDED PARTY IN THE ROMANIAN CIVIL TRIAL

1. Reasoning

1.1. Basic Appreciation

As mentioned above, in many cases the Courts use as reasoning for the reducing of the attorney's fees either a simple reference to article 274 paragraph 3 RCPC without further reasoning or, a reference to their right to appreciate on this aspect. In other cases, the Courts limit themselves to a conclusion that the attorney's fees are disproportionate⁵ with the lawyers' work or the value of the claim.

Such basic reasoning represents an obvious infringement of the very provisions of article 274 para.3 which states that, any decision of increasing or decreasing the attorney's fees has to be reasoned. Such reasoning cannot be a superficial one. It is accepted in the doctrine⁶ since a long time that such reasoning should be supported on the entire case situation and the evidences administered in the case. The necessary elements to be considered in such reasoning are: the modality in which the establishment of the fees is done and the competence of those which establishes the fees, the complexity of the high qualified work, the experience and the level of the professional education of the attorney, the proportionality⁷ of the fee with the volume of work for the preparation of the defense in the case, determined by complexity, difficulty and novelty of the litigation.

³ See the Minute of the meeting from the Superior Counsel of Magistrates and the members of the Commission for creating consistency in the judicial practice with the President of the Romanian High Court of Justice and Cassation and the representative of the Prosecutor office attached to Romanian High Court of Justice and Cassation and the presidents of the civil section, labor conflicts and insurances of the appeal courts for the discussion of the problems of inconsistency in the judicial practice, dated June 11, 2008,

⁴ See High Court of Justice and Cassation, Civil and Intellectual Property Section Decision no. 2420 dated 11th of April 2008, which states that "*article 274 paragraph 3 is intended to preempt the abuse of right, by using the attorney's fees for other purpose than the use of a qualified judicial assistance during a trial.*"

⁵ See the Galati Appeal Court / Commercial, Maritime and Fluvial Section Civil Decision no. 1993 dated May 2005 by which it is stated that "*...the attorney fee awarded by the bankruptcy judge is obviously disproportionate with both the volume of the attorney's work and the value of the debt.*"

⁶ See Victor Ursa, Valentina Deleanu, *ibid.*

⁷ See High Court of Justice and Cassation, Civil and Intellectual Property Section Decision no. 2420 dated 11th of April 2008.

1.2. Abuse of law and delictual liability,

Another reasoning used for the reducing the attorney's fees, refers to the abuse of law in consideration of the delictual liability. As stated in the High Court of Justice and Cassation, Civil and Intellectual Property Section Decision no. 2420 dated 11th of April 2008, the provisions of article 274 para.3. RCPC are intended to preempt the abuse of right.

According to the doctrine⁸ and jurisprudence⁹, the foundation of awarding the judicial expenses is the procedural default of the losing litigating party. The procedural default makes the legal assistance contract concluded between the attorney and the awarded litigating party to produce effects on the losing party, according to a principle, which rules the reparation of the damage in the delictual liability field - the reparation in full of the produced damage.

Following the said theory, the right to claim the recovery of the damages produced by an delictual fact, as any subjective civil right, may be exercised abusively. The sanction for the abusive use of a right is according to the Romanian Civil law and Romanian Civil Procedural Law the obligation to support the damages produced by the delictual fact. This means that, in a presumption of abuse of right whenever the Court considers so, according to the basic criteria of article 274 para.3 RCPC or developed criteria of the same article in the light of article 132 from the Statute of lawyers' profession, considering the delictual liability of the awarded party, the attorneys' fees paid by the latter to his/her lawyer shall be reduced.

2. Material and procedural aspects

The theory of abuse of law in consideration of the delictual liability, applicable according to article 274 para.3. RCPC gives rise to a series of material and procedural issues overlooked by the practice and doctrine.

The attorney's fees may be granted based on the express request in this sense of the awarded litigating party. The attorney's fees quantum is either requested within the main civil trial, in the end of the debates in the conclusion phase, when the quantum of such fees and other judicial expenses is known, or based on a separate application in a new trial.

The litigating parties opt usually for the first possibility and request as a supplementary claim to the main claim of the Court application the judicial expenses which include the attorney's fees. As mentioned, the quantum of the attorney's fees together with the evidences proving the quantum is identified in writing in the conclusions phase. The litigating parties request judicial expenses orally without ever identifying the quantum of such judicial expenses which include the attorney's fees. Therefore, at the conclusions phase, any of the litigating parties has no clue of the quantum of the fees requested by the other party and therefore it is not able to express any point of view on such request. On the other side, the litigating parties have no clue in such phase before a Court decision is taken, whether the abuse of law in consideration of the delictual liability mechanism provided by article 274 para.3 RCPC shall be triggered by the court and no defense of any kind may be made to counter argue against such mechanism.

The abuse of law considering the delictual liability involves materially several cumulative conditions as the existence of a delictual fact, the damage, the causality between the delictual fact and the damage and last but not the least, bad faith¹⁰.

⁸ See Gabriel Boroi, Octavia Spineanu – Matei, *ibid*.

⁹ See High Court of Justice and Cassation, Civil and Intellectual Property Section Decision no. 2420 dated 11th of April 2008.

¹⁰ See Ion Deleanu, *Treaty of Civil Procedure I*, IV-th Edition, revised, completed, updated, Editura Servo Sat 2004, p. 590, see also Viorel Mihai Ciobanu, Gabriel Boroi, *Civil Procedural law, Selective Course*, Edition 3, Editura All Beck 2005, p. 50

All these conditions are appreciated by the Court in the absence of any evidence expressly submitted on this issue by any of the parties and in absence of any written or submission on this issue.

The exercise of the Courts' right according to article 274 para.3 RCPC defies not only the fundamental principles, which governs the Romanian Civil Trial as contradictorality, the active role of the Court (article 129 para.5 RCPC), the oral character of the proceedings, equality of the parties, the right to defense. The exercise of the Courts' right according to article 274 para.3 RCPC defies the constitutional rights of the parties and the fundamental human rights as the right to a fair trial¹¹.

The separate application for judicial expenses including attorney's fees in a separate trial gives the parties the rights to know the claims of the awarded party regarding the attorney's fees incurred with the occasion of the main trial. Nevertheless, almost never the defenses of the losing party are based on abuse of law. By applying article 274 para.3 RCPC considering abuse of law and delictual liability, without informing the parties within the trial referring to the claim of the attorneys' fees, the Courts continues to infringe contradictorality of the proceedings, the own active role of the Courts, the oral character of the proceedings, equality of the parties, the right to defense. In the end of the debates about the proportionality or non proportionality of the attorney's fees relative to work of the attorney, or the value of the claim, the awarded party may find herself in a situation when the attorneys' fees are decreased or even not granted, based on a presumed delictual fact committed with bad faith, elements which are never discussed within the said trial.

There are even situation when the right to appeal does not exist anymore in case of decisions reducing the attorney's fees according to article 274 para.3 RCPC. It is the case of the Court decisions pronounced in the extraordinary appeals phases of civil trials.

THE CONSTITUTIONALITY OF ARTICLE 274 PARA. 3 RCPC

In 2005, the Constitutional Court jurisdiction has been triggered with an application by exception of non-constitutionality way, regarding the constitutionality of article 274 para.3 RCPC. The constitutionality of the said provision was challenged in relation to article 11 para.2, 21, 24, 31 para.3, 52 para.1 from the Romanian Constitution. By the decision no. 401 dated 14th of July 2005, the Constitutional Court decided that the only article with relevance to the constitutionality of article 274 para.3 RCPC is article 24 para.2. from the Romanian Constitution which states the rights of the parties to be assisted by an *ex-officio* or chosen attorney and rejected the application, considering article 274 para.3 RCPC constitutional.

The constitutionality of article 274 para.3 has been further challenged in 2007 in relationship to articles 15 para.1, 16 para.1., 24 para.2, 44 and 45 from the Romanian Constitution, when again the Constitutional Court¹² has rejected the application and considered mainly the reasoning given in the Decision no. 401 dated 14th of July 2005 is still applicable in this sense.

The reasoning of the Court is obviously very superficial, as various aspects of the right of the Courts to censor, reduce the attorney's fees commented above had not been even approached.

¹¹ The equality of arms in the case of Křemárand others v. the Czech Republic, the Court stated that "A party to the proceedings must have the possibility to familiarize itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance"

¹² See for further details the Constitutional Court Decision no. 493 din 29.05.2007.

CRITERIA APPLIED BY THE EUROPEAN HUMAN RIGHTS COURT

For the rejection of the non-constitutionality exception, in front of the Constitutional Court, the Public Ministry and the Court itself invoked the practice of the European Human Rights Court (EHRC) of reducing the attorney's fees. Such practice obviously exists but the criteria used by the European Human Rights Court are different from those used by the Romanian Courts.

The criteria used in the practice of EHRC, refers to the reality, necessity and reasonable character¹³ of the judicial expenses including the attorney's fees.

If the reality and necessity of the judicial expenses are elements applicable in the Romanian legal system, the reasonableness is a criterion not familiar to the Romanian legal system, which is a Roman law based system. Reasonability is a common law concept, which was taken over without clarification in the Romanian law and in Romanian Courts practice, especially in relation to the art.6 of European Convention of Human Rights application and interpretations by the EHRC.

DE LEGE FERENDA

The draft of the future Romanian Procedural Civil Code does not give up on the provisions existing in the present code and apparently introduces more criteria for the evaluation of the attorney's fees in the process of diminishing these expenses.

In this sense, article 438 para.2 from the draft provides "that the Court may decrease partially, even *ex-officio*, with motivation, the attorneys' fee, when such fee is expressly disproportionate with the value or the complexity of the case or with the activity rendered by the attorney, considering the circumstances of the case".

In the end of para. 2 from article 438 it is provided that, the Court action shall not affect the relation between the attorney and his client.

According to article 439 from the draft, the evidence regarding the existence and the size of the judicial expenses including those referring to the attorneys' fee has to be made the latest at the end of the debates on the merits.

The proposal of the new form of the existing article 274 para.3 RCPC does not solve the numerous material and procedural law issues raised in this article. Except for clarifying the fact that the Courts could exercise this right *ex-officio* or at the request of the other party and except for introducing the criteria of complexity and circumstances of the case, the text still maintains space for infringing the fundamental principles of the civil trial as contradictoriness of the proceedings, the oral character of the proceedings, equality of the parties, the right to defense and shall cause similar criticism in the future.

INSTRUMENTS FOR CREATING CONSISTENCY IN THE PRACTICE OF THE ROMANIAN COURTS

The available instruments for creating the consistency in the practice of the Romanian Court are the appeal in the interest of the law provided by article 329 RCPC and the mechanism provided by the European Convention of Human Rights.

The appeal in the interest of the law provided by article 329 RCPC is under the jurisdiction of the United Sections of the High Court of Cassation and Justice according to article 25 from the

¹³ See Sabou and Parcalab vs. Romania, application no. 46.572/99, European Human Rights Decision dated 28.09.2009, published in Official Monitory, First Part no. 484 from 08/06/2005.

Law no. 304/2004 and can be triggered exclusively by the General Prosecutor attached to the High Court of Cassation and Justice or by the management colleges of the Appeal Court.

Despite its continuous procedural improvement, the European Convention of Human Rights mechanism still involves different phases and poses difficulties.

Both instruments are time consuming and imply consistent limitations and frustrations for the litigating party.

CONCLUSIONS

The right of the Courts to reduce the judicial expenses consisting of attorneys' fee represents in the form provided by article 274 para.3 RCPC a constant source of judicial insecurity practically affecting the relationship between the attorney and its client.

We are of the opinion that the Court should have the right to censor the attorneys' fee in a trial. Nevertheless, such right has to be exercised with care and only by giving to the party involved the right to defend its position in case the other party or the Court considers the attorneys' fees requested are disproportionate in relationship with the value of the case, the attorney work or other criteria.

The situation may be remedied either by using an instrument of creating consistency in the practice of the Court, or by proposing a new text of the said article which shall provided that challenge of the attorneys' fee is acknowledged by the parties in the trial and debated over with the exercise of the defense right on this aspect and the possibility to use also the legal criteria provided by article 132 from the Statute of lawyers' profession.

Maintaining this situation of judicial insecurity shall pose difficulties in the relationship between the attorney and its client regarding the recovery of the judicial fees in their entirety in the civil trial for fees contractually established according to the law and declared as such for taxation purposes.

ACORDAREA CHELTUIELILOR DE JUDECATĂ CONSTÂND ÎN ONORARIUL AVOCAȚILOR ÎN PROCESUL CIVIL ROMÂN, CREAREA UNEI PRACTICI UNIFORME A INSTANȚELOR DIN ROMÂNIA

Beatrice ONICA JARKA*

Abstract

Articolul vizează analiza practicii instanțelor din România în ceea ce privește acordarea onorariilor avocaților părții în favoarea căreia s-a pronunțat soluția în procesul civil român și a dihotomiei între diferitele abordări în ceea ce privește acest aspect. Analiza criteriilor folosite de instanțele de judecată pentru a obliga partea care a căzut în pretenții să suporte cheltuielile de judecată constând din onorariile avocaților părții în favoarea căreia s-a pronunțat instanța drept cheltuieli de judecată va fi făcută astfel încât să evidențieze interdependența dispozițiilor de drept material care guvernează contractul de asistență juridică și relația procedurală creată între partea căzută în pretenții și cea în favoarea căreia a fost pronunțată soluția în cadrul procesului civil. Articolul va analiza lipsa de substanță a utilizării conceptelor de abuz de drept și de răspundere civilă delictuală drept considerente ale instanțelor românești în motivarea reducerii sau neacordării onorariilor avocaților ca și cheltuieli de judecată pentru partea în favoarea căreia se soluționează procesul cât și criteriul folosit de Curtea Europeană pentru Drepturile Omului în asemenea cazuri ca un instrument de uniformizare a practicii instanțelor de judecată românești în acest domeniu.

Cuvinte cheie: avocați, onorarii, reducere, instanțe, practica

INTRODUCERE

Relevanța și aplicabilitatea articolului 274 alin. 3 din Codul Român de Procedură Civilă („CRPC”) reprezintă în continuare o controversă care este lăsată la latitudinea interpretării subiective a judecătorilor în procesul civil român.

Conform articolului 274 alin. 3 CRPC „Judecătorii au dreptul să mărească sau să micșoreze onorariile avocaților, potrivit cu cele prevăzute în tabloul onorariilor minimale, ori de câte ori vor constata motivat că sunt nepotrivit de mici sau de mari, față de valoarea pricinii sau munca îndeplinită de avocat.” Articolul 274 alin. 3 CRPC este aplicabil doar cheltuielilor de judecată constând din onorariile avocaților părții în favoarea căreia a fost soluționată cauza și care se suportă de partea care a căzut în pretenții.

Aplicabilitatea dispoziției invocate în sensul creșterii onorariilor avocaților solicitate de către partea în favoarea căreia a fost soluționată cauza nu a provocat niciodată discuții deoarece cel mai probabil nu a fost luată în considerare ca opțiune de către instanțele de judecată. Unul dintre motivele care ar susține o asemenea opinie ar fi acela că instanțele de judecată nu sunt tentate să evalueze în sens superior munca prestată de avocați.

La polul opus, micșorarea onorariilor avocaților de către instanța de judecată în temeiul art. 274 alin. 3 CRPC a devenit una dintre cele mai uzitate întreprinderi ale judecătorilor în procesul civil român. Asemenea întreprinderi au rezultat adesea în aplicarea arbitrară a articolului invocat în sensul menționat, materializându-se într-o practică neunitară a instanțelor de judecată la diferite nivele de jurisdicție și în încălcarea unor garanții procesuale fundamentale pe care le vom prezenta

* Lector universitar doctor, Facultatea de Drept, Universitatea “Nicolae Titulescu” University, București (e-mail: beatrice.onicajarka@cunescu.ro).

în continuare. Prezentul studiu are relevanță în ceea ce privește analiza practicii judecătorești existente și posibilitatea de uniformizare a acestor practici din punct de vedere al instrumentelor pentru asigurarea acestei uniformizări.

REFERIRI LA LITERATURA DE SPECIALITATE

În doctrina de specialitate, dreptul instanțelor de judecată de a micșora cheltuielile de judecată constând din onorariile avocaților a fost abordată de puține ori. Opinia noastră în acest sens este susținută și de faptul că, art. 274 alin. 3 CRPC are același conținut încă înainte de 1989. Există câteva articole publicate pe acest subiect, care se concentrează pe elementele de drept material utilizate de către instanțele de judecată în aprecierea criteriilor prevăzute de art. 274 alin. 3 CRPC. În acest sens, doctrina în materie este menționată pe parcursul prezentului ca punct de pornire în analiza jurisprudenței instanțelor de judecată.

CONȚINUTUL ART. 274 ALIN. 3 CRPC

Articolul 274 alin. 3 CRPC prevede că judecătorii au dreptul să mărească sau să micșoreze onorariile avocaților părții în favoarea căreia a fost soluționată cauza, care vor fi suportate de către partea care cade în pretenții. Opinia dominantă în doctrină¹ este aceea că instanțele nu sunt obligate să mărească sau să micșoreze în mod automat onorariile avocaților și că este la discreția lor dacă optează în acest sens. O asemenea interpretare ridică diferite aspecte procedurale discutabile cu privire la exercitarea acestui drept de către instanța de judecată *ex-officio* sau la solicitarea părților în proces și dreptul la un proces corect.

Articolul 274 alin. 3 CRPC prevede că instanța de judecată poate folosi următoarele criterii de apreciere în exercitarea dreptului menționat:

- a). tabelul de onorarii minime al avocaților care în prezent nu mai există, și
- b). aprecierea existenței unei disproporții vădite între onorariile avocaților și valoarea pretenției sau a muncii prestate de către avocat.

Aplicarea criteriilor menționate este foarte controversată lăsând loc unei aplicări arbitrare a art. 274 alin. 3, după cum vom arăta mai jos.

Articolul 274 alin. 3 CRPC menționează de asemenea că orice decizie luată în baza acestui articol trebuie să fie motivată.

DIFERITE ABORDĂRI ALE ACORDĂRII ONORARIILOR AVOCAȚILOR DREPT CHELTUIELI DE JUDECATĂ ÎN PROCESUL CIVIL ROMÂN

Diferitele abordări ale aplicării articolului 274 alin. 3 CRPC sunt următoarele:

1). Neaplicarea articolului 274 alin. 3 CRPC pentru considerentul că relația dintre client și avocat, inclusiv quantumul onorariului reprezintă acordul părților și drept consecință un judecător nu poate interveni în acest acord pentru a micșora valoarea unui asemenea onorariu.

2). Aplicabilitatea art. 274 alin. 3 CRPC în sensul că judecătorii sunt îndreptățiți să micșoreze onorariile avocaților deoarece o asemenea acțiune nu intervine în relația juridică existentă între avocat și clientul său, iar decizia judecătorilor în sensul micșorării cheltuielilor de

¹ Vezi Victor Ursa, Valentina Deleanu, Dreptul Instanțelor de a crește sau reduce cheltuielile de judecată reprezentate de onorariile avocaților, publicată în revista „Dreptul” nr. 6/1978 p.14 -18.

judecată reprezentate de onorariile avocaților doar va stabili întinderea cunatumului onorariilor ce vor fi suportate de partea căzută în pretenții în proces.

1). Prima abordare a fost confirmată în 1996 prin practica Înaltei Curți de Casație și Justiție, Secția Comercială prin decizia nr. 914/1996 și ulterior urmată de practica instanțelor de grad inferior.

O asemenea decizie a fost criticată de doctrină² în baza prevederilor Legii 51/1995, care reglementează profesia de avocat și a Statutului profesiei de avocat, care lege la art. 31 dispune orice plângere cu privire la onorariile avocaților poate fi soluționată doar de către Decanul Baroului .

Criticile aduse acestei decizii erau făcute în sensul că în procesul civil onorariile avocaților părții în favoarea căreia s-a soluționat procesul dau naștere la două raporturi juridice diferite. Primul raport este unul de drept contractual material creat între avocat și clientul său. Cel de-al doilea este unul procedural născut între partea care a căzut în pretenții și cea în favoarea căreia a fost soluționată cauza, fundamentat pe culpa procedurală, în baza căreia partea ce a căzut în pretenții trebuie să suporte cheltuielile de judecată ce au fost făcute de către partea în favoarea căreia s-a soluționat cauza, inclusiv onorariile avocaților acesteia. Cele două raporturi sunt separate unul de celălalt, și prin micșorarea cheltuielilor de judecată constând din onorariile avocaților instanța de judecată nu modifică și nici nu intervine astfel în relația contractuală dintre avocat și clientul său, prin care au fost stabilite aceste onorarii.

Nu suntem în totalitate de acord cu critica adusă primei abordări în cadrul practicii instanțelor judecătorești referitoare la aplicabilitatea art. 274 alin.3 CRPC: Este adevărat că în relația privind procedura dintre părți, judecătorii pot acorda în totalitate sau numai parțial onorariile avocaților părții în favoarea căreia a fost soluționat litigiul, dar procedând în acest fel, judecătorul se pronunță implicit asupra relației contractuale dintre avocat și clientul său. Chiar criteriul enunțat în art. 274 alin. 3 CRPC este cel în conformitate cu care relația dintre avocat și client este evaluată de către judecător. În aprecierea existenței unei disproporții vădite dintre onorariile avocaților și valoarea pretențiilor sau a muncii prestate de către avocat, instanța judecătorească analizează elementele principale ale contractului de asistență juridică, și anume obiectul contractului și prețul stabilit de avocat și de client pentru acest obiect. Prin acordarea în tot sau în parte a onorariilor avocaților drept cheltuieli de judecată ce vor fi suportate de către partea care a căzut în pretenții, instanța judecătorească face de fapt aprecieri asupra modului de evaluare a muncii prestate de către avocat, asupra căreia clientul și avocatul au consimțit în contractul de asistență.

Conform art. 132 alin. 2 din Statutul profesiei de avocat, onorariile avocațiale sunt stabilite în funcție de dificultatea, complexitatea și durata cazului. Mai mult, alin. 3 al aceluiași art. 132 prevede că onorariile avocaților vor fi stabilite în considerarea următoarelor elemente: timpul și volumul muncii depuse pentru executarea mandatului primit sau a activității solicitate de client, natura, noutatea și dificultatea cazului, importanța intereselor în cauză, împrejurarea că acceptarea mandatului acordat de client îl împiedică pe avocat să accepte un alt mandat, din partea unei alte persoane, dacă aceasta împrejurare poate fi constatată de client fără investigații suplimentare, notorietatea, titlurile, vechimea în muncă, experiența, reputația și specializarea avocatului, conlucrarea cu experți sau alți specialiști impusă de natura, obiectul, complexitatea și dificultatea cazului, avantajele și rezultatele obținute pentru profitul clientului, ca urmare a muncii depuse de avocat, situația financiară a clientului, constrângerile de timp în care avocatul este obligat de împrejurările cauzei să acționeze pentru a asigura serviciul legal performante.

² Vezi Șerban Beligrădeanu, Dreptul instanțelor judecătorești de a aplica art. 274 alin. 3 CRPC după intrarea în vigoare a Legii 51/1995, publicată în revista "Dreptul" nr. 6/1997, p. 31-35, vezi de asemenea Gabriel Boroi, Octavia Spineanu - Matei, Codul de procedură Civilă comentat, editura Ch. Beck, București 2005, p. 426-429.

Cum asemenea criterii legale de evaluare sunt prevăzute de Statutul profesiei de avocat se pare că instanțele de judecată folosesc un dublu standard specific cadrului procedural creat de art 274 alin. 3 CRPC când hotărăsc micșorarea onorariilor avocaților acordate drept cheltuieli de judecată sau când în fapt cenzurează onorariile avocațiale care au fost stabilite în baza unor criterii legale punctuale, folosite de către avocat și client pentru stabilirea onorariilor în cadrul contractului de asistență juridică.

Înclinăm să credem că prin micșorarea onorariilor avocaților acordate drept cheltuieli de judecată instanțele de judecată în fapt revizuiesc legalitatea modalității prin care avocatul și clienții săi aplică elementele esențiale ale art. 132 din Statutul profesiei de avocat atunci când au încheiat contractul de asistență juridică.

2). Cea de-a doua abordare a practicii instanțelor judecătorești³ în acest domeniu este în favoarea creșterii sau reducerii onorariilor avocaților prin aplicarea articolului 274 alin. 3 CRPC. Raționamentul care susține o asemenea opinie este fie o simplă trimitere la respectivul articol, fie o explicație elaborată care include teoria abuzului de drept⁴.

EXERCITAREA DREPTULUI DE A MICȘORA ONORARIILE AVOCAȚILOR PĂRȚII ÎN FAVOAREA CĂREIA S-A SOLUȚIONAT CAUZA DE CĂTRE INSTANȚELE JUDECĂTOREȘTI, ÎN PROCESUL CIVIL ROMÂN

1. Motivare

1.1. Motivare de bază

După cum am menționat mai sus, în multe cazuri, instanțele ca motivare a micșorării onorariilor avocaților acordate drept cheltuieli de judecată, fie au făcut doar referire la articolul 274 alineatul 3 CRPC fără a dezvolta motivele, fie au făcut trimitere la dreptul lor de a face aprecieri asupra acestui aspect. În alte cazuri, instanțele se limitează la a conchide că există o disproporție⁵ între munca avocatului și valoarea pretenției supusă judecării.

O asemenea motivație este în mod evident o încălcare a chiar prevederilor art. 274 alin. 3, care prevede că orice asemenea decizie de creștere sau micșorare a onorariilor avocaților trebuie motivată. Această motivație nu poate fi una superficială. De ceva vreme este acceptat în doctrină⁶, că o asemenea motivație trebuie făcută în considerarea situației întregului caz cât și a probatoriului administrat în cauză. Este necesar ca următoarele elemente să fie luate în considerație când o asemenea motivare este făcută: modalitatea în care sunt stabilite onorariile și competența celor care stabilesc aceste onorarii, complexitatea muncii de înaltă calificare, experiența, nivelul profesional și educațional al avocatului, proporționalitatea⁷ onorariului cu volumul de muncă

³ Vezi minuta întâlnirii Consiliului Superior al Magistraturii și a membrilor Comisiei pentru crearea unei practici judiciare unitare cu Președintele Înaltei Curți de Casație și Justiție ("ICCJ") a României și reprezentatul parchetului de pe lângă Înalta Curte de Casație și Justiție și președinții secției civile și de conflicte de muncă și asigurări a Curților de Apel, pentru discutarea problemei, din data de 11.06.2008

⁴ Vezi Decizia 2420 din data de 11 aprilie 2008 a Înaltei Curți de Casație și Justiție Secția Civilă și de Proprietate Intelectuală care prevede că "scopul articolului 274 alin. 3 este de a preveni abuzul de drept, prin utilizarea onorariilor avocaților pentru alte scopuri decât accesul la asistență juridică calificată în timpul unui proces"

⁵ Vezi Curtea de apel Galați, Secția de drept comercial, maritim și fluvial, decizia nr. 1993 din data de 25 Mai 2005 în care este menționat că "onorariul avocatului acordat de către judecătorul sindic este în mod evident disproporționat atât față de volumul muncii depuse de avocat cât și față de valoarea datoriei"

⁶ Vezi Victor Ursa, Valentina Deleanu, *ibid.*

⁷ Vezi decizia 2420 datată 11 Aprilie 2008 a ICCJ Secția Civilă și de Proprietate Intelectuală

depusă pentru pregătirea apărărilor în cauză, determinată de complexitatea, dificultatea și noutatea litigiului.

1.2. Abuzul de drept și răspunderea civilă delictuală

O altă motivație pentru reducerea onorariilor avocațiale este întemeiată pe abuzul de drept și pe răspunderea civilă delictuală. După cum s-a afirmat în decizia Înaltei Curți de Casație și Justiție („ICCJ”) nr. 2420 din data de 11 aprilie 2008, prevederile art. 274 alin. 3 sunt CRPC destinate prevenirii abuzului de drept.

Atât doctrina⁸ cât și jurisprudența⁹ consideră că fundamentul acordării cheltuielilor de judecată părții în favoarea căreia s-a soluționat litigiul este de fapt culpa părții care a căzut în pretenții. Culpă procedurală este cea care determină aplicarea efectelor contractului de asistență juridică dintre avocat și partea în favoarea căreia s-a soluționat litigiul și asupra părții căzute în pretenții, conform principiului că regula în materia reparării prejudiciului în domeniul răspunderii civile delictuale este repararea integrală a prejudiciului produs.

Dacă urmăim teoria menționată, dreptul de a pretinde repararea prejudiciului produs de un act ilicit, ca oricare alt drept subiectiv, poate fi exercitat în mod abuziv. Sancțiunea pentru abuzul de drept este, conform Codului Civil Român și Codului Român de Procedură Civilă, obligarea la suportarea acoperirii prejudiciului cauzat de faptul ilicit. Drept urmare, de fiecare dată când instanța decide că ar trebui micșorate onorariile avocaților părții în favoarea căreia s-a soluționat litigiul fondat pe criteriul din art. 274 alin. 3 CRPC sau pe criteriile ce reies din interpretarea acestui articol în lumina art. 132 din Statutul profesiei de avocat, atunci este instituită o prezumție de abuz de drept.

a. Aspecte procedurale

Teoria abuzului de drept în considerarea răspunderii civile delictuale conform art. 274 alin. 3 CRPC ridică o serie de probleme de drept procedural și material care au fost trecute cu vederea de către practică și doctrină.

Onorariile avocaților pot fi acordate în baza cererii expres făcută în acest sens de către partea în favoarea căreia s-a soluționat litigiul. Cuantumul onorariilor avocaților este solicitat fie pe parcursul procesului civil principal, la sfârșitul dezbaterilor în faza punerii de concluzii, când este cunoscută întinderea unor asemenea onorarii și a altor cheltuieli de judecată, fie pe cale separată într-un nou proces.

Părțile la litigiu de regulă optează pentru prima posibilitate și solicită cheltuielile de judecată, inclusiv onorariile avocaților, ca cerere accesorie la cea principală. După cum am menționat, cuantumul onorariilor avocaților împreună cu dovezile care le susțin sunt identificate în scris în faza punerii de concluzii. Părțile pot solicita cheltuielile de judecată oral, fără a identifica cât dintre acestea reprezintă onorariile avocaților. Drept urmare, în faza punerii de concluzii niciuna dintre părți nu cunoaște care este cuantumul onorariilor solicitate de către cealaltă parte și astfel niciuna dintre ele nu este capabilă să își expună punctul de vedere asupra unei asemenea solicitări. Pe de cealaltă parte, părțile în litigiu nu au cunoștință într-un asemenea moment, înainte de orice decizie, dacă instanța va invoca abuzul de drept în considerarea răspunderii civile delictuale a părții care solicită cheltuieli de judecată constând din onorarii de avocat, prevăzut de art. 274 alin. 3 CRPC, astfel că nu își pot pregăti apărări pentru a combate această teorie.

Abuzul de drept în considerarea răspunderii civile delictuale a părții care solicită cheltuieli de judecată constând din onorarii de avocat implică îndeplinirea mai multor condiții cumulative:

⁸ Vezi Gabriel Boroi, Octavia Spineanu - Matei, *ibid*.

⁹ Vezi decizia 2420 din data de 11 Aprilie 2008 a ICCJ Secția Civilă și de Proprietate Intelectuală

existența unei fapte ilicite, prejudiciul, legătura de cauzalitate dintre fapta ilicită și prejudiciu și în cele din urmă a relei credințe¹⁰.

Toate aceste condiții sunt apreciate de către instanța de judecată în lipsa oricărei dovezi administrate în mod expres în acest sens de către oricare dintre părțile la proces și în absența oricăror concluzii scrise sau orale cu privire la această susținere.

Exercitarea în acest fel a dreptului instanței ce reiese din art. 274 alin. 3 CRPC sfidează nu numai principiile fundamentale ale procesului civil român și anume cel al contradictorialității, al rolului activ al instanței (art. 129 alin. 5 CRPC), al oralității procedurii, al egalității părților și al dreptului la apărare. Exercitarea dreptului instanței conform art. 274 alin. 3 CRPC de micșorare a cheltuielilor de judecată constând din onorarii de avocat sfidează drepturile constituționale ale părților la proces și dreptul fundamental al acestora la un proces echitabil¹¹.

Solicitarea cheltuielilor de judecată, inclusiv a onorariilor avocaților, pe cale separată de părților dreptul de a lua la cunoștință despre pretențiile părții în favoarea căreia s-a soluționat acțiunea principală cu privire la onorariile avocaților ce au fost ocazionate de procesul principal. Cu toate acestea, apărările părții care a căzut în pretenții nu sunt aproape niciodată întemeiate pe abuzul de drept. Prin aplicarea art. 274 alin. 3 CRPC în considerarea abuzului de drept și a răspunderii civile delictuale, fără informarea părților în timpul procesului asupra cererii privitoare la onorariile avocaților reprezentând cheltuieli de judecată, instanța continuă să încalce principiile contradictorialității, oralității, rolului activ, egalității părților și a dreptului la apărare. La sfârșitul dezbaterilor asupra proporționalității sau disproporției onorariilor avocaților cu munca prestată de avocat sau cu valoarea pretenției, partea în favoarea căreia s-a soluționat litigiul se poate găsi în situația în care onorariile avocaților sunt micșorate sau, mai mult, nu sunt acordate în baza unei prezumții a existenței unei fapte ilicite comise cu rea credință, elemente de drept care nu sunt discutate în respectivul proces.

Mai sunt și situații în care dreptul la cale de atac nu există în cazul deciziilor care micșorează onorariile avocaților în baza art. 274 alin. 3. Acesta este cazul deciziilor instanțelor de judecată pronunțate în contestațiile în anulare.

CONSTITUȚIONALITATEA ARTICOLULUI 274 ALIN. 3 CRPC

În 2005 a fost depusă la Curtea Constituțională o cerere prin care era ridicată excepția de necostituționalitate a art. 274 alin. 3 CRPC. Constituționalitatea respectivei prevederi a fost contestată în legatură cu articolele 11 alin. 2, 21, 24, 31 alin. 3, 52 alin. 1 din Constituția României. Prin decizia nr. 401 din data de 14 iulie 2005, Curtea Constituțională a decis că singurul articol care are relevanță asupra constituționalității art. 274 alin. 3 CRPC este art. 24 din Constituție care prevede dreptul părților de a fi asistate *ex-officio* sau de către un avocat ales, și a respins cererea, menținând articolul 274 alin.3 CRPC.

Constituționalitatea articolului 274 alin. 3 a mai fost contestată în 2007 în legătură cu articolele 15 alin. 1, 16 alin. 1, 24 alin 2, 44 și 45 din Constituția României, când din nou¹² Curtea

¹⁰ Vezi Ion Deleanu, *Tratat de Procedură Civilă I*, a 4-a ediție, revizuită, completată și actualizată, editura Servo Sat 2004, p. 590, vezi de asemenea Viorel Ciobanu, Gabriel Boroș, *Drept procesual civil*, Curs Selectiv Ediția a 3-a, editura All Beck 2005, p.50

¹¹ Egalitatea de mijloace în cazul Kremarand și alții v. Republica Cehă, Instanța a menționat “o parte în proces trebuie să aibă posibilitatea să se familiarizeze cu probele în fata curții, cât și de asemenea să aibă posibilitatea să comenteze asupra existenței, conținutului și autenticității în modalitatea și în intervalul de timp pe care le consideră potrivite și dacă este cazul în formă scrisă și în avans”.

¹² Vezi Decizia Curții Constituționale nr. 493 din 29.05.2007

Constituțională a respins acțiunea considerând că în mare motivația dată în Decizia nr. 401 datată 14 iulie 2005 este încă aplicabilă în acest sens.

Motivația Curții este în mod evident foarte superficială de vreme ce multe dintre aspectele referitoare la dreptul instanțelor judecată de a cenzura sau micșora onorariile avocaților comentate mai sus nici nu au fost abordate.

CRITERIUL APLICAT DE CĂTRE CURTEA EUROPEANĂ A DREPTURILOR OMULUI

Pentru respingerea excepției neconstituționalității, în fața Curții Constituționale, Ministerul Public și chiar Curtea Constituțională au invocat practica Curții Europene a Drepturilor Omului (CEDO) în ceea ce privește micșorarea onorariilor avocaților. O asemenea practică există dar criteriile folosite de către CEDO sunt diferite de cele folosite de instanțele judecătorești românești.

Criteriile folosite în practica CEDO se referă la realitatea, necesitatea și caracterul rezonabil¹³ al cheltuielilor de judecată, inclusiv al onorariilor avocaților.

Dacă realitatea și necesitatea cheltuielilor de judecată sunt elementele aplicabile în sistemul de drept românesc, criteriul caracterului rezonabil este străin acestuia care este un sistem bazat pe dreptul roman. Caracterul rezonabil este un concept de common law care a fost preluat în dreptul român și de către instanțele românești în practica lor fără nicio clarificare, mai ales în legătură cu articolul 6 din Convenția Europeană pentru Drepturile Omului aplicat și interpretat de către Curtea Europeana pentru Drepturile Omului.

DE LEGE FERENDA

Proiectul viitorului Cod de Procedură Civilă menține prevederea existentă în acest sens în prezentul cod și aparent introduce mai multe criterii pentru evaluarea onorariilor avocaților în procesul de reducere a acestor cheltuieli.

În acest sens, articolul 438 alin. 2 din proiect prevede că „*instanța poate reduce parțial, chiar și din oficiu, cu motivare onorariile avocaților, când asemenea onorarii sunt disproporționate în mod evident cu valoarea sau complexitatea cauzei sau cu activitatea prestată de către avocat, având în vedere caracteristicile cauzei*”.

La sfârșitul alineatului 2 al articolului 438 se prevede că acțiunea instanței nu va afecta relația dintre avocat și clientul său.

Conform art. 439 din proiect, dovada existenței și cuantumului cheltuielilor de judecată, inclusiv aceea referitoare la onorariul avocatului trebuie să fie făcută până cel mai târziu la sfârșitul dezbaterilor pe fond.

Noua propunere a formei existentului articol 274 alin. 2 CRPC nu rezolvă multe dintre problemele de drept material și procedural ridicate de prezentul studiu. Exceptând clarificarea faptului că instanțele ar trebui să exercite din oficiu acest drept sau la solicitarea uneia dintre părți și cu excepția introducerii criteriului complexității și circumstanțelor cauzei, textul menține posibilitatea încălcării principiilor fundamentale ale dreptului civil cum ar fi de exemplu contradictorialitatea procedurilor, caracterul oral al procedurilor, egalitatea părților, dreptul la apărare și va face subiectul unor critici similare în viitor.

¹³ Vezi Sabou și Parcalab vs. Romania, cererea nr. 46.572/99 Decizia CEDO din data de 28.09.2009, publicata în Monitorul Oficial, Prima Parte no. 484/08.06.2005.

INSTRUMENTE PENTRU CREAREA UNEI PRACTICI UNIFORME A INSTANTELOR DIN ROMÂNIA

Instrumentele disponibile pentru crearea unei practici unitare a instanțelor din România sunt recursul în interesul legii prevăzut de art. 329 CRPC și mecanismul pus la dispoziție de către Convenția Europeană pentru Drepturile Omului.

Recursul în interesul legii prevăzut de art. 329 CRPC este de competența Secțiilor Unite ale Înaltei Curți de Casație și Justiție conform articolului 25 din Legea 304/2004 și poate fi declanșat exclusiv de către Procurorul General al Parchetului de pe lângă Înalta Curte de Casație și Justiție sau de colegiile de conducere a curților de apel.

În ciuda continuului progres procedural, mecanismul în fața Curții Europene pentru Drepturile Omului încă implică diferite faze și pune dificultăți.

Ambele instrumente menționate pentru crearea unei practici uniforme a instanțelor de judecată din România în ceea ce privește micșorarea onorariilor de avocat reprezentând cheltuieli de judecată în procesul civil român implică atât un timp îndelungat cât și limitări și piedici pentru părțile în litigiu.

CONCLUZII

Dreptul instanțelor de a micșora cheltuielile de judecată reprezentând onorariile avocaților reprezintă în forma prevăzută de articolul 274 alin. 3 CRPC o sursă constantă de nesiguranță juridică care practic afectează relația dintre avocat și client. Considerăm că instanța ar trebui să aibă dreptul de a cenzura onorariile avocaților în cursul unui proces civil. Cu toate acestea, un asemenea drept trebuie să fie exercitat cu precauție și doar cu posibilitatea părții implicate de a-și apăra poziția în cazul în care partea adversă sau instanța consideră că onorariile avocaților sunt disproporționate în raport cu valoarea cauzei, munca avocatului sau alte criterii.

Situația ar putea fi remediată fie prin folosirea unui instrument prin care să se creeze o practică unitară a instanțelor, or prin propunerea unui nou text al articolului în cauză care să prevadă că atacarea cuantumului onorariului avocatului trebuie adusă la cunoștința părții în proces și dezbătută cu posibilitatea exercitării dreptului la apărare cu privire la acest aspect și posibilitatea folosirii criteriilor legale prevăzute de articolul 132 din Statutul Profesiei de avocat.

Menținerea unei situații de nesiguranță juridică va crea dificultăți în relația dintre avocat și clientul său cu privire la recuperarea cheltuielilor de judecată în întregime lor în cursul procesului civil român pentru onorarii stabilite contractual în conformitate cu prevederile legale și declarate în scopuri de taxare.

CERTAIN THEORETICAL AND PRACTICAL ISSUES, REGARDING THE ADMITTANCE INTO GUARANTEE OF THE ESTATES GAINED ON BASIS OF LAW NO. 112/1995 FOR THE REGULATION OF THE LEGAL SITUATIONS OF CERTAIN ESTATES WITH THE DESTINATION OF DWELLINGS, TRANSFERRED INTO THE PROPERTY OF THE STATE

Cornelia Beatrice Gabriela ENE-DINU*

Abstract

The property right is a subjective civil right, so that its admittance, protection and exertion should be approached within the general frame of the aggregate subjective civil law. In accordance with the provisions of art. 480 Civil Code: „the property is the right of someone to enjoy and dispose of a thing in an exclusive and absolute manner, but within the limits determined by law”. The property right is the fullest real right, as it is the only subjective right that renders to its holder three attributes: possession, usage and disposal. In regard to the protection of the subjective civil rights, it represents one of the fundamental principles of the Romanian civil law and it is presented as such both in the internal normative documents and in the international normative documents whereof Romania is a party. The property right should be exerted only according to its economic and social scope; it should be exerted by observing the law and morals (art. 5 Civil Code); it should be exerted bona fides (art. 970 Civil Code and art. 57 from the Constitution); it should be exerted within its limits. The judiciary and notary practice have faced within the last period the urgent necessity to find the most suitable solutions to the problems raised by the interdictions to alienate the estates stipulated by certain organic laws, such as: art. 9 para (8) from Law no. 112/1995 on the regulation of the juridical situation of certain estates with the destination of dwellings, transferred into the property of the State, with subsequent amendments and supplements.

Keywords: *the property right, subjective civil right, Romanian civil law.*

In accordance with art. 9 para (1) from the Law: „tenants, who are holders of contracts for the apartments that are not returned in kind to the former owners or their heirs may choose after the expiry of the term stipulated in art. 14 to buy such apartments against paying the prices as a lump sum or in installments”, and in accordance with art. 9 para (8): „apartments gained in the terms of para 1 may not be alienated for 10 years as of the date of purchase”. By the amendments brought by art. 9 para (1)-(4) from the Law, by art. 43 para (1) from Law no. 10/2001 on the legal regime of certain estates taken over abusively within the period 6 March 1945 - 22 December 1989, republished: „tenants, who were sold the apartments they lived in on basis of the provisions from art. 9 para 1-4 from Law no. 112/1995, by observing such laws, shall be entitled to alienate them under any form before the anniversary of the 10-year term as of the date of purchase, only to the entitled person, former owner of such dwelling”.

From the analysis of the legal text it results that the interdiction to alienate (re-alienate) the apartments gained by the tenants for 10 years as of purchase (See art. 37 from the Methodological Norms for the application of Law no. 112/1995 adopted by Government Decision no. 20/1995 republished in the Official Gazette of Romania, Part I, no. 27 from 18 february 1997), is a case of temporary and absolute inalienability that regards all apartments purchased in the terms of art. 9 para (1) from the Law. The formation of a real estate market depends inter alia also upon the

* Lecturer, Ph.D. candidate, Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: liadinu78@yahoo.fr).

manner in which the legal provisions on the circulation of estates are applied. In regard to the dwelling real estate market, although it is more dynamic than the land market, the deficit of dwelling space is felt unfavorably, as the offer is more limited than the demand. Under such terms, the interpretation of certain notions whereby certain interdictions in regard to the circulation of estates are implemented generates dysfunctions of the real estate market, contrary to the scope aimed at by the lawmaker; but the right cannot remain alien to the economic realities it regulates.

Under such conditions, we estimate that for our study subject it is important to distinguish whether the interdiction (prohibition) is:

a) either only a special sales incapacity or on purchase in considering the person (in personam);

b) or a inalienability (only on sales) established by law according to the nature or destination of the goods, stipulated *propter rem* that have as a main consequence the removal from the civil circuit.

The opinions expressed in the legal literature, related to the nature of such interdictions are divergent, as the notary and juridical practice reveal contradictory solutions, a context in which the critical approach of such issue seems necessary to us. In an opinion it was claimed that the interdiction to alienate the estates gained in terms of art. 9 para (8) from the Law represent a *intuitu personae* unavailability, preventing the persons that gained the properties to speculate the received estates. In another opinion it is claimed that the interdiction to alienate such estates is not a simple special alienation incapacity established between persons, but a inalienability stipulated *propter rem*, considered for the good (*intuitu rei*) and not for the person holding the right. This opinion is shared also by other authors, the alienation interdiction characterized as a *propter rem* obligation, being also extended in regard to the estates gained in terms of art. 9 para (1) from the Law. In another opinion that is quite ambiguous and imprecise, it is claimed that the prohibitive provision stipulated in art. 9 last paragraph from the Law „should not be rigidly interpreted when a clause occurs that is beyond the will of the gainer, such as his settlement in another locality”, a situation that in the opinion of the author would justify the alienation of the estate also during the 10-year period as of purchase. The opinions expressed by the practitioners in the notary activity, also in natural agreement with their practical activity, oscillate between the *in rem* nature of the inalienability of such goods and the *intuitu personae* nature of the alienation incapacity. Thus, in another opinion, the alienation interdictions stipulated in art. 9 final paragraph from the Law and art. 32 from Law no. 18/1991 of the Land Fund, with subsequent amendments and supplements, are *propter rem* inalienable, but the conclusion in regard thereto of sales precontracts, synalagmatic sales promises is legal, provided the parties do not establish the term to conclude the sales contract earlier than 10 years and such deed is not an alienation of the said estates. The inalienability of goods shall be substantiated on the provisions of art. 963 Civil Code, according to which: „only the goods that are in trade may be the object of a contract”.

Stating their opinions for the purpose of the *intuitu personae* nature of the interdiction to alienate the estates gained in terms of art. 9 final paragraph from the Law, certain authors show that only deeds transferring property are interdicted, not the legal deeds on the setting up and transfer of dismemberments of the property right, as such may also come in the form of deeds under private signature, whereas other authors are of the opinion that the interdiction to alienate estates also implies the interdiction to set up and transfer the dismemberments of the property right, the interdiction to mortgage such, as well as the conclusion of bilateral sales promises (pre-contracts), motivating that by their conclusion the provisions of the Law would be eluded (See O. Radulescu, *Interdictia de instrinare a apartamentelor cumparate de chiriasi in baza Legii nr. 112/1995*, in magazine Dreptul no. 10/1999, p.35).

In the legal practice it was deemed that sales pre-contracts are legal and their registration in the land ledger was ordered, as well as the sales contracts concluded by the heirs of the owners of the estates gained in terms of the Law.

Explicitly or implicitly, all quoted authors agree however that the aim of the lawmaker by alienating the said interdictions is that of limiting speculation with such estates upon which was set up, re-set up, a property right or the vocation to gain such a right as a legislative measure of evident social protection.

The interpretation and application of the law may not omit such a scope, because as a reputed theoretician of the Romanian law from the period between the two world wars noted, he who „on behalf of the positive law limits himself to a narrow logics, excerpted only from texts and omits their supreme reasoning of being, i.e. justice, commits a mistake that means a crime against the law itself”.

The scope of the law may not be contrary to the idea of justice, but subordinates itself to it.

Between the *propter rem* inalienability and the *intuitu personae* inalienability we have to see which better serves the scope of the law. Passing over the fact that such interdictions are at the edge of the constitutionality of the law, as they also bring *de facto* limitations to fundamental rights and freedoms other than the property right, influencing the right of free circulation and the right to settle the domicile in any locality in the country or even abroad (art. 25 from the Constitution), we have to choose that interpretative solution that brings the fewest limitations to the exertion of the fundamental rights and freedoms of the citizen. The fact may not be ignored that in accordance with art. 135 from the Constitution, the economy of Romania is a market economy and the State should ensure the freedom of the trade. This constitutional provision is not and should be not declarative. The freedom of trade also means the freedom of the circulation of goods.

The *propter rem* inalienability reflects an excessive intervention of the State in economy, impairing the freedom of trade in an unjustified manner, as it would restrict the civil circuit of such goods, in accordance with art. 963 Civil Code and it may not sell the traded things. The intention of the lawmaker was not that of removing such goods from the civil circuit and a proof is that they may be transmitted by *mortis causa* deeds or by civil deeds, such as *usucapio*, in case of which the effects are caused *ex tunc*, and it is possible that the beginning of the possession should be within the Law and art. 32 from Law no. 18/1991, republished, and it has no suspensive effect upon the prescription term.

The *propter rem* inalienability has a constitutional support only for the goods of public property, declared according to art. 136 para (4) from the Constitution as inalienable, and such inalienability is absolute, as they cannot be barred and perceived, but they can enter the civil circuit by non-transferable deeds of property, such as: the assignment and giving into administration or lease (art. 136 para (4) from the Constitution; art. 1844 Civil Code).

The Law may also set up a relative *propter rem* inalienability regarding certain goods that due to reasons related to public order and health or the national security have a restrictive circulation regime and they may be manufactured and traded only by certain authorized legal persons or individuals and upon certain economic activities is set up the State monopoly in terms of Law no. 31/1996¹², and the regime of gaining and holding such goods, such as: weapons and ammunition, explosive materials, intoxicant products and substances etc. and they are regulated by special laws.

If the inalienability would be *intuitu rei* or *propter rem*, it should theoretically concern all goods of the same kind, irrespective of their owner, not only the goods of certain persons. If it concerns only the goods of certain persons it means that not the nature of the goods is the one that determines the inalienability, but the quality of the person and thus the inalienability is *intuitu personae*.

The proper rem obligations theoretically do not impair the civil circuit, as they do not hinder the circulation of the goods and the new gainers remain to further fulfill them and they are *debitum cum re junctum*.

There is no reason of the above nature to set up such a proper rem inalienability in regard to the estates we refer to; on the contrary, there are suffice reasons to note that the alienation interdiction has an *intuitu personae* nature, being in reality a restriction of the property right, justified by the scope in which the lawmaker setup a right to the benefit of the heirs.

In case of tenants from the estates transferred into the property of the State, the gaining of the property right by their purchase is also conditioned by the fact of not selling such estates for 10 years as of the purchase date, under the sanction of absolute nullity of the alienation deed.

The restriction of exerting certain rights is governed by the proportionality principle itself, consecrated by art. 53 para (2) from the Constitution, any restriction should be pro rata to the situation that determined it, without impairing the existence of the right or of the freedom.

The restriction of exerting the property right by limiting the legal provision upon the good could concern only those who, benefiting of the social protection granted by the lawmaker would distort its scope, infringing the obligations under the condition of which was regulated such social protection.

As a consequence, we deem that a real technological interpretation of the said legal norms can lead only to the conclusion that by such norms was regulated an *intuitu personae* incapacity to dispose of such estate for 10 years. Some authors deem that such incapacity does however not concern the heirs of the initial owners, as they gain the concerned good not as an effect of the law under which the good was gained are not binding to them (to settle their domicile in the locality where they hold the land, to work such land etc.) and neither is the interdiction to alienate the estates.

Starting from the premises of the *intuitu personae* character of the inalienability of such estates, we further examine the legal deeds that may be concluded in such regard.

The sales pre-contracts are not alienation deeds of the estates, as they have as a legal object not the obligation to give, but the obligation to make, respectively to conclude in the future the promised contract, being practically a bilateral sales promise. Due to this reason was expressed the opinion that such are legal insofar the conclusion of the contract transferring the property is to be performed after the expiry of the 10-year term, as long as the alienation interdiction of the said estates lasts.

The argumentation brought in favor of this opinion is theoretically accurate and such deeds may be validly concluded, however provided that the law should not be eluded through them. When the bilateral sales promise is followed by the transfer of the real estate possession and the payment of the due price, we deem that the intention of the parties to elude the provision of the law is clear and the owner of the real estate demonstrates that he does not need any dwelling and so the reason wherefore the social protection was granted to him by the lawmaker is not real.

A decision of the High Court of Cassation and Justice (See the High Court of Cassation and Justice, S.civ. and of intellectual property, dec. no. 5499/2004, published in the magazine "Dreptul" no. 2/2006, p. 263), brings again into discussion certain controversial issues regarding the interdiction stipulated by art. 9 para. (8) from the Law that, as we know, stipulates that the "apartments gained in terms of paragraph 1 may not be alienated for 10 years as of the date of purchase".

The provision of art. 9 para (8) from the Law were amended by Law no. 10/2001 that by art. 43 para (1) stipulated the right of tenants who purchased the dwelling on basis of the Law to alienate it, even before 10-year term as of purchase, but only if the alienation is performed to the entitled person, former owner of such dwelling.

By the above-mentioned decision, the High Court essentially provided that:

- the legal or testamentary inheritors of the deceased that purchased an apartment on basis of the Law are entitled to sell it, under the suspensive condition that the transfer of the property should operate on the date of the 10-year anniversary as of gaining;
- the inheritors shall be entitled to set up and transfer dismemberments of the property right before the expiry of the mentioned term.

We shall further examine both provisions of the High Court. In regard to the inheritors right to sell under the indicated suspensive condition, it is to be noted that on basis of art. 1296 Civil Code: „the sale can be performed either purely or conditioned" that may be evidently also suspensive, as it is also expressly stipulated by art. 1584 para (1) French Civil Code. Only that in accordance with art. 1004 Civil Code, the obligation is conditioned when its fulfillment depends on a future and uncertain event". When the parties stipulate that the transfer of the property right shall operate on the anniversary of the 10-year term, this is certainly a future event, but also an „uncertain" one. The concerned date can be rather deemed a suspensive term, in the meaning of art. 1022 Civil Code, given the fact that the term, in comparison to the condition, does not suspend, but postpones only its execution. Irrespective of the qualification we refer to, we deem that we should make the distinction between the transfer of the property right that usually operates on concluding the contract and the delivery of the good that is the object of the sale and that usually operates or may operate later.

In accordance with art. 1583 French Civil Code, the sale is concluded between the parties and the property is de jure gained by the buyer as soon as the thing and the price are agreed upon, although the thing has not been delivered and the price has not been paid. The parties may of course agree that the transfer of the property should operate after the conclusion of the contract. Therefore, art. 1476 from the Italian Civil Code stipulates among the main obligations of the Seller also that of transferring the property upon the good or the right „if the transfer is not the immediate effect of the contract". In the French doctrine it was rightfully underlined that the transfer of the property that is the object of the sales contract is of the sales nature, not its essence. In the same way it was indicated in our doctrine in a justified manner that the parties may agree to postpone the transfer of the property right to a certain date that differs from that of concluding the contract, e.g. on the date when a buyer fully pays the price. Admitting thus that the inheritors may conclude sales deeds, if stipulated in the deed that the transfer of the property shall be performed on the anniversary of the 10-year term, motivating that for such purpose is not disregarded the interdiction we refer to, we naturally draw the conclusion that not only the heirs, but also their authors have such right.

Finally, considering the above stated, certain authors do not share the reason comprised in the above-quoted decision of the High Court, according to which to the inheritors of the holder of the property right upon the apartment purchased from the State, on basis of the Law (the former tenant) „were not incident the provisions of art. 9 final paragraph in regard to the interdiction of the alienation" (a solution justified on the idea of not admitting the extensive interpretation of certain exception norms). The motivation of the opinion of such authors is justified on the application of the principle *clasic nemo plus juris ad alium transferre potest quam ipse habet*; in other words, as long as he could not de cujus alienate the dwelling purchased on basis of the Law, for 10 years as of gaining, his inheritors cannot have larger rights than their author, without such legal axiom representing an „extensive interpretation" and an infringement of the provisions from art. 53 from the Constitution of Romania (republished) in regard to the extraordinary nature of restricting the exertion of certain rights or of certain freedoms. In regard to the possibility of the inheritors to transfer the usufruct of the purchased estate or other dismemberments of the property right, with the motivation that such are not alienations and that the lawmaker interdicted only

alienations, the same authors deemed that if we admitted the existence of such a possibility, the Law would be eluded.

In the opinion of such authors, the thesis that if the lawmaker interdicts the alienation of certain goods, neither parts (dismemberments) of the property right concerning such good can be alienated, remains valid, as the alienation interdiction would be eluded and the scope aimed at by the lawmaker would be disregarded.

By the interdiction stipulated in art. 9 from the Law was aimed at avoiding speculation and not creating difficulties to the persons entitled to request the retrocession of the apartments, inclusively by declaring the nullity or canceling the sales contracts concluded by the State with the tenants, sanctions that become more difficult to accomplish, if the estates are alienated to third parties that may invoke bona fides. Or, if the setting up of a usufruct and its assignment for a long time is allowed, none of the scopes aimed at by the lawmaker would be observed.

On the other side, as the usufruct is an element of property, so that if the sale is interdicted, then the setting up and the assignment of the usufruct would be the principle *accessorium sequitur principale*.

The same authors deem that before the expiry of the 10-year term, neither the inheritors, nor their authors may set up or transfer dismemberments of the property right upon the estates purchased on basis of the Law.

In the specialty literature were expressed divergent opinions in regard to the mortgaging of such estates that were gained in accordance with the Law.

Some authors deem that the mortgaging of such estates is not legal, starting from the provision comprised in art. 1750 para (1) Civil Code, according to which only estates in the civil circuit may be mortgaged. Such authors claim that the concerned estates are in the civil circuit, but their circulation is limited to *mortis causa* deeds. The same authors claim that the capacity to mortgage an estate belongs only to the person that also has the capacity to alienate such (art. 1769 Civil Code); or, as we subsequently showed, the new owners of such estates have a restricted capacity to exert the property right upon them and they cannot alienate them for 10 years as of the date of setting up the property right; as a consequence as these estates cannot be alienated, they can be neither mortgaged.

In another opinion it is claimed that such estates may be mortgaged and it is deemed that the cancellation of the mortgage security contract could be ordered only if *ab initio* proven that the owner aimed by mortgaging the good to reach its alienation by executory way of the good.

However the infringement of the law has to be proven, as the good faith of the owner is presumed. If the fraudulent intention of the owner is not proven, the mortgage security contract would be valid.

In the light of the above are incident the provisions of art. 45 para (2) from Law no. 10/2001, according to which: „legal alienation deeds, inclusively those made within the privatization process, having as an object the estates taken over without a valid title are stricken by absolute nullity, except the case when the deed is concluded bona fides”. Bona fides is presumed and the overturning of the presumption is possible by establishing the mala fides resulting from the evidence administered before the law court.

Under this last issue, the law courts concretely provided that those who gained as tenants the estates on basis of the provisions of the Law should perform the minimum diligences in order to find out whether they made the object of in kind return applications, so that those abusively dispossessed should regain the property right (See Decision no. 1/2003 of the Supreme Court of Justice, Civil Section; decision no. 1005/2003 of the Supreme Court of Justice, Civil Section; decision no. 4612/2004 – High Court of Cassation and Justice, Civil Section and intellectual property; decision no. 4702/2004 - High Court of Cassation and Justice, Civil Section and

intellectual property; decision no. 2141/2004 - High Court of Cassation and Justice, Civil Section and intellectual property; decision no. 5758/2004 - High Court of Cassation and Justice, Civil Section and intellectual property; decision no. 10045/2004 - High Court of Cassation and Justice, Civil Section and intellectual property).

„What regards us, we share the opinion of those authors according to which estates gained on basis of the Law may be mortgaged, considering the provisions of art. 1750 para (1) Civil Code, meaning that they are in the civil circuit, however provided the 10-year term stipulated by the lawmaker is fulfilled. As indicated, starting from the premises of the *intuitu personae* nature of the inalienability nature of such estates, the restriction of exerting the property right by limiting the legal disposal of the good, we do think that it could concern only those which benefiting of the social protection granted by the lawmaker would distort its scope by infringing the obligation under the condition of which was regulated this social protection”.

Thus, the restriction of exerting certain rights, such as that of mortgaging the good gained in terms of the Law is governed by the very principle of proportionality stipulated in 53 para (2) from the Constitution of Romania.

According to this principle, any restriction of the exertion of the property right should be *pro rata* with the situation that determined it, without being able to impair the existence of the right or of the freedom. However it is understandable that the lawmaker has not aimed at such effects. We deem that this opinion is accurate, considering the fact that such estates gained by virtue of the Law are in the civil circuit, so that they may be the object of a real estate security contract. To support a contrary opinion according to which the concerned goods would be removed from the civil circuit is not justified as long as certain legal deeds can be concluded in their regard, inclusively such transferring property of *mortis causa* nature.

The interdiction of alienation set up by the text is not equivalent with the temporary removal of the purchased estates from the civil circuit (a proof that they may be transmitted by inheritance), but with a limitation of the property right in the attribute of the provision understood for the purpose of alienation of transferring the property right by deeds among living persons. The temporary inalienability set up by Law aims only at the alienation by deeds among living persons, for valuable consideration or free of charge, not at the transmission by legal or testamentary inheritance and the intention of the lawmaker is not to remove such goods from the civil circuit.

Without substituting the law courts and so much the less the Constitutional Court at the question whether the limitation by legal deeds of the exertion of certain rights is constitutional (in this case, the stipulation of alienation interdictions), the answer can be only affirmative. Considering art. 44 para (1) from the Constitution of Romania, as well as such of art. 480 Civil Code in our opinion, the limitation by organic law of exerting certain rights is possible (as the alienation interdiction is the form of limiting the exertion of the property right).

Art. 44 para (1) from the Constitution of Romania stipulates that: „The property right, as well as the receivables against the State are guaranteed. The content and the limitation of such rights are established by law”; art. 480 Civil Code stipulates that: „The property is the right someone has to enjoy and dispose of a thing in an exclusive and absolute manner, but within the limits determined by law”.

From the interdiction established by art. 9 final paragraph from the Law, art. 43 para (1) from Law no. 10/2001 set up, as we mentioned, an exception, meaning that the concerned apartments may be alienated „under any form before the anniversary of the 10-year term as of the purchase date only to the entitled person, former owner of that dwelling”.

In considering such provisions and having regard to the *intuitu personae* nature of the interdiction to alienate such estates, we deem that they may be the object of real estate security contracts, as they are goods that are found in the civil circuit.

Thus, in order to admit in guarantee such estates, we deem that additional formalities are necessary to be performed, respectively:

a. it shall be checked whether the price of the estate was fully paid and for such purpose shall be produced either the proving receipt, or the address from the purchasing company wherefrom this should expressly result;

b. supporting documents shall be produced wherefrom should result that the 10-year term stipulated by the lawmaker expired, a term computed as of the date of the sale operation (for such purpose shall be submitted either the address from the selling company, or the photocopy of the land ledger of the estate);

c. it shall be checked whether the tenant becoming an owner was summoned, notified or announced in any way about the existence of an action formulated by any entitled person, concerning the estate he wants to alienate. In this case, we deem that it is not suffice to produce only an authentic declaration of the owner of the estate proposed to be brought into guarantee in regard to the above-mentioned operations, but also from the State or the selling legal entity, as well as of the mayoralty of the locality where the estate is situated;

d. information shall be requested about the existence/non-existence of litigations, having as an object the cancellation or the assessment of absolute nullity of a legal alienation deed concerning the estate gained in terms of the Law from the law court competent to solve the concerned cause.

Concerning the above and having regard to the necessity of concluding the transaction in terms of maximum security, without the occurrence of a risk on setting up the guarantee to the benefit of the bank and concurrently having regard to the provisions of art. 43 para (2) from Law 10/2001, as amended and supplemented by Law 247/2005, wherein it is mentioned: „under the sanction of absolute nullity, the alienation in any way of the estates gained by virtue of Law no. 112/1995, with subsequent amendments and supplements, shall be interdicted until the final and irrevocable solving of the actions formulated by the entitled persons, former owners or, as the case may be, their heirs, according to art. 45", we deem that the subject remains open to any comments, so much the more the court practice and the notary one, as well as the opinions of the theoreticians are divergent in regard to the legal nature of the estates gained in terms of this special law.

ASPECTS REGARDING THE PLACE OF PERPETRATION OF THE OFFENSE, A CRITERION FOR THE ESTABLISHMENT OF TERRITORIAL COMPETENCE IN CRIMINAL MATTERS

Bogdan Florin Micu*

Nicolae Titulescu University – Faculty of Law

Summary

Territorial competence is, together with material competence and functional competence, one of the fundamental forms of competence, without which the precise competence of a judicial body in the resolution of a criminal matter cannot be established.

Among the fundamental forms of competence, territorial competence is imperative by its extreme importance, being immutable, namely the judicial bodies can only build a case or try a criminal case if they are competent from the territorial point of view.

Starting from this qualification, it is extremely important to know the criteria based on which territorial competence is established and the way in which they are enforced, aspects analyzed in this article.

In the light of the Romanian criminal procedural regulations, the establishment of the territorial competence of the judicial bodies is done depending on two main coordinates – art. 30 (competence for offenses perpetrated in the country) and art. 31 (competence for offenses perpetrated abroad).

The establishment of the territorial competence as a criterion for the establishment of the territorial competence in criminal matters implies the approach of both criminal law aspects and criminal procedure law aspects.

Thus, from the point of view of substantial law, the appreciation of the place of perpetration of an offense is done by applying the territoriality principle. The proper enforcement of the territoriality principle in the establishment of the place of perpetration of the offense was characterized by different approaches that adopted in the criminal law doctrine several forms around which several theories have been built – the theory of action, result, unlawfulness, preponderance and ubiquity.

Last but not least, from the point of view of criminal procedure law, the analysis and definition of the place of perpetration of the offense is done in accordance with the theory of ubiquity or equivalence, a dominant theory in criminal doctrine nowadays.

CHAPTER I

TERRITORIAL COMPETENCE - RATIONE LOCI – IN CRIMINAL MATTERS

Section 1

Notion and importance of territorial competence

The territorial competence of a judicial body is the objective capacity of that body to solve the interrelated criminal cases, with social-judicial relevance, with regard to the territorial radius in which that particular body exerts its attributions¹.

The definition of the concept shows the double limitation of territorial competence, on one hand we are talking about the territorial radius in which the judicial body exerts its attributions conferred by law and on the other hand the relation with social-judicial relevance between the territorial radius and the criminal case that is going to be tried².

* Lecturer Ph.D., Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: bogdan.micu@univnt.ro).

¹ V. Dongoroz, S. Kahane, G. Antoniu - *Theoretical Explanations of the Code of Criminal Procedure*, Publishing House of the Socialist Republic of Romania, Bucharest, 1975, page 115.

² Idem.

Territorial competence is therefore the criterion used to determine which of the bodies of the same level is competent to solve a certain case³.

Among the fundamental forms of competence, territorial competence is imperative by its extreme importance, being immutable, namely the judicial bodies can only build a case or try a criminal case if they are competent from the territorial point of view. Unlike material competence, the *ratione loci* competence splits cases between different judicial bodies horizontally and is determined, as its name suggests, by territorial criteria.

Thus, territorial competence is not substantiated on something artificial, but on a natural criterion, on a fact⁴.

This form of competence represents the distribution in the territory of material competence, determines the territorial scope of the competence of different bodies with the same material competence.

Material consequence therefore appears as an essential condition for territorial competence so that a judicial body cannot be competent from the territorial point of view if it is not first competent from material point of view. We must point out at the same time that we cannot conceive the distribution of material competence among several judicial bodies without ensuring the order and discipline through territorial competence, the distribution of criminal cases according to this criterion not being done randomly⁵.

Territorial competence can be labeled as an extremely important condition for the activity of the judicial bodies, without which they could not reach the desired objective. On the other hand, the territorial competence criteria are also a guarantee provided to the citizen in the sense that he/she knows the competent territorial body, being eliminated this way the possibility of appearance of an abuse of power committed by the people that have the right to solve that particular case.

Naturally and objectively, under the current circumstances of the phenomenon of criminality, we could not speak about the existence of a single court that within the limits of its material competence has the ability to investigate and try all criminal actions perpetrated on the territory of a state. Very suggestively, **V. Manzini** shows that 'if the Italian state had had the surface of the San Marino state or the Vatican only one judge would have been enough for any category of material competence'⁶.

Such a situation would inevitably lead to problems and difficulties for both the judicial bodies – from the organizational point of view -, and for the citizens – material and time-related difficulties – in the resolution of the criminal cases they are involved in.

That's why the existence of a plurality of bodies equal in level, with the same material competence and their distribution along the whole territory of a state appears as an objective necessity. This distribution can only be made based on a territorial criterion.

According to this criterion, courts at the same level exert their competence in their turn on a limited surface of the territory of a state, namely within a territorial circumscription.

These territorial circumscriptions are more numerous and less extended if those bodies are lower in the scale of hierarchy of judicial bodies and the more they are more extended and less numerous, the more they occupy a higher position in this hierarchy.

³ I. Neagu – *Criminal Procedure Law*, Global Lex Publishing, Bucharest, 2002, page 282

⁴ Traian Pop - *Criminal Procedure Law*, vol. II, National Printing House, Cluj, 1946, page 157.

⁵ V. Rămureanu - *Criminal Competence of the Judicial Bodies*, Scientific and Encyclopedic Publishing, Bucharest, 1980, page 51. in the same sense, we also must mention the opinion of professor Traian Pop in the work entitled '*Criminal Procedure Law*', vol. II, National Printing House, Cluj, 1946, page 157-158.

⁶ V. Rămureanu - *Criminal Competence of the Judicial Bodies*, Scientific and Encyclopedic Publishing, Bucharest, 1980, page 51.

The legal dispositions on territorial competence make possible the distribution of criminal cases from the territorial point of view – horizontally – between judicial bodies of the same degree, each body having a certain territorial radius, with regard to the administrative-territorial organization of the country.

Section 2
Modalities of establishment of territorial competence. Competence for offenses perpetrated in the country

In the light of the Romanian code of criminal procedure, the establishment of the territorial competence of the judicial bodies is done based on two main coordinates; art. 30 Code of criminal procedure – Competence for offenses perpetrated in the country and art. 31 Code of criminal procedure – Competence for offenses perpetrated abroad.

This study approaches only the particularities of the establishment of territorial competence in case of offenses perpetrated in the country.

In the light of the previous regulations, to be more precise the Romanian Law, territorial competence was determined based on a single criterion, namely the place of perpetration of the offence - *forum delicti commissi* -, the importance of this criterion being justified by the fact that essential evidence could be found at the place of perpetration of the offence⁷.

In the old French law, the feudal regime had established the general rule of competence of the judge of domicile, but in time, the French Code of criminal procedure made the preference established by the old legislation disappear, being replaced by the principle of concurrence, according to which equally competent were the judicial bodies of the place of the offence, domicile and capture.

This tendency towards the multiplication of the bodies competent from the territorial point of view could be seen early and has become a constant of modern and contemporary legislation⁸.

In the Romanian criminal procedure law, the previous Code of criminal procedure stipulated for the offenses perpetrated in a country a three-party territorial competence. Thus, art. 21 Code of criminal procedure stipulated for the establishment of territorial competence three criteria, namely: the place of perpetration of the offense, the place of domicile or residence of the author and the place in which the author was caught.

At present, to the three known, traditional criteria that give competence⁹, another one was added: the place in which the victim lives.

The appearance of the fourth determining competence criterion is an innovation of the Code in force, an innovation whose explanations mainly resides in the legislator's intention to facilitate the effective participation of the victim in the criminal trial¹⁰.

⁷ Dem. M. Foişoreanu - *Judicial Organization from the Most Ancient Times*. PhD Thesis, page 73. in the same line, professor V. Dongoroz shows: 'in ancient times, the perpetration of a criminal deed was relevant only for the collectivity of the place of perpetration so the criminals can easily ensure their impunity leaving the place in order to benefit from the asylum of the indifference of the people of their place of refuge' - in *Theoretical Explanations of the Romanian Code of Criminal Procedure*, Publishing House of the Socialist Republic of Romania, Bucharest, 1975, page 115.

⁸ N. Volonciu - *Criminal Procedure Law*, Paideia Publishing, Bucharest, 1998, page 297.

⁹ The three enumerated criteria were also regulated in the first modern Code of criminal procedure that came into force on December 2, 1864. The old doctrine stipulated, referring to this issue, that : '... with regard to territorial competence, competent to try a case shall be the Courts of the place of perpetration, the defendant's domicile and the place in which he/she was caught' - I. Tanoviceanu - *Treaty of Law and Criminal Procedure*, vol. IV, Curierul Judiciar Publishing, Bucharest.

We must at the same time point out the fact that with regard to the previous regulation, at present there are modifications regarding the order in which these criteria are enumerated. Thus, the criterion of the place of perpetration of the offense is still on the first position, and the order of the last two criteria has been switched, the place of capture of the author passing to the position occupied by the criterion of the author's residence or domicile – as it had been regulated previously.

The need for a multiple competence from the territorial point of view is given by the importance of the discovery of the offenses and capture of the criminals in order to hold them responsible according to the law and perform this way a prompt investigation and trial meant to ensure the preventive and educative role of criminal justice¹¹.

The criteria of establishment of the bodies competent from the territorial point of view, although differentiated to a certain extent in the different legislations, have however some general constant elements.

In the regulations existing in other states, territorial competence can also be established depending on the place of arresting of the author¹² or depending on the domicile of the author or witnesses¹³.

The French criminal procedure legislation contains a series of differences with regard to the regulations existing in our legislation with regard to the criteria for the establishment of territorial competence.

Thus, in order to determine the competence of the judicial bodies, the French criminal procedure law does not take into account only the person that perpetrated the offense, but also certain circumstances of place, such as the place the offense was committed in, the place of residence or place of detention¹⁴. This way, in case of law violations it is mainly competence of the Court of the place of perpetration of the law violation or that of the place of residence of the alleged author. In case of offences and offenses, it is mainly competence of the Court of the place of perpetration, place of residence of the author, place of arresting or place of detention¹⁵.

In the French procedural system there is a difference between the competence of the examining judge on one hand and the courts on the other. The examining judge, competent from the material point of view to build a criminal case, offence or even – but only at the request of the General Prosecutor – law violation, is competent from the territorial point of view to investigate all law violations perpetrated outside the territorial radius of the Court he/she belongs to if one of the persons that allegedly participated in the perpetration of the action lives in the territorial radius of the Court he/she works in.

He/she can also inform about the perpetration of these activities if the author lives within the territorial radius of the Court he/she is carrying out his/her activity in¹⁶.

¹⁰ V. Rămureanu - *Criminal Competence of the Judicial Bodies*, Scientific and Encyclopedic Publishing, Bucharest, 1980, page 119.

¹¹ Continuing a point of view expressed previously, we cite the opinion of professor V. Dongoroz regarding our observations: 'in the modern world, due to an increased social capillarity, criminal deeds have a resonance that exceeds by far the place of perpetration and naturally produces trouble, fear and uncertainty at great distances. This explains why all modern criminal procedure legislations have adopted the system of plural territorial competence so that criminals cannot find asylum and impunity no matter where they are' - in *Theoretical Explanations of the Romanian Code of Criminal Procedure*, Publishing House of the Socialist Republic of Romania, Bucharest, 1975, page 115.

¹² A. Celțov - *Soviet Criminal Trial*, State Economic and Legal Literature Publishing House Bucharest, 1954, page 185.

¹³ M. S. Strogovici - *Soviet Criminal Trial*, State Legal Literature Publishing House, Bucharest, 1950, page 130.

¹⁴ Gaston Stefani, Georges Levasseur, Bernard Boulloc – *Procédure pénale*, Dalloz, page 494.

¹⁵ I. Neagu – *Criminal Procedure Law*, Global Lex Publishing, Bucharest, 2002, page 283.

¹⁶ *Code de procédure pénale*, art. 679, art. 687.

Paragraph 1 of art. 30 Code of criminal procedure mentions as related to the social-judicial relevance with the committed offence and therefore determining for the territorial competence of the criminal courts the following places:

- a) place in which the offence was perpetrated (forum facti comissi);
- b) place in which the author was captured (forum deprehensionis);
- c) place in which the author lives (forum habitationis rei);
- d) place in which the victim lives (forum habitationis vitimae).

These places have an equivalent value as criteria that determine competence, their enumeration indicating only the order of preference in case the criminal trial is initiated at the same time by the criminal judicial bodies of two or several of the aforementioned places; if the initiation of the criminal trial is not simultaneous, territorial competence is established by priority, namely the first notification¹⁷.

In the light of the legal disposition in force, we mention that the territorial competence of the criminal judicial bodies can also be determined by other criteria different from the ones stipulated in art. 30 paragraph 1 Code of criminal procedure. Thus, according to art. 45 paragraph 2 Code of criminal procedure, when one of the places mentioned in art. 30 paragraph 1 Code of criminal procedure is unknown, the competence belongs to the criminal prosecution body that was notified first. In this sense, competent from the territorial point of view can be the criminal prosecution body that the complaint or denunciation regarding the perpetration of offences was filed with, although this body may not be part of the bodies mentioned expressly in art. 30 paragraph 1 Code of criminal procedure¹⁸.

In judicial practice, the criterion of the place of perpetration of the offence most of the times determines the competence of the criminal judicial bodies motivates especially by the fact that most probatory evidence necessary to find the truth can be found in the territorial radius of the judicial body of perpetration of the offence.

CHAPTER II

PLACE OF PERPETRATION OF THE OFFENCE – THE MOST IMPORTANT CRITERION FOR THE ESTABLISHMENT OF TERRITORIAL COMPETENCE FOR THE OFFENCES PERPETRATED IN THE COUNTRY

Section 1 *Aspects of criminal law*

Law as social phenomenon is carried out in two coordinates: space and time¹⁹. Space is a relation element that imposes naturally and inevitably certain limits to the power of action of the criminal law and therefore limits its scope of application. The criminal law action ends where the incidence of its power ends from the territorial point of view²⁰.

Any law system has applicability within the territorial limits of the applicability of the legislative power. That's why the law is characterized by diversity and there are as many judicial systems as states at a certain moment, even between these national law systems there are affinities due to syncretisms that group the national law systems into law families²¹.

¹⁷ V. Dongoroz, S. Kahane, G. Antoniu - *Theoretical Explanations of the Code of Criminal Procedure*, Publishing House of the Socialist Republic of Romania, Bucharest, 1975, page 116.

¹⁸ I. Neagu – *Criminal Procedure Law*, Global Lex Publishing, Bucharest, 2002, page 284.

¹⁹ V. Pașca - *Prolegomena in the Study of Criminal Law*, Lumina Lex Publishing, Bucharest, 2000, page 119.

²⁰ R. Stănoiu, I. Griga, T. Dianu - *Criminal Law, General Part*, Hyperion Publishing, Bucharest, 1992, page 42.

²¹ Revista Română de Drept nr. 4/1977, *Aspects of Competence of the Maritime and River Sections* - V. Neamțu, page 30.

Criminal actions can be perpetrated in the territory of one state or several states, case in which we speak about either the territoriality of criminal law or its extra-territoriality, as the case may be.

The principle of territoriality of the criminal law was born with the appearance of the national states, being indisputably related to the sovereignty concept. Stated by Beccaria due to reasons of celerity of criminal liability and for the substantiation of criminal liability based on guilt, as it is assumed that the criminal knows the laws of the place, this principle is recognized for the first time by the Napoleon Criminal Code and then by the European codes that got their inspiration from it. The Romanian criminal codes of 1864, 1936 and 1969 recognized this principle by mostly identical regulations, nuances appearing in the definition of the notion of territory.

The territoriality principle in criminal matters is a fundamental public law principle. Laws in general, and criminal laws in particular, expression of the sovereignty of the state, have efficacy in the whole territory regulated by this sovereignty.

Thus, the criminal procedure law has efficacy in the territory ruled by the sovereignty of the state in which it was elaborated, as sovereignty is territorial, it is normal for the criminal substantial or procedural law to also be territorial.

The space range of criminal law coincides with the sovereignty space²². As a consequence, the general principle ruling the matter of application of criminal law in space is the territoriality principle.

The efficiency of criminal law in the defense of social values starts to be real upon its validity date. The observance of the social values starts to be real upon its validity date. The observance of the exigencies of criminal law by most addressees confers an active efficiency to criminal law.

Against the people that perpetrate offences, the rule of the law shall be enforced by constraint, and the criminal law shall have a reactive efficiency. Expression of national sovereignty and independence of the country, criminal law is applied to the offences perpetrated in România - art. 3 Criminal Code.

The imperative nature of the norm included in art. 3 Criminal Code imposes the exclusive and unconditional enforcement of the Romanian criminal law to the offences perpetrated in Romania, irrespective of the quality of the author, a Romanian or foreign citizen, stateless person residing in Romania or abroad²³. If the author is a foreign or stateless citizen residing abroad, he/she cannot invoke the fact that the law of his/her country is more favorable. The conditions of his/her criminal liability for the offences perpetrated in Romania are established exclusively on the basis of the Romanian criminal law.

The exclusivity of the enforcement of the Romanian criminal law also limits the effects of the non bis in idem principle, therefore if the criminal had been tried abroad for an action committed in Romania, the resolution of the foreign Courts has not the authority of a tried matter, and the criminal can be tried by the Romanian Courts, irrespective of the solution rendered by the foreign Courts – acquittal, dismissal of the criminal trial, conviction – the only effect of the foreign resolution being the fact that according to art. 89 Criminal Code the part of sentence, remand or confinement performed abroad are deducted from the sentence rendered by the Romanian Courts.

The knowledge of the scope of application of the territorial criminal law supposes the determination of certain conceptual notions.

²² V. Dongoroz, S. Kahane, I. Oancea and others - *Theoretical Explanations of the Romanian Criminal Code, General Part*, Publishing House of the Socialist Republic of Romania, Bucharest, 1969, page 51.

²³ V. Rămureanu - *Criminal Competence of the Judicial Bodies*, Scientific and Encyclopedic Publishing, Bucharest, 1980, page 55.

According to art. 17 Criminal Code, the offence is an action that presents a social danger, committed with guilt and stipulated in the criminal law.

Perpetration of an offence, according to the interpretation given by the legislator in art. 144 Criminal Code means the perpetration of any of the facts that the law punishes as consumed offence or attempt as well as the participation in their perpetration as an author, instigator or accomplice. The perpetration in Romania of any of the aforementioned actions attracts the incidence of the Romanian criminal law based on the principle of territoriality of criminal law.

Perpetration of the offence in the country means any offence committed within the boundaries of this territory, as this notion was construed by the legislator in art. 142 Criminal Code, as well as the ones committed on a Romanian ship or aircraft.

The juridical-criminal notion of territory is different from what territory normally means, in other words the term territory in criminal matters is not used in the geographical sense, but in a wider meaning²⁴.

Thus, the notion of juridical territory encountered in the expressions 'Romanian territory' or 'territory of the country' means according to art. 142 Criminal Code the land surface and waters between the frontiers, with the soil, underground and air space as well as the territorial water with its soil, underground and air space.

Therefore, the territory of the country comprises the ground surface, underground, internal waters, territorial sea and air space above them.

Territory is the material and indispensable base of the existence of the state.

Over its territory, the state has exclusive territorial competence, the territorial sovereignty of the state being characterized on one hand by exclusivity in the sense that over a territory only the authority of one state can be exerted; only this state exerts through its bodies the judicial power over the whole territory.

The exercise of sovereignty of several states over the same territory contradicts the very concept of sovereignty.

The exclusivity of territorial competence also results from the sovereign equality of the states. 'Between independent states the observance of territorial sovereignty and exclusive territorial competence is one of the essential bases of international relations'²⁵.

State is the only one capable of determining the coverage and nature of its competences it exerts within the limits of its territory as a state, its territorial competence being basically unlimited.

Ground surface is the stretch of land comprised between the political-geographical boundaries of the state. According to the Constitution of 1991 - art. 3 - the territory of Romania is inalienable, and the frontiers of the country are established by organic law, with the observance of the principles and the other generally-admitted norms of international law.

Under the administrative aspect, territory is organized in communes, towns and counties, an administrative organization that mainly determines the territorial competence of the judicial bodies.

Internal waters comprise running waters or stagnant waters within the state frontiers, as well as internal maritime waters. If the state frontier is a navigable running water, the limit of the territory is established taking into account the line of the greatest depth and in case of non-navigable or stagnant waters, their midpoint line. Internal maritime waters are surfaces of water

²⁴ V. Dongoroz, S. Kahane, I. Oancea and others - *Theoretical Explanations of the Romanian Criminal Code, General Part*, Publishing House of the Socialist Republic of Romania, Bucharest, 1969, page 52.

²⁵ Resolution of the International Court of Justice 1949, *International Public Law* - Raluca Miga-Beșteliu, ALL Publishing, Bucharest, 1998.

comprised between the seashore and the basic line that the stretch of territorial sea is measured from.

The basic line of territorial sea is the line of the biggest ebb tide along the coast or, as the case may be, the line that links the most advanced points of the shore.

Territorial water is the sea part adjacent to the shore up to a certain distance at sea²⁶.

The determined width of territorial sea was in the beginning justified by considerations regarding the defense of the territory - *terrae potestas finitur ubi finitur armorum vis* – evolving with the progress of ballistics (cannon range), and is now justified not only by military but also economic considerations.

The underground area is formed of the whole underground of the land surface, internal waters and territorial sea, stretching in depth unlimitedly, from the conceptual point of view, but limited by the real possibility that the human activity may have to penetrate this underground²⁷.

Air space comprises the air column above the land territory and territorial sea of a state. The national air space must be delimited from the international one, namely the one above the free sea, the exclusive economic area and the continental plateau of certain states.

With regard to the territory of a certain state, so in our case with regard to the territory of our state, offences can be perpetrated either in the country, namely on the territory of the country, or abroad, namely outside the territory of the country, or partly on the territory of the country and partly abroad (offences started abroad and continued on that territory, for example the action was performed abroad, but its results were produced in the territory).

These are the three possibilities of perpetration of criminal actions with regard to the territory²⁸.

Considering these possibilities, we may ask the following: when can we consider that a criminal action was perpetrated or not on the territory of our state?

In order to answer this question, we need to determine, with regard to the development of the criminal activity the **place** of perpetration of the offence and to see whether this place is within the territorial limits of our state or not.

There have been in the criminal law doctrine with regard to the establishment of the place of perpetration of the offence several theories differentiated between them by the criterion they are using in order to determine the place of the offence; thus: the theory of action, result, unlawfulness, preponderance and ubiquity.

a) The action theory proposes as criterion the material activity of the agent. The offence is considered, according to this theory, to be perpetrated in the place of performance of the activity that constitutes the objective element of the offence and led to the illicit result. According to this theory, it is not important whether the result of the action was produced or not in the same place that the criminal activity was carried out in.

The resolution voted on September 7, 1883 by the International Law Institute in Munich embraced the point of view of this theory: the territorial competence of criminal law is that of the country in which the guilty person is during his/her criminal activity.

b) Opposed to the action theory is the result theory, which uses as criterion the result produced by the criminal activity, an atypical result that completes the material side of the offence. The offence is considered to be perpetrated where the illicit result was produced, even of the

²⁶ According to the Convention on territorial sea and adjacent area, territorial sea is adjacent to its coasts (art. 1) and is 12 marine miles wide.

²⁷ V. Dongoroz, S. Kahane, I. Oancea and others - *Theoretical Explanations of the Romanian Criminal Code*, Publishing House of the Socialist Republic of Romania, Bucharest, 1969, page 52.

²⁸ Idem

activity that produced it was performed on another territory. This theory prevailed in Switzerland and especially in England and the United States.

c) Another theory is, as mentioned above, the unlawfulness theory.

This theory uses as criterion for the establishment of the place of the offence the appearance of the guilt that is sufficient to attract the criminal liability of the criminal. The place where the first infringement of the criminal law, the first punishable activity (punishable preparatory actions, punishable attempt) was performed is considered to be the place of perpetration of the offence.

d) The preponderance theory considers the action deemed as essential in the substance of the offence and the development of the criminal activity. The place of perpetration of the offence is therefore the place in which the most important action for the perpetration of the offence was committed.

e) The criminal's will criterion belongs to the subjective theory. According to this theory, the place of perpetration of the offence is the place in which the criminal understood, pursued to commit the result of his/her criminal activity, even if this result was produced on another territory.

f) Last but not least, in the ubiquity theory that dominates the doctrine today, the criterion for the establishment of the place of perpetration of the offence is that of the whole development of the criminal activity. According to the ubiquity theory, the offence is considered perpetrated in any place in which at least part of the illicit activity was carried out or in any place in which one of the results of this activity was produced, except for the places that served as transit for the illicit activity.

The fact that among all the aforementioned theories the one that dominates in the end in the criminal law doctrine is the ubiquity theory proves the superiority of this theory. Life, practice registered everywhere imposed as in so many cases the solution that best reaches the desired purpose, namely to ensure criminal protection with the maximum of possibilities. This theory responds better to the need for achieving a most efficient protection of social relations, protected by criminal laws. All the other theories are using a singularization criterion that leads to the non-dialectic resolution of the issue of the place of perpetration of the offence. The criteria used by these theories are deficient by the fact that they artificially limit the place of the offence in contradiction with the complexity of the criminal activity and to the detriment of a repression activity susceptible of functioning for the totality of the moments that this complexity represents. For example, in the case of the result theory, it is obvious that the public order of the place in which the illicit activity was carried out was infringed, and on the other hand, this theory appears as inoperative in the case of criminal activities that have not gone beyond the attempt or in the case of formal offences whose consumption does not depend on the production of a result.

On the contrary, in the case of the ubiquity theory, any place where something of the criminal action, something illicit was performed is considered to be the place of perpetration of the offence, and measures can be taken and therefore wherever the criminal law was infringed, the troubled public order shall be re-established on these grounds²⁹.

Therefore, if on the territory of a certain state only part of the illicit activity was performed or only its result was produced, the offence is considered perpetrated on the territory of that particular state and the criminal law of that particular state shall be enforced based on the territoriality principle.

This solution was also adopted by the International Law Institute – Cambridge session, 1951.

The legal-criminal literature showed that this solution however has one inconvenient, namely the fact that if all legislations adopted symmetrical solutions, the positive competence

²⁹ V. Dongoroz, S. Kaliane, I. Oancea and others - *Theoretical Explanations of the Romanian Criminal Code*. Publishing House of the Socialist Republic of Romania, Bucharest, 1969, page 55.

conflicts would multiply. We cannot agree with this opinion, as among the states to which ubiquity was applied, the ubiquity criterion can only be used to perform a trial in attendance of the criminal in the state in which the criminal is located; any of the other states cannot obtain extradition except for the case in which the refuge state does not perform criminal pursuit and this way conflicts can be avoided. Conflicts also appear when the offence was perpetrated on the territory of countries that do not apply the ubiquity principle, in this case each state applying its own principle (action, result), being considered as having exclusive competence.

The legislator of the Criminal Code of 1969, as well as that of the Criminal Code of 1936, adopted in the dispositions of art. 143 Criminal Code the criterion of ubiquity or integral development, according to which the offence is considered to be perpetrated everywhere (the term *ubiquity* is derived from the Latin adverb *ubique* = *everywhere*) in the place only one act of perpetration or the result of the offence was produced³⁰.

The theory of ubiquity, recognized in art. 143 Criminal Code to explain the meaning of the expression ‘offence perpetrated in the country’, was taken over and established by the criminal procedure law, in the dispositions of art. 30 paragraph 4 Code of criminal procedure, which stipulate that: ‘The place of perpetration of the offence means the place in which the criminal activity took place totally or in part or the place in which its result was produced’.

Section 2

Aspects of criminal procedure law

The place of perpetration of the offences was considered by the previous regulation and the current regulation as the main criterion for the establishment of territorial competence, placing it in the top of the competence-attributive criteria.

An indication of the importance attributed to this place is given by the fact that there are authors in the specialized literature that refer to this place in the very definition of territorial competence.

With regard to the ‘forum delicti comissi’ we must mention that our previous legislation defined it in art. 21 Code of criminal procedure in accordance with the action theory, which stipulated that the establishment of the territorial competence is made depending on the place in which the offence was committed, even when its result was produced in another circumscription. On the other hand, the previous Criminal Code, regulating the application of criminal law in space, adopted the ubiquity principle. We therefore note the fact that in the previous criminal legislation we could not talk about the existence of a single criterion for the establishment of the place of perpetration of the offence.

At present, the place of perpetration of the offence is defined in accordance with the theory of ubiquity, equivalence – as it is also named by the specialized literature. This theory is dominant nowadays in the criminal doctrine, responding best to the need for a criminal ‘protection’ with the maximum number of possibilities³¹.

In this sense, art. 143 paragraph 2 Criminal Code and art. 30 paragraph 4 Code of criminal procedure mentions that the place of perpetration of the offence is any place in which any action of performance or the result of the offence was produced.

The importance given to this first criterion results from the fact that in this place the values defended by law were infringed, in this place took place the negative resonance of the perpetration

³⁰ C. Bulai - *Romanian Criminal Law - General Part*, volume I, ‘Şansa’ S.R.L. Publishing and Press House. Bucharest, 1992. page 73.

³¹ R. M. Stănoiu, I. Griga, T. Dianu – *Criminal Law, General Part*, Hyperion Publishing, Bucharest, 1992, page 45

of the offence, in this place the order was infringed and at the same time here the judgment produces in the most efficient way its preventive effects and the ones meant to restore the troubled order.

The specialized literature stated the fact that the place of perpetration of the offence is primarily an issue of material law³². However, the place of perpetration of the offence is also an issue of the criminal procedure law from the point of view of the application of the criminal procedure law in space and especially from the point of view of territorial competence.

This criterion is adopted by almost all legislations and takes into account on one hand the relation existing between the territorial radius of a judicial body and the place of perpetration of the offence, on the other.

Thus, according to it, the territorial competence of a body covers all offences of its material competence perpetrated in the territorial circumscription it exerts its jurisdiction in.

The term place of perpetration of the offence has a wider meaning, as it means both the actual place of perpetration of the action and the surrounding areas or other places that contain data regarding the preparation, perpetration and consequences of the action, including the ways of access and withdrawal of the author from the criminal area³³. This place is the richest in traces or data referring to the criminal action and its author.

The criminal pursuit body and the trying Court have the possibility to investigate directly the place of perpetration of the action and its consequences, to establish the circumstances in which the criminal action was committed and identify the author by the discovery, establishment, collection and criminal investigation of the traces, probationary evidence, all these activities actually contributing to the achievement of the criminal procedure objective³⁴.

The explanation of the meaning of the words 'place of perpetration of the offence' does not have a limited application to the establishment of territorial competence only, but it is also meant to eliminate the difficulties that may arise in practice for the establishment of competence, for example in case of continuous or continued offences or when the result of the offences is produced in a place different from the one of the criminal activity³⁵. Thus, the omitting offences are considered to be perpetrated in the place in which the activity that the criminal committed should take place or when the result of that inactivity was produced.

The place of perpetration of the preparatory actions, when they are incriminated, shall be the place in which they were carried out. The place of perpetration of these actions – when they are not punished by themselves but subsequently become collusion actions – shall be any place of action of performance for the objective substance of the offences for which the preparatory actions were carried out. And last but not least, if the preparatory actions are independent actions, the place of perpetration shall be the place in which they were carried out.

With regard to the attempt, it is considered committed where the different actions of performance were carried out. The actions prior to or simultaneous to the perpetration of the offence regarding its content, without being however collusion actions, shall play no role in the establishment of the place of perpetration of the offense.

A long-discussed issue is the one regarding continuous and discontinued offences.

For the establishment of the place of perpetration of these offenses, the legislators unanimously admit as criterion for the establishment of the forum delicti commissi the ubiquity

³² T. Pop - *Criminal Procedure Law*, National Printing House, Cluj, 1947, page 163.

³³ E. Stancu - *Criminology Treatise*, Actami Publishing, Bucharest, 2001, page 50.

³⁴ G. Stefani, G. Levasseur, B. Boulloc - *Procédure Pénale*, Dalloz, page 494.

³⁵ V. Rămureanu - *Criminal Competence of the Judicial Bodies*, Scientific and Encyclopedic Publishing, Bucharest, 1980, page 108.

principle, being considered perpetrated anywhere criminal activity was performed at a certain moment, or, in other words, they are considered perpetrated everywhere this activity was extended.

Issues are also raised regarding the situation of the participants - coauthors, instigators, accomplices – in the offence³⁶. In case of participation in an offence perpetrated on the territory of a state, the actions by which the participant contributes to the perpetration of the offence, even if they are performed outside the territory of that state, attract the competence of the bodies of that particular state. The participants' actions that form an indivisible whole cannot be separated, so the criminal activity as a whole shall fall under the incidence of criminal law.

The place of perpetration varies as coverage and importance from one offence to another and from one action to another³⁷. Sometimes the place of perpetration of the offence is determined precisely, and the committed action becomes especially serious due to the place of perpetration, sometimes the place is imprecisely determined or unknown or without any importance for the seriousness of the action.

The place in which the offence was perpetrated plays an essential role in the establishment of the territorial competence of judicial bodies, a fact pointed out in time by most criminal procedure systems.

Although there is no hierarchal classification of the place that normatively determine the territorial competence, it is however to the interest of the good enforcement of justice when the place of perpetration of the offences is well-known and has a real importance for the development of the criminal trial, for the criminal pursuit bodies that almost always initiate this process and belong to a territorial radius different from the place of perpetration to facilitate ex-officio the matter a notification from the criminal pursuit body of the place of perpetration of the offences or direct, whenever possible, to that body the notifications received by them³⁸.

³⁶ R. M. Stănoiu, I. Griga, T. Dianu - *Criminal Law, General Part*, Hyperion Publishing, Bucharest, 1992, page 46

³⁷ T. Pop - *Criminal Procedure Law*, volume I, National Printing House, Cluj, 1947, page 159.

³⁸ V. Dongoroz, S. Kahane, G. Antoniu - *Theoretical Explanations of the Code of Criminal Procedure*, Publishing House of the Socialist Republic of Romania, Bucharest, 1975, page 119.

BIBLIOGRAPHY

1. Bulai Costică – *Romanian Criminal Law – general part*, volume I, ‘Şansa’ S.R.L. Publishing and Press House, Bucharest, 1992.
2. Celţov A. – *Soviet Criminal Trial*, State Economic and Legal Literature Publishing House, Bucharest, 1954.
3. Dongoroz V. Kahane S., Oancea I. ş.a. – *Theoretical Explanations of the Romanian Criminal Code*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1969.
4. Dongoroz V. Kahane S., Antoniu G. ş.a. – *Theoretical Explanations of the Romanian Criminal Code*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1969.
5. Foişoreanu Dem M. – *PhD Thesis: Judicial Organization from the Most Ancient Times*.
6. Levasseur G., Stefani G., Bouloc B. – *Procédure pénale*, Dalloz, Paris.
7. Neagu I. – *Criminal Procedure Law – Treatise –*, Global Lex Publishing, Bucharest, 2002.
8. Paşca V. – *Prolegomena in the Study of Criminal Law*, Lumina Lex Publishing, Bucharest, 2000.
9. Pop T. – *Criminal Procedure Law*, volume I, II, National Printing House, Cluj, 1947.
10. Rămuranu V. – *Criminal Competence of Judicial Bodies*, Scientific and Encyclopedic Publishing, Bucharest, 1980.
11. Stănoiu R., Griga I., Dianu T. – *Criminal Law, General Part*, Hyperion Publishing, Bucharest, 1992.
12. Strogovici M.S. – *Soviet Criminal Trial*, State Legal Literature Publishing House, Bucharest, 1950.
13. Stancu S. – *Treatise of Criminology*, Actami Publishing, Bucharest, 2001.
14. Tanoviceanu I. – *Treatise of Law and Criminal Procedure*, volume IV, Curierul judiciar Publishing, Bucharest, 1913.
15. Volonciu N. – *Treatise of Criminal Procedure, General Part*, Paideia Publishing, Bucharest, 1998

ASPECTE PRIVIND LOCUL SĂVÂRȘIRII INFRAȚIUNII, CRITERIU DE DETERMINARE A COMPETENȚEI TERITORIALE ÎN MATERIE PENALĂ

Bogdan Florin Micu*

Universitatea Nicolae Titulescu – Facultatea de Drept

Rezumat

Competența teritorială este, alături de competența materială și de competența funcțională, una din formele fundamentale de competență, fără de care nu se poate stabili competența precisă a unui organ judiciar în rezolvarea unei cauze penale.

Dintre formele fundamentale de competență, competența teritorială se impune prin deosebita sa importanță, ea fiind inuabilă, în sensul că organele judiciare nu pot instrumenta sau judeca o cauză penală decât dacă sunt competente din punct de vedere teritorial.

Plecând de la această calificare apare ca deosebit de importantă cunoașterea criteriilor în funcție de care se stabilește competența teritorială și modul în care acestea sunt aplicate, aspecte analizate în cadrul acestui articol.

În lumina reglementărilor procesual penale române, determinarea competenței teritoriale a organelor judiciare se realizează după două coordonate principale – art.30 (competența pentru infracțiunile săvârșite în țară) și art. 31 (competența pentru infracțiunile săvârșite în străinătate).

Stabilirea competenței teritoriale ca și criteriu de determinare a competenței teritoriale în materie penală presupune antamarea atât a unor aspecte de drept penal, cât și a unor aspecte de drept procesual penal.

Astfel din punct de vedere al dreptului substanțial, aprecierea locului unde a fost săvârșită o infracțiune se face prin aplicarea principiului teritorialității. Aplicarea însăși a principiului teritorialității în determinarea locului săvârșirii infracțiunii a fost caracterizată prin abordări diferite ce au îmbrăcat în doctrina dreptului penal mai multe forme în jurul cărora s-au construit mai multe teorii – teoria acțiunii, a rezultatului, a ilegalității, a preponderenței și a ubicuității.

În final, din punct de vedere al dreptului procesual, analiza și definirea locului săvârșirii infracțiunii se face în conformitate cu teoria ubicuității sau a echivalenței, teorie dominantă în prezent în doctrina penală.

Cuvinte cheie: *Competență, Teritorialitate, Limite, Infracțiune, determinare*

CAPITOLUL I COMPETENȚA TERITORIALĂ - RATIONE LOCI - ÎN MATERIE PENALĂ

Secțiunea 1

Noțiunea și importanța competenței teritoriale

Competența teritorială a unui organ judiciar este capacitatea obiectivă a organului respectiv de a soluționa cauzele penale care au o legătură, cu relevanță social-juridică, în raport cu raza teritorială în care organul respectiv își exercită atribuțiile sale¹.

Din definirea conceptului, se observă dubla limitare a competenței teritoriale, pe de o parte este vorba despre raza teritorială în care organul judiciar își exercită atribuțiile conferite de lege, iar pe de altă parte de legătura cu relevanță social-juridică dintre raza teritorială și cauza penală ce urmează a fi dedusă judecății².

* Lector universitar doctor, facultatea de Drept, Universitatea "Nicolae Titulescu", București (e-mail: bogdan.micu@univnt.ro).

¹ V. Dongoroz, S. Kahane, G. Antoniu - *Explicații teoretice ale Codului de procedură penală*, Editura Academiei Republicii Socialiste România, București, 1975, p. 115.

² Idem.

Competența teritorială este, așadar, criteriul cu ajutorul căruia se determină care dintre organele de același grad este competent să soluționeze o anumită cauză³.

Dintre formele fundamentale ale competenței, competența teritorială se impune prin deosebita sa importanță, ea fiind imuabilă, în sensul că organele judiciare nu pot instrumenta sau judeca o cauză penală decât dacă sunt competente din punct de vedere teritorial. Spre deosebire de competența materială, competența *ratione loci* împarte cauzele între diferite organe judiciare pe linie orizontală și este determinată, după cum ne sugerează chiar denumirea, de criterii teritoriale.

Astfel, competența teritorială nu se întemeiază pe ceva artificial, ci pe un criteriu natural, pe un fapt⁴.

Această formă a competenței reprezintă distribuirea în teritoriu a competenței materiale, determină întinderea teritorială a competenței diverselor organe cu aceeași competență materială.

Competența materială apare, pe cale de consecință, ca o condiție esențială a competenței teritoriale, astfel încât un organ judiciar nu poate fi competent din punct de vedere teritorial dacă nu este mai întâi competent din punct de vedere material. Trebuie subliniat totodată faptul că nu poate fi concepută distribuirea competenței materiale între mai multe organe judiciare, tară ordinea și disciplina asigurate de competența după teritoriu, repartizarea cauzelor penale după acest criteriu nefăcându-se în mod întâmplător⁵.

Competența teritorială poate fi catalogată ca o condiție deosebit de importantă pentru activitatea organelor judiciare, fără de care acestea nu ar putea atinge finalitatea dorită. Pe de altă parte, criteriile competenței teritoriale se constituie și într-o garanție oferită cetățeanului în sensul cunoașterii de către acesta a organului teritorial competent, fiind înlăturată astfel posibilitatea apariției unui abuz de putere din partea celor în drept să soluționeze cauza respectivă.

În mod firesc și obiectiv, în condițiile actuale ale fenomenului infracțional, nu s-ar putea vorbi despre existența unei singure instanțe care, în limitele competenței sale materiale, să aibă abilitatea de a cerceta și judeca toate faptele penale săvârșite pe teritoriul unui stat. Foarte sugestiv, **V. Manzini** arăta că „dacă statul italian ar fi avut întinderea statului San Marino sau a Vaticanului ar fi fost suficient un singur judecător pentru orice categorie de competență după materie”⁶.

O astfel de situație ar duce, în mod inevitabil, la apariția unor probleme și dificultăți, atât pentru organele judiciare - din punct de vedere organizatoric -, cât și pentru cetățeni - dificultăți de ordin material, dar și de timp - în rezolvarea cauzelor penale în care sunt implicați.

De aceea, existența unei pluralități de organe egale în grad, cu aceeași competență materială și repartizarea acestora pe întreg teritoriul unui stat se impune ca o necesitate obiectivă. Această repartizare nu poate fi realizată decât în baza unui criteriu teritorial.

Potrivit acestui criteriu, instanțele de același grad își exercită competența, fiecare în parte, asupra unei suprafețe limitate din teritoriul unui stat, adică în cadrul unei circumscripții teritoriale.

Aceste circumscripții teritoriale sunt cu atât mai numeroase și mai puțin întinse, cu cât organele respective sunt situate mai jos pe scara ierarhiei organelor judiciare și cu atât mai întinse și mai puțin numeroase cu cât ocupă o poziție mai înaltă în această ierarhie.

Dispozițiile legale referitoare la competența teritorială fac posibilă repartizarea cauzelor penale din punct de vedere teritorial – pe linie orizontală - între organele judiciare de același grad, fiecărui organ revenindu-i o anumită rază teritorială, în raport de organizarea administrativ-teritorială a țării.

³ I. Neagu – *Drept procesual penal*, Editura Global Lex, București, 2002, p.282

⁴ Traian Pop - *Drept procesual penal*, vol. II, Tipografia Națională, Cluj, 1946, p. 157.

⁵ V. Rămureanu - *Competența penală a organelor judiciare*, Editura Științifică și Enciclopedică, București, 1980, p. 51. în același sens, trebuie menționată și opinia prof. Traian Pop în lucrarea „*Drept procesual penal*”, vol. II, Tipografia Națională, Cluj, 1946, p. 157-158.

⁶ V. Rămureanu - *Competența penală a organelor judiciare*, Editura Științifică și Enciclopedică, București, 1980, p. 51.

Secțiunea 2

Modalități de determinare a competenței teritoriale. Competența pentru infracțiunile săvârșite în țară

În lumina Codului de procedură penală român, determinarea competenței teritoriale a organelor judiciare se realizează după două coordonate principale; art. 30 C. proc. pen. - Competența pentru infracțiunile săvârșite în țară și art. 31 C. proc. pen. - Competența pentru infracțiunile săvârșite în străinătate.

Prezenta lucrare abordează numai particularitățile stabilirii competenței teritoriale în cazul infracțiunilor săvârșite pe teritoriul țării.

În viziunea reglementărilor anterioare, mai precis în dreptul roman, competența teritorială era determinată cu ajutorul unui criteriu unic, mai precis, locul unde a fost comis delictul - *forum delicti commissi* -, importanța acestui criteriu justificându-se prin faptul că, la locul comiterii delictului puteau fi găsite probe esențiale⁷.

În vechiul drept francez, regimul feudal stabilise regula generală a competenței judecătorului de la locul domiciliului, dar cu timpul, Codul de procedură penală francez a făcut să dispară preferința stabilită de vechea legislație, substituindu-i principiul concurenței, potrivit căruia erau competente în mod egal organele judiciare de la locul delictului, domiciliului și capturii.

Această tendință spre multiplicarea organelor competente din punct de vedere teritorial s-a manifestat de timpuriu și a devenit constantă în legislația modernă și contemporană⁸.

În legislația procesual penală română, Codul de procedură penală anterior reglementa pentru infracțiunile săvârșite în țară o competență teritorială tripartită. Astfel, art. 21 C. proc. pen. prevedea pentru determinarea competenței teritoriale trei criterii, și anume: locul unde a fost săvârșită infracțiunea, locul unde făptuitorul își are domiciliul sau reședința și locul unde făptuitorul a fost prins.

În prezent, celor trei criterii atributive de competență, cunoscute, tradiționale⁹, li s-a mai adăugat unul: locul unde locuiește persoana vătămată.

Apariția celui de-al patrulea criteriu determinant de competență constituie o inovație a Codului în vigoare, inovație a cărei explicație rezidă în principal în intenția legiuitorului de a înlesni participarea efectivă a persoanei vătămate la procesul penal¹⁰.

Trebuie menționat totodată și faptul că, față de reglementarea anterioară, în prezent există modificări și în ceea ce privește ordinea în care sunt enumerate aceste criterii. Astfel, criteriul locului unde a fost săvârșită infracțiunea a rămas și în prezent pe primul loc, ordinea următoarelor două criterii fiind inversată, locul prinderii făptuitorului trecând în locul ocupat de criteriul reședinței sau domiciliului infractorului - așa cum era reglementat înainte.

⁷ Dem. M. Foișoreanu - *Organizarea judiciară din cele mai vechi timpuri*. Teză de doctorat, p. 73. în același sens, prof. V. Dongoroz arată: „în vremurile mai de demult, săvârșirea unei fapte penale interesa doar colectivitatea de la locul săvârșirii, așa fel încât infractorul își putea asigura ușor impunitatea părăsind acel loc pentru a beneficia de azilul indiferenței celor de la locul de refugiu” - în *Explicații teoretice ale Codului de procedură penală român*, Editura Academiei Republicii Socialiste România, București, 1975, p. 115.

⁸ N. Volonciu - *Drept procesual penal*, Editura Paideia, București, 1998, p. 297.

⁹ Cele trei criterii enumerate erau reglementate și în primul Cod de procedură penală modern, intrat în vigoare la 2 decembrie 1864. Doctrina veche arăta, referindu-se la această problemă, că: „... sub raportul competenței teritoriale, vor fi competente să judece o pricină instanțele de la locul comiterii, de la domiciliul inculpatului și de la locul unde acesta a fost prins” - I. Tanoviceanu - *Tratat de drept și procedură penală*, vol. IV, Editura Curierul Judiciar, București.

¹⁰ V. Rămureanu - *Competența penală a organelor judiciare*, Editura Științifică și Enciclopedică, București, 1980, p. 119.

Necesitatea unei competențe multiple, din punct de vedere teritorial, a organelor judiciare este dată de importanța descoperirii infracțiunilor și prinderii infractorilor, pentru tragerea lor la răspundere potrivit legii și realizarea astfel a unei cercetări și judecări prompte ce are ca efect asigurarea rolului preventiv și educativ al justiției penale¹¹.

Criteriile de determinare a organelor competente din punct de vedere teritorial, deși diferențiate într-o oarecare măsură în diversele legislații, au totuși anumite constante generale.

În reglementările existente în alte state, competența teritorială poate fi stabilită și în funcție de locul reținerii făptuitorului¹² sau în funcție de domiciliul învinutului sau martorilor¹³.

Legislația procesual penală franceză conține o serie de diferențe față de reglementările existente în legislația noastră, în ceea ce privește criteriile de determinare a competenței teritoriale.

Astfel, pentru determinarea competenței organelor judiciare, legea procesual penală franceză nu ține seama doar de persoana care a comis infracțiunea, ci ia în considerare totodată și anumite circumstanțe de loc, precum locul unde a fost comisă infracțiunea, locul de reședință sau locul de detenție¹⁴. În acest mod, în cazul contravențiilor este în principiu competent tribunalul locului comiterii contravenției sau acela al locului de reședință al presupusului făptuitor. În cazul delictelor și al crimelor este în principiu competent tribunalul locului de comitere, al locului de reședință a făptuitorului, al locului de arestare sau al locului de detenție¹⁵.

În sistemul procesual francez se face diferența între competența judecătorului de instrucție, pe de o parte și cea a instanțelor de judecată, pe de altă parte. Judecătorul de instrucție, competent din punct de vedere material, de a instrumenta o cauză penală, contravențională sau chiar - dar numai la cererea procurorului general - un delict, este competent din punct de vedere teritorial de a cerceta toate infracțiunile comise și în afara razei teritoriale a tribunalului de care aparține, dacă una dintre persoanele presupuse a fi participat la săvârșirea faptei locuiește în raza teritorială a tribunalului unde el își desfășoară activitatea.

El poate, de asemenea, informa despre înfăptuirea acestor activități, dacă făptuitorul locuiește în raza teritorială a tribunalului unde el își desfășoară activitatea¹⁶.

În reglementarea alin. 1 a art. 30 C. proc. pen. sunt prevăzute ca având legătură cu relevanță social-juridică cu infracțiunea săvârșită și deci ca fiind determinante pentru competența teritorială a instanțelor de judecată penală, următoarele locuri:

- e) locul unde a fost săvârșită infracțiunea (forum facti commissi);
- f) locul unde a fost prins făptuitorul (forum deprehensionis);
- g) locul unde locuiește făptuitorul (forum habitationis rei);
- h) locul unde locuiește persoana vătămată (forum habitationis vitimae).

Aceste locuri sunt de o valoare echivalentă ca și criteriile determinative de competență, enumerarea lor indicând numai ordinea de preferință în cazul în care procesul penal este pornit simultan la organele judiciare penale de la două sau mai multe dintre locurile arătate mai sus; dacă

¹¹ În continuarea unui punct de vedere redat anterior, reproducem opinia prof. V. Dongoroz în legătură cu mențiunile noastre: „în lumea modernă, datorită unei tot mai sporite capilarități sociale, faptele penale au o rezonanță care depășește cu mult aria locului săvârșirii și produce în mod firesc tulburare, temere și nesiguranță la mari distanțe. Aceasta explică de ce toate legislațiile de procedură penală moderne au adoptat sistemul competenței teritoriale plurale, încât infractorii să nu poată găsi azil și impunitate oriunde s-ar refugia” - în *Explicații teoretice ale Codului de procedură penală român*, Editura Academiei Republicii Socialiste România, București, 1975, p. 115.

¹² A. Celțov - *Procesul penal sovietic*, Editura de Stat pentru Literatură Economică și Juridică București, 1954, p. 185

¹³ M. S. Strogovici - *Procesul penal sovietic*, Editura de Stat pentru Literatură Juridică, București, 1950, p. 130.

¹⁴ Gaston Stefani, Georges Levasseur, Bernard Boulloc - *Procédure pénale*, Dalloz, p. 494

¹⁵ I. Neagu - *Drept procesual penal*, Editura Global Lex, București, 2002, p. 283.

¹⁶ *Code de procédure pénale*, art. 679, art. 687.

pornirea procesului penal în mai multe locuri nu este simultană, ceea ce fixează competența teritorială este prioritatea, adică prima sesizare¹⁷.

În lumina dispozițiilor legale în vigoare, apreciem că pot determina competența teritorială a organelor judiciare penale și alte criterii decât cele prevăzute în art. 30 alin. 1 C. proc. pen. Astfel, potrivit art. 45 alin. 2 C. proc. pen., când nici unul din locurile arătate în art. 30 alin. 1 C. proc. pen. nu este cunoscut, competența revine organului de urmărire penală care a fost mai întâi sesizat. În acest sens, poate fi competent, din punct de vedere teritorial, organul de urmărire penală la care a fost depusă plângerea sau denunțul cu privire la săvârșirea unei infracțiuni, deși acest organ ar fi posibil să nu facă parte din organele arătate expres în art. 30 alin. 1 C. proc. pen.¹⁸

În practica judiciară, criteriul locului săvârșirii infracțiunii determină, de cele mai multe ori, competența organelor judiciare penale motivat, în special, de faptul că majoritatea mijloacelor de probă necesare aflării adevărului se regăsesc în raza teritorială a organului judiciar de la locul săvârșirii infracțiunii.

CAPITOLUL II

LOCUL SĂVÂRȘIRII INFRACTIUNII - CEL MAI IMPORTANT CRITERIU DE DETERMINARE A COMPETENȚEI TERITORIALE PENTRU INFRACTIUNILE SĂVÂRȘITE ÎN ȚARĂ

Secțiunea 1 *Aspecte de drept penal*

Dreptul ca fenomen social, se desfășoară pe două coordonate: spațiu și timp¹⁹. Spațiul este un element de relație care impune în mod firesc și inevitabil anumite limite puterii de acțiune a legii penale și țărnuiește deci câmpul ei de aplicare. Acțiunea legii penale sfârșește acolo unde încetează, din punct de vedere teritorial, incidența puterii sale²⁰.

Orice sistem de drept are aplicabilitate în limitele teritoriale în care puterii legiuitoare îi este recunoscută aplicabilitatea. Din această cauză, dreptul prezintă diversitate, existând simultan atâtea sisteme juridice câte entități statale există la un moment dat, chiar dacă între aceste sisteme de drept naționale există afinități datorate unor sincretisme care grupează sistemele de drept naționale în familii de drept²¹.

Faptele penale se pot săvârși pe teritoriul unui stat sau pe teritoriul mai multor state, caz în care vorbim fie de teritorialitatea legii penale, fie de extrateritorialitatea acesteia, după caz.

Principiul teritorialității legii penale a luat naștere odată cu apariția statelor naționale, fiind indiscutabil legat de conceptul de suveranitate. Afirmat de Beccaria din motive de celeritate a răspunderii penale și pentru fundamentarea răspunderii penale bazate pe vinovăție, infractorul fiind prezumat a cunoaște legea locului, acest principiu este consacrat pentru prima dată de Codul Penal Napoleon și apoi de codurile europene care s-au inspirat din acesta. Codurile penale românești din 1864, 1936 și 1969 au consacrat acest principiu prin reglementări, în mare parte, identice, nuanțări apărând în definirea noțiunii de teritoriu.

Principiul teritorialității în materie penală este un principiu fundamental de drept public. Legile, în general, și legile penale, în special, fiind expresia suveranității statului au eficacitate în tot teritoriul aflat sub imperiul acestei suveranități.

¹⁷ V. Dongoroz, S. Kahane, G. Antoniu - *Explicații teoretice ale Codului de procedură penală*, Editura Academiei Republicii Socialiste România, București, 1975, p. 116.

¹⁸ I. Neagu - *Drept procesual penal*, Editura Global Lex, București, 2002, p. 284.

¹⁹ V. Pașca - *prolegomene în studiul dreptului penal*, Editura Lumina Lex, București, 2000, p. 119.

²⁰ R. Stănoiu, I. Griga, T. Dianu - *Drept penal, partea generală*, Editura Hyperion, București, 1992, p. 42.

²¹ Revista Română de Drept nr. 4/1977, *Aspecte ale competenței secțiilor maritime și fluviale* - V. Neamțu, p. 30.

Astfel, legea procedurală penală are eficacitate în teritoriul aflat sub imperiul suveranității statului sub care a fost elaborată, suveranitatea fiind teritorială, este normal ca și legea penală substanțială sau procedurală să fie teritorială.

Întinderea în spațiu a legii penale coincide cu întinderea în spațiu suveranității²². Pe cale de consecință, principiul general care guvernează materia aplicării legii penale în spațiu este principiul teritorialității.

Eficiența legii penale în apărarea valorilor sociale este reală din momentul intrării acesteia în vigoare. Respectarea exigențelor legii penale de către marea majoritate a destinatarilor îi conferă legii penale o eficiență activă.

Față de cei care săvârșesc infracțiuni, ordinea de drept urmează a se realiza prin constrângere, iar legea penală va avea o eficiență reactivă. Expresie a suveranității naționale și a independenței țării, legea penală se aplică infracțiunilor săvârșite pe teritoriul României - art. 3 C. pen.

Caracterul imperativ al normei cuprinse în art. 3 C. pen. impune aplicarea exclusivă și necondiționată a legii penale române infracțiunilor săvârșite pe teritoriul României, indiferent de calitatea făptuitorului, cetățean român sau străin, apatrid domiciliat în România sau cu domiciliul în străinătate²³. Dacă făptuitorul este cetățean străin sau apatrid domiciliat în străinătate, el nu poate invoca faptul că legea țării sale este mai favorabilă. Condițiile răspunderii sale penale pentru infracțiunile săvârșite pe teritoriul României se stabilesc exclusiv în baza legii penale române.

Exclusivitatea aplicării legii penale române limitează și efectele principiului non bis in idem, astfel că, dacă infractorul ar fi fost judecat în străinătate pentru o faptă comisă pe teritoriul României, hotărârea instanțelor străine nu are autoritate de lucru judecat, iar infractorul poate fi judecat de instanțele române, indiferent de soluția pronunțată de instanțele străine – achitare, încetarea procesului penal, condamnare - singurul efect al hotărârii străine fiind acela că, potrivit art. 89 C. pen., partea de pedeapsă, arestarea preventivă ori reținerea, executate în străinătate se deduc din pedeapsa aplicată de instanțele române.

Cunoașterea sferei de aplicare a legii penale teritoriale presupune determinarea anumitor noțiuni de ordin conceptual.

Potrivit art. 17 C. pen., infracțiunea este fapta care prezintă pericol social, săvârșită cu vinovăție și prevăzută de legea penală.

Prin săvârșirea unei infracțiuni, potrivit interpretării date de legiuitor în cuprinsul art. 144 C. pen. se înțelege săvârșirea oricăreia dintre faptele pe care legea te pedepsește ca infracțiune consumată sau ca tentativă precum și participarea la comiterea acesteia ca autor, instigator sau complice. Săvârșirea pe teritoriul României a oricăreia dintre activitățile amintite mai sus atrage incidența legii penale române în baza principiului teritorialității legii penale.

Prin săvârșirea infracțiunii pe teritoriul țării se înțelege orice infracțiune comisă în limitele acestui teritoriu, așa cum această noțiune a fost interpretată de legiuitor în cuprinsul art. 142 C. pen. precum și cele comise pe o navă sau aeronavă românească.

Noțiunea juridico-penală a teritoriului este diferit de ceea ce se înțelege în mod obișnuit prin teritoriu, cu alte cuvinte termenul de teritoriu din materia penală nu este folosit în sensul lui geografic, ci într-o accepție mai largă²⁴.

Astfel, prin noțiunea de teritoriu în sens juridic, întâlnită în expresiile „teritoriul României” sau „teritoriul țării”, se înțelege, potrivit art. 142 C. pen., întinderea de pământ și apele cuprinse

²² V. Dongoroz, S. Kahane, I. Oancea ș.a. - *Explicații teoretice ale Codului penal român, partea generală*, Editura Academiei Republicii Socialiste România, București, 1969, p. 51.

²³ V. Rămureanu - *Competența penală a organelor judiciare*, Editura Științifică și Enciclopedică. București, 1980, p. 55.

²⁴ V. Dongoroz, S. Kahane, I. Oancea ș.a. - *Explicații teoretice ale Codului penal român, partea generală*, Editura Academiei Republicii Socialiste România, București, 1969, p. 52.

între frontiere, cu solul, subsolul și spațiul aerian precum și marea teritorială cu solul, subsolul și spațiul aerian al acesteia.

Așadar, teritoriul țării cuprinde suprafața terestră, subsolul, apele interioare, marea teritorială și spațiul aerian de deasupra acestora.

Teritoriul constituie baza materială și indispensabilă a existenței statului.

Asupra teritoriului său, statul are competență teritorială exclusivă, suveranitatea teritorială a statului caracterizându-se pe de o parte prin exclusivitate în sensul că asupra unui teritoriu nu se poate exercita decât autoritatea unui singur stat; numai acesta exercită prin propriile sale organe asupra ansamblului teritoriului, puterea judecătorească.

Exercitarea suveranității mai multor state asupra aceluiași teritoriu ar contrazice însuși conceptul de suveranitate.

Exclusivitatea competenței teritoriale decurge de asemenea din egalitatea suverană a statelor. „Între state independente, respectul suveranității teritoriale precum și a competenței teritoriale exclusive este una dintre bazele esențiale ale raporturilor internaționale”²⁵.

Statul este singurul în măsură să determine întinderea și natura competențelor pe care le exercită în limitele teritoriului de stat, competența sa teritorială fiind practic nelimitată.

Suprafața terestră este întinderea de pământ cuprinsă între frontierele politico-geografice ale statului. Potrivit Constituției din 1991 - art. 3 - teritoriul României este inalienabil, iar frontierele țării sunt consfințite prin lege organică, cu respectarea principiilor și a celorlalte norme general admise ale dreptului internațional.

Sub aspect administrativ, teritoriul este organizat în comune, orașe și județe, organizare administrativă de care depinde, în principiu, determinarea competenței teritoriale a organelor judiciare.

Apele interioare cuprind apele curgătoare sau stătătoare aflate între frontierele de stat, precum și apele maritime interioare. În cazul în care frontiera de stat este situată pe ape curgătoare navigabile, limita teritoriului se stabilește luând în considerare linia celei mai mari adâncimi, iar în cazul apelor nenavigabile sau stătătoare, linia mediană a acestora. Apele maritime interioare sunt suprafețele de apă cuprinse între țărmul mării și linia de bază de la care se măsoară întinderea mării teritoriale.

Linia de bază a mării teritoriale este linia celui mai mare reflux de-a lungul țărmului sau după caz linia care unește punctele cele mai avansate ale țărmului.

Marea teritorială este partea de mare adiacentă țărmului, până la o anumită distanță în larg²⁶.

Lățimea determinată a mării teritoriale a fost, la început, justificată de considerente privind apărarea teritoriului - *terae potestas finitur ubi finitur armorum vis* - evoluând în raport de progresele balisticii (bătaia tunului), a ajuns în prezent să fie justificată nu doar de considerente de ordin militar, ci și economic.

Subsolul sau zona subterestră este compusă din întreg subsolul suprafeței terestre, al apelor interioare și al mării teritoriale, întinzându-se în adâncime în mod nedeterminat, din punct de vedere conceptual, limitat însă de posibilitatea reală pe care activitatea omenească ar avea-o de a pătrunde în acest subsol²⁷.

Spațiul aerian cuprinde coloana de aer aflată deasupra teritoriului terestru și a mării teritoriale a unui stat. Spațiul aerian național trebuie delimitat de cel internațional, adică de cel aflat deasupra mării libere, zonei economice exclusive și a platoului continental al unor state.

²⁵ Hotărârea C. I. J. 1949, *Drept internațional public* - Raluca Miga-Beșteliu, Editura ALL, București, 1998.

²⁶ Potrivit Convenției asupra mării teritoriale și a zonei contigue, marea teritorială este o zonă adiacentă coastelor sale (art. 1) și are lățimea de 12 mile marine.

²⁷ V. Dongoroz, S. Kahane, I. Oancea ș.a. - *Explicații teoretice ale Codului penal român*, Editura Academiei Republicii Socialiste România, București, 1969, p. 52.

În raport cu teritoriul unui anumit stat, deci în cazul de față în raport cu teritoriul statului nostru, infracțiunile pot fi săvârșite fie în țară, adică pe teritoriul țării, fie în străinătate, adică în afara teritoriului țării, fie parte pe teritoriul țării și parte în străinătate (infracțiuni începute pe teritoriu și continuate în afara lui, în străinătate sau începute în străinătate și continuate pe acel teritoriu, de exemplu acțiunea a fost executată în străinătate, dar rezultatele s-au produs pe teritoriu).

Acestea sunt cele trei posibilități de săvârșire a unor fapte penale în raport cu teritoriul²⁸.

Având în vedere aceste posibilități, se pune întrebarea când se poate considera că o faptă penală a fost săvârșită sau nu pe teritoriul statului nostru?

Pentru a răspunde la această întrebare este nevoie de a determina, în raport cu desfășurarea activității infracționale, care este **locul** săvârșirii infracțiunii și apoi a se vedea dacă acest loc se află sau nu situat în limitele teritoriale ale statului nostru.

Au existat în doctrina dreptului penal, în legătură cu determinarea locului săvârșirii infracțiunii, mai multe teorii, diferențiate între ele prin criteriul pe care îl folosesc pentru a determina locul infracțiunii; astfel: teoria acțiunii, a rezultatului, a ilegalității, a preponderenței și a ubicității.

a) Teoria acțiunii propune drept criteriu activitatea materială a agentului. Infracțiunea este socotită, potrivit acestei teorii, săvârșită la locul unde s-a efectuat activitatea care constituie elementul obiectiv al infracțiunii și care a condus la rezultatul ilicit. Potrivit acestei teorii nu interesează dacă rezultatul acțiunii s-a produs sau nu în același loc unde s-a desfășurat activitatea infracțională.

Rezoluția votată la 7 septembrie 1883 de Institutul de Drept Internațional la München a îmbrățișat punctul de vedere al acestei teorii: competența teritorială a legii penale este aceea a țării unde se găsește culpabilul în timpul activității sale criminale.

b) Opusă teoriei acțiunii este teoria rezultatului, care folosește drept criteriu rezultatul produs prin activitatea infracțională, adică urmare atipică care întregește latura materială a infracțiunii. Infracțiunea este socotită a fi săvârșită acolo unde s-a produs rezultatul ilicit, chiar dacă activitatea care l-a produs a fost efectuată pe un alt teritoriu. Această teorie a prevalat în Elveția și mai ales în Anglia și S.U.A.

c) O altă teorie este, după cum s-a arătat mai sus, aceea a ilegalității.

Această teorie folosește drept criteriu pentru determinarea locului infracțiunii apariția vinovăției suficiente să angajeze răspunderea penală a infractorului. În locul unde s-a produs prima încălcare a legii penale, prima activitate pedepsi bilă (acte preparatorii pedepsibile, tentativă pedepsibilă), în acel loc infracțiunea este considerată a fi comisă.

d) Teoria preponderenței are în vedere actul socotit ca esențial în conținutul infracțiunii și în desfășurarea activității infracționale. Locul săvârșirii infracțiunii este deci locul unde a fost efectuat actul cel mai important pentru realizarea infracțiunii.

e) Criteriul voinței infractorului aparține teoriei subiective. Potrivit acestei teorii, este socotit ca loc al infracțiunii locul unde infractorul a înțeles, a urmărit să realizeze rezultatul activității sale infracționale, chiar dacă acest rezultat s-a produs pe alt teritoriu.

f) În sfârșit, în teoria ubicității, dominantă astăzi în doctrină, criteriul pentru determinarea locului săvârșirii infracțiunii este acel al desfășurării integrale a activității infracționale. După teoria ubicității, infracțiunea este considerată a fi săvârșită oriunde s-a desfășurat măcar o parte din activitatea ilicită sau oriunde s-a produs vreunul din rezultatele acestei activități. Se exceptează, însă, locurile care au servit numai de tranzit activității ilicite.

Faptul că dintre toate teoriile enunțate mai sus, cea care până la urmă domină în doctrina dreptului penal este teoria ubicității, vădește superioritatea acestei teorii. Viața, practica de

²⁸ Idem

pretutindeni a impus, ca și în atâtea cazuri, soluția care realizează cât mai deplin scopul urmărit adică asigurarea ocrotirii penale cu maximum de posibilități. Această teorie răspunde cel mai bine necesității de a realiza o protecție cât mai eficace a relațiilor sociale, ocrotite de legile penale. Toate celelalte teorii folosesc un criteriu de singularizare care conduce la rezolvarea nedialectică a problemei locului infracțiunii. Criteriile folosite de aceste teorii păcătuiesc prin aceea că limitează artificial locul infracțiunii în contradicție cu complexitatea activității infracționale și în detrimentul unei activități de represiune susceptibilă de a funcționa pe ansamblul momentelor pe care le reprezintă această complexitate. De exemplu, în cazul teoriei rezultatului, este evident că și ordinea publică a locului unde s-a desfășurat activitatea ilicită a fost încălcată, iar pe de altă parte, această teorie apare ca inoperantă în cazul activităților infracționale care n-au depășit faza tentativei sau în cazul infracțiunilor formale a căror consumare nu depinde de producerea unui rezultat.

Dimpotrivă, în cazul teoriei ubicuității, orice loc unde s-a realizat ceva din activitatea infracțională, ceva ilicit, este socotit a fi locul săvârșirii infracțiunii, putându-se lua măsurile în consecință și, în acest fel, oriunde legea penală a fost încălcată, ordinea publică tulburată va putea fi restabilită pe acest temei²⁹.

Așadar, dacă pe teritoriul unui anumit stat s-a efectuat numai o parte din activitatea ilicită sau s-a produs numai rezultatul acesteia, infracțiunea este socotită a fi săvârșită pe teritoriul aceluia stat și, în baza principiului teritorialității, va fi aplicată legea penală a aceluia stat.

Soluția aceasta a fost adoptată și de Institutul de Drept Internațional - sesiunea Cambridge, 1951.

În literatura juridico-penală s-a arătat că soluția comportă totuși un inconvenient, în sensul că dacă toate legislațiile ar adopta soluții simetrice conflictele pozitive de competență s-ar multiplica. Nu putem fi de acord cu această părere, fiindcă dintre statele față de care s-a realizat ubicuitatea, criteriul ubicuității nu poate fi folosit pentru efectuarea unei judecăți în prezența infractorului decât în statul pe teritoriul căruia se află făptuitorul; oricare dintre celelalte state nu va putea obține extrădarea decât în cazul când statul de refugiu nu procedează la o urmărire penală, astfel încât conflictele se pot evita. Conflictele apar, dimpotrivă, când infracțiunea a fost săvârșită pe teritoriul unor țări care nu aplică principiul ubicuității, în acest caz, fiecare stat, bazându-se pe principiul său (acțiune, rezultat), se consideră ca având competență exclusivă.

Legiuitorul Codului penal de la 1969, ca de altfel și cel al Codului penal de la 1936, a adoptat în dispozițiile art. 143 C. pen. criteriul zis al ubicuității sau al desfășurării integrale, potrivit căruia infracțiunea se consideră săvârșită pretutindeni (termenul *ubicuitate* derivă din adverbul latin *ubique* = *pretutindeni*) unde s-a săvârșit fie și numai un act de executare sau s-a produs rezultatul infracțiunii³⁰.

Teoria ubicuității, consacrată în art. 143 C. pen. pentru a explica înțelesul expresiei de „infracțiune săvârșită pe teritoriul țării”, a fost preluată și statornicită și în legea procesual penală, în dispozițiile art. 30 alin. 4 C. proc. pen., care reglementează că: „Prin locul săvârșirii infracțiunii se înțelege locul unde s-a desfășurat activitatea infracțională, în totul sau în parte, ori locul unde s-a produs rezultatul acesteia”.

Secțiunea 2

Aspecte de drept procesual penal

Locul săvârșirii infracțiunii a fost considerat de reglementarea anterioară dar și de către actuala reglementare drept principalul criteriu de determinare a competenței teritoriale, așezându-l în fruntea criteriilor atributive de competență.

²⁹ V. Dongoroz, S. Kaliane, I. Oancea ș.a. - *Explicații teoretice ale Codului penal român*. Editura Academiei Republicii Socialiste România, București, 1969, p. 55.

³⁰ C. Bulai - *Drept penal român - partea generală*, vol. I, Casa de Editură și Presă Șansa" S.R.L.. București, 1992. p. 73.

Un indiciu al importanței ce i se atribuie acestui loc este relevat de faptul că există autori în literatura de specialitate care se referă la acest loc în chiar definiția competenței teritoriale.

Cu privire la „forum delicti comissi” trebuie precizat că legislația noastră anterioară îl definea în art. 21 C. proc. pen. după teoria acțiunii, care prevedea faptul că, determinarea competenței după teritoriu este făcută în funcție de locul unde infracțiunea a fost comisă, chiar în cazul când rezultatul acesteia s-a produs în altă circumscripție. Pe de altă parte, Codul penal anterior, reglementând aplicarea legii penale în spațiu, a adoptat principiul ubicuității. Observăm, deci, faptul că în legislația penală anterioară nu se putea vorbi despre existența unui criteriu unic pentru determinarea locului săvârșirii infracțiunii.

În prezent, locul unde a fost săvârșită infracțiunea este definit în conformitate cu teoria ubicuității, echivalenței - cum mai este denumită în literatura de specialitate. Această teorie este dominantă astăzi în doctrina penală, ea răspunzând cel mai bine necesității unei „ocrotiri” penale cu maximum de posibilități³¹.

În acest sens, în art. 143 alin. 2 C. Pen. și art. 30 alin. 4 C. proc. pen. se precizează că este loc al săvârșirii infracțiunii orice loc unde s-a comis vreun act de executare ori în care s-a produs rezultatul infracțiunii.

Importanța acordată acestui prim criteriu reiese din aceea că în acest loc au fost lezate valorile apărute de lege, în acest loc s-a produs rezonanța negativă a săvârșirii infracțiunii, în acest loc s-a încălcat ordinea și totodată aici judecata își produce la modul cel mai eficace efectele sale preventive și de restabilire a ordinii încălcate.

S-a afirmat în literatura de specialitate faptul că locul săvârșirii infracțiunii este înainte de toate o chestiune de drept material³². Totuși, locul comiterii infracțiunii interesează și dreptul procesual penal din punct de vedere al aplicării legii procesuale penale în spațiu și în special din punct de vedere al competenței teritoriale.

Acest criteriu este adoptat de cvasiunanimitatea legislațiilor și are în vedere pe de o parte legătura ce există între raza teritorială a unui organ judiciar și locul comiterii infracțiunii, pe de altă parte.

Astfel potrivit acestuia, în competența teritorială a unui organ intră toate infracțiunile de competența sa materială, ce se săvârșesc în circumscripția teritorială în care își exercită jurisdicția.

Termenul de loc al săvârșirii infracțiunii are un înțeles mai larg, el semnificând atât locul efectiv al comiterii faptei, cât și zonele apropiate sau alte locuri ce conțin date cu privire la pregătirea, comiterea și urmările faptei, inclusiv căile de acces și de retragere a autorului din câmpul infracțional³³. Acest loc este cel mai bogat în urme sau date referitoare la actul infracțional și la autorul acestuia.

Organul de urmărire penală și instanța de judecată au posibilitatea să investigheze direct la locul comiterii faptei și consecințele ei, să stabilească împrejurările în care a fost comis actul penal și să-l identifice pe autor prin descoperirea, fixarea, ridicarea și cercetarea criminalistică a urmelor, mijloacelor de probă, toate aceste activități fiind de natură a contribui în mod efectiv la realizarea scopului procesual penal³⁴.

Explicarea înțelesului cuvintelor „locul săvârșirii infracțiunii” nu are o aplicație limitată numai la stabilirea competenței teritoriale, ci este de natură a înlătura dificultățile ce s-ar putea ivi în practică pentru stabilirea competenței, de exemplu în cazul infracțiunilor continue, continuate ori atunci când rezultatul infracțiunii se produce în alt loc decât acela în care s-a desfășurat activitatea

³¹ R. M. Stănoiu, I. Griga, T. Dianu – *Drept penal, partea generală*, Editura Hyperion, București, 1992, p. 45

³² T. Pop - *Drept procesual penal*, Editura Tipografia Națională, Cluj, 1947, p. 163.

³³ E. Stancu - *Tratat de criminalistică*, Editura Actami, București, 2001, p. 50.

³⁴ G. Stefani, G. Lévassieur, B. Bouloc - *Procédure Pénale*, Dalloz, p. 494.

infracțională³⁵. Astfel, infracțiunile omisive se socotesc a fi săvârșite în acel loc unde ar fi trebuit să se desfășoare activitatea pe care infractorul a comis-o sau acolo unde s-a produs rezultatul acelei inactivități.

Locul de comitere al actelor preparatorii, atunci când sunt incriminate, va fi locul în care ele au fost efectuate. Locul săvârșirii acestor acte - atunci când nu sunt pedepsibile prin ele însele, dar care devin ulterior acte de complicitate - va fi orice loc în care s-a efectuat vreun act de executare în realizarea conținutului obiectiv al infracțiunii în vederea căreia au fost îndeplinite actele preparatorii. În fine, în cazul în care actele preparatorii constituie acte de sine stătătoare, locul săvârșirii lor va fi acela unde ele au fost efectuate.

În ceea ce privește tentativa, ea se consideră săvârșită acolo unde s-au efectuat diversele acte de executare. Actele anterioare sau concomitente săvârșirii infracțiunii, care privesc conținutul acesteia, fără a fi însă acte de complicitate, nu vor juca nici un rol în determinarea locului în fracțiunii.

O problemă mult discutată este aceea privitoare la infracțiunile continue și continuate.

În determinarea locului comiterii acestor infracțiuni, părerile sunt unanime în a admite drept criteriu de determinare a *forum delicti commissi*, principiul ubicuității, acestea fiind considerate a fi săvârșite oriunde a avut loc la un moment dat activitatea infracțională sau, altfel spus se consideră săvârșite pretutindeni unde s-a prelungit această activitate.

Sunt, de asemenea, ridicate unele probleme cu privire la situația participanților - coautori, instigatori, complici - la infracțiune³⁶. În cazul participației la o infracțiune săvârșită pe teritoriul unui stat, actele prin care participantul contribuie la săvârșirea infracțiunii, chiar dacă sunt efectuate în afara teritoriului aceluși stat, atrag competența organelor statului respectiv. Actele participanților, formând un tot indivizibil, nu pot fi despărțite, astfel încât activitatea infracțională în ansamblul ei va cădea sub incidența legii penale.

Locul săvârșirii infracțiunii variază ca întindere și importanță de la o infracțiune la alta și de la o faptă la alta³⁷. Uneori locul comiterii infracțiunii este precis determinat, iar fapta comisă capătă o gravitate deosebită datorită locului comiterii, alteleori locul este imprecis determinat sau necunoscut ori tară nici o importanță pentru gravitatea faptei.

Locul unde a fost săvârșită infracțiunea are un rol esențial în determinarea competenței teritoriale a organelor judiciare, fapt evidențiat de-a lungul timpului de majoritatea sistemelor procesuale penale.

Deși nu există o ierarhizare a locurilor care, normativ, determină competența teritorială, este totuși în interesul bunei înfăptuiri a justiției ca atunci când locul săvârșirii infracțiunii este bine cunoscut și prezintă o reală importanță pentru desfășurarea procesului penal, organele de urmărire penală de la care pornește aproape întotdeauna acest proces, dacă aparțin altei raze teritoriale decât cea de la locul săvârșirii, să înlesnească o sesizare din oficiu din partea organului de urmărire penală de la locul săvârșirii infracțiunii sau să îndrume, când este posibil, către acel organ, sesizările pe care le-ar primi³⁸.

³⁵ V. Rămureanu - *Competența penală a organelor judiciare*, Editura Științifică și Enciclopedică, București, 1980, p. 108.

³⁶ R. M. Stănoiu, I. Griga, T. Dianu - *Drept penal, partea generală*, Editura Hyperion, București, 1992, p. 46

³⁷ T. Pop - *Drept procesual penal*, vol. I, Editura Tipografia Națională, Cluj, 1947, p. 159.

³⁸ V. Dongoroz, S. Kahane, G. Antoniu - *Explicații teoretice ale Codului de procedură penală*, Editura Academiei Republicii Socialiste România, București, 1975, p. 119.

BIBLIOGRAFIE

1. Bulai Costică – *Drept penal român – partea generală*, vol. I, Casa de Editură și Presă „Șansa” S.R.L., București, 1992.
2. Celțov A. – *Procesul penal sovietic*, Editura de Stat pentru Literatură Economică și Juridică, București, 1954.
3. Dongoroz V. Kahane S., Oancea I. ș.a. – *Explicații teoretice ale Codului penal român*, Editura Academiei Republicii Socialiste România, București, 1969.
4. Dongoroz V. Kahane S., Antoniu G. ș.a. – *Explicații teoretice ale Codului penal român*, Editura Academiei Republicii Socialiste România, București, 1969.
5. Foișoreanu Dem M. – *Teză de doctorat: Organizarea judecătorească din cele mai vechi timpuri*.
6. Levasseur G., Stefani G., Bouloc B. – *Procédure pénale*, Dalloz, Paris.
7. Neagu I. – *Drept procesual penal – Tratat* –, Editura Global Lex, București, 2002.
8. Pașca V. – *Prolegomene în studiul dreptului penal*, Editura Lumina Lex, București, 2000.
9. Pop T. – *Drept procesual penal*, vol. I, II, Editura Tipografia Națională, Cluj, 1947.
10. Rămuranu V. – *Competența penală a organelor judiciare*, Editura Științifică și Enciclopedică, București, 1980.
11. Stănoiu R., Griga I., Dianu T. – *Drept penal, partea generală*, Editura Hzperion, București, 1992.
12. Strogovici M.S. – *Procesul penal sovietic*, Editura de Stat pentru Literatură Juridică, București, 1950.
13. Stancu S. – *Tratat de criminalistică*, Editura Actami, București, 2001.
14. Tanoviceanu I. – *Tratat de drept și procedură penală*, vol IV, Editura Curierul judiciar, București, 1913.
15. Volonciu N. – *Tratat de procedură penală, partea generală*, Editura Paideia, București, 1998

INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SOME NOTES ON THE PRINCIPLE OF COMPLEMENTARITY: A READING OF THE BRAZILIAN LAW

*Fabio RAMAZZINI BECHARA**

Abstract

The Second World War, despite of the atrocities committed, is a mark in the history of human rights achievements. The Charter of Human Rights and the establishment of the United Nations recognized the international community as one of the most important allies of the effectiveness of human rights. The response of international community to all violations of human rights could be seen in the establishment of international criminal courts. Despite of all efforts to create a permanent international criminal jurisdiction after Nuremberg, only in the 1990's, after the cold war, the world could see a real mobilization to accomplish the aim of establishing such jurisdiction. The Rome Statute, which created the permanent international criminal court and its rules and proceedings, has had a tremendous support from the international community, and also from Brazil. But, despite of the advance that the Rome Statute represents, there is a long way to be followed, especially because all states that make part of the treaty must understand that the ICC has its basis on the complementary principle, and it is not a violation of sovereignty, but a tool to strengthen national sovereignty. This is the issue that will be examined on this article.

Keywords: *international criminal court, The Rome Statute, the principle of complementarity, the Brazilian criminal law*

Introduction

The presidential decree no. 4.388 of September 25, 2002, promulgated the Rome Statute of the International Criminal Court¹. The statute had been previously ratified by the National Congress through the legislative decree no.112 of June 6, 2002. Later, the constitutional amendment no.45 recognized the legitimacy of the International Criminal Court in the fifth article of the National Constitution. The court would then prosecute crimes defined by the Rome Statute.

The international norm effective in the internal level, established the jurisdictional competence of the International Criminal Court for the prosecution of crimes such as genocide, crimes against humanity, crimes of war and of aggression, established the penalties and defined the procedures to be observed, from the investigation to the execution of those accused of such crimes.

It would be, however, relevant to know under what conditions or assumptions the International Criminal Court would act in case there is a conflict or concurrence with the Brazilian jurisdiction. It is, therefore, possible to ask: if a Brazilian citizen commits one of the crimes

* Prosecutor Attorney for the State of São Paulo. Former member of the Special Task Force for the Deterrence of Organized Crime. Doctoral Candidate in Law at the University of São Paulo and Master in Law from the Pontificia Universidade Católica de São Paulo. Member of the International Association of Criminal Law. Professor at the School of Public Prosecution in São Paulo and of the Damasio de Jesus Law School. Author of books and studies published both in Brazil and abroad (e-mail: fabio.bechara@mp.sp.gov.br).

¹ It is possible to question the legal nature of the Rome Statute as an international treaty for the defense of human rights. The nature of the statute could be characterized by its function in the protection of human rights. On the other hand, this same function could also be questioned under the argument that the statute is not a declaration of human rights but that it is simply a punitive judicial order in the international context.

mentioned or if such crime is committed in Brazilian territory which organ would have the competence to act? What would be the penal law applicable to the case?

How to establish the cooperation between Brazil and the International Criminal Court?

PAPER CONTENT

Problem description

Those questions take from the principle of complementarity² the fundamentals to the answer, since such principle is the basis of the International Criminal Court action and of the application of the dispositions of the Rome Statute. To answer such questions, however, one must examine some previous concepts.

Antecedents

The International Criminal Court is an instance created neither to regulate the internal reality of the States nor to override the capacity of these States to deal with local problems. The International Criminal Court is rather one more tool for humanitarian protection derived from the recognition of the universal³ character of human rights to reinforce the process of accountability for international crimes at a national level. The court is one more judicial instrument to strengthen national justice systems by incorporating specific international standards.

The movement towards an international penal jurisdiction in terms of human rights is associated with the omission or incapacity of national jurisdictions to deal with severe violations which breed a feeling of collective indignation in the international community and create the need for power to handle such issues. The International Criminal Court is, therefore, the most adequate instrument to assert human rights. Moreover, the insufficiency of economic sanctions, the rights of the victims, and the importance of not forgetting the atrocities committed enhance the desire of establishing a permanent International Criminal Court.

The resort to Penal Law by the international community to condemn as crimes attempts to transgress universal human rights and to punish atrocities according to international standards leads to the need of expanding the power to effectively protect human rights.

While it is possible to establish two instances of responsibility for international crimes national and international- it is also necessary to find if there any areas in which the two instances clash. Whereas national jurisdictions in the prosecution of international crimes are guided by the principle of universality -universal or cosmopolitan justice- it is perfectly possible for two or more States to demand the right to prosecute criminals.

When the case, however, is referred to the international judicial order, whose action becomes necessary because of the incapacity or impossibility to punish at a national level, the action of the International Criminal Court is applicable and non- conflicting.

In such case the International Criminal Court has the monopoly of International Penal Law as an instance of guarantee or 'ultima ratio'. The legitimacy of international Criminal courts derives from their capacity of assuring that human rights are protected according to Norberto Bobbio⁴.

² The idea of complementarity has the sense of subsidiarity.

³ The universal character of human rights derives from identifying common standards and not from unifying values, in order to respect social, cultural, and political diversity, which characterizes different societies. In terms of human rights, the multicultural aspect of global society answers the need to reach harmony rather than to unify. Moreover, the concepts of universal and multicultural values are compatible and complementary in the sense that one ends where the other begins.

⁴ A Era dos Direitos, Editora Campos, 2004.

The solution to the apparent conflict lies on two principles: the primacy of international jurisdiction and its complementary character. While the primacy is based on the idea that international jurisdiction should prevail over national jurisdiction, the principle of complementarity assumes a local incapacity or connivance to supply an answer to a given situation.

The Nuremberg, Tokyo, Rwanda and the former Yugoslavia Tribunals were guided by the principle of primacy of international jurisdiction while the idea of a permanent International Criminal Court is guided by its complementarity principle. The adoption of the complementarity principle in a permanent Criminal Court uses the double function of the principle to guarantee that atrocities do not remain unpunished and that national justice systems become stronger through the recognition of universal values.

Answers to the questions

First question

The answer should be developed based on the 1st and 17th articles of the Rome Statute. The 1st article writes that the International Criminal Court serves as a complement to national penal jurisdictions. On a first reading, one can see that the International Criminal Court's action does not eliminate the competence of the internal jurisdiction but rather assumes the non incidence of such jurisdiction. Article 17, I, and its lines "a", "b", "c", and "d", state in which situations the competence of the International Criminal Court is admissible, adding that a specific case will not be admitted if a) such case is object of inquiry and criminal procedures under the State's jurisdiction; b) if the case has been object of inquiry and criminal procedure by the State and the State has decided not to deal with such case; c) if the defendant has been definitely tried; d) and if the case is not severe enough to justify the intervention of the International Criminal Court.

Lines "a" and "b" refer to the lack of will or incapacity of the State to carry out the investigation or the criminal procedure as a condition for the intervention of the International Criminal Court. Line "c" is based on denial - the *ne bis in idem*-, the measure used to prevent the double prosecution of the same case. Finally, in line "d", when the case is regarded as not severe the intervention of the International Penal Court is not justified.

Thus follows the first interpretation of the principle of complementarity, which considers the action of the International Criminal Court as secondary to the national jurisdiction, whose delimitating criteria are the existence or not of : a) the case to be prosecuted; b) the will and disposition of punishing on the part of the State under consideration; and the severeness of the violation. In this line there is a recognition that the jurisdiction of the International Criminal Court neither precedes nor overrides the national jurisdiction but simply works as a complement under the assumption that those accountable for the behavior described in the 5th article of the Rome Statute should not remain unjustifiably unpunished. Whether the deliberate intention of the State, under whose jurisdiction the case would be prosecuted, is not to punish or whether there is lack of will or incapacity or even lack of structure to prosecute, in all cases, the crimes described in the 5th article and the following articles of the Rome Statute, justify the action of the International Criminal Court.

Once the conditions above have been fulfilled the International Criminal Court will be enabled to exert its jurisdiction if a) there is an accusation from the State to prosecute b) if there is an accusation from the United Nations Security Council to prosecute c) if the prosecutor is entitled to act without provocation. (13th article).

Therefore, in answer to the first question, one notices that the prevailing and original competences to prosecute the Brazilian who commits the crime of genocide are subject to the

Brazilian justice. The Brazilian citizen will only be prosecuted by the International Criminal Court in case the Brazilian justice does not demonstrate the necessary disposition to punish him⁵. The case considered internal does not represent an obstacle for the International Criminal Court to act, once the decision whose effects have become final relates to a situation of impunity.

Second question

The answer is based on the innovations introduced by the international norm of criminalization of certain behaviors, which are numbered and described in the 5th article and the following articles of the Rome Statute. These are crimes of genocide, of war, of aggression and against humanity. With the exception of aggression, all the other crimes were defined in detail.

In Brazil the crime of genocide is provided for and defined in the Federal Law. n.2.889/56. In case a Brazilian citizen commits genocide, considering the character and primacy of national jurisdiction, the Brazilian penal law will be applied. Likewise, if the action of the International Criminal Court is admitted according to the requirements described in the 17th article of the Rome Statute, the law to be applied will be the international law. In this case both the application of the Brazilian penal law and the competence of national justice will be guided by the 7th. o, I, “d” article of the penal code, whose basic principle is that of universal justice with the assumption of international commitment on the part of the Brazilian state to punish the violation.

The action of the Brazilian Justice in this case is not submitted to any condition, not even the entrance of the accused in national territory so that he can be prosecuted⁶.

The same solution applies to crimes of war and crimes against humanity. Although these crimes do not have a correlated denomination, some of the behavior which defines such crimes corresponds to the normative provisions of the Brazilian Law. Whenever there is a relationship of symmetry with the internal legislative order, there are no reasons to be concerned. In cases in which there is no such symmetry a question arises: Could the Brazilian Justice apply the international penal norm as a source of integration⁷? Here is an extremely difficult question with two possible solutions. The first solution is to accept that the Brazilian Justice System cannot apply the international norm under the argument that the constitutional legislative procedure required to consider certain behaviors as crimes to be punished was not observed. The result is a nationalistic view based on the respect to national sovereignty by preserving its constitutional competence.

A second solution derives from the premise that the National Constitution in its beginning and in the 4th article recognizes in the international order a complement to the national order. The same disposition recognizes that Brazil in its international relations will be guided by the prevalence of human rights. The 5th article recognizes international treaties that focus on human rights as a source of national law and accept as legitimate the International Criminal Court. The

⁵ The lack of disposition may be characterized by the existence or non- existence of some investigation procedure, legal procedure of acknowledgement or even execution. It is important to emphasize that once the action of the International Criminal Court is recognized as legitimate based on the requirements, procedures, and provisions of the Rome Statute, there will be no possibility of appeal to the National Justice against the course taken.

⁶ Although the Penal Code establishes the action of the Brazilian Justice and consequently the application of the Brazilian Law without the existence of any condition such as the criminal's entrance in Brazilian territory, one should not forget that the right to information in the national penal process has a status of constitutional guarantee. Besides, the right to information is equally recognized in the “Pacto de São José da Costa Rica”, ratified by Brazil. In other words, although the penal action is approved by a judge, it will not follow its natural course in case the defendant is neither personally cited, nor does he appear in court to be questioned and nor does he nominate a defense attorney according to the terms of the 366th article of the Penal Code.

⁷ It is important to notice that when analyzing the international norm as a complement to the national law, the idea of complementing changes its function as the national justice applies the international norm.

National Constitution further defines the procedures of incorporation of international treaties. Finally, the Act of Transitory Constitutional Dispositions indicates an effort of the country to contribute to the creation of an International Human Rights Court.

To sum up, one cannot deny that the human rights are an ideological option of the Brazilian State and consequently in its most variable sources, also including international customs. The recognition of international treaties as a source of internal law and the legislative process of incorporation, as far as international human rights treaties are concerned, derive from the same constitutional power which provided for the other formal sources and their respective legislative procedures. Thus, one is led to the conclusion that international treaties, mainly those of human rights, are as legitimate as the legislative procedure required for the approval of the law in a formal sense, which considers certain behaviors as crime and applies punishment as provided for in the 5th article, XXXIX of the National Constitution⁸. According to these arguments the Brazilian Justice System could apply the international material law in case there is an absence of provision in the internal legislation for crimes of war and against humanity.

Unlike the crime of genocide, these two other types of crime in the Brazilian penal law and in the enforcement of National Justice are provided for in the 7th, II, "a" article, of the Penal Code, which equally follows the principle of universal justice. In this case, however, specific conditions must be attended to so that the Brazilian Justice can act, such as in the already mentioned entrance of the criminal in national territory.

Such understanding proves to be reasonable and coherent in that it preserves the information values in the internal level, allowing the incidence of the international norm only in case there is absence of will on the part of the Brazilian State to punish the individual responsible for one of the violations described in the 5th article of the Rome Statute.

Admitting the subsidiary enforcement of the international law which defines crimes and prescribes penalties means respecting the prudence, the caution and the coherence necessary to defend the National Law, preserving the objectives proposed by the Rome Statute. It should be noticed that the Rome Statute has intended neither to exclude the competence of the national jurisdiction nor to override the internal legal order. The objective of the statute has been to qualify a permanent mechanism of protection of human rights in case there is lack of interest or incapacity of national states to investigate and punish crimes that violate human rights.

Therefore, with the exception of crimes of war and against humanity the penal law to be applied in case a Brazilian commits the crime of genocide will be the Brazilian law, which will prevail over the international material norm, according to the principle of complementarity, whose incidence is guided by the same criteria which authorize the action of the International Criminal Court.

Third question

Regarding the cooperation which must be established between Brazil and the International Criminal Court, one must consider that the decisions of this court are directly executed internally without any need to control acceptance. Such conclusion derives not only from the acceptance of the Rome Statute, which forbids any reservations in relationship to the effectiveness of its dispositions but also from the Brazilian Constitution. The introductions of the 1st, 3rd, and 4th articles of the National Constitution express the option for human rights in all possible levels both internal and international.

⁸ The solution is supported by the 5th article of the Penal Code, which prescribes the enforcement of the Brazilian law on crimes committed in national territory with the exception of situations dealt with in international treaties. With the exception of crimes committed in national territory the international law will be applied.

The International Criminal Court expresses more than one level of concern about human rights, which are the foundation of the court's legitimacy. The international penal responsibility for international crimes does not clash with the national jurisdiction. Rather, the responsibility assumes the non-interference of the national jurisdiction according to a process model deemed as fair. The moment the International Criminal Court acts, one assumes that the attempts to penalize at national level have been exhausted.

The recognition of the legitimacy of the International Criminal Court by the Brazilian Constitution from an ideological point of view, implied the acceptance not only of the court's jurisdiction but also of all its decisions. The creation of the International Criminal Court was not meant to pre-empt the sovereignty of States; the main objective was to strengthen the integration of the States in the international justice order.

Therefore, all the decisions of the International Penal Court can be executed in Brazil, according to a model of compulsory cooperation, which excludes the demand for legal control. In case there is no cooperation on the part of the State, the United Nations Security Council becomes the legitimate organ to impose sanctions.

Conclusions

The Rome Statute stands out as a great achievement when compared to other international criminal courts created by resolutions of the United Nations Security Council. These courts are guided by the principle of primacy of international jurisdiction, leading to two types of questioning: a) regarding national sovereignty, b) the rationality which must guide the action of these courts, restricted to the prosecution of crimes severe enough to justify their intervention.

The founding principle of complementarity qualifies the International Criminal Court for its capacity to solve the apparent conflict between the national and international jurisdictions and between the national and international penal law. The International Criminal Court qualifies as an instrument to protect and assert human rights, which are fundamental to the action of the principle of complementarity and basic to the mechanism that safeguards the primacy of national sovereignty and the strength of internal jurisdiction.

AUDIO AND VIDEO INTERCEPTIONS AND RECORDINGS IN CRIMINAL LAW IN ROMANIA

Ion NEAGU*
Mircea DAMASCHIN**

Abstract

Within the present study we propose to undertake an analysis of an institution introduced in 1996 in the Code of Criminal Procedure, and which, by reference to a relative recent date of legislation, causes controversial discussions in the Romanian legal environment: the interception and recordings of conversations and communications made by phone or by any mean of electronic communication. Also, the controversial aspects with respect to this evidence mean are generated by the conflict existing between very important social values, specific for this field, between the necessity to ensure a social climate characterized by sanctioning those who commit offences, on one side, and the right of every human individual to be protected against interferences in their private life (by violating the right of privacy of the correspondence and communications). To this end, we shall proceed to present the legislative framework established by the Code of Criminal Procedure provisions, and, mainly, we shall emphasize the shortcomings of the law text, proposing solutions to the Romanian legislator.

Keywords: *the criminal law in Romania, the audio and video interceptions and recordings, the evidence, the right to private life, serious offences.*

Introduction

The possibility to use in the criminal law in Romania the sounds or images recordings was regulated, for the first time, by the Law no 141/1996. Thus, by this normative act, at Title III “Evidence and Evidence Means”, Chapter II “Evidence Means” was introduced Section V¹ “Audio or Video Recordings”. Subsequently, by Law no 281/2003, the name of this section was changed to “Audio or Video Interceptions and Recordings”. The new regulation added to the already existing evidence means, two new more: audio recordings and the images recordings (video or photo).

Literature review

The issue of the judicial authorities’ interference in the private life of the individual by violating the right to correspondence privacy is widely discussed by the national specialized literature, and mostly by the international one. We are taking into account, on national level, a series of studies, as follows: **Ioan Lascu**, *Particularitățile de investigare și cercetare a infracțiunilor de corupție în lumina noilor modificări legislative*, Revista Dreptul no 11/2002, pages 137-148; **Mircea Damaschin**, *Înregistrările audio sau video și fotografiile*, Revista de Drept Penal no 3/2001, pages 49-56; **Augustin Lazăr**, *Interceptările și înregistrările audio sau video*, Revista de Drept Penal no 4/2003, pages 36-51; **Angela Hărăștășanu**, *Interceptarea și înregistrarea convorbirilor sau comunicărilor*, Revista de Drept Penal no 2/2004, pages 69-75;

* Professor Ph.D., Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: ion.neagu@univnt.ro).

** Lecturer Ph.D., Law Faculty, “Nicolae Titulescu” University, Bucharest (e-mail: mircea.damaschin.lesij@univnt.ro).

Dan, *Unele observații privind interceptările și înregistrările audio sau video*, Revista Dreptul no 2/2005, pages 169-171; **Camelia**, *Interceptările audio și video*, Revista de Drept Penal no 1/2006, pages 106-113.

Referring to the studies published in important international law magazines, we would like to mention **Frédéric Sudre**, *Droit de la Convention Européenne des droits de l'homme* published in La Semaine Juridique – Edition generale, 05 février 2003; Andy Roberts, *Identification of suspects from CCTV and Video Recordings*, Journal of Criminal Law, no 67/2003; **Nick Taylor**, *Abuse of process: Destruction of CCTV Evidence*, Journal of Criminal Law, no 67/2003, **Andrew Roberts**, *Covert Video Identification: European Convention on Human Rights, Article 8*, Journal of Criminal Law, no 67/2003; **Nick Taylor**, *Interception of Communications: Failure to Comply with the Right to Private Life* Journal Of Criminal Law, no 67/2003; **Andrew Roberts**, *Regulation of Investigatory Powers Act 2000: Private Surveillance*, Journal of Criminal Law, no 70/2006.

Audio and Video Interception and Recordings in Criminal Law in Romania

1. Preamble

According to article 91¹, paragraph 1 of the Code of Criminal Procedure, the interception and recording of conversations and communications made by phone or by any other mean of communication are made only based on the motivated authorization of a judge, upon the request of the public prosecutor who performs or surveys the criminal investigation, under the conditions prescribed by the law, if there are solid clues or data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio, and the interception and recording are essential to establish the matter of fact, or because the identification or the localization of the participants may not be made by other means, or because the investigation would be delayed too long.

By reference to the former article 91¹, paragraph 1, previous to passing the Law no 356/2006 (“the interception and recordings of certain conversations or communication, on magnetic tape or any other type of support, shall be performed only with the motivated authorization of the court, upon the request of the public prosecutor, in the cases and under the conditions prescribed by the law, if there are solid clues or data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio, and the interception and recording are essential in order to determine the truth”), there may be expressed a series of observations, as follows. First of all, it was completed the regulation which mentions the interception and recordings object. Thus, previous to the Law no 356/2006, the interception and recordings aimed “the conversations or the communications”. De lege lata, are taken into account “the conversations or communications made by phone or by any other electronic mean of communication” Secondly, for a greater strictness of expression, the interception and the recordings are ordered upon the request “of the public prosecutor who performs or surveys the criminal investigation”. Previously, the court was notified by the “public prosecutor”.

As a conclusion, the interception and the recordings of conversations and communications presumes the fulfillment of the following conditions:

- a). the existence of the judge’s motivated authorization;
- b). the existence of solid clues and data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio;
- c). the interception and the recordings are essential to establish the matter of fact, or because the identification or the localization of the participants may not be made by other means, or because the investigation would be delayed too long.

2. Essential conditions for performing the interception and recordings of the conversations and communications made by phone or by any other electronic mean of communication

2.1. Regarding the **first condition**, previous to the modifications occurred during 2006, the authorization to perform interception and recordings was ordered by the president of the court which had the authority to try the case in the first instance. As a result of the provisions introduced by the Government Emergency Ordinance no 60/2006, the activity of authorizing the audio interception and recordings was granted to the president of the competent court, if the president is absent, the authorization may be given by a judge appointed by the court's president. Despite the obvious hesitations of the legislator, we consider that the current effective law text, subjected to analysis, complies best with the imperatives aiming to determine the truth in a criminal trial, but also, but also with the requirements on observing the fundamental rights and liberties of individuals (for the present case, the right to private life and correspondence privacy).

By the new provisions, it was regulated an alternative territorial authority, the authorization may be ordered at the level of the court which would have the authority to try the case in the first instance, or at the level of the court corresponding as rank to the court which would have the authority to try the case in the first instance, under which jurisdiction it is found the prosecutor's office of the public prosecutor who performs or surveys the criminal investigation. The regulation is not above criticism. Thus, the court which tries in the first instance is determined by reference to the provisions of article 31, paragraph 1, in case of simultaneous notification. Of these courts, the authority belongs to the court under which jurisdiction was performed the criminal investigation, meaning to the court under which jurisdiction it is found the prosecutor's office of the public prosecutor who performs or surveys the criminal investigation. Therefore, in the event the criminal investigation is performed under the jurisdiction of a court other than the one authorized to try in the first instance a legal transfer of authority shall take place, justified by the criminal trial promptness. In this way, it is established an alternative territorial authority between two courts but for which there are used wordings signifying a sole court, the one that shall try the case in first instance.

Under certain special situations, in case of emergency, when a delay in obtaining the authorization under the common conditions, showed above, would generate serious damages to the investigative activity, the public prosecutor who performs or surveys the criminal investigation may order, as a temporarily title, by motivated ordinance, recorded in the register particularly provided by article 228, paragraph 1¹, the interception and recording of conversations and communications on a period of maximum 48 hours (article 91², paragraph 2 of the Code of Criminal Procedure, as modified by Law no 356/2006).

In light of article 91², paragraph 3 of the Code of Criminal Procedure (as modified by Law no 356/2006), within 48 hours since the expiration of the term provided in paragraph 2, the public prosecutor shall submit the ordinance, along with the support on which were performed the interception and recordings and an official report with the conversations summary, to the judge of the court which would have the authority to try the case in first instance or to the judge of the court corresponding as rank to the above one, under which jurisdiction it is the found the prosecutor's office of the public prosecutor who performs or surveys the criminal investigation, for validation.

We underline the modification of the provisions according to which the interception and recordings may be ordered, as a temporarily title, by the public prosecutor. Thus, in the previous

¹ According to article 228, paragraph 1¹ of the Code of Criminal Procedure, at the headquarters of the criminal investigation bodies it shall be established a special register which shall help to maintain the account of the criminal investigation papers that are very important to the criminal trial (for instance, the criminal investigation commencement decisions)

regulation it was determined the duration of these temporary recordings, by establishing the public prosecutor obligation to inform the court about the evidence activities ordered, within 48 hours since starting the interception and recording.

According to the present regulation, the temporary interception and recording of conversations may be ordered for a maximum period of 49 hours. Also, another difference, as compared to the previous regulations, consists of that the court shall be informed by the public prosecutor within 48 hours from the expiration period for which the interception and recording may be performed without an authorization from the judge. It results that, in light of the previous rules, the judge was informed on the interception and recordings performance, *without his authorization*, within maximum 24 hours since the ordinance issuing, while, *de lege lata*, the public prosecutor shall inform the judge on this fact within maximum 96 hours.

Establishing a term of 48 hours during which a person's conversations may be intercepted and recorded, in the absence of a judge authorization, is an aspect which renders the criminal investigation more efficient. In this way, by this regulation there were given, to the criminal investigative bodies, the instruments adapted to the present conduct of the persons who commit criminal unlawful acts, thus aiming to establish a proportion between the expert governmental bodies' reaction and the criminal phenomenon (mostly the phenomenon of organized crime).

Despite all this, we could not grasp the reason based on which the judge is informed on the evidence activity only after the expiration of 48 hours term since the interception and recording completion. We make this observation under the conditions in which the evidence activity, for most of the cases, is performed by other bodies than the public prosecutor. At the same time, it could be invoked the necessity to establish such a time frame to draft the documents which shall be submitted to a judge in order to validate the recordings. According to the new regulation, informing the judge, presumes, among other things, the presentation of an official report of *the conversations summary*, unlike the previous provisions according to which the recorded conversations are *completely reproduced* in writing.

Also, maintaining the wording "delay in the authorization obtaining would generate serious damages to the *criminal investigation activity*", leads to the conclusion that the temporary interception and recordings, performed based on the public prosecutor ordinance, implies the existence of an already opened criminal investigation. Therefore, these evidence operations may not be performed by invoking the existence of certain serious grounds and data on *preparation* of an offence perpetration, but only within an already existing criminal trial.

Also, we notice the faulty wording of article 91², paragraph 2 of the Code of Criminal Procedure, according to which the public prosecutor submits to the court the support on which are made the *interception* and the recordings. The interception operation may not be made on a certain support, what is being preserved, in fact, is the recording. Any recording implies a previous interception, but not the other way around, because an interception activity is possible without recording any conversation or communication. As a consequence, what is found on the used technical support is the conversation or the communication recorded as a result of the interception, and not the interception itself.

The judge decides on the lawfulness and the thoroughness of the ordinance with in maximum 24 hours, by a motivated decision passed in the council chamber. If the ordinance is validated and the public prosecutor has requested the extension of the authorization, the judge shall authorize the interception and recording continuation, under the conditions of article 91¹, paragraph 1-3 and 8 of the Code of Criminal Procedure. If the judge does not validate the public prosecutor ordinance, he shall order the immediate ceasing of the interception and recordings, and those already performed shall be erased or, if necessary, destroyed by the public prosecutor, to this end being drafted an official report, and a copy of it shall be submitted to the court. In this case, we

notice the ambiguity of the expression “*those already performed*”, this term having, in its grammatical interpretation, the meaning of “*interception and recordings*”. And it is obvious the fact that the interception, operation essential to the recording, may not be erased or destroyed.

In reference to the same legal provision, it is noticed the exhaustive character of the wording “*the recordings shall be erased or destroyed*”, text which covers all possible factual situations. Thus, the legislator made the necessary delimitation between the “*erasing*” operation and the “*destroying*” one, taking into account, for instance, the fact that the pictures (which may be defined as static image recordings) may not be erased, the only possible option being their destruction. To this end, there are recordings which may be erased from the support on which they are made, but there are, also, recordings which imply the destruction of their support.

Also, it is noticed the fact that the legislator did not take into account the regime applicable to the official report of recorded conversations summary. We consider that to erase or destroy the temporary recordings performed at the order of the public prosecutor, without destroying the official report of recorded conversations summary, has no finality; this conclusion is needed because the interception object is preserved, in this way, by the official report drafted. Thus, during the erasing or destroying operation it is necessary to consider the official report drafted, too, therefore it shall remain no trace of the performed activity, which, in the end, it was not validated by the judge.

Compared to the previous regulation, the present regulation in this field clearly provides that the trial session, during which the judge decides if it is necessary to validate or to invalidate the public prosecutor’s ordinance of performing the interception and the recordings, takes place in the council chamber. The discussed rule completes the confidential character of this evidence activity.

2.2. Relative to the second legal condition (to exist solid clues and data on the preparation or perpetration of certain offences for which the criminal investigation is performed ex officio), arises the conclusion that the offence for which it shall be ordered the authorization to use this evidence proceeding must imply the commencement of the criminal proceedings ex officio. In article 91¹, paragraph 2 of the Code of Criminal Procedure, the Romanian legislator used the technique of exemplifying enumeration, stating that the authorization may be granted in case of offences against the state security, provided by the Criminal Code and by other special laws, as well as in the case of drug trafficking offences, weapons trafficking offences, human trafficking offences, acts of terrorism, money laundering, money or other values counterfeit offences, in the case of the offences provided by Law no 78/2000 (corruption deeds) or other serious offences which may not be determined or whose perpetrators may not be identified by other means, or in the case of offences committed through means of electronic communication.

By reference to the previous wording of article 91¹, paragraph 2 of the Code of Criminal Procedure, it is noticed the substitution of “*offences which are committed by means of telephonic communication or by other telecommunication means*” wording with the phrase “*offences which are committed by means of electronic communication*”.

The legislative technique proceeding, consisting of exemplifying enumeration, leads to the possibility of resorting to the interception and recordings of conversations or communications for offences other than those provided by the law text, but which must fulfill an essential general condition: to exist solid clues or data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio. *Per a contrario*, in the case of offences for which the criminal investigation is not performed ex officio, these evidence means are inadmissible.

In relation to this specification we notice the possibility to express some different interpretations of the law text. Thus, the reason based on which it was resorted to the condition that the offences which are prepared or are perpetrated, to be investigated ex officio, resides, in our

opinion, in the low social danger posed by the other offences, for which the criminal investigation starts as a result of a previous complaint. In this way, it is established an agreement between the Code of Criminal Procedure and the provisions of the Constitution of Romania where, in article 53, paragraph 2, is stipulated the principle of proportionality between violating a fundamental right, on one side, and the danger generated by the perpetration of the criminal offence, on the other side (in the case of these evidence means, it is about the relation between violating the right to private life, consisting of conversations and communications privacy, and the social danger generated by committing an offence or the presumed social danger if we are in the situation of having solid clues or data on the preparation of certain offences perpetration). Despite all this, in the same category of offences for which the criminal investigation is not performed *ex officio*, fall also the offences which are not characterized by a low degree of social danger. To this end, we are taking into account some offences which are investigated upon the previous complaint of the injured party (the simple sexual assault provided by article 197, paragraph 1 Criminal Code), but mostly, offences which may generate a high degree of social danger and for which the order to commence the criminal investigation is conditioned by a manifestation of will, so which are not investigated *ex officio* (e.g. the application of the Chamber of Deputies, of the Senate and of the President of Romania, for the offences perpetrated by members of the Government in relation to the exercise of their powers; thus it is possible to invoke the inadmissibility of this mean of evidence in order to determine the truth within criminal cases having as passive subject a member of the Government, since this are criminal cases for which the criminal investigation commencement is not made *ex officio* being needed previous authorizations). This interpretation exceeds the reason and the initial intentions of the legislator, which gives us the right to conclude that, in order to identify the real finality of the discussed rule, it is necessary to resort to the restrictive interpretation. Thus, there shall be considered inadmissible the interception and recordings of conversations and communications only for the offences for which the criminal investigation commences as a result of a previous complaint of the injured party, and not for all the legal cases where the principle of criminal investigation authoritative character is abolished.

2.3. Regarding the **third condition**, we also notice new aspects compared to the period previous to 2006. Thus, according to the previous regulation it was established that the interception and recording *are necessary in order to determine the truth*; now we must notice that the interception and recording are necessary: 1. to establish the matter of fact; 2. because the identification or localization of the participants may not be made by other means; 3. because the investigation would be delayed to long.

Under this conditions, we notice that the court's president who shall issue the authorization, or the judge appointed by the president, must decide that the interception and recording of conversations are necessary in order to establish the matter of fact or because the identification or localization of the participants may not be made by other means or because the investigation would be delayed to long.

The authorization for interception and recording is made by motivated decision, which shall comprise: the actual clues and facts that justify the measure; the reasons for which the matter of fact may not be established or the identification or localization of the participants may not be made by other means, or why the investigation would be delayed to long; the person, the mean of communication or the location subjected to surveillance; the period for which the interception and recording are authorized (art. 91¹, paragraph 9 of the Code of Criminal Procedure). By modifying the third condition required for the interception and recording authorization, it was modified also the content of the order. Thus, previous to 2006, the decision had to contain the actual clues and facts which justified the measure; the reasons for which the measure is essential to determining the

truth; the person, the mean of communication or the location subjected to surveillance; the period for which the interception and recording are authorized.

3. The duration of the interception and recording of conversations and communications made by phone or by any other electronic communication mean

The authorization is granted for the duration required to intercept and record, but for no more than 30 days, with the possibility of being renewed, before or after the expiration of the previous one, under the same conditions, and for serious justified reasons, each extension not exceeding 30 days. The overall duration of the authorized interception and recordings, regarding the same person and the same deed, shall not exceed 120 days (art. 91¹, paragraphs 3 and 4). By the new provisions it was modified the wording “4 month”, representing the overall duration of the authorized interception and recordings, with the “120 days”. In this way the time unit used is unique, being avoided the situations where a person had its conversations intercepted and recorded for 4 months, time period which may comprise 120, 121 or 122 days.

Also, it was replaced the wording “*the overall duration of the authorized interception*” by the “*the overall duration of the authorized interception and recordings, regarding the same person and the same deed*”. By this rule it is established, first of all, a maximum term for the interception operations necessary to the evidence activity of the recording. Secondly, from the used wording, we may conclude that to establishing the overall duration there were taken into account two cumulative criteria, person unit and deed unit. It results, for instance, that in case the indicted is tried for an offence and there are discovered data regarding the preparation or perpetration of a serious offence, it shall be possible to determine that it is the same person but a different deed. So, it is possible to legally request the authorization of another interception and recording, considering the new offence prepared or perpetrated by the person whose conversations or communications were recorded. This reasoning may be also used for the factual hypothesis “other persons, same deed”. In this way, the perpetrator whose conversations were initially intercepted and recorded, shall still be subjected to this surveillance if it is determined that at the preparation or perpetration of the deed were involved other persons, too. This is the way in which are created the conditions necessary to intercept and record the conversations or communications of a person for a period longer than the 120 days deadline, a major differentiating aspect as compared to the previous regulation.

4. Performing the interception and recordings as a result of the request of the injured party

The recordings provided in paragraph 1 may be performed as a result of a motivated request of the injured party, regarding the conversations and communication addressed to it. To this end, according to article 91¹, paragraph 8 of the Code of Criminal Procedure, “*upon the motivated request of the injured party, the public prosecutor may request to the judge the authorization for intercepting and recording the conversations or communications made by this party by phone or by any other electronic communication mean, regardless of the nature of the crime which constitutes the object of the investigation*”.

There are noticed the modifications occurred with respect to the regime applicable to the interception and recordings of the injured party. First of all, the present procedure allows the possibility of these interception and recordings, the motivated request being submitted to the relevant public prosecutor, in order for him to inform the court, and not directly to the court, as it could be interpreted from the previous wording of article 91¹, paragraph 6 of the Code of Criminal Procedure.

Secondly, from the analyzed rule it results the conclusion that the request of the injured party to be performed the interception and recordings may be rejected by the public prosecutor,

because he has the power and not the obligation to inform the relevant court. We notice that this way of interpretation results from the manner in which the discussed rule was drafted, and according to which the public prosecutor *may* request from the judge the authorization to use this evidence proceeding.

Thirdly, it was eliminated the condition regarding the nature of the crime which represented the object of the investigation. Thus, by the previous regulation, not being stipulated different conditions for the injured party conversations, the authorization was granted by reference to the general conditions existing in the field. *De lege lata*, the authorization may be granted **notwithstanding the nature of the crime**, which represents the investigation object.

This regulation shows a significant moving off from the principles which have determined the introduction in the criminal law in Romania of the “audio or video recordings” institution. Thus, for the juridical nature of this institution it is essential to observe the constitutional principle of proportionality between limiting the exercise of the right and the cause which determines this restriction. According to article 53, paragraph 2 of the republished Constitution of Romania, “*such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it...*”. The initial regulation observed the proportionality principle, stipulating that in order to decide the restriction to exercise the right of correspondence confidentiality, namely the right to particular, family and private life, it was necessary that for the invoked offence, the criminal proceedings to be commenced *ex officio*. In other words, the restriction of the above mentioned fundamental rights is not possible if the offences for which the criminal proceedings commences upon a previous complaint of the injured party.

Applying the same constitutional principle, the regulation was completed, by using the legislative procedure of exemplifying enumeration, listing some offences which may justify the authorization of interception and recordings, offences which have as common ground the high degree of social danger.

According to this regulation, as a result of the injured party motivated request, it is possible to order some interception and recordings in case there are solid clues or data regarding the preparation or perpetration of an offence of threat, for instance.

5. Other provisions regarding the procedure of interception and recording of conversations and communications made by phone or by any electronic communication mean

According to the law (article 91², paragraph 1 of the Code of Criminal Procedure), the bodies which perform the interception and recordings, provided by article 91¹, are:

- the public prosecutor who performs or surveys the criminal investigation;
- the criminal investigative body, following the public prosecutor order.

The persons who are called to offer technical support to the interception and recordings are compelled to maintain the confidentiality of the performed operation, the breach of this obligation is sanctioned according to the Criminal Code.

About the performance of the interception and recordings of the conversations or communications which concern deed representing the object of the investigation or which contributes to the identification or localization of the participants to the offence perpetration, the public prosecutor or the employee of the judicial police, delegated by the public prosecutor, drafts an official report where the conversations or the communications are rendered entirely². Within the

² C. Șandru, *Interceptarea convorbirilor telefonice, în jurisprudența programelor de la Strasbourg*, IRDO, Drepturile omului, nr. 6-7, 1994, p. 25; D. Ciuncan, *Autorizarea judiciară a înregistrărilor audio și video*, în P.L., nr. 2, 1998, p. 30.

official report is mentioned the authorization granted by the court for their performance, the number and the numbers of the telephone sets or other identification data of the links between which the conversations or communications were made, the names of the persons who had them, if known, the date and time of each conversation or communication and the registration number of the support used to record (article 91³, paragraph 1 of the Code of Criminal Procedure, as it modified by Law no 356/2006).

According to the previous regulation on the performance of the recordings, there was drafted an official report by the public prosecutor or by the criminal investigative body. *De lege lata*, the investigative body of the judicial police shall not draft this official report *ex officio*, but only as a result of the *competent public prosecutor delegation*. This decision leads to noticing the fact that the institution of interception and recording of conversations or communications was places, only under the public prosecutor authority, even in the cases where the criminal investigation is developed by the investigative bodies of the judicial police.

Also, article 91³, paragraph 1 of the Code of Criminal Procedure was completed by the mention “*other identification data of the links between which the conversations or communications were conducted.*” This completion is justified by the new provisions, according to which, the communications or conversations that can be intercepted and recorded are made by phone or by any electronic communication mean. For instance, a communication intercepted and recorded via the Internet implies identification data specific to this communication method.

The official report is certified for authenticity by the public prosecutor who performs or surveys the criminal investigation. If the offences are perpetrated through conversations or communications which contain state secrets, the registration shall be made in different official reports, and the provisions of article 97, paragraph 3 of the Code of Criminal Procedure are applied accordingly.

The previous text was operating with two different terms, “state secret” and “professional secret”. Thus, it was established the interdiction to mention within the official report about the conversations or communications which contained state or professional secrets. The first ones had to be registered in different official reports. Such a regulation could lead to the conclusion that the recordings of conversations or communications which contained professional secrets could be rendered in the content of a different official report.

In the effective law text, these specifications regarding the professional secrets are not stipulate any more, which means that these shall be registered within the content of an official report, drafted according to article 91³, paragraph 1. Excepted from this rule are the conversations and communications which are not subordinated to the lawyer professional secret, under the conditions of article 91¹, paragraph 5.

Taking into account the above mentioned, we may conclude that the new regulation represents a restriction of the scope of the “professional secret” institution in the criminal law. As a result, we consider that the regime established for the “state secret” hypothesis must be extended also for the “professional secret” hypothesis.

The correspondence had other languages than Romanian shall be transcribed in Romanian, with the support of a translator/interpreter.

To the official report it is attached, in a sealed envelope, a copy of the support which contains the conversation recording. The original support is kept at the prosecutor’s office, in special places, inside a sealed envelope, and it shall be submitted to the court upon its request. After the court is informed, the copy of the support containing the conversation recording and the copies of the official reports are kept at the court clerk’s office, in special places, inside a sealed envelope, being exclusively available to the judge or to the panel of judges appointed to solve the case.

By modifying the previous regulations, which established the public prosecutor obligation to submit to the court the “*magnetic tape or any other type of support with the conversation recording*”, *de lege lata*, to the court shall be submitted “*a copy of the support which contains the conversation recording*”, the original being kept at the prosecutor’s office. We consider this regulation as being faulty because it creates the possibility to transfer, by copying, the information existing on different electronic supports, and the possibility to produce multiple copies in easy conditions.

Also, it is mentioned the fact that the “original support is kept at the prosecutor’s office ... and it shall be submitted to the court upon its request”, under the conditions in which “the support copy ... is kept at the court clerk’s office ...”. It may be deduced that to the court it shall be presented the copy of the support, and, possibly, the original support, while, from the content of article 91³, paragraph 7 results the rule stipulating that the original support, namely, its copy must be kept at the court’s office, after the case is solved. This specification of the law text leads to the conclusion that there is a moment when the original support is handed over to the court of law, but this moment it is not specified.

In addition to the previous regulation, within the effective law text it is stipulated the obligation relative to the trial of the public prosecutor to submit the drafted official reports to the accused or the indicted, when the criminal investigation documentation is presented. On this occasion, upon request, the accused or the indicted may request to hear the recordings (article 91³, paragraph 4 of the Code of Criminal Procedure).

In relation to this aspect we must underline the fact that, according to the dispositions regarding the criminal investigation documentation presentation, this activity may be developed by the public prosecutor as well as by the investigative bodies of the judicial police. According to article 91³, paragraph 4 of the Code of Criminal Procedure, the criminal investigation documentation presentation which contains the official reports of the interception and recordings performance becomes an activity related to the exclusive competence of the public prosecutor. Taking into account that the majority of the offences listed in article 91¹, paragraph 2 falls under the criminal investigation authority of the public prosecutor, and by reference to the more and more obvious tendency of the legislator to transfer these powers to the public prosecutor, it may be stated that the regulation mentioned above is justified.

Yet, we notice the futility of the provisions of article 91³, paragraph 4 of the Code of Criminal Procedure, taking into account the fact that the official reports which register the interception and recording of conversations or communications are criminal investigation actions, representing parts of the criminal investigation file. From this perspective, the accused or the indicted possibility to take notice of their content may not be questioned, because the official report mentioned in the law is not part of the papers characteristic to criminal investigation partially confidential, as are, for instance, those regarding the actual identity of the undercover investigator or the identity data of the witnesses.

The drafting comprised within the law content which refers to the possibility of the accused or the indicted to be showed the “official reports where are reproduced the *recorded conversations*” is faulty, because by a *per a contrario* interpretation, the registered aspects regarding the *recorded communications* may not be showed to him, fact which, obviously, contradicts the legislator. As a consequence we notice that in order to apply the law, an extensive interpretation of this provision related to trial must be made, in the sense that to the accused or the indicted are presented the official reports where are reproduced the conversations and the other communications recorded.

The same observation must be made regarding the possibility that, upon request, the accused or the indicted must be able to hear the conversation recordings. The law text imperfection

consists in the fact that for the communications which may not be listened, but viewed (for instance, a text sent by electronic mail is a communication between persons which may be intercepted and recorded, but may not be listened), the accused or the indicted may not request to have easy, direct visual and audio contact. In relation to this regulation we notice that the legislator intention was to offer to the accused or the indicted the possibility to hear the audio recordings, or to view the recordings which interest him/her.

Regarding the same issue, an intercepted communication consisting of a text sent by E-mail shall not be deemed as being an *image recording*, and because of this, the provisions of article 91⁵ of the Code of Criminal Procedure become applicable, text not modified, which stipulates that the legal provisions of article 91¹-91³ of the Code of Criminal Procedure are applied to the image recordings case also.

According to article 91³, paragraph 5 of the Code of Criminal Procedure, “if because it was decided by a decision of not commencing the trial, the public prosecutor is compelled to inform *about this* the person whose conversations or communications were intercepted and recorded”.

This regulation is not above critical observations because it contains a reiteration of the provisions of article 246 and article 249 of the Code of Criminal Procedure, and as consequence the text appears as being futile.

De lege ferenda, this law text must be modified as to be clearly highlighted the will of the legislator regarding the public prosecutor obligation to inform the persons whose conversations or communications have been intercepted and recorded, under the circumstances of not commencing the trial.

Thus, in a criminal investigation file where were performed interception and recordings of conversations or other communications, finalized by a decision of not commencing the trial, the person who made the information, the accused or the indicted and the other interested persons shall receive the copy of the decision of not commencing the trial and, additionally, the persons whose conversations or communications have been intercepted and recorded shall be informed of the restriction of the fundamental rights resulting due to this evidence activity.

In the event of a solution of not commencing the trial, the support on which are made the conversations recordings are archived at the prosecutor’s office, in special places, in a sealed envelope, ensuring the confidentiality, and are kept until expiration of the prescription term of the criminal liability for the deed which constituted the object of case, when they are destroyed, to this end being drafted an official report (article 91³, paragraph 5, II Thesis of the Code of Criminal Procedure).

Subsequent to the archiving, the support of the recorded conversations may be viewed or copied if the investigations are resumed or under the provisions of article 91², paragraph 5 of the Code of Criminal Procedure, and only by the public prosecutor who performs or surveys the criminal investigation, and in other cases only with the authorization granted by the judge.

In the event of a final verdict of conviction, of acquittal or of ceasing the criminal trial, the original support and its copy are archived along with the file of the case at the court’s office, in special places, in a sealed envelope, ensuring the confidentiality. After archiving, the support of the recorded conversations may be viewed or copied only under the provisions of article 91², paragraph 5 of the Code of Criminal Procedure, with the previous consent of the court’s president.

6. Interception and recordings of conversations and communications made by phone or by other electronic communication mean, between the lawyer and the party he/she represents or assists

The recording of the conversations between the lawyer and the party he/she represents or assists in the trial shall not be used as evidence, unless from its content results convincing and

useful information or data regarding the preparing or perpetration of an offence by the lawyer, offence provided by paragraph 1 and 2 (art. 91¹, paragraph 6 of the Code of Criminal Procedure).

In reference to the previous regulation, according to which the conversations between the lawyer and the person he/she represents were protected by the professional secret institution, being confidential, *de lege lata*, it is stipulated the possibility to use these conversations as evidence in the criminal trial. The condition which must be fulfilled consists of demonstrating the existence within these conversations of certain *convincing and useful information or data regarding the preparing or perpetration of an offence by the lawyer, offence provided by article 91¹, paragraph 1 and 2 of the Code of Criminal Procedure*.

We notice the modification of the terminology used to indicate the professional relationship existing between these participants in the criminal trial. Thus, initially it was used the wording “*lawyer and litigant*”, unlike the present regulation which uses the wording “*lawyer and the party he/she represents or assists in the trial*”. Even though by the term “*litigant*” is indicated the party to which is granted judicial assistance, the present wording is more accurate, not subjected to interpretations.

The conditions need to be fulfilled for commencing the interception and recording of the conversations between the lawyer and the party he/she assists or represents are the same as for the other interception and recordings. The supplementary element consists of the legal condition which shall be fulfilled subsequent to the interception and recordings. Thus, the recorded conversation shall contain *convincing and useful information or data regarding the preparing or perpetration of an offence by the lawyer*. Imposing this condition subsequent to the evidence proceeding performance is futile, under the conditions in which upon authorizing, there were invoked *convincing information or data regarding the preparing or perpetration of an offence*. This regulation method gave rise to a current law text that is “*overloaded*” and has many interpretation difficulties.

7. Other recordings

According to article 91⁴ of the Code of Criminal Procedure, the procedure examined above is to be applied to the recordings performed in the surrounding environment too, localization and tracking by GPS or by other means of electronic surveillance.

The previous text contained provisions according to which the interception and recordings procedure was applying with regard “to the conversations performed by other means of telecommunication”.

De lege lata, it was regulated the possibility of recordings in the *surrounding environment*, operation which implies the recording of the discussions which takes place between two or more persons, directly, without resorting to technical means of communication.

Also, the established regime is valid with regard to the operations of GPS localization or tracking, or other such surveillance activities.

Article 91⁵ of the Code of Criminal Procedure stipulates that the same rules are applicable in case of image recordings, including their certification procedure, except the typed form which may or may not be possible, as is the case.

8. Verification of the recordings of conversations and communications made by phone or by any other electronic communication mean

According to article 91⁶ of the Code of Criminal Procedure, the evidence obtained as a result of using this evidence proceeding, may be subjected to a technical examination, upon the public prosecutor request, upon the request of the parties, or ex officio. This regulation goal is to eliminate not only the suspicion of conversation or other communication recordings counterfeiting, but also certain reserves regarding these means of evidence.

The audio or video recordings performed by the parties or by other persons represent means of evidence when they concern the conversations or communications had by these persons with third parties. Any other recordings may represent means of evidence when are not forbidden by the law (art. 91⁶, paragraph 2 of the Code of Criminal Procedure). This is the way in which it may be made the distinction between the recordings performed by the parties or by other persons, which concern their own conversations or communications, on one side, and other recordings performed by the parties or by other persons, on the other side. The first ones represent means of evidence, while the second ones *may constitute* means of evidence, if they are not forbidden by the law.

Conclusions

On the scene of the criminal law in Romania it is welcomed the initiative of introducing these new methods of evidence, the audio and video recordings being, in many cases, the most important means of evidence which lead to the solving of a criminal case. But, at the same time, the relatively recent legislative establishment of this new trial institution and the sensitiveness of the field where these means of evidence are obtained (field with very important, fundamental social values, and in most cases, antagonistic, like the need to ensure public order by violating the right to private life) led to the creation of some new contradicting thesis, generated the uneven judicial practice, and even now, there exist legal provisions which are, at least, debatable.

By this study we have attempted to detect the legislative aspects which may be improved, from our point of view.

Thus, for instance, the new regulation enables the public prosecutor (judicial body that has the right to order the interception and recording of conversations or communications, only by exception) to authorize the use of this evidence mean for a longer period of time as compared to the effective legislation in 2003, under the legal conditions which do not prove the necessity of this measure.

Also, the law text faulty wording are obvious, like in the case of the rule according to which the interceptions may be made on a certain type of support (in reality, what is preserved on that support being the recordings which imply a previous interception of a conversation or communication).

In our opinion, it is also very important the legislator's failure to mention what is the regime applicable to the official report of recorded conversations summary. Thus, erasing or destroying the temporary recordings performed by order of the public prosecutor, which is not followed by the destruction of the official report of recorded conversations summary has no finality, because the object of interception is preserved in this way through the official report drafted. So, in an erasing or destroying operation it is necessary to take into account the official report drafted, also, to the end of not leaving any trace of the performed activity, which, in the end, was not validated by a judge.

Also, we notice that one of the principles which stood at the base of the audio and video interception regulation is represented by the balance between breaking the correspondence privacy and the criminal law, by perpetrating an offence for which the criminal investigation is commenced ex officio. Thus, as rule, for the offences for which the criminal investigation does not commence ex officio, the interception and recordings are not possible. But, among these offences are serious crimes, in some cases, the authoritative character being removed not by taking into account the social danger of the deed but by reference to other aspects (like the existence of a certain quality of the perpetrator). Under these conditions, we already noticed that the evidence proceeding may be used even if the criminal investigation may not be commenced ex officio, the reason being the high social danger of the deed.

Finally, we notice that the criminal matter legislation must be improved with regard to the provisions of the Criminal Procedure Code, but, mostly, with regard to the provisions of the special laws, which stipulate the possibility of using this evidence proceeding.

References

Book

1. Bernard Bouloc, *Procédure pénale*, (Daloz, 2008), 1055.
2. Ion Neagu, *Drept procesual penal. Partea generală. Tratat* (București, Editura Global Lex, 2007), 583.
3. Grigore Theodoru, *Tratat de drept procesual penal* (București, Editura Hamangiu, 2007), 1020
4. Jean Larquier, Philippe Conte, *Procédure pénale* (Daloz, 2006), 311
5. Jean Pradel, André Varinard, *Les grands arrêts de la procédure pénale* (Daloz, 2006), 410
6. Thierry Garé, Catherine Ginestet, *Droit pénal. Procédure pénale* (Daloz, 2006), 427
7. Pierre Rancé, Olivier de Baynast, *L' Europe judiciaire. Enjeux et perspectives* (Daloz, 2001), 159

Journal article

Article in a print journal

1. Ioan Lascu, "Particularitățile de investigare și cercetare a infracțiunilor de corupție în lumina noilor modificări legislative", *Dreptul* nr. 11 (2002), 137-148
2. Mircea Damaschin, „Înregistrările audio sau video și fotografiile”, *Revista de Drept Penal* nr. 3 (2001), p. 49-56
3. Augustin Lazăr, „Interceptările și înregistrările audio sau video”, *Revista de Drept Penal* nr. 4 (2003), p. 36-51
4. Angela Hărăștășanu, „Interceptarea și înregistrarea convorbirilor sau comunicărilor”, *Revista de Drept Penal* nr. 2/2004, p. 69-75
5. Dan Lupașcu, „Unele observații privind interceptările și înregistrările audio sau video”, *Revista Dreptul* nr. 2 (2005), p. 169-171
6. Camelia Bogdan, „Interceptările audio și video”, *Revista de Drept Penal* nr. 1 (2006), p. 106-113

Article in a online journal

1. Frédéric Sudre, „Droit de la Convention Europeene des droits de l'homme”, *La Semaine Juridique - Edition générale*, 23 janvier 2008,
http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?risb=21_T3529257753&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3529257756&cisb=22_T3529257755&treeMax=true&treeWidth=0&csi=303982&docNo=6
2. Julie Renee Linkins, Satisfy The Demands Of Justice: Embrace Electronic Recording Of Custodial Investigative Interviews Through Legislation, Agency Policy, Or Court Mandate, *American Criminal Law Review*, winter (2007) (http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T3693892917&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3693892920&cisb=22_T3693892919&treeMax=true&treeWidth=0&csi=168966&docNo=2)
3. Andrew Roberts, Regulation of Investigatoy Powers Act 2000: Private Surveillance, *Journal of Criminal Law*, no. 70 (2006),
http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?risb=21_T3529298842&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3529298845&cisb=22_T3529298844&treeMax=true&treeWidth=0&csi=280328&docNo=3
4. Andrew Roberts, Regulation of Investigatoy Powers Act 2000: Private Surveillance, *Journal of Criminal Law*, no. 70 (2006),
5. Raymond Martin, Une interception téléphonique doit respecter le principe de confidentialité des échanges, *La Semaine Juridique-Edition générale*, 24 mai 2006
6. Simon McKay, Regulation of Investigatory Powers Act 2000. Meaning of *Intercetion*, *Journal of Criminal Law*, no. 69 (2005), http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?risb=21_T3529352134&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3529352137&cisb=22_T3529352136&treeMax=true&treeWidth=0&csi=280328&docNo=2
7. Laurent Di Raimondo, Droit du justiciable au controle efficace de la régularité des écoutes téléphoniques, *La Semaine Juridique-Edition générale*, 24 mai 2006, (http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?start=23&sort=BOOLEAN&format=GNBFI&risb=21_T3693288407)
8. Thomas P. Sullivan, Electronic recording of custodial interrogations: everybody wins, *Journal of Criminal Law & Criminology*, Spring (2005),
http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T36940

- 15442&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3694015447&cisb=22_T3694015446&treeMax=true&treeWidth=0&csi=7394&docNo=4)
9. Andrew Roberts, Identification of suspects from CCTV and Video Recordings, *Journal of Criminal Law*, no. 67 (2003),
http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?risb=21_T3529298842&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3529298845&cisb=22_T3529298844&treeMax=true&treeWidth=0&csi=280328&docNo=8
 10. Andrew Roberts, Covert Video Identification: European Convention on Human Rights, Article 8, *Journal of Criminal Law*, no. 67 (2003),
http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?risb=21_T3529341920&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T3529341923&cisb=22_T3529341922&treeMax=true&treeWidth=0&csi=280328&docNo=1
 11. Jean Devézé, Courrier électronique et secret, *La Semaine Juridique-Edition générale*, 05 juin 2002, (http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?start=28&sort=BOOLEAN&format=GNBFI&risb=21_T3693288407)
 12. Virginie Peltier, Définition de l'interception de correspondance émise par la voie des télécommunications, *La Semaine Juridique-Edition générale*, 17 mai 2000, http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?start=32&sort=BOOLEAN&format=GNBFI&risb=21_T3693288407
 13. Wayne T. Westling, Vicki Waye, Videotaping Police Interrogations: Lessons from Australia, *American Journal of Criminal Law*, summer (1998) (<http://www.lexisnexis.com/us/lnacademic/search/homeSubmitForm.do>)

THE INFRACTIONS OF TAX EVASION

Mihai Adrian HOTCA*

Abstract

In order to avoid the problems regarding the carrying out of the duties that come to the public institutions and authorities, the state regulates a tax system, the finality of which consists in assuring the revenues necessary for the optimal functioning of the state institutions and authorities, as well as of their obligations. The prevention and fight of the tax evasion represents a constant concern of the legislator. One of the latest laws in this matter is Law no. 241/2005. This law was adopted in order to prevent and fight the taxpayers' eluding the carrying out of the tax obligations. Law no. 241/2005 has two purposes: the first one consists in setting the measures meant to prevent the infractions of tax evasions and other infractions related to that and the second one is to fight the infractions of tax evasion and other infractions related to the above-mentioned infractions. Through the deeds forbidden by the norms of this law, it damages the social values regarding the taxation and the social relations generated by this one. Through Law no. 241/2005, the Romanian legislator incriminated more deeds of tax evasion. Also in the case of committing these infractions, the legislator regulated certain causes of unpunishment and reduction of the punishments. The current study deals with the analysis of the infractions of tax evasion and of the causes of unpunishment and reduction of the punishments.

Keywords: *tax evasion; infraction; causes of unpunishment; causes of reduction of the punishments*

Introduction

The existence of the state depends, among others, on the participation of the taxpayers, natural persons and legal entities, to the setting of the public funds. The functioning of the etatic or administrative institutions implies the carrying out of some very high expenses that depend in their turn on the existence of some previous public revenues. The prevention and fight of the tax evasion represents a constant concern of the legislator. One of the latest laws in this matter is Law no. 241/2005 regarding the prevention and fight of the tax evasion.

The purpose of Law no. 241/2005, as well as that of any law that contains penal norms of accusation, is to defend the society against some antisocial deeds. Through the deeds forbidden by the norms of this law, it damages the social values regarding the taxation and the social relations generated by this one. Corresponding to the gravity of the deeds forbidden through the special penal norms contained by Law no. 241/2005, the sanctions of penal law stipulated by this one are the most severe legal sanctions for illicit deeds related to taxation existing in the Romanian legal system.

In the field of taxation, the prevention and fight of the deeds of tax evasion or of those related to these ones take place through various types of instruments, such as those of economic, politic, legal etc. nature etc. The legal measures can be from the domain of commercial law, penal law etc.

The prevention and fight of the tax evasion are carried out also through other instruments than those stipulated by Law no. 241/ 2005; one of these is the fiscal certificate regulated by Government Ordinance no. 75/ 2001. The prevention and fight of the tax evasion is also carried out through other normative documents. Among these, it is also the Fiscal code, Law no. 82/ 1991, Customs code etc.

* Associate Professor, Ph.D., Dean of the Law Faculty, "Nicolae Titulescu" University, Bucharest (e-mail: mihaihotca@gmail.com).

Next we shall analyze the content of art. 9 of Law no. 241/ 2005 that stipulates the infractions of tax evasion and art. 10 that regulates certain causes of unpunishment and reduction of the punishments.

Literature Review

The doctrine is quite scarce regarding the analysis of the infractions of tax evasion stipulated by Law no. 241/ 2005. Among the representative works for this subject, we mention the works of M.Ș. Minea, C.F. Coștaș, D.M. Ionescu, Law of the tax evasion. Comments and explanations, Bucharest, 2006.

Beside the present paper, the specialty literature records also other works that I have mentioned in the bibliographic list in the end.

1. Content of art. 9 of Law no. 241/2005

According to art. 9 paragraph (1) of Law no. 241/2005, the following deeds committed for the purpose of eluding the carrying out of the tax obligations are infractions of tax evasion and are punished with imprisonment from 2 years to 8 years and the forbiddance of some rights:

- a). hiding of the asset or of the imposable or taxable source;
- b). total or partial omission of marking the afferent trading operations or the obtained incomes in the accounting documents or in other legal documents;
- c). marking of the expenses that are not based on real operations in the accounting documents or in other legal documents and marking of other fictive operations;
- d). alteration, destruction or hiding of the accounting documents, memories of the fiscal electronic taxation devices or cash- registers or of other data storage devices;
- e). drawing up of double accounting registers by using documents or other means of data storage;
- f). eluding of performing the financial, tax and customs verifications by not declaring, fictively or inexactly declaring with regard to the main or secondary offices of the checked persons;
- g). substitution, degradation or giving away of the assets put under distraint according to the provisions of the Tax procedure code and of the Penal procedure code by the debtor or other third parties.

If, through the deeds stipulated by paragraph (1), it was caused a prejudice higher than EUR 100.000 in the equivalent of the national currency, the minimum limit of the punishment stipulated by Law and its maximum limit is increased with 2 years. If, through the deeds stipulated by paragraph (1), it was caused a prejudice higher than EUR 500.000 in the equivalent of the national currency, the minimum limit of the punishment stipulated by Law and its maximum limit is increased with 3 years.

2. Analysis of the infractions stipulated by art. 9

2.1. Hiding of the asset or of the imposable or taxable source.

The hiding is an activity through which the active uncircumstanced subject places in safety the asset or the imposable or taxable source, depending on the case. The imposable and taxable object (asset or source) represents, from the tax point, an income or a good for which it should be paid up tax obligations.

The hiding of the asset or of the imposable or taxable source can take place both through the action of putting in safety the asset or the source for the purpose of not being known by the competent authorities, and through the omission of declaring an income or asset that has to be declared for the purpose of taxation. For instance, the omission of declaring some incomes resulting from the cession of the right of use of an asset. In doctrine and practice, it was mooted the question of setting the content of letter a) in correlation to letter b) of art. 9 paragraph (1). The offered solution is that that the non-declaring represents „hiding” in the sense of art. 9 paragraph (1) letter a) if there is only the obligation of declaring for that particular income. If the income eluded from the tax or fine payment has to be both marked and declared, the deed has to be framed within the provisions of art. 9 paragraph (1) letter b) and the concurrence of infractions is excluded.

2.2. Total or partial omission of marking the afferent trading operations or the obtained incomes in the accounting documents or in other legal documents.

The content of the infractions is fulfilled no matter of the circumstance that there is or there is not an accounting register. The examined infraction of tax evasion can be committed in numerous factual modalities. For instance, a taxpayer purchases a quantity of goods that he does not register in accounting and later on, after he sells these goods, he does not register the income from the sale of the goods either.

In a case, it was retained that the defendant, in its capacity of driving instructor auto, taught a number of 63 persons from whom he cashed in amounts between ROL 450.000 and 700.000 in 1997 and for each person he issued an invoice that recorded a lower amount than the one that had been cashed in and, in this manner, he avoided the tax payment amounting ROL 3.259.812. According to art. 13 [the correspondent text to art. 9 paragraph (1), letter a) of Law no. 87/1994], it is an infraction of tax evasion the deed of not totally or partially recording the obtained revenues in the accounting registers or of recording expenses that are not based on real operations, if they had as result the unpayment or diminution of the taxes, fine or contribution. In this case, in the accounting registers, the defendant marked as cashed in lower amounts than the ones cashed in in reality and the expenses assumed to be made in addition and to be unmarked were not proved, so that he is guilty of committing the infraction.

In literature and jurisprudence, it was mooted the question of the report between the infraction stipulated by art. 9 paragraph (1) letter b) and the infraction stipulated by art. 43 of Law no. 82/1991. The solutions for this matter were both in the sense of retaining a concurrence of infractions, and in the sense that the infraction stipulated by art. 43 of Law no. 82/1991 is absorbed by the complex infraction stipulated by Law no. 241/2005. Here is an example. A person with the intention of omitting to record certain operations submitted to the taxation in the accounting having as result the distortion of the imposable and taxable revenues.

According to art. 43 of Law no. 82/1991: „The witting performance of inexact recordings, as well as the witting omission of the recordings in the accounting that have as result the distortion of the revenues, expenses, financial results, as well as of the elements of assets and liabilities that are recorded in the balance sheet, represent an infraction of intellectual dishonesty and are punished according to the law”. From reading the norm, it can be noticed that there are certain resemblances, but also differences, between this norm and the one stipulated by art. 9 letter b).

Being confronted with this matter [under the regulation existing on the settling date of the case, the equivalent of art. 9 letter b) was art. 13 of Law no. 87/1994], the Supreme Court did not have a unitary practice. So, in a process, it considered that the deed of not marking the revenues obtained by a company through the accounting documents that had as result the unpayment of the tax represented both an infraction of tax evasion stipulated by art. 13 of Law no. 87/1994, and one of intellectual dishonesty described by art. 43 of Law no. 82/1991.

In other decisions, the High Court of Justice and Cassation also considered that the infraction of intellectual dishonesty stipulated by Law no. 82/1991 is absorbed by the complex infraction stipulated by Law no. 87/1994.

The above-presented law matter was settled by the Reunited Sections of the High Court of Justice and Cassation, in the sense that the deed of total or partial omission or the marking of the run trading operations or of the obtained revenues in the accounting documents or in high legal documents or the marking of the expenses that are not based on real operations in the accounting documents or in other legal documents or the marking of other fictive operations represent a complex infraction of tax evasion stipulated by art.9 paragraph 1 letter b and c of Law no. 241/2005 (former art.11 letter c, former art.13 of Law no. 87/1994). The solution of the High Court of Justice and Cassation is questionable because art. 43 of Law no. 82/1991 refers only to the recordings in the accounting and it does not include the activity of marking the economic- financial operations in the justifiable documents according to art. 6 of the same law, and in fact, the infraction of tax evasion has in view also the justifiable documents. On the other hand, the accusation in Law no. 82/1991 refers to all the economic- financial operations while the infraction of tax evasion refers only to the trading operations, obtained revenues and fictive expenses or operations.

In order to have a concurrence of infractions, it is necessary that the inexact recordings or their omission should be reflected in the balance sheet and should lead to the eluding of payment of the tax obligations. Otherwise, it is retained only the infraction stipulated by art. 9 paragraph 1 letter b) or c) of Law no. 241/2005, if the case.

2.3. Marking of the expenses that are not based on real operations in the accounting documents or in other legal documents and marking of other fictive operations.

The marking of some operations or unreal (fictive) expenses in the accounting documents and other official financial- fiscal documents consists in the activity through which, in these documents, it is performed recordings that are not based on totally or partially valid justifiable documents. In the judicial practice, it was decided that this infraction can not be retained in the case that the action of rectifying a book- keeping error of the unreal operations took place due to the annulment of a document. In a different case, the court retained the existence of the infraction by taking into account the fact that, at the request of her husband, the defendant drew up 74 fictive invoices from which it resulted the delivery of spare parts to companies that did not exist in reality. The blue exemplars of these invoices were torn up by the defendant and the red and green exemplars were recorded in the accounting.

2.4. Alteration, destruction or hiding of the accounting documents, memories of the fiscal electronic taxation devices or cash- registers or of other data storage devices.

The alteration of the accounting documents, memories of the fiscal electronic taxation devices or cash- registers or of other data storage devices consists in their modification or forgery. The destruction means the cancellation of such documents, data, and the hiding consists in their putting in safety, so that they can not be found by the competent authorities. The activity through which it is fulfilled the content of the examined infraction can not be framed in other accusation norms at the same time, because this does not come in concurrence with other infractions, the material elements of which can be found in the text of the special norms (for example, false material, destruction and theft).

2.5. Drawing up of double accounting registers by using documents or other means of data storage.

We are in the presence of a double accounting register, in the sense of the accusation norm, then when, beside the apparent accounting register and inadequate to the reality, there is a parallel

real accounting register that totally or partially covers the activity of the taxpayer in question. As we have already said, judiciously, for the existence of carrying out a double accounting register, it is necessary to exist enough official accounting documents that should contain real data about the taxpayer's financial- accounting activity, and not certain isolated recordings. If a taxpayer holds two identical accounting registers, even inadequate to the reality, the content of this infraction is not fulfilled either. But we can talk about a different infraction of tax evasion [for example, the one stipulated by art. 9 paragraph (1) letter b].

2.6. Eluding of performing the financial, tax and customs verifications by not declaring, fictively or inexactly declaring with regard to the main or secondary offices of the checked persons.

In order to exist this infraction, it should be fulfilled a prime essential requirement, namely, that the eluding of performing the (financial, tax and customs) verifications should take place by not declaring, fictively or inexactly declaring with regard to the main or secondary offices of the checked person. The secondary and main offices should be declared at the trade register according to Law no. 26/1990, as well as at the tax authorities. The content of the infraction implies also the carrying of the essential requirement referring to the existence of the tax control, because this is the only way that it can be established the taxpayer's eluding the performance of the financial, tax and customs verifications. Of course, the eluding of performing the verifications takes place for the purpose of evading from the carrying out of the tax obligations.

2.7. Substitution, degradation or giving away of the assets put under distraint according to the provisions of the Tax procedure code and of the Penal procedure code by the debtor or other third parties.

In order to fulfill the content of the infraction, it is necessary that the substituted, degraded and given away assets should be legally put under distraint. This infraction can come in concurrence with other infractions and it can also be excluded by other infractions (for instance, in the case of eluding the putting under distraint) or it can exclude other infractions (such as the destruction). So, if through eluding, the legally applied seal was broken, it is a concurrence of infractions between this infraction and the infraction of breaking the seal (art. 243 of Penal code); if the legally put under distraint asset is given away, it will be only an infraction of tax evasion; if the legally put under distraint asset is destroyed, we will deal only with the infraction of destruction (art. 217 of Penal code).

3. Causes of unpunishment and causes of reduction of the punishments

3.1. Content of the legal text

According to art. 10 (1) of Law no. 241/2005, in the case of committing an infraction of tax evasion stipulated by the current law, the limits of the punishment stipulated by law for the committed deed are reduced to half, if during the penal pursuit or during the trial, until the first term of the trial, the accused or defendant entirely covers the caused prejudice. If the prejudice caused and recovered in the same conditions is of up to Eur 100.000 in the equivalent of the national currency, it can be applied the punishment with the fine. If the prejudice caused and recovered in the same conditions is of up to Eur 50.000 in the equivalent of the national currency, it is applied an administrative sanction that is recorded in the criminal record.

The provisions stipulated by paragraph (1) are not applied if the doer has committed another infraction stipulated by the current law within 5 years since the committing of the deed for which he benefited from the provisions of paragraph (1).

3.2. Analysis of the causes of reduction or replacement of the sanctions

The utterance of the legislator contained in art. 10 is unsuitable under more aspects.

First, the 2nd thesis – according to which it can be applied the punishment with the fine if the caused and recovered prejudice (during the penal pursuit and during the trial, until the first trial term) is of up to Eur 100.000 in the equivalent of the national currency – can not be considered a cause of reduction of the punishment or of unpunishment, because it takes place a replacement of the punishment.

Secondly, the 3rd thesis – according to which it is applied an administrative sanction that is recorded in the criminal record if the prejudice caused and recovered in the same conditions is of up to Eur 50.000 in the equivalent of the national currency – is not exactly a cause of unpunishment, but a cause of replacement of the penal liability. On the other hand, given the fact that the administrative fine is to be recorded in the criminal record, the purpose of changing the nature of the applied sanction is practically imperceptible.

3.3. Conditions of application of art. 10

The application of the cause of reduction of the punishment or replacement of the sanctions is three times conditioned. The first requirement is to deal with an infraction of tax evasion, which means that only the infractions stipulated by art. 9 of Law no. 241/2005 enter the application domain. The second – negative – condition is that the causes of reduction of the punishment or replacement of the sanctions are not applied if the doer another infraction stipulated by Law no. 241/2005 within 5 years since the committing of the deed for which he benefited from these causes. The third condition regards the entire recovery of the prejudice at latest until the first trial term.

In the case of the deeds committed under Law no. 87/1994, if the penal pursuit or the trial takes place after the coming into force of Law no. 241/2005, the defendants can benefit from the causes of impunity or reduction of the punishment regulated by art.10 of this law only if, by application of art.13 of Penal code, it can be retained the committing of a tax infraction stipulated by art.9 of Law no. 241/2005 and it is covered the prejudice at latest at the first trial term.

In this situation, the first trial term can be considered the one immediately after the date of coming into force Law no. 241/2005, no matter of the stage the penal trial is.

3.4. Effects of incidence of art. 10

The first question is if the prosecutor can apply art. 10 of Law no. 241/2005 in the case of incidence of the 3rd thesis, respectively when the application of an administrative sanction is imposed. We think that the prosecutor can apply the sanction with administrative character, because, according to the special norm, the application of this sanction is made because there is a „cause of unpunishment”, so, it can not be explained why the legislator named it like this. Consequently, *volens nolens*, we have to accept that art. 10 paragraph (1) of 3rd thesis is dedicated to a special cause of unpunishment with the possibility for the prosecutor to give a solution based on art. 11 point 1 letter c) of Penal procedure code by applying a sanction with administrative character stipulated by art. 91 of penal code, if the conditions of incidence are also fulfilled. In order to support this interpretation, there is also the legal observation regarding the covering of the prejudice during the penal pursuit.

Conclusions

From the above- said, it results that the infractions of tax evasion are incriminated unsuitably in the Romanian penal law. We have in view also the fact that there is a lack of

correlations between the content of art. 9 of Law no. 241/2005 and the content of other accusation norms, such as art. 43 of Law no. 82/1991.

On the other hand, the utterance of the legislator contained in art. 10 of Law no. 241/2005 is unsuitable under more aspects. First, the 2nd thesis – according to which it can be applied the punishment with the fine if the caused and recovered prejudice (during the penal pursuit and during the trial, until the first trial term) is of up to Eur 100.000 in the equivalent of the national currency – can not be considered a cause of reduction of the punishment or of unpunishment, because it takes place a replacement of the punishment. Secondly, the 3rd thesis – according to which it is applied an administrative sanction that is recorded in the criminal record if the prejudice caused and recovered in the same conditions is of up to Eur 50.000 in the equivalent of the national currency – is not exactly a cause of unpunishment, but a cause of replacement of the penal liability.

In conclusion, Law no. 241/2005 is far from being a corresponding law; it is a law that, on the contrary, can be considered to be a law of „stimulation” of the tax evasion.

References

1. *M.Ș. Minea, C.F. Costăș, D.M. Ionescu*, Law of the tax evasion. Comments and explanations, C.H. Beck Publishing house, Bucharest, 2006;
2. *M.A. Hotca, M. Dobrinou*, Infractions stipulated by special laws. Comments and explanations, C.H. Beck Publishing house, Bucharest, 2008;
3. *D.A.P. Florescu, P. Coman, G. Bălașa*, Taxation in Romania, All Beck Publishing house, Bucharest, 2005;
4. *V. Dabu, A.-M. Gușanu*, The new law regarding the tax evasion (I), in R.D.P. no. 1/2006;
5. *V. Păvăleanu*, Tax evasion, in R.D.P. no. 1/2006;
6. *V. Dabu, A.-M. Gușanu*, The new law regarding the tax evasion (II), in R.D.P. no. 2/2006;
7. *C.V. Neagoe*, Cause of unpushment. Tax evasion, in R.D.P. no. 2/2006;
8. *V. Dabu, A.-M. Gușanu*, The new law regarding the tax evasion (III), in R.D.P. no. 3/2006.

NATIONAL AND COMMUNITY TRADEMARK INFRINGEMENT PROCEEDINGS IN HUNGARY

Mátyás Kapa*

Abstract

The article refers to the disputes in connection with the counterfeiting and the validation of brands in Hungary. The author presents the rules and the practice of these disputes, also with an emphasis on the complex rules of the disputes related to community brands. It can be established that the applicable community rules ensure the protection and validation of the brand owners' rights on an immense and unitary market.

Key words: *trademark, community trademark, trademark infringement, infringement proceedings, EC law*

Introduction

A *trademark* is a distinctive sign used to identify products or services. It belongs exclusively to the proprietor of the registered trademark. The primary function of the trademark is to distinguish the products and services of the proprietor from those of other entities.¹ According to Hungarian regulations, any graphically represented sign that is able to distinguish a product or service from those of other entities can be registered. The following signs can particularly be registered

- words, phrases, including names and slogans;
- letters, numbers;
- figures, images;
- two or three dimensional objects, including the shape of the product or its packaging;
- colours, colour schemes, flashlight, hologram;
- sounds;
- in addition, the combination of any of the above².

We can distinguish national, community and international trademarks. National trademarks are regulated by Act IX/1997 in Hungary, while (EC) No 40/94 regulates community trademarks. International trademarks fall under the scope of the Treaty of Madrid of 1891 and the related Madrid Protocol of 1989. In Hungary 4,246 national trademarks and 4,568 international trademarks were registered in 2007. Still in 2007 88,251 community trademarks with effect to Hungary were registered. The number of registered national trademarks has not changed compared to previous years; the number of international trademarks has decreased while the number of community trademark registrations has increased considerably. The number of national trademarks valid in Hungary was 52,093 in 2007, with 54 percent Hungarian, 21 percent American, 5 percent British and 3 percent German proprietors.

Proceedings related to trademarks fall under the scope of the Hungarian Patent Office and the court in Hungary. The competences of the Hungarian Patent Office include among other things entering trademarks into the Register, renewal, revocation and registration of trademarks. The

* Professor Ph.D., Dean of the Law Faculty, "Károli Gáspár" University, Budapest.

¹ See Vanda Lamm, Vilmos Peschka (chief editor), *Jogi Lexikon*, Budapest, 1999, p. 624.

² Article 1, Act XI of 1997

proceedings of the Office are special administrative authority procedures. Trademark proceedings can be grouped into two big categories.

One of the groups includes supervision proceedings related to the decisions of the Hungarian Patent Office. These are non-litigious proceedings, carried out exclusively by the Metropolitan Court of Budapest. In 2007 236 amendment requests were filed at the Office, 49 of which were dealt with within the competence of the Office itself and 187 were forwarded to the Court.

The other group includes trademark proceedings. In these cases the person claiming property can turn directly to court in order to obtain a decision in a litigious proceeding. Within trademark proceedings, special regulations apply to infringement proceedings. In Hungary 160 infringement proceedings were initiated in 2007 and 132 in 2008.

2. Trademark infringement proceedings

On the basis of trademark rights the proprietor of the trademark has exclusive rights to use the trademark. Any other person shall refrain from disturbing the proprietor of the trademark. Trademark infringement occurs when an entity uses the trademark to mark the same or similar products or services during its business activities without permission to do so from the proprietor of the trademark.³ In case of trademark infringement, the proprietor can initiate court proceedings against the violator.

Trademark infringement proceedings in Hungary are special proceedings in Hungary. This means that the regulations of the Code of Civil Procedure as well as special regulations shall be applied. These special regulations related to trademark infringement proceedings are included in Act No. XI of 1997 on the protection of trademarks and geographical indications.

Trademark infringement proceedings fall under the competence and scope of the Metropolitan Court of Budapest exclusively. A professional judge rules in the first instance in general. In trademark infringement proceedings however the court proceeds with a council of three professional judges. In such cases the parties can be represented by an authorised patent agent.

Upon the request of the parties the court can reject admission of the public to the hearings even if the general conditions of excluding the public do not apply. In trademark infringement proceedings the parties can request provisional measures more easily and on a wider scale compared to general regulations. For example it is a general rule in Hungarian law related to court proceedings that the parties can only request provisional measures after the statement of claim has been submitted to the court. In trademark infringement procedures however a request for provisional measure can be submitted before the statement of claim has been filed. Preliminary proving can be applied in a wider scale as well. The court can however require a guarantee as a condition to initiate preliminary proving and provisional measures.

In a trademark infringement proceeding if one of the parties has made its argument plausible to the appropriate extent, the court can upon the request of the proving party oblige the opponent to present its documents or other proof it holds, as well as make possible a review and provide information on bank, financial and trade data or present documents related to these.

3. Proceedings related to infringement of community trademarks

According to current community law, special regulations regard proceedings related to the infringement of community trademarks. In community trademark infringement procedures both

³ See Endre Lontai, *Szellemi alkotások joga*, Budapest, 1998, pp. 234-235.

the community law and the regulations of the member states shall be applied. It is interesting to discuss shortly the issue of how community law and national law create a legal system to be applied.

Most approaches regard community law a completely or relatively autonomous legal system, which differs from both national domestic law and international law.⁴ However, many experts point out that community law “significantly pervades and partially overlaps the domestic legal systems of the member countries (...) the law of the EC also forms a special framework with the legal systems of the member states”.⁵ These approaches look at this phenomenon from the point of view of the European Communities, the European Union and community law. As for me I would rather approach the question from the side of the legal system of the member state, and from this viewpoint I would rather point out that due to the direct effect of community law, community regulations are unambiguously built in into national legal systems. Therefore, the legal systems of the member states have become two-level systems: in the legal system of each country we can distinguish a European and a national level.⁶ Thus, presently the legal system of each member country is divided vertically into two great structural parts. The national level aims at complete and flawless regulation. The European level contains partial, aim oriented regulations, where the community aspect generates the creation of a norm, and therefore, regulations are not created in every field, but basically in connection with community aims.⁷

Legal norms of the European Community naturally do not exist and function alone, but in functional interaction with other norms of the legal system. If we examine community regulations more closely we come to the conclusion that there is a strong connection to the national laws regulating the given area. Moreover, the community regulation often cannot be interpreted without the national law. This is partly because community regulation only partially covers its subject.

We have to take it into consideration that as we have already mentioned above, the Community regulations were added to the legal systems of the member countries, so these legal systems became two-level. When exploring the content of each norm during the application of the traditional methods of legal interpretation, we must regard the European and national level in each legal system as a unit. Therefore, in case of grammatical, logical and especially the systematic and historical legal interpretation we must interpret national and European norms in relation. However, if we do so, a certain norm might have different content in each legal system. Thus, using the different methods of legal interpretation we could have a different content for the same norm in various legal systems, as the theoretically unified community law must be compared with practically different national laws when interpreted.

In community trademark infringement proceedings multilevel regulations apply. The court applies primarily the Council Regulation (EC) No 40/94. On all matters not covered by this regulation a community trademark court shall apply its national law, including its private international law. Unless otherwise provided in this regulation, a community trademark court shall apply the rules of procedure governing the same type of action relating to a national trade mark in

⁴ See Vanda Lamm – Vilmos Peschka (chief editor), *Jogi Lexikon*, Budapest, 1999, p. 370.; András Jakab, *A jogszabálytan főbb kérdéseiről*, Budapest, 2003, p. 170.

⁵ László Kecskés, *EK-jog és jogharmonizáció*, Budapest, 1999, p. 111.

⁶ It is worth mentioning that the rules of the European level are not necessarily the same in each member state. There are, for example, countries, which do not participate in certain forms of cooperation (see, e.g.: Monetary Union, home affairs in civil cases)

⁷ For the problem of the division of legislative spheres between the European Union and the member states, see Tamás Kende – Tamás Szűcs – Petra Jeney (editor): *Európai közjog és politika*, Budapest, 2007, pp. 744-795.

the member state where it has its seat.⁸ The Hungarian trademark court applies Act No. XI of 1997 on the protection of trademarks and geographical indications as well as the Code of Civil Procedure as additional regulations. Community trademark infringement procedures are thus special court cases in Hungary as there is a special order between the regulations to be applied: primarily Council Regulation (EC) No 40/94 shall be applied, and if there is no regulation regarding an issue then the special proceeding regulations stipulated in the Hungarian Trademark Act follow and if this cannot settle the proceeding, the Code of Civil Procedure shall apply.⁹

In community trademark proceedings the so called community trademark court nominated by the member states shall proceed. In Hungary the Metropolitan Court of Budapest proceeds in the first instance and the Regional Court of Appeal of Budapest proceeds in the second instance.

Proceedings related to infringement of community trademarks shall be brought in the courts of the member state in which the defendant is domiciled or, if he is not domiciled in any of the member states, in which he has an establishment. If the defendant is neither domiciled nor has an establishment in any of the member states, such proceedings shall be brought in the courts of the member state in which the plaintiff is domiciled or, if he is not domiciled in any of the member states, in which he has an establishment.

If neither the defendant nor the plaintiff is so domiciled or has such an establishment, such proceedings shall be brought in the courts of the member state where the Office for Harmonization in the Internal Market has its seat.¹⁰

The above regulations can be avoided if

- a). the parties agree that another community trademark court shall proceed;
- b). the defendant appears at another community trademark court.

The community trademark infringement procedure can be brought in the courts of the member state in which the infringement has taken place or has been attempted.

In community trademark proceedings a plea relating to revocation or invalidity of the community trademark submitted otherwise than by way of a counterclaim shall be admissible in so far as the defendant claims that the rights of the proprietor of the community trademark could be revoked for lack of use or that community trademark could be declared invalid on account of an earlier right of the defendant.¹¹

The community trademark courts shall treat the community trademark as valid unless its validity is put in issue by the defendant with a counterclaim for revocation or for a declaration of invalidity.¹² The counterclaim for revocation or for declaration of invalidity can only be based on revocation or invalidity reasons as specified in EC 40/94 and not according to national law.

Application may be made to the courts of a member state, including community trademark courts, for such provisional, including protective, measures in respect of a community trademark or community trademark application as may be available under the law of that state in respect of a national trademark, even if, under this regulation, a community trade mark court of another member state has jurisdiction as to the substance of the matter.¹³

Where a community trademark court finds that the defendant has infringed or threatened to infringe a community trademark, it shall, unless there are special reasons for not doing so, issue an order prohibiting the defendant from proceeding with the acts which infringed or would infringe

⁸ Article 97, (EC) No. 40/94

⁹ See Daisy Kiss, Zoltán Rónay, Ágnes Sántha, Péter Szabó: *A különleges perek*, Budapest, 2006, p. 209.

¹⁰ Paragraphs (1)-(3), Article 93, (EC) No. 40/94

¹¹ Paragraph 3, Article 95, (EC) No. 40/94

¹² Paragraph 1, Article 95, (EC) No. 40/94

¹³ Paragraph 1, Article 99, (EC) No. 40/94

the community trademark. It shall also take such measures in accordance with its national law as are aimed at ensuring that this prohibition is complied with.¹⁴

In proceedings related to community trademark infringement an appeal to the community trademark courts of second instance shall lay from judgments of the community trademark courts of first instance.¹⁵ The regulation stipulates that the related regulations of national law on further appeal shall be applied for the verdicts of the community trademark court of second instance. In my opinion we can draw the conclusion that according to the regulations of the Code of Civil Procedure the final verdict of second instance can requested to be supervised – based on violation of law.

In Hungarian legal practice it has become debated if the Metropolitan Court of Budapest as a community trademark court can proceed and rule in a proceeding related to infringement of community, national or international trademarks. In a specific case the plaintiff submitted its claim to the Metropolitan Court of Budapest requesting the court to assess that the defendant infringed its Hungarian national trademarks as well as international and community trademarks used by the plaintiff, by importing perfumes to Hungary from the date of 22 April, 2005. The court of first instance stated that the defendant infringed national, international and community trademarks of the plaintiff. The court ruled that the defendant should stop violating the law, and requested the defendant to provide data on the distributors of the perfumes, its business contacts and its warehouses in Hungary. The court also authorised the plaintiff to publish a declaration that would serve as recompense. It ruled confiscation of the products and destroying them at the costs of the defendant within 15 days. The court of second instance has partially revised the verdict of the court of first instance, and stated that the court of first instance as community trademark court could have made a verdict only in relation to infringement of the community trademark and it should not have proceeded in relation to national and international trademarks. After this the Supreme Court revised the verdict of second instance in a revision proceeding. It ruled that the applicable law, (the Civil Code of Procedure, the Trademark Act and Council Regulation (EC) No. 40/94) does not contain any specifications that would restrict the plaintiff from connecting its claims on infringement of its community trademark to its claim on infringement of its national and international trademarks. As a consequence, it is possible that the Metropolitan Court of Budapest can decide in a proceeding on the infringement of the community trademark as well as other claims related to infringement of national and international trademarks.¹⁶

Finally, the question arises, which is the appropriate procedure to follow if there is a court proceeding related to trademark infringement or its attempt going on between the same parties in the same matter at the courts of different member states, and one of the courts proceeds in relation to the community trademark while the other proceeds in relation to the national trademark. As the subject of the proceeding is not the same here, we cannot talk about *lis pendens*, but the connection between the two proceedings is obvious.¹⁷ In such cases the court other than the court first seized shall of its own motion decline jurisdiction in favour of that court where the trade marks concerned are identical and valid for identical goods or services. The court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.¹⁸

¹⁴ Paragraph 1, Article 98, (EC) No. 40/94

¹⁵ Paragraph 1, Article 101, (EC) No. 40/94

¹⁶ BH 2008/65.; Legf. Bír. Pfv. IV. 20.423/2007. sz.

¹⁷ See Daisy Kiss, Zoltán Rónay, Ágnes Sántha, Péter Szabó, *A különleges perek*, Budapest, 2006, p. 214.

¹⁸ Paragraph (1) a), Article 105, (EC) No. 40/94

The court other than the court first seized may stay its proceedings where the trade marks concerned are identical and valid for similar goods or services and where the trade marks concerned are similar and valid for identical or similar goods or services.¹⁹

4. Conclusion

The above paper has overviewed Hungarian regulations related to trademark infringement proceedings, with special regard to the multilevel and complex regulations related to community trademark proceedings. It can be stated that the effective community regulation provides the validation and the protection of rights of trademark proprietors on a huge unified market.

¹⁹ Paragraph (1) b), Article 105, (EC) No. 40/94

TOWARDS A DES-INCRIMINATION OF DRUG POSSESSION FOR OWN USE IN ROMANIA

Traian DIMA*

Abstract

In 2000, Law no. 143 for prevention and fight against drug use and illegal drug trafficking entered into force in Romania. This law represented an operative instrument to fight against the drug mafia and generally against organized crime in the field of the Romanian judicial organisations.

Pursuant to the provisions of Law 143(4)/2000, the deed of illicit drug possession for own use has firstly been incriminated, as a reaction of the Romanian society against illicit use of drugs dramatically increasing since 1990. According to the statistic data released by the National Anti-Drug Agency, illicit drug use has been increasing after 2000 although such incrimination was already introduced in the criminal law.

Almost eight years after the prohibition of drug possession for own use that has not produced any effects in reducing the number of drug users, the question of changing the criminal philosophy of the Romanian legislator, who leads an extremely harsh repressive politics in the field, may be raised. One proposes in this respect, to remove the drug possession for own use from the illicit criminal sphere and to solve such cases by imposing certain administrative sanctions altogether with some medical procedures/medical care services, the sole able to solve complex drug addiction related problems.

Taking into account the reduced social danger of drug possession for own use, as well as for giving higher efficiency to medical standards in the field, with a more substantial preventing effect, the Romanian legislator needs to review its criminal politics of illicit drug use, by re-evaluating the gravity and dangerous effects of drugs possess for own use by its des-incrimination.

Key words: *drugs, consumption, possession, trafficking, des-incrimination*

Introduction

The existing law in Romania prior to the entrance into force of the current legislation considered the illicit drug self-administration to be a minor offence. Thanks to the use and illicit drug trafficking boom / increase in our country since 1990, pursuant to the socio-economic and political changes in the Romanian society structure and the birth of the rule of law, the unlawful drug possession for own use was raised to the rank of criminal offence¹ through the provisions of Law no. 143/2000 for prevention and fight against drug use and illicit drug trafficking².

Therefore, the society has responded throughout the criminal law against the danger of unlawful drug possession for own use, a very dangerous growing phenomenon for both the young generation and the entire society. In order to fight illicit drug use, the criminal legislator adopted on the date Law no. 143/2000 was drawn up, the repressive thesis not paying attention enough to the harmonization of the criminal legislation with the medical standards, the sole in charge to solve the drug addiction related problems, considering that prohibition of drug use by incriminating the

* Professor Ph.D., Law Faculty, "Nicolae Titulescu" University, Bucharest (e-mail: traian.dima@univnt.ro).

¹ Therefore, art. 4 of Law no. 143/2000 provides as follows: (1) The unlawful cultivation, production, manufacture, experimentation, extraction, preparation, transformation, purchase or possession of dangerous drugs for own use is punished with imprisonment of 6 months to 2 years or fine; (2) If the deeds provided in paragraph (1) concern high-risk drugs the punishment is imprisonment of 2 years to five years.

² Law no. 143/2000 for the prevention and fight against drug use and illegal drug trafficking amended by Law no. 522/2004 has been published in the Official Gazette of Romania, Part I no. 362 of 03/08/2000;

illegal drug possession for own use under criminal sanctions, could stop the increasing drug abuse in Romania.

It seems that, the Romanian legislator found more accessible the use of criminal law means in preventing illicit drug use than the medical strategies in the field, considering that our sanitary system after the 1990's, was lacking in the necessary financial funds and qualified medical staff able to solve the increasing problems related to the widespread drug addiction in Romania.

It is less true that the criminal law is used to persuade the drug users to leave their common world.³ in other countries' doctrine as well.

Even if the Romanian legislator used and still uses the criminal law "instruments" for fighting illicit drug use, life has shown us that after Law no 143/2000 entered into force this phenomenon failed to diminish, but has increased according to the statistics released by the National Anti-Drug Agency.

Although almost eight years passed since the entering into force of Law no. 143/2000, several times amended, the Romanian legislator still makes use of the same criminal sentence philosophy of the consumers unlawfully possessing drugs for own use. The Romanian legislator's lack of response in the matter, allows us to conclude that it still preserves the same harsh politics in preventing and fighting the abusive drug consumption similar to those used in 2000 that, according to us no longer acts in the benefit of both the individual and the society.

This is exactly the problem we want to debate upon, to observe and bring arguments on the legislator's fault in carrying out sanctions for illicit drug possession for own use.

As stated in the European specialized literature, the drug use as attitude of a natural person against the use of a certain substance under national control lies in the "ethical, medical and criminal" sphere.⁴ Morally, Romanian citizens disagree with the drug use, considering it to be harmful for both individual and society. Even the church disagrees with drug use considering it a Cardinal Sin⁵.

Medically speaking, the abusive drug use is beyond question a mental health issue that can bring into discussion the responsibility and guiltiness of such substances consumer, when he commits deeds punishable by the criminal law.

Since alcohol and tobacco consumption is no less dangerous for individual and society than drug consumption, one wonders which are the units of measurements used by the criminal legislator when deciding that the simple drug possession for own use should be held for criminal offence? Through this incrimination, the legislator transformed the individual from a simple occasional drug consumer into an offender, expelled the drug addicted from society and made him face the public disdain.

Therefore, we may ask ourselves whether it is legal for the State to intervene by force and actually conduct a public control over the individual's private life for its own good, on the grounds that the society refuses it's members self-destruction by drug consumption.

It's no wonder that the incrimination of the unlawful drug possession in Law no. 143/2000 made in Romania as well as in other countries, the object of unconstitutionality exception. In arguing the unconstitutionality exception, the accused consumer sustained, through its solicitor, that the provisions of art. 4 of Law no. 143/2000, punishing by imprisonment the purchase or drug

³ Yves Cartuyveles, "Loi pénale, usage de drogues et politique", article in the paper "L'usage pénal des drogues", edition De Boeck & Larcier, Bruxelles, 2003, pp. 41-56.

⁴ *Idem, op. cit;*

⁵ Pope Benedict XVI considers drugs and pedophilia unforgivable sins, irrespective of a person's tolerance. The Catholic Church amended the already known list of the seven mortal sins, by adding another seven sins. The list of the mortal sins was published in the Vatican's official newspaper "L'observatore Romano", on March 2007. According to such list, the drug use is labeled as a mortal sin (source: Libertatea no. 5690 of 11 March 2008);

possession of own use breach an aspect of private life, i.e. that of disposing of himself, therefore it infringes the provisions of art. 26 (paragraph 2) of the Constitution, concerning the intimate, family and private life.⁶

Judging this unconstitutionality exception, the Romanian Constitutional Court decided that “the provisions of art 4 of Law no. 143/2000 are completely in accordance with the provisions of article 8, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Liberties, since the incrimination of drug possession for own use is provided by law, representing a necessary measure in a democratic society for morality and health protection, thus being a mechanism of preventing criminal offences capable to endanger the public security.”⁷

In our opinion, considering the drug possession for own use a criminal offence, the Romanian legislator of the 2000’s adopted the thesis of penal repression of drug users that does not speak in the European or national medical standards favour that govern the drug addiction related problems, leaving thus behind fair solving of this matter.

By his goodwill, the criminal legislator of the 2000’s also offered the criminal investigating departments the chance to duly investigate the offender drug user, providing in art. 16 of Law no. 143/ 2000 a clause of incrimination reduction. Such a provision is completely (null and) void.⁸ As underlined in the European non-fiction books “the change of the drug user’s behaviour a reprehensible one to an intelligent one in the service of law is the result of a technique applied by the legislator.”⁹

This technique used by the legislator has been criticised in the Romanian doctrine as well, because creating this clause of punishment reduction he leaves behind the objective reality.¹⁰ Which would be the best social and legal answers in solving the problems raised by the incrimination of drug possession for own use and which would be the society’s best answer over the drug abuse?

The answer to this question has been largely debated upon by the supporters of different systems in force in the entire world. Four strategies of drug abuse control are known, as it follows: the prohibition system, the risks reducing system, the des-incriminating system and the controlled drug system.¹¹ According to our criminal law, one can observe that the Romanian legislator adopted the prohibitory system, forbidding under criminal sanctions the drug possession for own use. Such system adopted by the Romanian legislator enjoys the advantage of ethics, but it also has a series of negative effects as underlined in the doctrine, that follows the system.¹²

One may think that the Romanian legislator did not keep in mind the categories of drug users existing in society when incriminating unlawful drug possession for own use. Medically,

⁶ Article 26 of the Romanian Constitution provides the following: (1) The public authorities shall respect and protect the intimate, family and private life. (2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.

⁷ Decision of the Constitutional Court no. 334 of 28/06/2005 published in the Official Gazette of Romania, Part I no. 651 of 22/07/2005.

⁸ Article 16 of Law no. 143/2000 provides : The person who has committed one of the criminal offences provided by articles 2-10, and denounces and facilitates other persons’ identification and criminal for involvement in drugs offences may be reduced to half its punishment as provided by law.

⁹ Marie Sophie Devresse “Construire l’usager: un passage obligé de la destion pénale des drogues ”, article in the paper “L’usage pénal des drogues”, edition De Boeck & Larcier, Bruxelles, 2003, pages 141-148

¹⁰ For more details refer to T. Dima, A. Paun, the article “Un alt mod de abordare a cauzei de reducere a pedepseim prevazute de art. 16 din Legea nr. 143/2000 privind prevenirea si combaterea traficului si consumului ilicit de droguri” in “Dreptul” no. 2/2008, pp. 188-191.

¹¹ For more details feel free to read the analyses of these systems broadly done by professor Francis Caballero and Yann Bisiou in the paper “Droit de la drogue”, 2nd edition, published by Dalloz, Paris, 2000, pp. 95-164.

¹² *Idem, op. cit.*

there is a clear distinction between the occasional drug user, the common drug user, the drug addicted, the sick user and the problem user, in other words the abusive drug user.¹³ Legally we also distinguish two main kind of drug users, who conduct two different activities.

Therefore, the first category includes the consumers who unlawfully possess drugs for their own use whereas the second category includes the consumers who unlawfully possess drugs for their own use but conduct illegal trafficking activities with such substances in order to gain money to further purchase drugs for their own consumption.

Romanian legislation shows a gap with respect to these two categories of drug users in that there is no elucidating provision to explain the exact limits a certain quantity of drug must be included within, in ordered to be classified as unlawfully possessed drug for own use or unlawfully possessed drug for both own use and illicit trafficking. *De lege ferenda*, such provision is needed.

If we refer to these two categories of users, one may observe that the occasional or common user deed of possessing illicit drugs for own use, represents a less dangerous social threat for society in comparison to those users who possess drugs for both own use and trafficking with such substances.

The deed of the consumer who possesses drugs for its own use but conducts trafficking activities with the possessed drugs as well, appears to be a serious and dangerous threat to society, because he maintains the illicit use and drug trafficking in society by selling parts of the possessed drug to other drug consumers, what represents the authorities target in preventing and fighting such incidences. It is obvious that the legislator should have taken into account the social threat in accordance with the deeds deployed by the two of consumers, and should have made a distinction *ab initio* in what concerns the sanctions applicable to the two categories of consumers but he fails to do so.

Therefore, in our opinion, the deed of drug possession for own use should be des-incriminated in Romania as well, carrying out administrative sanctions instead of the criminal ones, associated by case with medical care services in case of drug addiction, because, a drug addicted shall be viewed as a sick person and not be transformed into an offender, following the laws and regulations applicable in other member states of the European Union.

Conclusions

As underlined in literature, the criminal sanction of the drug users transforms them into victims of the criminal law, although in their case, the sanitary ideal should win.

Therefore, the legislator should review its politics related to drug possession for own use, and should des-incriminate it, in Romania as well.

¹³ See Marie Sophie Devresse, citat. Supra 9.

THE DIRECT EFFECT OF TREATY PROVISIONS

Anca-Magda Vlaicu*

Abstract

The purpose of the paper is to analyze the direct effect of Treaty provisions, starting from the moment when the doctrine of direct effect of Community law was created by ECJ up to the present time. To this end, the first objective is to define the concept of “direct effect”, by revealing the broad and the narrow sense of the notion, and the relation between two different notions: direct effect and direct applicability.

Following to the definition of the concept, the next objective is to point out the importance of analysing the matter – both as a major difference from international treaties, and as one of the most important characteristics which define the relation between European law (with focus to the Treaties) and domestic law.

In this context, the main objective of the paper is to present the evolution of the notion and conditions under which Treaty provisions can achieve direct effect, as they derive from European ECJ’ decisions, starting from vertical effect (negative obligations, positive obligations, incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level), to horizontal effect, and finally to the indirect effect (duty of consistent interpretation, requiring all national legislation to be interpreted in the light of the EC law by national courts).

At the same time, in close relation to the presentation of ECJ’ decisions, the paper also intends to present the main academic debates on the same issues (evolution of the notion and conditions for achieving direct effect), consequent to creation and evolution of the doctrine of “direct effect”.

As a final objective, the paper will summarize the meaning of the notion of “direct effect” and the actual conditions required for incidence in the case of Treaty provisions, and also the practical implications of the expansion direct effect of Treaty provisions, both socially, and financially.

Key words: *direct effect, direct applicability, vertical direct effect, horizontal direct effect, indirect effect*

Introduction

The purpose of the paper is to analyze the direct effect of Treaty provisions, starting from the moment when the doctrine of direct effect of Community law was created by ECJ up to the present time.

When the EC Treaty was drafted, the primary means by which Community law was thought to be enforced against the Member States was represented by the procedure set out in what is now article 226 EC; from its earliest case law until the present day, the Court has engaged in a prolonged and radical programme that has resulted in the judicial creation of a series of ways in which national courts, rather than the Court of Justice, are expected to play the main role in the enforcement of Community law against the Member States, national authorities and private parties.

Three principal means have been established: 1. the creation and subsequent expansion of the doctrine of direct effect; 2. the creation and subsequent expansion of the duty of consistent interpretation (also known as “indirect effect”); 3. the creation and subsequent expansion of the principle of states liability.

As pointed out before, this paper will analyze the doctrine of direct effect, focused on the direct effect of Treaty provisions; the importance of analysing the matter resides in the fact that the

* Judge, Ph.D. candidate, Law Faculty, “Nicolae Titulescu”, Bucharest (e-mail: magda_vlaicu@yahoo.com).

topic dealt with is central to the study of EU law - it has been developed by the ECJ and its jurisprudence has become more complex over the years.

Thus, on the one hand, the doctrine of direct effect of EC law (which applies in principle to all binding Community law) presents major differences compared to the same notion in international law (notably referring to international treaties), and, on the other hand, the direct effect of EC law is one of the most important characteristics which define the relation between European law and domestic law and also the basis for supremacy of EC law.

In this context, the paper will analyze the meaning of the notion of "direct effect" (also making references to other close, but different notions – direct applicability, immediate applicability, invocability), will present the evolution of the notion and conditions under which Treaty provisions can achieve direct effect, as they derive from ECJ' decisions, starting from vertical effect (raising EC law against the Member State or a state entity - in case of negative obligations, positive obligations, incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level), to horizontal effect (invoking EC law among private parties), and finally to the indirect effect (duty of consistent interpretation, requiring all national legislation to be interpreted in the light of the EC law by national courts).

The paper will also summarize, consequent to the presentation of the aspects indicated above, the meaning of the notion of "direct effect", the actual conditions required for incidence in case of Treaty provisions, and the practical implications of the direct effect of Treaty provisions, both socially, and financially.

At the same time, in close relation to the presentation of ECJ' decisions, the paper intends to present the main academic debates on the same issues (evolution of the notion and conditions for achieving direct effect), consequent to creation and evolution of the doctrine of "direct effect".

Literature review

The juridical literature relevant on the matter (1) emphasized that the starting point was the distinction between public and private enforcement - law can be enforced either through a public arm of government, which is accorded power to bring infringers to court, or through actions brought by private individuals, or an admixture of the two.

The Treaty embodied an express mechanism for public enforcement in Article 226, allowing the Commission to sue Member States before the ECJ for breach of Community law (this compulsory jurisdiction was itself unusual, since most international treaties contained no such mechanism). There are however limits to this kind of enforcement: on the one hand, the Commission did not have the institutional capacity to prosecute more than a tiny fraction of all possible infringements and therefore the remedy under article 226 was weak; on the other hand, the article could not be used against private individuals (2).

The ECJ therefore took the bold step of legitimating private enforcement by holding that Treaty articles could, subject to certain conditions, have direct effect, so that individuals could rely on them before their national courts and challenge inconsistent national action, thereby bringing individuals into the Community-legal order (this step had to be taken since the texts of the EC Treaties made no reference to the effect which their provisions were to imply, and thus the original Member States may not have thought that the provisions of these Treaties would be treated any differently from those of other international treaties).

In the same line of reasoning, other authors (3) pointed out that, when the EC Treaty was drafted, it was envisaged that the procedure as set out in what is now article 226 EC would be the primary means by which Community law is enforced against the Member States; still, the Court

judicially created a series of ways in which national courts, rather than the Court of Justice, are expected to enforce Community law against the Member States, national authorities and private parties.

Three principal means established were: the creation and subsequent expansion of the law of direct effect (Van Gend en Loos and its progeny); the creation and subsequent expansion of the duty of consistent interpretation (also known as “indirect effect” - Von Colson and Marleasing); the creation and subsequent expansion of the principle of states liability (Francovich and Brasserie du Pêcheur/Factortame III).

The cases that have established and developed these principles are among the most important - and the most revolutionary - ever decided by the Court of Justice. The law that has been created in these decisions is, to a large extent, what marks the European Union out as being so different from other international organizations.

As for terminology, The ECJ used interchangeably the terms of “direct effect”, “direct applicability” and “immediate applicability”, which started a debate in juridical literature on whether they were synonyms or not and the meaning of each notion apart.

The English literature preferred the terminology of “direct effect” (4) and underlined a distinction between a broader and a narrower sense of the notion - in a broad sense, it means that provisions of binding EC law which are clear, precise, and unconditional enough to be considered justifiable can be invoked and relied on by individuals before national courts, and in the narrower (or classical) concept direct effect is defined in terms of the capacity of a provision of EC law to confer rights on individuals.

A part of French literature (5) opted for the term “direct applicability”, which meant that the European provision is unconditional and complete (it needs no transposition measures), pointing out that “direct effect” (in the narrow sense of the notion adopted by English literature) consisted in obtaining on the part of the national judge the application of the European norm in the case; therefore, concluded that the term “direct applicability” was preferable.

Also, they came to the conclusion that, at the present time, the criteria for recognizing direct effect reduce to a simple functional exigency, respectively a European provision has direct effect on the condition that it had characteristics to make it susceptible of jurisdictional application.

Connected to the “justiciability” of Community law, they stressed that a European provision fulfilled this condition even when the judge was called to appreciate upon it (which was not the case for legislative or executive appreciation); also, the “justiciability” depends on the type of application made by the national judge (in case of application of European law as a consequence of lack of national law relevant on the matter or in case of substitution of domestic law, the Community provision in discussion must be unconditional and sufficiently precise; in case that the national judge must appreciate upon compatibility between domestic and Community law, the latter was “justiciable” even if domestic authorities possessed discretion on the matter, on the condition that it’s limits should be unconditional and sufficiently precise); finally, all Community law is “justiciable” if it serves to interpretation of domestic law by a national judge.

Other French authors (6) made a difference between “invocability”, on the one hand, and “direct effect”, “direct applicability”, on the other hand, underlining that the expression “invocability” seemed to be preferred by the Court in case of certain secondary European law provisions (especially directives) in order to make a difference from other European law provisions (in case of which were generally used the expressions “direct effect”, “direct applicability”).

Others (7), using the expressions “direct effect”, “direct applicability” as ECJ did (interchangeably), mentioned generally that they referred to every individual’s right to ask the

national judge to apply treaties, regulations, directives and European decisions, irrespective of the domestic legislation.

Romanian literature (8) also made a clear distinction between “direct effect” and “direct applicability” - “direct applicability” means that the European law is unconditional and complete (it needs no transposition measures) and “direct effect” means that a provision of EC law confers rights on individuals, which can be invoked and relied on before national courts.

This distinction has also been agreed by other authors (9), who pointed out that direct applicability automatically implies that the norm has direct effect, whereas a provision that has direct effect is not automatically directly applicable (the case of directives, for example).

Other authors (10) emphasized the distinction between direct applicability and immediate applicability – the first expression refers to the normative content of European law, and the second to the temporal relation between Community law and the obligation to apply it by those to whom it addresses.

Apart from the debates presented above, all literature agrees on the incontestable fact that the doctrine of direct effect is a creation of the European Court of Justice and generally present the same evolution of the doctrine and conditions for direct effect, as they come out from the Court’s jurisprudence, starting from vertical direct effect (recognized in three steps - negative obligations, positive obligations, incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level) to horizontal effect, and finally to indirect effect, as will be presented in the next sections of the paper.

PAPER CONTENT

Definition

As shown above, a part of juridical literature made a clear distinction between a broader and a narrower sense of the notion of direct effect.

They pointed out that the broader definition, which can arguably be derived from Van Gend en Loos, can be expressed as the capacity of a provision of EC law to be invoked before a national court (this is referred to as “objective” direct effect - (11); on the other hand, the narrower “classical” definition of direct effect is usually expressed in terms of the capacity of a provision of EC law to confer subjective rights on individuals, which they may enforce before national courts (this is sometimes referred to as “subjective” direct effect).

The degree of difference between these formulations depends however on the definition of “rights” being used - if what is meant is simply the right to invoke EC law in a national court to assist one’s case, then there is little difference between the narrow and the broad notions of direct effect. In many other cases, however, the ECJ has gone beyond the simple reference to a right to invoke, and has indicated that an individual litigant can rely before a national court on the substantive right, such as the right to be free from discrimination based on nationality. Moreover, if the “conferral of rights on individuals” involves entitlement to a particular remedy or the imposition of a corresponding duty or liability on another party, then there may well be a relevant difference between the broad and the narrow definitions.

Independent of the adoption of the broad or the narrow definition of direct effect, the notion of direct effect should be clearly differentiated from the notion of direct applicability, which means that the European law is unconditional and complete (it needs no transposition measures).

Finally, focused on direct effect of Treaties (which have complete and conditional direct effect), it should be pointed out that complete direct effect means that the provision in discussion has both vertical and horizontal direct effect, and conditional direct effect imposes fulfillment of certain conditions (sufficiently precise, clear and unconditional); vertical direct effect allows

Community law to be invoked against a Member state or national authorities and horizontal direct effect refers to legal proceedings against a private party - the vertical/horizontal distinction requires the ECJ and national courts to differentiate between state entities and non-state entities.

Relevance of the matter

The importance of analysing the direct effect (of Treaties provisions) resides in the fact that the topic is central to the study of EU law and presents clear distinctions from the same notion, as it appears in international law.

Thus, on the one hand, the doctrine of direct effect of EC law (which applies in principle to all binding Community law, in the sense that confers rights on individuals, which can be invoked and relied on before national courts) presents major differences compared to the same notion in international law (notably referring to international treaties), as in the *Danzing* case the International Court of Justice stipulated that, as a general rule, an international treaty cannot give birth to rights and obligations on individuals (12).

The conclusion is justified on the fact that effect of an international treaty has traditionally been a matter to be determined in accordance with the constitutional law of each State party to that treaty; therefore, in countries which adopt a dualist approach to international law, international agreements do not of themselves give rise to rights or interests which citizens can invoke before national courts. Instead, the provisions of such treaties bind only the States at an intergovernmental level and, in the absence of implementation, cannot be directly domestically enforced by citizens (13).

Since the texts of the EC Treaties made no reference to the effect which their provisions, the original Member States may not have envisaged that the provisions of these Treaties would be treated any differently from those of other international treaties - the ECJ nonetheless held that the EEC Treaty was different from other international treaties and that individuals could derive rights from its provisions that could be enforced at national level.

Still, the theory of direct effect formulated by the European Court is not absolute novelty, as international law acknowledged it, but only in the case of self-executing treaties (14) – in these conditions, the originality of the doctrine in European law consists rather in the area of action of the notion of direct effect. As some authors remarked (15), in international law operates the presumption that provisions do not have direct effect, but for the exception underlined before; on the contrary, in Community law the presumption is reversed, in the sense that, as a general rule, all European law has direct effect, but for exceptions regarding individual qualities of each provision apart (and not concerning the category of normative instruments to which the provision belongs).

On the other hand, the direct effect of EC law is one of the most important characteristics which define, along with the supremacy and immediate application of Community law, the relation between European law and domestic law (as Community legal system is independent of each national legal system).

Finally, after the ECJ had set out the doctrine of direct effect in case *Van Gend and Loos*, giving rights to individuals to invoke Community law in their national courts, and thus providing for Member States the possibility of making Community law as effective as possible, it next moved to the next question of what happens in a situation of conflict between national law and Community law – therefore, the development of the doctrine of supremacy of Community law over national law was a logical sequel to the doctrine of direct effect.

Evolution of the concept in case of Treaty provisions

Article 249 (ex article 189) of the EC Treaty provides that regulations are “directly applicable in all Member States”; thus, regulations become automatically part of national legislation and do not require any further implementation.

Article 249 stipulates that directives are “binding as to the result to be achieved”, but the Member States are left to choose how they implement them.

The EC Treaty is silent on the subject of Treaty articles.

If the situation had been left at that, and the Community rules had simply been regarded as similar to international law, this would have meant that the only way in which individuals could challenge European Law was where it had been incorporated into national law in the form of regulations (directly applicable in all Member States).

The ECJ changed matters by means of its jurisprudence over the years, in a series of well known cases - literature (16) pointed out that there were 3 main steps in case of Treaty provisions - starting from acknowledging vertical direct effect for Treaty provisions (raising EC law against the Member State or a state entity) in case of negative obligations, positive obligations and incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level, to admitting horizontal direct effect (invoking EC law among private parties), and finally to recognizing the indirect effect (duty of consistent interpretation or the principle of harmonious interpretation, requiring all national legislation to be interpreted in the light of the EC law by national courts).

Having established that Treaty Articles could have in principle direct effect, the ECJ then moved on to expanding the concept in two related ways: on the one hand, the conditions for direct effect were subtly loosened, and on the other hand, direct effect thus modified applied to regulations and decisions, as well as Treaty Articles.

Vertical direct effect – negative obligations

The foundations of direct effect were laid down by ECJ in the decision *Van Gend en Loos*, in 1963, a decision which remains the most famous of all of its rulings.

The *Van Gend en Loos* Company imported a quantity of chemicals from Germany into the Netherlands; it was charged with an import duty which had allegedly been increased (by changing the tariff classification from a lower to a higher tariff heading) since entering into force of the EEC Treaty, contrary to Article 12 of the Treaty.

The company contested the import duty and, on appeal against payment before the domestic courts (Dutch *Tariefcommissie*) and raised in argument article 12 mentioned before; in this context, two questions were referred to the ECJ under Article 177 EC, respectively whether article 12 of the EEC Treaty has direct application within the territory of a Member State (in other words, whether nationals of such a State can, on the basis of the article in question, claim individual rights which the courts must protect); the second question was whether the charged duty was an unlawful increase (only the answer to the first question is important for the topic dealt with by the present paper).

Observations were submitted to the ECJ by the Belgian, German, and Netherlands governments; Belgium argued that the question was whether a national law ratifying an international Treaty would prevail over another law, and that this was a question of national constitutional law, which was within the exclusive jurisdiction of each Member State’s domestic court; The Netherlands government appreciated that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of the authors of the Treaties.

The ECJ pointed out though that, in order to answer the question raised and establish whether the provisions of a founding Treaty had the same effect as those of an international treaty, it was necessary, first of all, to consider the goal of having created the Communities and also the spirit, the general scheme and the wording of those provisions.

Thus, the objective of the EEC Treaty, which was to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies more than an agreement which merely creates mutual obligations between the contracting states; ECJ stressed that this view was confirmed by the preamble to the Treaty, which referred not only to governments, but also to peoples, the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens; also, noted that the nationals of the states brought together in the Community were called upon to cooperate in the functioning of the Communities (through the intermediary of the European Parliament and the Economic and Social Committee).

Secondly, ECJ also made reference to article 177 (actual 234) of EEC Treaty, respectively the task assigned to the Court of Justice under Article 177, the object of which was to secure uniform interpretation of the Treaty by national courts and tribunals, and concluded that the states had acknowledged that community law had an authority which could be invoked by their nationals before those courts and tribunals.

In these conditions, ECJ underlined that the conclusion to be drawn is that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligation which the Treaty imposes in a clearly defined way upon individuals, as well as upon the Member States and upon the institutions of the Community

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive, but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation it follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

In addition, the argument based on Articles 169 and 170 of the Treaty put forward by the three governments which have submitted observations to the court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the court a state which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court ...

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision, in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States”.

The ECJ established thus in *Van Gend en Loos* the initial conditions to be met so that a Treaty article could have direct effect; starting from the requirement, familiar from international law, that a provision should be essentially self-executing, the criteria which were to be met were as follows: negative, clear and precise, unconditional, containing no reservation on the part of the Member State, an not dependent on any national implementing measure (but the development of direct effect in subsequent years was characterized by the broadening and loosening of these initial conditions).

These criteria imply a restrictive vision of the range of Treaty provisions that may be invoked before national courts; in practice, however, they have been interpreted liberally over the years, ECJ’s jurisprudence emerging to the idea of liberalization and expansion of direct effect.

As for the first condition (the Treaty article must contain a negative obligation), it was to be dropped, as it will be presented, altogether, as ECJ later also recognized direct effect for Treaty provisions containing positive obligations and even in the case of incomplete implementation of principles stipulated by Treaties, as a result of non-taking of appropriate measures at Community level.

The conditions that the Treaty Article should be clear and unconditional, containing no reservation on the part of the Member States, was qualified within a few years of the *Van Gend* ruling; they were explained in literature (17) as follows: “clear and precise” is a necessary condition for a correct interpretation of the norm by the national judge, “unconditional” refers to a special category of EEC provisions, which stipulated transitory obligations during the transition period that lasted until 1970 (at the end of this period, this kind of obligations would become unconditional).

The ECJ made it clear that the existence of Member State discretion to, for example, prevent the free movement of goods on grounds laid down in what is now article 30 ECJ did not preclude the direct effect of article 28, since the cases coming within article 30 were exception and did not undermine the force of the clear obligation contained in what is now article 28. Similarly, in *Van Duyn*, the ECJ rejected the argument that what is now article 39 (3), which allows limitations on the free movement of workers on grounds of public policy, public security, or public health, prevented article 39 from having direct effect, because “the application of these limitations is subject to judicial control”.

The idea that direct effect could apply even where the Member States possessed discretion, on the ground that the exercise thereof controlled by the courts, represented a significant juridical shift in thinking about direct effect.

Finally, the idea that direct effect was precluded where further measures were required at national level was also modified, as the ECJ’s strategy was to fasten on the basic principle that governed the relevant area; therefore, should the treaty article be sufficiently certain, it would accord it direct effect, notwithstanding the absence of implementing measures at Community and national level.

Thus, article 43 EC, for example, provided that restrictions on freedom of Community national establishment nationals in States, other than that of their nationality, were to be abolished “within the freedom framework of the provisions set out below” (the framework in question was to have included a general programme and a set of directives to liberalize the activities of employed and self-employed persons, but few of these had been adopted by the time the *Reyners Case* arose in 1973 – the case is to be presented below).

Vertical direct effect – positive obligations

As exposed above, ECJ first acknowledged direct effect for Treaty provisions containing negative obligations and therefore a natural question appeared – the doctrine of direct effect only concerned negative obligations?

This aspect was soon to be clarified, on the occasion of a preliminary ruling on the basis of the reference made by a German court, in the *Lutticke* case, which concerned the direct effect of article 95 (3) of the EEC Treaty – a transitory provision which no longer is in force today.

The ECJ found that article 95 (3), which imposed a positive obligation to abolish any discriminatory taxation was directly effective; individuals could, therefore, rely on this provision before their national courts from that time.

Vertical direct effect - incomplete implementation of principles

The third step into liberalizing the direct effect of Treaty provisions had its starting point in the *Reyners v. Belgium* case.

Jean Reyners was a Dutch national who obtained his legal education in Belgium, but was refused admission to the Belgian Bar (as lawyer) solely on the ground that he lacked Belgian nationality, a condition imposed by domestic law. He challenged the relevant Belgian legislation before the Conseil d'Etat, which referred several questions to the ECJ, including the question whether article 52 of the Treaty was directly effective, in the absence of implementing directives under articles 54 and 51 of the Treaty.

The Belgian government argued that article 52 merely laid down a principle that was to be complemented by secondary legislation, and that it was not for the Court to exercise a discretionary power, which was reserved to the legislative institutions of the Community and the Member States.

The ECJ rejected the argument, starting from the idea that the rule on equal treatment of nationals was one of the fundamental legal provisions of the Community, which was, by its essence, capable of being directly invoked by nationals of all the other Member States.

In order to support this conclusion, ECJ pointed out that, “in laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result, the fulfillment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures...the fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfillment...it is not possible to invoke against such an effect the fact that the Council has failed to issue the directive provided for by Articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by Article 52; after the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect”.

Thus the ECJ determined that, despite the slow harmonization of national laws in this field, the Treaty could be directly invoked by individuals in order to challenge obvious discrimination based on nationality; the basic principle of non-discrimination was established to be directly effective, even though the conditions for genuine freedom of establishment were far from being achieved.

Connected to the case presented above, an important remark is to be made, respectively the idea that, whereas many cases on direct effect concern the enforcement of obligations against a Member State which has failed properly to implement Community requirements, the *Reyners* case

shows the Court employing direct effect to compensate for insufficient action on the part of the Community legislative institutions.

The Defrenne judgment relaxed further the original Van Gend en Loos criteria for direct effect.

In this case (*Defrenne v. Sabena*), under Belgian law, female air stewards were required to retire at the age of forty, unlike their male counterparts. Gabrielle Defrenne had been forced to retire from the Belgian national carrier as stewardess on this ground in 1968. She brought an action against the former employer, Sabena, claiming that the lower pension payments this entailed breached the principle in article 141 EC that ‘each Member States shall ensure and maintain the principle that men and women should receive equal pay for work of equal value’.

On this point, there appeared to be a number of obstacles to Article 141 being directly effective - the principle seemed to be neither clear, nor unconditional, as complete implementation of the principle would require elaboration of further criteria for recognizing discrimination and implementing measures to abolish it.

While in *Reyners*, the terms of article 43 seemed to envisage further implementing measures, article 141 in *Defrenne* appeared to lack sufficient precision to be directly enforced by a national court (the first obstacle, concerning the lack of implementation of the principle, had already been overcome in *Reyners*).

Article 141 at that time required States to ensure “the application of the principle that men and women should receive equal pay for equal work”; unlike the Treaty provisions in *Van Gend*, article 141 did not impose a very precise (negative) obligation on the Member States - the term “principle”, for example, is not very specific, nor were the terms “pay” and “equal work” defined (it was also evident that neither the Commission, nor the States considered that provision to be directly effective or legally complete).

What the Court did, however, was to identify and isolate the principle stipulated by article 141, that of equal pay for equal work, rather than to focus on the fact that there might be cases (unlike the one under discussion) involving complex factual questions regarding “work of equal value”, concerning jobs which were different in nature.

Horizontal direct effect

Defrenne v. Sabena marked a significant liberalization of the doctrine of direct effect, in that it brought provisions of Community law that were less than “clear and unconditional” within the scope of the doctrine.

The case is important, in addition to this, for a second reason. In *Van Gend en Loos*, the party against whom the trader wished to have EC law enforced was the Dutch customs authorities, respectively a part of the Dutch state; in the *Lutticke* case, also, European law was enforced on an official authority of the state – these cases both concerned actions of individuals against official authorities, involving vertical direct effect.

In *Defrenne*, by contrast, the applicant had taken action against a private company – the Belgian airline, Sabena – a specific aspect which brought in the distinction between vertical direct effect and horizontal direct effect (direct effect in the context of legal proceedings against a Member State is known as “vertical direct effect”, whereas direct effect in the context of legal proceedings against a private party is known as “horizontal direct effect” - the vertical/horizontal distinction imposes the ECJ and national courts to differentiate between state entities and non-state entities).

The importance of the Court’s ruling in *Defrenne* was its recognition that Treaty provisions (such as article 141) were capable of bearing both vertical and horizontal direct effect; therefore,

they may be invoked, relied on and enforced in domestic legal proceedings whether the party proceeded against is the state or a private party.

The same conclusion was underlined in the Walrave case, concerning employment in case of organization of cyclism contests (in discussion was the compatibility between the provisions stipulated in the rules of the Union Cycliste Internationale, which imposed that the pacemaker must be of the same nationality as the stayer and EC law), where the Court stipulated that the prohibition on discrimination based on nationality contained in articles 7, 48 and 59 of the EEC Treaty does not apply only to the action of public authorities, but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services, including agreements and rules which do not emanate from public authorities.

Indirect effect

According direct effect to provisions of Community law (including Treaty provisions, which are the topic of this paper) is not the only way of enabling their enforcement by national courts and tribunals - the European Court was concerned to give as much as possible useful effect (usually the term “*effet utile*” is used untranslated) to Community law; it tried therefore to circumvent the difficulties as to direct effect described above (in case that the EC norm in discussion did not satisfy the basic conditions – sufficiently clear, precise and unconditional) by pursuing another line of reasoning.

As already presented, the Court of Justice may enforce a provision of Community law, whether it has direct effect or not, by means of the procedure stipulated in article 226 to 228 EC; in addition, national courts may enforce measures of EU law, even in case that they should not have direct effect (as they do not fulfill the cumulative conditions presented above), through two additional means: namely, through the duty of consistent interpretation - “indirect effect” - and through the doctrine of state liability.

The establishment of the duty of consistent interpretation appeared in Von Colson case, which took in discussion a directive invoked during the proceedings before a German labour court, as its terms were insufficiently clear and unconditional to satisfy the test for direct effect; however, the Court of Justice ruled that this did not necessarily mean that the directive could be of no assistance to the claimants.

The Court’s reasoning in support of this conclusion is, in some respects, reminiscent of its reasoning in Van Gend en Loos. In particular, the fact that the EC Treaty contains no explicit authority for the proposition that national courts are required to interpret and apply provisions of national law in conformity with Community law did not stop the Court of Justice making such a proposition (the Court explicitly relied on two sources of law in support of its establishment of the doctrine of indirect effect: article 6 of Directive 76/207/EC in discussion and article 10 EC - the latter contains the “fidelity principle”).

The Court's ruling in Van Colson established the duty of consistent interpretation as being limited to the specific context of the interpretation by a national court of national law whose explicit purpose was the transposition of Community law (and the particular of directives) into national law.

This limited interpretation was dropped by the Court in its ruling in the Marleasing case, which concerned a “horizontal situation involving two private parties before a domestic court, where the interpretation of national law in the light of an unimplemented directive would not impose penal liability on any party, but was likely to affect its legal position in a disadvantageous way” (18).

Expanded the law of indirect effect in two ways: first, by giving it a more wide ranging content, requiring all national legislation to be interpreted in the light of EC law, irrespective of whether it was implementing legislation or not, and irrespective of whether it was enacted prior or subsequent to the provision of EC law in question; and secondly, strengthening the national courts' interpretive duty.

Still, the risks implied in using the doctrine of indirect effect have been recognized by the Court of Justice in two ways: first, the Court has held that indirect effect does not require *contra legem* interpretations of national law (the strength of the interpretive obligation is not so strong as to require a provision of national law to be given a meaning that contradicts its ordinary meaning); secondly, the Court has been particularly cautious of using the doctrine in the field of criminal law, where legal certainty is particularly important for safeguarding the liberties of the individual.

Liberalization of the doctrine of indirect effect has been made in the *Pfeiffer* case, where the ECJ stipulated that "the requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction to ensure the full effectiveness of Community law when it determines the dispute before it ...".

The judgment in *Pfeiffer* illustrates thus the extent to which the Court has developed the doctrine; effective judicial protection may have originated with the terms of Article 6 of Directive 76/207/EC, but it is no longer so confined - on the contrary, it is now "inherent within the system of the Treaty", and applies to all EC law, including Treaty provisions.

Moreover, concerning the question of which instruments of European law national courts are required to consider when applying indirect effect (it might have been thought, in the wake of *Von Colson*, that national courts would be required to consider only such instruments of European law as may be directly enforceable in national courts - i.e., Treaty provisions, Regulations, Decisions and Directives), in 1989, however, the Court established in the *Grimaldi* case that the duty of consistent interpretation was to be taken into account not just for "hard law", but also of legally non-binding recommendations.

A final point about the duty of consistent interpretation needs to be made, respectively to the *Pupino* case, where the Court recognized action of indirect effect in the third pillar of the European Union.

The case arose a dispute relating to the interpretation, by an Italian criminal court, of Council Framework Decision 2001/220/JHA, adopted under article 34(2)(b) TEU, which provides that "Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect".

The significance of *Pupino* appears in two ways. First, there is no equivalent in the Treaty on European Union of Article 10 EC, the one provision of the EC Treaty on which the Court of Justice had expressly relied upon in support of its creation of the duty of consistent interpretation in *Von Colson* (as indicated in *Pfeiffer*, the duty is now seen by the Court as one which, as direct effect has always been, requires no textual justification - it is rather a duty that inheres "within the system" of the Treaties). Secondly, the judgment is significant for its decoupling of indirect effect from direct effect (article 34 TEU makes it plain that Framework Decisions under the third pillar cannot entail direct effect, yet *Pupino* shows that, despite this, they can have indirect effect).

Conclusions

The key reason given by the Court for the direct effect of Treaty provisions - a doctrine not spelled out by Treaties themselves, but created by the European Court's jurisprudence - was that

the fundamental aims of the Treaty and the nature of the system it was designated to create would be seriously damaged if EC law clear provisions could not be domestically enforced by those they affected (the same line of reasoning was later reiterated when acknowledging indirect effect for Community provisions).

Juridical literature suggested a distinction between the broader concept of direct effect, which entails the invocability of EC law, and a narrower concept, which relates to the conferral of subjective rights on individuals.

The original conditions for direct effect have been loosened in the years since *Van Gend en Loos*; the current position is that Treaty provisions have conditional and complete direct effect, which means that, provided that they fulfill the basic criteria (sufficiently clear, precise and unconditional), have both vertical and horizontal direct effect, and therefore may be invoked in legal proceedings not only against Member States and state entities, but also against private parties.

On the other hand, direct effect, in the classic “subjective” sense of the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts, is increasingly seen as but one way for Community law to impact on national law - indirect effect provides different ways in which Community law can impact on national legal systems. Also, the principle that national law should be interpreted in the light of EC law is a broad one – it applies not only to directives (although they were the starting point), but also EC Treaty provisions (and general principles of EC law, international agreements entered by the EC, other forms of non-binding EC law).

The implication of the creation of direct effect was enormous; thus, the ECJ conceived a new way of strong enforcement method, which was needed to ensure that Member States complied with the provisions to which they had agreed - automatic internalization of Treaty rules within national legal systems strengthened the effectiveness of Community norms – which appeared as a sanction for those Member States which had not taken the appropriate measures to implement EC law.

Also, by involving individuals and all levels of the national court system directly in the process of their application at domestic level, direct effect appears as a guarantee, a supplementary legal protection for individuals, who may invoke before their national courts the rights conferred to them by EC law.

Finally, from a theoretical point of view, the development of the doctrine of supremacy of Community law over national law was a logical sequel to the doctrine of direct effect.

Apart from the theoretical implications presented above, there were cases when ECJ’s stipulations had important socio-economic consequences; e.g., the finding of horizontal direct effect in *Defrenne* had considerable practical implications - on the one hand, protection for women in the workplace was significantly enhanced; on the other, the financial implications were considerable, as the immediate burden of compliance fell upon all parties against whom the right could be asserted (the Irish government argued, for example, that the costs of compliance would exceed Irish receipts from the European Regional Development Fund for the period 1975-77 and the British government argued that it would add 3.5 per cent to labour costs).

On the other hand, the development of the principle of harmonious interpretation (indirect effect) is also of important practical significance; despite the greater academic attention that is generally given to direct effect, it is indirect effect that is currently the main form of ensuring effect of EC law (as shown before, the doctrine of indirect effect has originally applied to directives - whether correctly, incorrectly or not transposed at all – but later cases extended its application to all EC law, including Treaty provisions which lack direct effect).

As for the future, it is clear that the doctrine of direct effect of Treaties has been well established by the European Court in its jurisprudence and largely discussed in juridical literature; the indirect effect of Treaties, especially the area to be covered by this notion, remains though a topic to be analyzed, in the light of the beginning made by the Pupino case, which extended indirect effect to the third pillar of the European Union.

Starting from the Court's considerations in Pupino, according to which "it would be difficult for the Union to carry out its task effectively if the principle of loyal co-operation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law, were not also binding in the area of police and judicial co-operation in criminal matters, which is moreover entirely based on co-operation between Member States and the institutions", whether the Court of Justice will keep following this line of reasoning remains to be seen.

References

1. Paul Craig, Grainne de Burca, *EU Law, Text, Cases And Materials*, Fourth Edition, Oxford University Press, 2007, p. 269
2. P.Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 1992, 12OJLS, 453
3. Damian Calmers, Christos Hadjiemmanuil, Giorgio Monti, Adam Tomkins, *European Union Law, Text and Materials*, Cambridge University Press, 2006, p. 365-366
4. Damian Calmers, Christos Hadjiemmanuil, Giorgio Monti, Adam Tomkins, *cit*, p. 365-366
5. Guy Isaac, Marc Blanquet, *Droit general de l'Union Europeenne*, 9-e edition, Dalloz, 2006, p. 267
6. Joel Rideau, *Droit Institutionnel de L'union et des Communautes Europeennes*, 3-e edition, Librairie Generale de Droit et de Jurisprudence, E. J.A., 1999, p. 819
7. R. Lecourt, *L'Europe des juges*, Bruylant, Bruxelles, 1976, p. 248
8. Augustin Fuerea, *Drept comunitar European. Partea generala*, Editura All Beck, 2003, p. 155-157
9. Gilbert Gornig, Ioana Eleonora Rusu, *Dreptul Uniunii Europene*, Editia a 2-a, Editura C.H.Beck, Bucharest, 2007, p. 75
10. Dacian Cosmin Dragoș, *Uniunea Europeana, Instituții, Mecanisme*, ediția 3, Editura C.H. Beck, Bucharest, 2007, p. 100, Gyula Fabian, *Drept Institutional Comunitar*, ediția a II-a, SC Editura Sfera SRL, Cluj Napoca, 2006, p. 86
11. W.van Gerven, *Of Rights, Remedies and Procedures*, 2000, 37 CML Rev. 501; D. Edward, *Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations*, in Scritti in Onore di Giuseppe Federico Mancini, II, *Diritto dell' Unione Europea* (Guiffre, 1998), 423
12. Raluca Bercea, *Drept comunitar. Principii*, Editura C.H. Beck, Bucharest, 2007, p. 210-212
13. D. Wyatt, *New Legal Order or Old*, 1982, 7 EL. Rev. 14
14. Raluca Miga-Besteliu, *Drept international public*, Volumul I, Editura All Beck, Bucharest, 2005, p. 110
15. C. Blumann, L. Dubois, *Droit institutionnel de l'Union Europeenne*, p. 315
16. Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a III-a revăzută și adăugită, Editura Universul Juridic, Bucharest, 2006, p. 167, Ovidiu Tinca, *Drept Comunitar General*, Ediția a III-a, Editura Lumina Lex, Bucharest, 2005, p. 304
17. Tudorel Stefan, Beatrice Andresan Grigoriu, *Drept comunitar*, Editura C.H. Beck, Bucharest, 2007, p. 210
18. G. Betlem, *The Principle of Indirect Effect of Community law*, 1995, 3ERPL1; M. Amstutz, *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, 2005, 11ELJ 766

DEFINITION OF REFUGEE IN INTERNATIONAL LAW: CHALLENGES OF THE PRESENT TIMES

Catrinel BRUMAR*

Abstract

Traditionally, a refugee in international law is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country (according to the 1951 Convention on the refugee status). Thus, in cases challenging the status of an individual as a refugee, the reference to the above mentioned definition and the criteria it employs should be sufficient in order to determine the recognition of the specific protection.

However, at present, thousands of persons are forced to leave their country for economic reasons or because of natural disasters. These people, running from natural adversities and from poverty, exercise in fact their right to seek happiness, or in more ordinary terms, their well being. The states' response for these individuals is yet far from being positive, as they keep to the traditional definition, where criteria as poverty or natural disaster are excluded, in order to refuse them the benefit of the refugee status. Nevertheless, the international bodies, as well as states, must deal with these refugees "hors Convention" and grant them, in order to fulfill commitments in the human rights field, some form of protection. This paper intends to analyze the pressures exercised on the traditional definition, the states' reaction and the possible other forms of protection for an optimal response to the need of persons who are outside their country because of economic reasons or natural tragedies.

Key words: refugees, grounds of persecution, need of protection, objective standards.

Introduction

Traditionally, the refugee is defined, both in the United Nations High Commissioner for Refugees (UNHCR) Statute and in the 1951 Convention relating to the Status of Refugees (here after the "1951 Convention") as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

Through practice and competent bodies guidelines, this definition, was interpreted in a broad manner, in order to permit a larger number of beneficiaries. However, the definition relies on a complex of subjective and objective factors and has an individualist approach. In real life, the large number of persons crossing an international border and founding themselves denied or without the protection of the country of origin made it difficult to verify the fulfilment of the conventional standards in order to recognise the quality of refugee or, even more painful, made this demarch useless, as the primary need for protection prevailed over other standards.

* Lecturer, Ph.D. candidate, Law Faculty, "Nicolae Titulescu", Bucharest (e-mail: catrinelbrumar@yahoo.com).

The traditional definition of refugee

The doctrine and case-law explained and interpreted this definition, in order to identify the criteria to be fulfilled by a person in order to be granted the refugee status. It appears from this analysis that four conditions must be verified:

1. the person must have crossed an international frontier, as the 1951 Convention talks about a person who is “outside his or her country of origin”
2. the person must invoke a well-founded fear of persecution
3. the invoked ground for persecution must enter into one of the five reasons identified by the 1951 Convention: race, nationality, religion, membership of a particular social group or political opinion.
4. the person is without the protection of his or her country of origin.

1. The crossing of an international frontier

The crossing of an international frontier is a fundamental condition in order to discuss the applicability of the refugee definition, as only a person who has fled his or her country of origin can be considered as a refugee. This condition is not to be linked with the other requisites of the refugee definition, as it is not necessary that the person leaves his or her country of origin by reason of persecution¹. It is possible that a person becomes a refugee after leaving the country of origin and that the crossing of the international frontier has no connection with any fear of persecution, but it is an intrinsic part of the refugee definition this position of the person finding him or herself outside the country of origin.

2. Well-founded fear of persecution

The person aiming at obtaining the recognition of the refugee status must invoke a well-founded fear of persecution.

As the fear is concerned, every feeling is intrinsically subjective and consequently could not be quantified or expressed in precise components. The fear must however derive from conditions of general or individual character that locate the individual in a social and political context and permit to establish if the person, considering his or her particular situation, is well founded in the sentiment of fear, as he or she it is facing the risk of persecution². This sentiment makes the connection between the past – past acts of persecution, past events contributing to the picture of the general and personal situation – and the future – the risk or serious possibility of future persecution, as it is not necessary that such an act could have already taken place.

The persecution concept, not defined in the 1951 Convention, is linked by this very instrument to the violation of individual fundamental rights and freedoms, such as the right to life, the right to freedom and safety, the interdiction of torture or ill-treatment.

In states' practice and case-law, the persecution was perceived as “severe violation of basic human rights”, “systematic and discriminatory conduct”; if general acts of persecution are perpetrated because their authors see or perceive something about their victims or attributed to their victims, only the persecution for reasons of one of the five grounds identified in the Convention qualifies a person to obtain the refugee recognition.

The author of persecution was traditionally evoked as a “agent of persecution”, or the term of agent usually describes a person acting on behalf of another, so that the “agent of persecution”

¹ G. S. Goodwin-Gill, J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), 65

² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva, HCR/IP/4/Eng/REV.1 Reedited, January 1992), 43

was traditionally considered to be the agent of the state; in this way, the only persecution acts taken into consideration were the acts of state agents or, more generally, of state³.

This narrow interpretation is partially sustained by the relation the 1951 Convention establishes between the persecution and the lack of protection, as the definitions stated that the person “is unable or unwilling to avail himself or herself of the protection” of the state. However, if it is undisputed that only a state could offer protection, the developments show (as it will be detailed below) that the authors of persecution are not only state agents but also non-state actors.

3. *Reasons for persecution*

The 1951 Convention identifies five grounds of persecution, grounds that in many situations represent also grounds for discriminatory treatment of the individual. The five reasons are: race, religion, nationality, membership of a particular social group and political opinion.

a. Race

The race is defined in the Convention on the Elimination of All Forms of Racial Discrimination as “race, colour, descent, or national or ethnic origin” in the context of the racial discrimination definition. If at origins the 1951 Convention gave to this ground a narrow interpretation, the development in the world justify the reference to the Convention on elimination of Racial Discrimination, extending the notion to “ethnic origin” or to “national origin”, although the basic sense of race does not cover these aspects of a person’s identity.

b. Religion

The introduction of this ground in the text of the 1951 Convention testifies not only the will of nations to learn from the past’s lessons, but also their conviction as to the fundamental character of the freedom of thought, conscience and religion. In fact, the definition of the refugee has as premise the freedom of everyone to have, adopt and manifest a religion or belief of his or her own choice.

However, the concept of religion evolved during the last 50 years and the discussion challenges the traditional concept in order to permit the access of other beliefs that qualify as religious and philosophical convictions, determining individuals to manifest these beliefs in religious groups or associations.

c. Nationality

The notion is rather ambiguously used, as it is not to be understood as an expression of the link between the individual and the state of origin but rather as to include origins or membership to ethnic, religious, cultural, linguistic communities; this interpretation should not be reduced to minorities, although the situation of minorities is often much more sensitive. However, it is possible that a link to a majority community constitutes a ground of persecution.

d. Membership to a particular social group

A social group can be defined as people in a certain relation or sharing similarities, interests, values, aspirations, social status or activities. The essential aspects for determining a particular social group should be the factual circumstances that constitute similarities in all the members’ situation and their legal or social treatment.

³ L. Jeannin, M. Meneghini, *Le droit d’asile en Europe: étude comparée*, (Paris: L’Harmattan, 1999) 40-41

e. Political opinion

The political opinion is generally understood as an opinion a person expresses about the functioning, the decision and the measures adopted by the government or the policy makers in the state of origin.

The political opinion must be an assumed one, but it is not necessarily to have been expressed of an open manner.

As the remembrance of the political opinion in the refugee definition aims at undermining the fundamental character of another individual freedom – the freedom of expression –, the person expressing these political opinions must not be asked to cease or to moderate his or her speech, without violating the freedom of expression.

4. Lack of protection

The lack of protection refers to the protection that states must afford to people under their jurisdiction with respect to fundamental rights and freedoms. When such a protection is missing or is refused to an individual subjected to persecution or facing such a risk, then the person is entitled to seek international protection.

It follows from the definition that the international protection is a subsidiary one and it engages only if and when the state's protection is unavailable because of the state's failure or refusal to afford it.

This traditional approach is very tied to the concept of persecution for one of the five grounds recognised by the 1951 Convention. Although the doctrine and the practice tried to broaden the notion, the resistance of domestic authorities made this demarch not complete.

The concept of refugee in UNHCR practice and regional approaches

Since the adoption of the conventional definition, pressures exercised on the traditional approach by practice and case-law determined changes in the perception of a refugee. As we will see, the practice of UNHCR as well as regional tentatives to define a refugee underlined the need for a flexible approach, where the need for protection, determined by the forced character of the migration, is intended to become the principal factor to be taken into consideration in the evaluation of a person's claim to benefit from recognition of the refugee status.

This section of the paper will briefly present the two important directions for change; the practice and the regional approach.

1. The practice of UNHCR

The mandate of UNHCR defines the refugee in a similar manner as the 1951 Convention that it in fact preceeded. However, during the almost 60 years of its existence, the UNHCR was confronted with situations where, on one hand, the massive afflux of refugees made it impossible for a individual determination fo the fulfilling of criteria in orfder for a person to be recognised as a refugee and, on the other hand, the immediate need for protection for people falling outside the refugee qualification necesitated a rapid reaction irrespectve fo the fulfilment of criteria.

Thus, starting with the Chinese refugees in Hong Kong⁴ or the algerian refugees in Tunis or Marrocco⁵, the UNHCR offered protection to persons whose situation was of concern for humanity. In the beginning of ita mandate, the UNHCR assistance was reduced to a financial one, but in time the UNHCR developped programs of assistance and rapid reaction for all people who

⁴ United Nations General Assembly Resolution 1167 (XII)

⁵ United Nations General Assembly Resolution 1389 (XIV)

crossed an international frontier in seek of a form of protection, refused or inexistent from their country of origin.

2. The regional approaches

At regional level, the definition of a refugee encounters several changes, as the countries experts in that region acknowledged the need for protection of people forced by civil war or other circumstances in their country of origin to cross an international frontier or the need for a more comprehensive interepration of the traditional conventional definition.

a. The Convention governing the specific aspects of refugee problems in Africa

This convention, adopted in 1969, tried to offer a regional response to challenges put by the african refugee movements. As a result, the definition of the refugee, as retained by the Convention, after reaffirming the inclusion clauses of the 1951 Convention and stating that the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it, enlarges the application of the conventional instrument to ever person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The african definition introduces objective criteria in the determination of a refugee⁶; as a consequence, in case of circumstances affecting or destroying the state, the factual aspects are sufficient in order to recognise a person as a refugee and offer the benefit of an international subsidiary protection.

The objective criteria are echoed in other extraconventional documents in this field, as the Cartagena Declaration on Refugees and the Bangkok Principles Concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee. However, these documents are adopted by experts and have a limited influence of the evolution of the refugee definition.

b. The European level

At the european level, two poles of preoccupation can be remarked.

The first one is the Council of Europe. In the framework, the two major organs of the european organisation, namely the Parliamentary Assembly and the Committee of Ministers manifested concern for the situation of the de facto refugees, as being those persons that do not benefit from recognition as refugees under the 1951 Convention or have strong but different from persecution reasons to refuse the come back to the countra of origin. Although this effort did not generate the expected results, the categories of de facto refugees benefited at the national level of member states of other forms of complementary protection.

The second center of preoccupation ids the European Community, in principal starting with the Amsterdam Treaty that extended the Community competences in the field of asylum and immigration. As a result, a nes body of legislation was adopted. One of the pieces of this legislation, the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the

⁶ M. Delcea, *Protecția juridică a refugiaților în dreptul internațional*, (Timișoara, Editura Presa Universitară Română, 2002), 163

qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, provided for minimum criteria to be applied when interpreting the refugee definition contained in the 1951 Convention.

This option made by the European legislative does not recourse to objective standards and that preserves the traditional approach, excluding from its application the persons who have fled their homes for serious reasons but different from persecution fear. However, the definition englobes the benefits of 50 years of practice and specialists guidelines and offers a general view of the refugees definition present status.

After reaffirming the definition in the 1951 Convention, the Directive explains the extent of terms used in this definition, such as persecution, grounds for persecution, agent of persecution, protection.

In the European Community's approach, an act qualifies as persecution if it is sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely the right to life, prohibition of torture, prohibition of slavery and no punishment without law. An accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as severe violation of human rights are also considered as acts of persecution. The Directive constructs a very narrow connection between human rights and persecution, as an act of persecution constitute or contains a human rights' violation.

As to the grounds of persecution, the Directive reiterates the five reasons of the 1951 Convention, but offers a more generous interpretation, in accordance with the interpretation provided by the UNHCR and various domestic bodies involved in the national implementation of the 1951 instrument⁷.

The Directive acknowledges that the actors of persecution or serious harm include the state, but this entity is no longer considered to be the sole agent of persecution, as parties or organisations controlling the state or a substantial part of the territory of the state and non-state actors, can also apply a treatment amounting to persecution.

In the area of protection, the Directive considers the state to be the principal provider for protection, but parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state can also offer this benefit. The formal protection is not sufficient, as the normative text requires prevention of the persecution in various manners, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

The development of the refugee definition through practice, case-law and regional approaches: sketch of the challenges and progress

The development of the perception over the refugee concept was due, in our opinion, to two major kinds of factors.

The first category of factors refers to the adoption by many practitioners of broader interpretation to the five grounds of persecution identified in the 1951 Convention and the acceptance of the fact that the nominated conventional ground should not be the sole or the dominant ground for persecution.

⁷ Jane McAdam, 'The Qualification Directive: An Overview', in Karin Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, (Nijmegen: Wolf Legal Publishers, 2007) 8-9

The second set of factors valorizes the new approach of the relation between the state and the agent of persecution and, as a consequence, of the statal protection concept, that required this protection to be real, adequate and effective.

The broad interpretation of the reasons for persecution

Although reasons like race or nationality did not give rise to challenges in the interpretation an application of the 1951 Convention, concepts as religion, particular social group or political opinion benefited from revisiting the initial sense, in order to adapt the refugee definition to realities of the five decades that the 1951 convention crossed.

The first general observation when presenting the developments in the conception about the grounds of persecution is that in the determination of the objective standard of “being persecuted” it is made constant reference to international human rights standards. This way, the freedoms of religion, expression are given the sense established in international human rights law. The work of monitoring organs in human right law is often quoted by the UNHCR or the Convention refugee law practice organs.

As we showed in the previous section, the european approach considers that an act of persecution contains at least some aspects of human rights’ violation; however, the UNHCR underlines that various measurs, not in themselves amounting to severe human rights’ violation alone or in combination with other adverse factors, can give rise to a well’founded fear of persecution, making one’s life so insecure in the country of origin that the only solution for that person is to leave that country.

Thus, although in many situations persecution is equal or constitutes a violation of human rights, other possible persecutory treatments should not be excluded.

As a *first consequence* of this reference to international human rights standard, the treatment of an individual claiming the refugee recognition will take into consideration the need for respect of basic human rights in the evaluation of the risk of severe harm. Thus, the fact that a person will engage, at the return in the state of origin, in a voluntary activity that is prohibited by the domestic law or practice (homosexuality, non recognized religion) in violation of basic standards in international human rights law is to be taken into consideration in determining the risk of persecution.

However, we cannot but note with regret the opposition that the volutary but protected activities still meet at the national and even at the european level, as domestic bodies still consider that exercise of freedom of expression or religion in the state of reception is in fact a way of constructing a refugee appearance or case and sometimes sanction this use by refusing to recognise the refugee status. In this respect, the European Directive considers that “a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon *constitute the expression and continuation of convictions or orientations held in the country of origin*”. The grant of the refugee status depends on the past experience of the individual, and excludes the cases where the person, exercising his or her freedom of expression or religion decides to criticise or adopt new opinions. Moreover, the change in one’s opinion or religion, far from being considered a normal exercise of fundamental rights, is apreciated as ground for refusal of refugee status, as Member states may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

It is however true that the evolutive interpretation of some of the five grounds generated a broader approach of refugee concept.

For instance, the reason related to religion is naturally interpreted as not limited to traditional religions or to religions similar to the traditional ones; at the same time, in accordance with the international proclamations of this freedom of religion, the analysis of the refugee claim does not only take into consideration the personal, intimate ideas about the spiritual destiny of humankind, but also includes different aspects of one person's convictions, belonging to a particular group and ordinary life (distinctive clothing, dietary requirements, other practices), in conformity with the interpretation provided by the Human Rights Committee in its General Comments, that the UNHCR cited in its guides and handbooks, suggesting that the notion of religion should benefit of a broader interpretation.

At the same time, another notion used in the identification of the five grounds of persecution, the notion of "particular social group" evolved from a very narrow interpretation, referring to a group that has immutable characteristic - that is, a common past, ethnicity - to an approach that considers a social group to be a group sharing a common characteristic which make it recognizable by the rest, without needing to be cohesive. This way, groups like Chinese women who already have one child and face the risk of application of the domestic legislation on the demographic control are considered to be a group, as well as other types of groups where the gender criterion is important.

The gender-based persecution became an important part of the discriminatory acts that the application of the 1951 Convention dealt with⁸. In fact, in a very short period of time women founding themselves in a very delicate situation (rape, battery, genital mutilation, forced marriage etc.) were considered to constitute a particular social group, although they did not fit in the classic definition of this ground of persecution. The use of the gender criterion in evaluating the risk of persecution on a Convention ground is now frequent when it comes to religion and the restraints it imposes or to political opinion, in the context of women refugees punished for the political activity of their family male members.

In this respect, it is worth mentioning the provisions of the European Directive, that lists acts of a gender-specific or child-specific nature among the various forms of persecution.

As a *second consequence*, one could not reproach or advise a person claiming the refugee recognition to have a certain behaviour in order not to offend his persecutor, once he or she has return to the state of origin⁹. The requirements of discretion, self-restraint or moderation when fundamental rights and freedoms are involved in order to elude the risk of persecution are undermining the refugee protection and such an application would expose many people to a mutilation of their rights.

As a *third consequence*, one could note the fact that the refugee conventional law, at the beginning centered on the individual perspective, becomes more objective and group-oriented. This change is due to the fact that, on one hand, the ill-treatment, discriminatory acts suffered by other members of the group (family, community, political association) could offer an image about the general degree of human rights protection in the state of origin and by that state and, on the other hand, the situation of other members of the group to which the individual belongs is taken into account in the analysis of the risk of persecution.

The protection of the state of origin

The definition laid down in article 1 of the 1951 Convention permits to recognize both state and non-state actors as agents of persecution. Although traditionally, the persecution was perpetrated by the authorities of a country, it is often that authorities, without being actively

⁸ N. Kelley, "The Convention Refugee Protection Definition and Gender-Based Persecution: A Decade's Progress", *International Journal of Refugee Law* 13 (2001): 565

⁹ Rodger P.G. Haines, James C. Hathaway, and Michelle Foster, "Claims to Refugee Status based on Voluntary but Protected Actions: Discussion Paper No. 1", *International Journal of Refugee Law* 15 (2003) :430-443

involved in persecution, tolerate or are unable to offer protection against persecutory acts perpetrated by individuals. In fact, the UNHCR in its guidelines for interpreting the 1951 Convention goes a step further and considers that a persecution unrelated to a Convention ground and perpetrated by a non-state actor could nevertheless be considered from the refugee definition perspective if the failure or refusal of the state's protection is founded on one of the five grounds. Thus, the short and classic definition of a refugee as being a victim of state persecution became very soon a very restrictive one and was rejected on the ground that against the acts of a private persecutor, the state of origin in first place must offer a genuine protection.

The state's protection must not only be formally available, it should be effective and adequate, as the mere existence of a state system of protection does not, in absence of effectiveness, protect the person from a risk or present persecution. As the European Directive puts it, prevention, as well as prosecution and punishment of acts of persecution should be assured by a system that a state puts in place.

If the state's protection is ineffective or refused to the individual, he or she are looking for international protection.

However, in this analysis, an important part refers to the internal flight alternative, or the protection the state can provide in other parts of its territory. If this protection is available and the person could have access to it, even if it implies some efforts from his or her part, then the international protection of a refugee should be refused to that individual.

In this respect, the European directive considers that technical difficulties should not be taken into account when examining the internal protection alternative. This approach is restrictive as it allows the imposition of an extraordinary burden on the individual, who is supposed to accept and assume the difficulties of the relocation, even if they impede him or her from continuing with a normal life and from enjoying the fundamental rights.

This perspective is more sensitive with the state's efforts to provide a protection, even if it is scarcely enough but not with the individual's need for genuine protection, even if we are talking about a subsidiary, international protection.

In this respect, the UNHCR's approach is the most favourable to the individual, as it focuses on the need for protection¹⁰ and on the fact that the necessity of that protection derives from the forced character of his or her leaving. This approach permits the access to international protection for individuals who, due to objective natural or social circumstances, are forced to leave their country of origin, and find refuge on another country's territory, like the economic or the ecological refugees.

Conclusions

The traditional definition of refugee, focused on the concepts of well-founded fear of persecution on the five grounds, feeds an individualist approach and does not permit the inclusion of objective circumstances that determine people to flee their homes in search of protection. Although the practice and legal personalities tried to enlarge the sphere of beneficiaries by evolutive interpretation, its scope remains narrow and refuses protection to persons in need.

Thus, the concentration on the need for protection allows to bring assistance to persons who would otherwise be excluded from the benefit of the refugee status, and is recognised by the proliferation of complementary forms of protection in the national systems. In this respect, the quest for genuine, effective protection should be the one of the reasons for recognising the refugee status.

¹⁰ Niraj Nathwani, „The purpose of Asylum”, *International Journal of Refugee Law* 12 (2000): 354

THE PRINCIPLE OF FREEDOM AND EQUALITY

Elena COMȘA*

Abstract

“Principles have such a great influence over our opinions, that we usually refer to them in order to judge truth and to weight probability, to such an extent that what is incompatible with them is so remote and seems probable that we don’t even regard it as possible” (J. Locke)¹.

Although specialized literature is consistent in terms of the importance of having law principles, this cannot be said about the number of long established principles or about their grounds.

What is important, say professors Dogaru and Danisor², is that “any principle in relation to which all individual relations are sorted is indispensable for maintaining the society; the significance of this principle, what it authorizes and forbids is not indifferent, and what is primordial for the social organism is first of all its existence”.

The pursuit in researching the principles of freedom and equality aims to both an incursion in time and the deciphering of the juridical, philosophic and moral connotations afferent to such a vast area as that of law principles. Although an analytical³ description is intended of these principles, freedom and equality seem so interconnected in terms of their content and significance, as I consider that by undertaking them separately I would diminish their profound understanding and their impact.

Keywords: *principle, value, freedom, equality, discrimination.*

Introduction

“The discussion on principles – initiated in Athens in the 4th century B.C. and still ongoing today, 25 centuries later – is actually a discussion on the essence of the law, on its fundamentals”⁴.

Any law principle crystallizes social values, defined as “criteria for valuing, standards, milestones”; they are social because they represent in “the human life fundamental principles of choice”⁵. These values are not strictly juridical. They can be juridical, political, moral, religious, esthetic, philosophical, etc.

Values set axiological dimensions for any positive right. Juridical values (equality, freedom, justice) ground juridical rules, they are transposed in law norms; once they become consecrated values are protected, promoted by such. Non-juridical values (good, truth) become or juridical nature and are then protected in the same manner.

Gh. Mihai draws attention on the fact that “people live together, they do not co-exist”⁶; they “collaborate”, “get to consensus”, they “cooperate”. Law involves otherness; whilst coexistence is

* Lecturer, Ph.D. candidate, Law Faculty, “Nicolae Titulescu”, Bucharest (e-mail: elena_comsa@yahoo.com).

¹ Quoted by Dumitru Mazilu, Law General Theory (Romanian title: Teoria generală a dreptului), Ed. All Beck, București, 1999, p. 126.

² I. Dogaru, D.C.Danisor, Gh. Danisor – Law General Theory (Romanian title: Teoria generală a dreptului), Ed. Științifică, București, 1999, p. 62

³ “analysis” = “general method for researching reality based on decomposing a whole into its components and studying each of them separately” – in Dictionary of Contemporary Romanian Language, (Romanian title: Dicționar al limbii române contemporane), Vasile Breban, Editura Științifică și Enciclopedică, București, 1980.

⁴ Gh. Mihai, *Fundamentele dreptului – Teoria izvoarelor dreptului obiectiv*, vol. III, Ed. All Beck, București, 2004, p. 147.

⁵ Gh. Mihai, *Fundamentele dreptului*, vol. I - II, Ed. All Beck, București, 2003, p. 168.

⁶ Idem, p. 163.

possible for flocks, hordes, and anthills, living together is translated by “awareness of values”. Each free man has the possibility of choice; however “we are similar by the values we receive, yet different by our valorizing, because any value is particularly valorized by action”.⁷

The present pursuit in researching the principles of freedom and equality aims to both an incursion in time and the deciphering of the juridical, and also philosophic and moral connotations afferent to such a vast area as that of law principles.

Literature Review

The specialized literature comprises opinions according to which the changes in the contemporary society have brought too much freedom, to much private independence to individuals; this is translated in more restless in life, as the individual is permanently asking himself “where, how far can and should he go”.⁸ It is the opinion of the distinguished professor Gheorghe Mihai that this aspects claim for a larger need for the law.

In another view, “the concrete law is not viable but for values and such values are always typically expressed in the enunciation of a law system’s principles.”⁹ Nonetheless, juridical axiology is not about researching only juridical values; it also aims to “give reason for the other social values”. Thus, principles represent the area in which law meets philosophy, moral, politics and the other social domains.

This is the reason why in drawing up this paper the guidelines have been followed set forth by professors Nicolae Popa, Ion Dogaru, Gh. Dănișor and D.C. Dănișor as expressed in “Filosofia dreptului. Marile curente” (The Philosophy of Law. Great Currents): “When it comes to law, and not only, it is necessary each time to start with the Greek and Roman antiquity, because that is where the source of the entire European development lays. Even if nowadays society is no longer similar to the one back then, if the institutions governing us are radically different, somewhere in depth, on the level of grounding principles, the universally valid ideas can be found which continue to rule us in the present”¹⁰.

Not least, we have attempted to grasp the manner in which in his encyclopedia “Teoria generală a dreptului” (General Law Theory) professor Mircea Djuvara defined freedom as “a default postulate in any law matter”, such that “law without freedom is a contradiction, a meaningless enunciation”¹¹.

In respect with the principle of equality, “rather regarded as a principle law than a law principle”, the referral paper has been that of Simina Elena Tănăsescu – “Principiul egalității în dreptul românesc” (Equality Principle in the Romanian Law).

Principle of Freedom

Although an analytical¹² description is intended of these principles, freedom and equality seem so interconnected in terms of their content and significance, as we consider that by

⁷ Gh. Mihai, *Fundamentele dreptului – Teoria răspunderii juridice*, vol. V, Ed. C.H. Beck, București, 2006, p. 44.

⁸ Gh. Mihai, *Fundamentele dreptului*, vol. I - II, Ed. All Beck, București, 2003, p. 53.

⁹ Gh. Mihai, *Fundamentele dreptului*, vol. I - II, Ed. All Beck, București, 2003, p. 167.

¹⁰ N. Popa, I. Dogaru, Gh. Dănișor, D.C. Dănișor - *Filosofia dreptului. Marile curente*, Ed. All Beck, București, 2002, p. 3.

¹¹ M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, Ed. All, București, 1995, p. 160.

¹² “analysis” = “general method of researching the reality based on decomposing a whole into its components and on separately studying each of these” – in *Dictionar al limbii romane contemporane*, Vasile Breban, Editura Științifică și Enciclopedică, București, 1980.

undertaking them separately we would diminish their profound understanding and also their impact.

Reflections have always been made on freedom. Regardless if approached as an ideal to be achieved or as a fulfilled reality, freedom transcends law. One can speak of freedom in moral, in art or in relation with the divinity; yet such exceed the theme undertaken hereby.

Nonetheless, entirely understanding freedom as human essence cannot be achieved but for a strictly juridical perspective. Although “freedom is the grounds for law. Without freedom we couldn’t understand that it is about law; we face a simple relation of forces which does not make object to law”¹³, in the specialized literature it is underlined that law regards freedom upon a restrictive manner: freedom-relation. Law only refers to the person-in-law; it restricts, sometimes hindering, the freedom of the “citizen” by considering other people’s freedoms; the finality of law is a social one: optimizing the relations between individuals by coordinating their freedoms and instating by this the juridical order.

Law is not concerned with the individual as a distinctive entity, considered himself; it is not about researching his human self, about improving man, but the structure, the order and therefore, it does not reveal authentic freedom. “The logic is turned over of finalities: instead of improving the individual and therefore, as a consequence, his moral progress, which makes him accept more and more the others’ freedom, improving the order, when viewing freedom from a juridical standpoint, we aim to improve order, and only as a consequence of this increased improvement in the logical coherence of the structure, the individual gets to be more protected”¹⁴.

Given the aspects above, the concept of freedom is to be described both from a philosophical view and from a juridical one.

Philosophic literature has always attempted to find answers regarding authentic freedom.

Plato believed that freedom could be obtained only by education; it is only this way that man would get away from appearances and would free himself by truth; the essence of freedom resides in revealing the truth by education.

For Aristotle also the most important was the improving nature of the human being. Freedom had to be searched by means of contemplation (theoria), and intuitive knowledge was regarded as the one able to raise man from his actual stage (praxis). Practice had to be subordinated to theory; intuitive wisdom was the one researching principles; by action (praxis) man would be able to get higher towards principles, could he “reach” freedom¹⁵.

Pufendorf considered that if man consented to the establishment of society he understood that by such he wouldn’t become lower, but he would gain increased freedom. For Montesquieu, freedom in a state is ensured by fundamental laws, however in relation to the citizen, and a decisive role is played by morals, habits¹⁶.

Rousseau considered that in the nature stage people had lived isolated from one another, yet being free and equal. The shift from the nature stage to the civil society represented a fall of the individual. He understood however to cease his natural freedom and “the unlimited right of obtaining everything that drew him and what he could touch” in order to obtain in return another type of freedom – civil freedom. This freedom as understood need represented the grounds of law in Rousseau’s opinion, because “the excessive impulse of wishing represents slavery, whilst obeying a law which you have established for yourself means freedom”¹⁷.

¹³ M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, Ed. All, București, 1995, p. 160.

¹⁴ I. Dogaru, D.C.Dănișor, Gh. Dănișor - *Teoria generală a dreptului*, Ed. Științifică, București, 1999, p. 65.

¹⁵ Apud N. Popa, I. Dogaru, Gh. Dănișor, D.C.Dănișor - *Filosofia dreptului. Marile curente*, Ed. All Beck, București, 2002, p. 49.

¹⁶ Idem, p. 121.

¹⁷ J.J. Rousseau, *Contractul social*, Ed. Științifică, București, 1957, p. 107.

Thus, at the basis of the social contract Rousseau put the free will of individuals. "Social pact establishes such equality between citizens that everyone subject to the same conditions and will enjoy the same rights"¹⁸. This is a consequence of the equivalence in renderings: if a citizen ceases to the whole a part of his natural freedom, then every body will enjoy the same treatment from the society.

The finality of the social contract is mainly juridical security. By the social pact, freedom and equality as natural rights are maintained and moreover guaranteed, and citizens' security is ensured.

For Kant "law is the set of conditions y which one's arbiter can get in agreement with another's arbiter, following a general freedom law". This is the idea of freedom-relation mentioned at the beginning. If law is about other people's freedom, then the law imposes, it constraints. And then freedom in the field of law is not authentic. "Freedom, in its absolute sense, is not possible otherwise but in the field of Ethics"¹⁹.

However, to this standpoint we oppose the assertion of Montesquieu: "Freedom is the right of doing what the laws allow; and if a citizen could do what they forbid, he would no longer have freedom, because the others could do the same"²⁰.

This way, the intransigence in the Kantian belief is considerably attenuated. In essence, it is about apparent (or at least justified) limitation of freedom by law imposed by the need of ensuring juridical order by harmonizing the freedoms of all individuals.

The law uses this subtle mechanism, limiting one's freedom, in order for everyone's freedom to triumph. Actually, this is "a confirmation of freedom and not a limitation of"²¹.

"Between law and morale no scission can exist. At the basis of law there lays humanity", says professor Djuvara, considering that the idea of individual right is losing ground nowadays in favor of social solidarity theory.

From this standpoint, individual's freedom is translated by the idea of duty. Law involves otherness and thus duties, respecting other people's freedom. By what mechanisms can law act over individuals in order to make freedom triumph, which actually is profitable precisely to them?

First of all, by constraint; the individual is imposed to adapt his behavior to legal provisions, otherwise being subject to correction. This way, perturbed juridical order is reinstated by applying the sanction. Yet, as specialized literature shows²², this way the action is made over the effect, by ignoring the cause; before breaching a law norm, the individual breaches a principle; his inner self is affected. He has to be helped to recover his sociability. How? By education, the second mechanism by which the law can act over the individual. This implies making the individual moral, improving him. The effect is a long term one, because the moral individual does not have to be constrained to respect the other's freedom, he makes it because that's how his inner self dictates it.

By getting away from his sollen area and focusing on his sein area, the concept of freedom approached from a strictly juridical view seems to be an ideal.

From a juridical standpoint, the notion of "freedom" has two senses: we speak of freedom in a general sense, as a guiding principle of law, and from the standpoint of juridical technique, as subjective law.

¹⁸ Idem, p. 127.

¹⁹ Apud N. Popa, I. Dogaru, Gh. Dănișor, D.C. Dănișor - *Filosofia dreptului. Marile curente*, Ed. All Beck, București, 2002, p. 221.

²⁰ Montesquieu, *Despre spiritul legilor*, Ed. Științifică, București, 1964, p. 193.

²¹ M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, Ed. All, București, 1995, p. 122.

²² I. Dogaru, D.C. Dănișor, Gh. Dănișor - *Teoria generală a dreptului*, Ed. Științifică, București, 1999, p. 69.

As a general law principle, freedom implies on one hand a just limitation of the individual's freedom of action so that by coordinating all freedoms juridical order would be ensured (as mentioned above, it is an apparent limitation; actually, it is a confirmation of such), and on the other hand, it is a break in front of a potential excess in the society's freedom in disfavor of individuals. This way, if others' freedom is respected, the individual gets the necessary guarantees regarding his own freedom.

"Freedom is this way an implied postulate in any law problem. Law without freedom is a contradiction, a meaningless enunciation"²³.

The state provides juridical warranty of the individuals' freedom, stipulating in art. 23 of the Constitution that "Individual freedom and person safety are inviolable". The constitutional text considers "the person's physical freedom, his right of freely behaving and moving, of not being held in slavery or in other kinds of servitude, of not being retained, arrested or held in custody but for the cases and in the forms which are expressly stipulated by the Constitution and by laws"²⁴.

The general principle of freedom is dispersed in the law areas in the form of individual freedoms: the freedom of conscience, religious freedom, the freedom of speech, the freedom of meeting, economic freedom, the freedom of entering contracts, the freedom of communicating, the freedom of getting informed, the freedom of getting associated, the political option freedom.

The human and citizens rights' statement proclaims freedom of person, providing that "people are born and remain free and equal in rights", freedom being defined as "the power of doing something that does not harm another".

The universal statement of human rights stipulates that "each individual is entitled to life, freedom and personal freedom".

The subjective right to freedom is considered an essential right for citizens, and its inalienable nature is constantly underlined in the E.C.H.R.: "No one can waive it"²⁵.

"Waiving one's freedom means giving up one's human nature, his human rights, even his duties..."²⁶.

Principle of Equality

Regardless how different people are in terms of gender, race, nationality, language or religious belief, they all have the same essence. Thus, equality is considered an inborn right and inherent to human beings. Professor Gh. Mihai speaks of the principle of "anthropological" equality: "people are equal meaning that no one is more or less a bio-psycho-social person, under no aspect, and this qualitative equality leads to identify, because people are essentially identical"²⁷.

The Universal Statement of Human Rights stipulates that "All human beings are born free and equal in dignity and rights". Referring to the nature as "human being", and not citizen, the text ascertains a natural equality of people, and not a juridical one. However, in order to be efficient equality has to be guaranteed from a juridical standpoint.

Ever since the antiquity there can be noticed at Plato and Aristotle a modern conception of democracy; it is grounded on freedom and equality. "If freedom and equality – said Aristotle – are,

²³ M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, Ed. All, București, 1995, p. 160.

²⁴ I. Muraru, E. S. Tănăsescu, *Drept constituțional și instituții politice*, ediția a 12-a, vol. I, Ed. All Beck, București, 2005, p. 166.

²⁵ C. Bârsan, *Convenția europeană a drepturilor omului. Comentarii pe articole*, vol. I – Drepturi și libertăți, Ed. C.H. Beck, București, 2005, p. 287.

²⁶ J.J. Rousseau, *Contractul social*, Ed. Științifică, București, 1957, p. 91.

²⁷ Gh. Mihai, *Fundamentele dreptului*, vol. I - II, Ed. All Beck, București, 2003, p. 185.

as often said, the two fundamental basis of democracy, the more complete such equality in political rights, the more pure democracy will exist in all its purity”²⁸.

The same opinion also had Alexis de Tocqueville, who thought that the equality of conditions was the basic principle of democracy, and Montesquieu for whom “love for democracy is love for equality”.

Numerous discussions take place in the doctrine in respect with the juridical nature of the equality principle. Opinions vary between considering equality as an objective law principle, or a fundamentally subjective one.

In the French law, equality is qualified as an objective law principle, with the particularity of providing it with a strengthening role over the effectiveness of the other citizen rights. In the German doctrine, the view is undertaken of subjective public law right.

In our law system it is stated²⁹ that although under the appearance of qualifying it as subjective right, the principle of equality is more than that: it is “a fundamental right with the value of a general principle for the field of fundamental rights”, it is an objective law principle regarding the equilibrium of law and moreover “it is rather considered as a principle right than as a law principle”, because it accompanies and guarantees the use of the other rights. Sometimes it has also been interpreted as a distinct set of rights, composed of different specific realities.

“Equality can only exist between free people, and freedom only between people the equality of which has been juridical ascertained”³⁰.

The principle of equality finds its juridical expression in the Romanian law by its being consecrated in the fundamental law. Its provision under a few of the Constitution’s texts does not affect the unitary nature of the concept.

In its general form, the principle of equality can be found in art. 16 of the Constitution, consecrating “The Equality in Rights”: “Citizens are equal in front of the law and public authorities, with no privileges or discrimination”. It is an “equality of chances” for all citizens³¹. This provision, in order to complete the content of the principle, should be correlated with the one comprised in art. 4 par. 2, where it is mentioned that “Romania is the common and indivisible country of all its citizens, with no differences regarding race, nationality, ethnic origins, language, religion, gender, opinion, political belonging, wealth or social origins”.

The other constitutional provisions are only applications of the principle of equality in various areas and they refer to: the right to identity for national minorities, non-discrimination in terms of salary rights for women and men, equality of spouses, just settlement of fiscal duties, equality of vote.

Essentially, equality in its general form resides in each citizen’s right of not being subjected to discrimination and of being treated equally, both by public authorities and by the other citizens. This is about an “equality in rights”, opposed to the concept of “actual equality”.

Simina Elena Tanasescu explains this opposition stating that “social life produces differences of which the lawgiver should take account when it attempts to impose a certain behavior to these law subjects. The versions at the lawgiver’s disposal are two: either it calls for juridical equality, establishing the equality in rights of all subjects, or it grounds on a material equality, referring to an equality of the results”³².

²⁸ Apud N. Popa, Ion Dogaru, Gh. Dănișor, D.C. Dănișor - *Filosofia dreptului. Marile curente*, Ed. All Beck, București, 2002, p. 63.

²⁹ S. E. Tănăsescu, *Principiul egalității în dreptul românesc*, Ed. All Beck, București, 1999, p. 4.

³⁰ N. Popa, M. C-tin Eremia, S. Cristea, *Teoria generală a dreptului*, ediția a 2-a, Ed. All Beck, București, 2005, p. 107.

³¹ M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituția României revizuită – comentarii și explicații*, Ed. All Beck, București, 2004, art. 16.

³² S. E. Tănăsescu, *Principiul egalității în dreptul românesc*, Ed. All Beck, București, 1999, p. 17.

Thus, the lawgiver provides an equal juridical framework for all citizens, ascertaining a formal equality; it is concerned with ensuring equal laws for all citizens, yet without guaranteeing equal results; “if positive right was the exact reflection of the natural right, then juridical equality should impose to the lawgiver to not make discriminations which nature would not make”³³. However, actual inequalities are inherent to the social life, says the author “this framework only has the vocation of universality; it does not comprise all law subjects in the same time”³⁴.

At the other end there is material equality, actual equality or equality by law; it refers to all concrete cases (“it rejects vocation to the universality of the principle”³⁵) and considers the existent differentiations, aiming for a concrete equality of the results.

Also referred to as “positive discrimination”, the principle of material equality aims either to correct actual inequalities, or to attenuate some existent juridical inequalities, concretized in (negative) discriminations, faced only by certain categories of persons.

This strategy involving not only a vocation for equality, but an effective, touchable equality, and also certain obligations from public authorities, was less used by the Romanian constitutional judge.

The different significances of the two equality standards are suggestively exemplified by Ch. Perelman³⁶ when he referred to the following: “when we consider merit, all people are equal, meaning they all deserve; but when we apply merit, equity interferes, which asks for everyone to have by its merits, which means establishing a hierarchy of inequality, without damaging equality”.

In respect with the notion of “discrimination”, it is considered in general that it should be understood as unjustified, illegitimate, arbitrary differentiation.

The discrimination criteria are stipulated in art. 4, par. 2 from the Constitution: their area of coverage has increased considerable when in the jurisprudence of the Constitutional Court the idea was included that not only non-discrimination criteria that are expressly stipulated by the fundamental law should be complied with; there are considered discriminations any arbitrary exclusions of law subjects.

The jurisprudence of the Constitutional Court also registered an evolution in respect with admitting a relative version of the equality principle. In a first phase there has been settled that equality was not about uniformity. Thus, equality does not imply equal treatment in any circumstance; some equal situations there should have equal treatment, whilst in different situations *maybe* different treatment exists. Ulterior, the Constitutional Court considered that different situations *call* for different juridical regime; however, an objective and reasonable motivation should exit. Thus a differentiation right has been admitted.

The next step was to consecrate a new fundamental right – the right to difference “as expression of citizens’ equality before the law, incompatible with uniformity”³⁷.

Conclusions

Law principles cannot be dissociated by the evolution of human society. According to the observations of Locke, inborn respect for principles “is so large and their authority is so suzerain

³³ Idem, p. 19

³⁴ Idem, p. 20.

³⁵ Idem, p. 24.

³⁶ Quoted after Gh. Mihai, *Fundamentele dreptului*, vol. I - II, Ed. All Beck, București, 2003, p. 185.

³⁷ I. Muraru, M. Constantinescu, *Curtea Constituțională a României*, Ed. Albatros, București, 1997, p. 113.

that not only other people's testimony, but also the evidence of our own feelings is often rejected if a contrary testimony is given to these defined rules"³⁸.

Throughout the society's evolution, values viewed as universal have influenced the history of human rights and human principles. The current community order is a testimony of this aspect. The Treaty establishing an European Constitution, by which it is aimed to create an area of human freedom and hope, in ensuring a climate of peace, justice and solidarity throughout the world, proclaims the protection of the values of respecting human dignity, freedom, democracy, equality, lawful state and respect for human rights, including the rights of persons belonging to minorities. "These values are common to member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

"In all juridical relations a value is established, and that is why it can be said that entire law is nothing but a research of values. They are structured in higher and higher hierarchies of values, which are of the same nature as the idea of obligation itself, being un-conditional values"³⁹.

³⁸ Apud D. Mazilu, quoted paper., p. 126

³⁹ M. Djuvara, Teoria generală a dreptului (Enciclopedie juridică), Ed. All, București, 1995, p. 216.

THE RELATIONSHIP BETWEEN INSTITUTIONS, BANKING REGULATION AND BANKING DEVELOPMENT IN THE MENA REGION

Samouel BEJI*
Darine YOUSSEF**

Abstract

The purpose of the paper is to check, on the one hand, the nature of the relationship existing between institutional development (measured by the corruption level, quality of bureaucracy, rule and law, law enforcement...), banking regulation and banking development. On the other hand, we test the relationship that exists between banking development and economic growth. We used the GMM (General Method of Moments) system on dynamic panel data for 19 countries of the MENA region, in the 2 estimations (Algeria, Bahrain, Egypt, Iran, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, Yemen). The main results are: (i) the existence of a positive and statistically significant effect of the economic development on the banking development, (ii) banking regulation affects positively and in a significant manner, the banking development, (iii) the non existence of a significant statistically relationship between institutional quality and banking development, (iv) and finally, our findings also suggest that economic growth is enhanced by banking development. The absence of a significant relationship between institutional environment quality and banking development can be explained by the nature of the institutional indicators, which vary very slowly through time. That's why, may be, banking development level reached by MENA region countries, cannot be explained by institutional development. We have chosen to assimilate the financial development to just banking development, given the relative importance of the banking sector, in comparison to the size and importance of the financial markets in these countries.

Keywords: *Financial Development, Institutional Development, Banking Regulation, Economic Development, Dynamic Panel.*

Introduction

The issue of the paths to follow in order to realize the financial development for the developing economies and even for the developed ones has not finished provoking reactions, suggestions and polemics. So what makes this debate interesting? If we trust on the works of McKinnon (1973) ; Shaw (1973) and for the recent studies of Greenwood and Jovanovic (1990) ; Bencivenga and Smith (1991) ; Roubini and Sala-i-Martin (1992) ; King and Levine (1993) ; Levine (2004) we conclude that the financial development is prominent for the growth and the economic development. Although the fact that this question has not yet been distinct concerning the effectiveness and especially for the sense of the causality between the two concepts.

After the beginning of the vast wave of the financial globalization which accompanied a larger movement of globalization, we attend, since the end of the eighties, to many attempts of the developing countries to insert the globalized financial sphere. This trend is explained by the thought on the benefits of the openness and the exchange on a large scale. Following the example of the commercial liberalization, the policymakers in that period thought that the financial

* Teaching Assistant and Ph.D. candidate at University Paris-Nord (France).

** Ph.D. candidate at University Paris-Nord (France).

integration would be advantageous for the economic development. Nonetheless, the financial crises episode for many developing countries, threw doubts about the advantages of the financial liberalism and the trust on the financial integration, yet defended strongly by the “Washington Consensus” ideas. Since these countries already engaged on reforms plans in order to abolish the restrictions on capital movements and to liberalize their financial systems. In the same way for the decision makers of economic policies in these emergent countries, this understood that the financial opening is not like the commercial liberalization. They also understood that the financial liberalization requested a number of economic, financial and almost institutional and political prerequisites, to do so. The question was then, how to liberalize instead of to liberalize or not, in order to realize the financial development and so the economic development.

These crises attracted the attention on the necessity to be doted by an adequate frame for the financial openness. Furthermore, it’s necessary to proceed by steps and by following progressive plan to avoid the risks of speedy openness. The examples of South Korea, China, Malaysia in Asia defend the idea of the sequencing and the importance of the gradualism in the process of the financial openness. Indeed, these countries opted for an exclusive and alternative way of financial openness, different from the globalized version recommended by the International Financial Institutions (IFI). This “protected” financial openness avoided them to live the mishaps of the other experiences of financial globalization.

This analysis lead us to express the same interrogations for the case of the South Mediterranean Sea countries (SMS), given the need to the economic development for these countries on one hand, and their specificities in the other. The aim of this paper is to try to show the importance of a gradualist approach in a globalized world. In fact, we will try to show, using a dynamic panel model with the GMM method, the importance of the banking regulation and the quality of the institutions in fostering the banking development without provoking risks and financial disturbances. In our econometric study, we will also test whether the banking development has an effect on the economic development in the SMS countries. The value of this study is to try to provide some clarification on a subject that has not been much discussed, namely, the link between institutional development and financial development. Our study is also important because it involves the region of North Africa and the Middle East (MENA), which has not been the subject of previous studies on the effectiveness of these links

I. The Link between the Banking Development and the Institutional Development

The link between the financial openness and the financial development is not free of ambiguity. Indeed, in order to profit from the capital account liberalization, the financial systems have to be strengthened by a developed legal and institutional framework. Specifically, the economies where the legal and judicial system don’t guarantee the property rights, or don’t look after the enforcement of financial contracts, suffer in general from a lack of incentives to lending activities and the settlement of financial transactions. Lenders and borrowers legal rights, the credibility and transparency level of laws organizing the financial sector are the main factors that govern the financial sector in an economy, and give or not incentives to turn to the financial system. According to this, Claessens and al (2002)¹ and Caprio and al (2004)² founded that more

¹ Claessens. S ; Djankov. S; Fan. J and Lang. L: «Expropriation of Minority Shareholders in East Asia», Journal of Finance, P : 21.

² Caprio. G ; Laeven. L and Levine. R (2004): «Governance and Bank Valuation», mimeo, University of Minnesota, P : 2.

lenders are protected by an efficient judicial system, deeper is the financial system. By considering the effective level of legal and institutional development, we can then surround the ambiguity between the financial openness and financial development. Indeed, we can adopt the hypothesis that the financial development can be the outcome of the financial openness, only if the whole economy reaches a reasonable level of institutional and legal development.

In addition to the legal environment quality which is important to realize the financial development, we notice in the recent economic literature the emergence of another important factor, considered as the natural complement of a good institutional structure. It's the concept of social capital approximated by the level of trust and cooperation among individuals.

1. The Importance of Social Capital

Fukuyama (1997) considers that: « *Social capital can be defined simply as the existence of a certain set of informal rules or norms shared among members of a group that permits cooperation among them. The sharing of values and norms does not in itself produce social capital, because the values may be the wrong ones... The norms that produce social capital... must substantively include virtues like truth-telling, the meeting of obligations, and reciprocity* »³. For Bowles. S and Gintis. H (2002): « *Social capital generally refers to trust, concern for one's associates, a willingness to live by the norms of one's community and to punish those who do not* »⁴

The social capital is a concept borrowed from sociology, related to the benefits taken by individuals via their adhesion to communities and associations (Bourdieu, 1985). It is also the quality of human relationships in a society and its potential to be enhanced (Coleman, 1990). In this context, a high level of social capital leads to the exclusion and the punishment of all who deviate from a set of social conventional standards.

The relationship between social capital and financial development attracted the attention of few economists, comparing to the studies on the link between social capital and economic development. Only the studies of Guiso . L, Sapienza. P and Zingales. L (2000) ; Hong. H, Kubik. J. D and Stein. J. C (2001) ; Calderon. C, Chong. A and Galindo. A (2001) had clearly analyze the link between the two concepts, via empirical studies connecting indicators of social capital and financial development indicators. The existence's intuition of a link between social capital and financial development is the result of the fact that a financial contract between a lender and a borrower needs a given level of trust to be accomplished and to its clauses to be respected. Since in a financial contract, the lender transfer an amount of money at the date t to the borrower, in the hope to recover it at $t+1$ in the future. In order to avoid an opportunist behavior, another clauses comes complete the contract, like collateral requirement. However, in several cases and given many factors, the collateral system loses its effectiveness because of the lack of the system of regulation adopted (like the difficulty to the lender to access to collateral in case of the borrower's insolvency) or a lack in the system of contracts enforcement. Even, in the case of a strict application of laws, the financial contracts are intrinsically incomplete. It involves that no contract can guarantee completely the refund of a loan. It involves also, even if the law is strictly respected, that trust will have an important role to play in defining the financial market deepness, given the fact that a financial contract is basically incomplete.

³ Fukuyama, F. (1997), « Social Capital » Tanner Lecture on Human Values, P: 378-379 cited in Durlauf, N. S and Fafchamps, M. (2004) : « Social Capital », NBER Working Paper Series 10485. P: 4

⁴ Bowles S and Gintis. H (2002) : « Social Capital and Community Governance », Economic Journal 112, P : 422, cited in Durlauf, N. S and Fafchamps, M. (2004) : opus cite., P : 5.

Furthermore, trust is more important in the economies where legal rights of lenders are less protected and judicial system is weak. Hence, a high level of trust would favor the settlement of financial contracts between individuals and then contribute to the development of financial markets. Moreover, the respect of financial contracts is not necessarily due to the threat of legal punishment, but it's an issue of mutual trust among different market participants. Indeed, if the debtor don't respect his commitment and don't repay his debt in the future, the use of financial contracts will be shrank and even involves, in case of generalization of the phenomena, to a high insolvency and risk to weaken the whole banking sector⁵. Hence, the trust level can be considered as a significant factor of development or banking distress and could even explain the differences between financial systems and economic development among countries.

2. Law and Finance Theory

A prolific economic literature noticed the incidence of financial development on growth. Levine, R. and Zervos, S. (1998) showed that the development of banking sector and financial markets is a good proxy of economic development in general⁶. For a microeconomic point of view Demirguç-Kunt and Maksimovic (1998), and also Rajan, R. and Zingales, L. (1998)⁷ showed in their studies that financial institutions are crucial for firms and industry's expansion. Although the existence of discords among theorists about this issue, it seems to be clear the reliance of a positive relationship between financial development and growth. This link fixes more than issue about the financial development state in many countries. Indeed, what makes some countries reach growth and economic development by financial development and other no? The law and finance theory gives more than an explanation about this question and fix the issue of the legal and institutional environment to explain the differences between levels of financial development⁸.

The first part of this theory argues that where the legal and judicial system is strong, respects rigorously the property rights, the investor rights and protects contracts between individuals, savers are more encouraged to turn to banks and then finance the need of firms to invest, contributing by the way to the expansion of capital markets. The absence of that legal framework wouldn't allow investor to access to private financing and so hinders financial development.

The second part of the law and finance theory, argues that the different legal traditions born in Europe during the last centuries, expanded after to all over the world by conquests, the different colonization waves and herding phenomena explain the differences seen today concerning investor protection laws, the application of financial contracts and then the differences between financial development levels, if we trust the first part of that theory.

La Porta and al (1998)⁹ were interested by laws governing the investor protection, the quality of enforcement of these laws and the property concentration in 49 countries. Their analyses lead to three main results. First, laws are different although they give a set of adequate rights to

⁵ Calderon. C, Chong. A and Galindo. A (2001) : « Structure and Development of Financial Institutions and Links with Trust : Cross-Country Evidence », Inter-American Development Bank, Research Department Working Papers N°444.

⁶ Levine. R and Zervos. S (1998) : « Stock Markets, Banks and Economic Growth », American Economic Review, 88, P : 542.

⁷ Rajan. R. G and Zingales. L (1998): « Financial Dependence and Growth », Chicago University and NBER, P : 26.

⁸ Beck. T and Levine. R (2004) : « Legal Institutions and Financial Development » in Claude Menard, Shirley. M (eds) Handbook of New Institutional Economics, Kleuver Dordrecht, The Netherlands, P : 251.

⁹ La Porta. R ; Lopez de Silanes. F ; Shleifer. A and Vishny. R W (1998) : « Law and Finance ». Journal of Political Economy 106, P : 1151.

investors. In particular, the common law legal tradition countries would protect more effectively investors than French civil legal tradition. German civil law and Scandinavian one, take a middle rank between them. In addition, there isn't evidence confirming the existence of privileged category of investors. Evidence show, rather, that common law legal tradition protects all kinds of investors. This result corroborates the hypotheses of La Porta and al (1998) about the investors range's multiplicity of rights in the presence of multiple legal traditions. These rights are induced by laws and not inherent to the equities themselves. Second, the enforcement of laws is different according to the countries. Indeed, the laws enforcement is more rigorous in German civil law and Scandinavian countries. The laws enforcement is also accurate in common law countries, but less rigorous in French civil ones. The quality of laws enforcement, on the contrary to laws themselves is improved with the income level. Third, evidence supports the hypothesis that countries develop substitutes to bad investor protection systems. La Porta and al (1998) argue that : « *Some of these mechanisms are statutory, as in the case of remedial rules such as mandatory dividends or legal reserve requirements. We document the higher incidence of such adaptive legal mechanisms in civil law countries. Another adaptive response to poor investor protection is ownership concentration. We find that ownership concentration is extremely high around the world, consistent with our evidence that laws, on average, are only weakly protective of shareholders. In an average country, close to half the equity in a publicly traded company is owned by the three largest shareholders. Furthermore, good accounting standards and shareholder protection measures are associated with lower concentration of ownership, indicating that concentration is indeed a response to poor investor protection* »¹⁰.

II. The Role of Banking Regulation in Promoting the Banking Sector

Based on the Basel accords of 1988, a policy of prudential regulation began to be imposed on banks participating in the globalization of the economy. The objective of this policy is to ensure a degree of regulation of banking systems. At the same time, and from the early 1990's, policy advice for the economies of emerging countries was based largely on the ideology of « Washington consensus ». This ideology sees in the trade and financial liberalization a model to follow to achieve growth and economic prosperity.

The International Financial Institutions, like the International Monetary Fund, World Bank and WTO defended and worked extensively in the dissemination of these practices. Nevertheless, these institutions have not stressed the need and importance to proceed in stages in the process of monitoring political liberalization. This is called the process of *sequencing*. This is the approach that is to move from a policy of protectionism, to a policy of liberalization by sequences studied, prudent and not by a sudden manner. The emerging market economies of emerging countries were therefore encouraged to liberalize their markets quickly and not in a progressive way. For example, members of the IMF's Interim Committee voted in April 1997 of an amendment of the articles of the IMF, to ensure that the liberalization of the capital account is one of the « fundamentals » of the institution.

We will try to present as part of this section, a possible alternative policy of financial liberalisation in its internal version, as presented and defended by supporters of a financial deregulation and integration. The point of view that we try to defend is that an adequate regulation of the banking activity might be preferable to an encouraging competition policy. In the sense that it can protect the banking sector in developing countries from the misadventures of globalized finance, intrinsically bearer of financial instability.

¹⁰ La Porta. R ; Lopez de Silanes. F ; Shleifer. A and Vishny. R W (1998) : opus cite, P : 1152.

III. The Importance of Banking Development in Economic Growth

Much of the literature on the relationship between financial development and economic growth refers to the precursor work of Schumpeter. J (1911). The essential argument that develops Schumpeter to defend his point of view is that the services provided by the financial sector (mainly capital allocation to projects that offer the best opportunities for profit without the potential risks of losses due to moral hazard, the adverse selection or high transaction costs) represent a real propeller of the economic activity. Empirical work done, seemed to prevail in these assertions. However, the question that was raised following the emergence of this literature was whether the financial sector plays a role in economic development, or is that the financial development followed « passively » and hence a large and rapid industrialization movement, as has been particularly stressed by Goldsmith. R (1969). Indeed, he believes that « *there is no chance, however, to establish with confidence the direction of the causal mechanism i.e., whether financial factors are responsible for accelerated economic development, or is that the financial development is simply a reflection of economic growth* » While Goldsmith has shown that doubts exist on the matter, other economists have shown outright scepticism regarding the role of financial development. Like Robinson. J (1952) who considers that « *where firms lead, finance follows* ».

In what follows, we will give an overview of how Levine. R (1997) adopted a functional approach, to show the impact of development financial sector on growth. Indeed, it is based on the principle that the costs of acquiring information, and establish transactions explain the need for the emergence of banks and financial markets. This means that in a model with the Arrow-Debreu hypothesis, where the cost of information and transactions are inexistent, there is no need to financial intermediaries. Financial systems therefore serve to facilitate the allocation of resources through time and space in an uncertain environment. Levine. R (1997) divided the main function into five sub-cores functions, namely :

- The diversification of risk ;
- The collection of information on investment and resource allocation ;
- Exert corporate control ;
- The savings mobilization ;
- Ease trading of goods and services.

To better profit from the possibilities of growth offered by the financial system, the author advocates that its development affects growth through two channels:

- The accumulation of capital : By improving the capital formation rate and acting on the savings rate, or the reallocation of savings ;
- The technological innovation : The invention of new production processes acts on the technological innovation rate.

1. The diversification of risk

The author considers two types of risk : the risk of liquidity and an idiosyncratic risk. The origins of the Liquidity risk are the uncertainties related to the conversion of financial assets to means of payment. The asymmetries of information and transaction costs are likely to intensify this type of risk. The existence of this kind of distortions legitimates the emergence of financial markets and financial institutions. Liquid Capital markets are markets where it is not very costly to exchange financial instruments, and where there is less uncertainty about the timing and arrangements for such exchanges. This concerns us closely in the search for a link between financial markets and growth, to the extent that the liquidity of a financial market encourages the firm to run long-term investments relatively more profitable, since investors can recover at lower

cost savings. Levine. R (1997) considers that the diversification of liquidity risk, through the development of financial markets can revive and encourage technological innovations. Indeed, he explains that the commitment in funding innovative projects is risky and uncertain. The possibility of having a diversified portfolio for the financing of such projects can temper this risk and promote investment activities to generate technological progress. For example, financial systems may cause the acceleration of technological progress and hence economic growth by facilitating the diversification of risk.

2. The collection of information on investment and resources allocation

Financial intermediaries have more resources, opportunities and skills in collecting information on investments than savers and other economic agents. Therefore, they are more able to reduce the costs of acquiring information, which allow a better allocation of resources. In addition, financial intermediaries allow the identification of the best production technology and thus are likely to encourage technological innovations by identifying entrepreneurs who represent the best opportunities for new manufacturing processes. In addition, the financial market is also important in the dissemination of information on firms and managers through the prices of financial assets, which allow better allocation of resources.

3. Managers Monitoring and exert corporate control

Gale. D ; Hellwig. M (1985) and Townsend. R (1979) consider that in preparing contracts debts between insiders and outsiders, financial intermediaries manage to limit the information asymmetry ex-post. In addition to debt contracts, and financial intermediation of banks, the capital markets can improve the control of firms. For example, the public exchange of shares in the capital markets reflected efficient information on the companies and enables owners to link the compensation of managers with stock prices. In addition, in a developed financial market, it is easier to make takeovers and thus improve the management of small firms in difficulty. It follows a better allocation of resources.

4. The mobilization of savings

Financial intermediaries minimize transaction costs associated to the collection of savings. They minimize also the problems of information asymmetry. Thanks to the comparative advantage they gain in the collection of savings for the short term and its transformation into long-term loans, financial intermediaries manage to minimize the costs of collecting savings. Since doing so, they are able to "save" the efforts of other economic agents in the search for information. They centralize, in a way, the information relating to savers and investors, in order to minimize costs and better allocate resources. Thus, in effectively mobilizing resources to finance projects, the financial system play a crucial role in facilitating the adoption of new production technologies, and incitement to technological innovation. As noticed by McKinnon. R (1973) to illustrate the importance of financial intermediaries in the mobilization of savings : « *The farmer could provide his own savings to increase slightly the commercial fertilizer that he is now using, and the return on this marginal new investment could be calculated. The important point, however, is the virtual impossibility of a poor farmer's financing from his current savings the whole of the balanced investment needed to adopt the new technology. Access to external financial resources is likely to be necessary over the one or two years when the change takes place. Without this access, the*

constraint of self-finance sharply biases investment strategy toward marginal variations within the traditional technology »¹¹

5. Trade facilitation

In addition to facilitating the mobilization of savings and the expansion of production technologies to a large part of the economy, the financial arrangements that reduce transaction costs can promote specialization, technological innovation and hence economic growth. The links between the facilitation of transactions, specialization, innovation and economic growth are the basic elements of the Adam Smith's « *Wealth of Nations* ». Indeed, it considers that the specialization of work is the main factor underlying its productivity improvement. With more specialization, workers are more willing to invent better machines or new production processes. More specialization requires more transactions. Because each transaction is costly, and the financial arrangements that reduce transaction costs will facilitate greater specialization. In this case, the markets that promote exchanges encourage productivity gains. But what is interesting to know is that there is a feedback that goes from these productivity gains to the development of financial markets.

IV. Studies and methodology of analysis

The presentation of the different approaches on the possible links between the institutional development and the banking regulation on financial development, and in a second stage, the link between financial development and economic growth, taught us that there is a divergence of views about to the reality of these links. Indeed, we have seen that there is some theoretical optics that consider that institutions quality contributes to financial development. Other economists consider that there are other determinants of the financial development which explain it more than the institutional environment. The case of the link between financial development and economic growth is more problematic because until now there has been no consensus as to the meaning and reality of this relationship. The value of this study is to try to provide some clarification on a subject that has not been much discussed, namely, the link between institutional development and financial development. Our study is also important because it involves the region of North Africa and the Middle East (MENA), which has not been the subject of previous studies on the effectiveness of these links. Concerning the link between financial development and economic growth, it is linked to the first part of the study, namely the link institutional development and financial development. Indeed, believers in financial development as a determinant of economic growth wondered what makes some countries failing to ensure their financial development, while others do it. They think it's really institutional development, which affects the financial development. An appropriate institutional environment acts positively on the development of the banking sector and the operation of capital markets, which in turn would promote the financing of economic activity. Institutional development is therefore regarded as a direct determinant of financial development and as an indirect determinant of economic growth. We will empirically study in what follows the nature, reality and intensity of these links.

¹¹ Mckinnon. R (1973) : « Money and Capital in Economic Development », The Brookings Institution, Washington. D. C. P : 13

1. Models presentation

The objective of this section is to test the direct and the indirect link of the institutional development on growth of a sample of 19 countries in the MENA region (Algeria, Bahrain, Egypt, Iran, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, Yemen) over the period 1982-2005. As we explained earlier, we chose to represent financial sector development only by the development of the banking sector. This choice reflects the relative importance and the large share of the banking sector in relation to capital markets in the functioning of the entire financial sector in the countries of our study. It is also due to the paucity of empirical studies on the development of the banking sector and its impact on economic growth. Therefore, we estimate two equations; the first concerns the link between development banking, institutional development and banking regulation. The second one connects the economic development with bank development.

a. The link between Banking Development and Institutional Development integration banking Regulation

The first equation to be estimated connects the banking development, institutional development and banking regulation, in the presence of other macroeconomic control variables. The objective of the study is to investigate the nature and intensity of the relationship between institutional development and banking regulation on the banking development. To reach this aim, we estimate this equation :

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 INS_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (1)$$

Where the dependant variable DB is banking development indicator, INS is institutional quality, REG is banking regulation, LY is logarithm of GDP per capita and X is a set of macroeconomic control variables: inflation rate, trade openness and computer, communications and other services as part of commercial service exports.

From this first equation, we released other equations, by decomposing INS. Indeed, INS represents the institutional quality, which is a synthetic indicator of 6 other indicators. The aim of that decomposition is to care about other institutional aspects, likely to act on the banking development. Here are the 3 other equations :

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 CONCOR_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (2)$$

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 LAW_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (3)$$

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 VOA_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (4)$$

Where CONCOR is the control of corruption variable, LAW represents the law and order, VOA represents the voice and accountability.

The same estimations were made on another set of institutional variables. These new institutional variables pertain particularly to financial transactions, namely, laws enforcement ENFORCE, private property protection index PROPERTY and trust index TRUST.

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 ENFORCE_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (5)$$

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 PROPERTY_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (6)$$

$$DB_{it} = \alpha_0 + \alpha_1 DB_{it-1} + \alpha_2 TRUST_{it} + \alpha_3 REG_{it} + \alpha_4 LY_{it} + \alpha_5 X_{it} + \varepsilon_{it} \quad (7)$$

b. The Link between Banking Development and Economic Development

We will estimate the second type of equation, in order to try to shed light on which manner the banking development affects the economic development. The equation estimated is :

$$TCR_{it} = \beta_0 + \beta_1 TCR_{it-1} + \beta_2 DB_{it} + \beta_3 Z_{it} + \delta_{it} \quad (8)$$

Where TCR is the GDP growth rate, DB is the banking development indicator, Z is a set of macroeconomic control variables: inflation rate and trade openness.

The regression was made on 19 MENA region countries. The data are sampled every four years between 1980 and 2005 (1982-1985, 1986-1989, 1990-1993, 1994-1997, 1998-2001, and 2002-2005)

2. Data Description

For the construction of the banking development indicator DB, we followed the same method of Demetriades. P and Law. S. H (2005)¹². We use principal component analysis (PCA) to reduce three financial proxies into one principal component. The three financial proxies are : domestic credits to private sector, domestic credits provided by banking sector and liquid liabilities. The three variables are expressed as part of GDP. The source of these three proxies is the World Development Indicators.

We use the same method of the PCA to construct INS the institutional indicator. We reduce six institutional proxies into one principal component. The six institutional proxies are : control of corruption, law and order, bureaucratic quality, ethnic tensions, repudiation of contracts risk and expropriation risk. The source of these proxies are : the International Country Risk Guide.

For the capital social indicator TRUST, the source is the World Values Survey.

We construct also the banking regulation indicator REG by the PCA method. The other proxies of banking regulation are : entry into banking requirements index, capital regulatory index, banking activities restrictions, private monitoring index and official supervisory power. The source of these proxies are Barth. J, Caprio. G and Levine. L (2006)¹³

The source of the macroeconomic control variables : inflation rate, trade openness and computer, communications and other services as part of commercial service exports is the World Development Indicators.

¹² Demetriades, P and Law. S (2005) : « Openness, Institutions and Financial Development », University of Leicester Working Paper N°05/08. P : 7

¹³ Barth. J ; Caprio.G and Levine. R (2006) : « Rethinking Bank Regulation Till Angels Govern », Cambridge University Press.

3. Results and interpretation

The estimations were realized by using the method of the GMM *system* on dynamic panel data, and the standard deviations are calculated by using the procedure of White, what allows us to escape the problem of heteroscedasticity. The results of estimation of the first 7 equations: (1), (2), (3), (4), (5), (6) and (7) are presented in the table 1.

Table 1. The link between the institutional development, the banking regulation and the banking development

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Initial banking development	0,689 (4,1)***	0,635 (4,55)***	0,69 (3,74)***	0,681 (4,23)***	0,697 (3,21)***	0,705 (3,79)***	0,586 (5,81)***
INS	-0,0249 (0,57)						
REG	0,135 (2,01)**	0,095 (2,23)**	0,076 (1,22)	0,129 (2,55)**	0,18 (1,69)*	0,135 (2,19)**	
LY	0,16 (2,17)**	0,167 (1,93)**	0,191 (1,81)*	0,121 (1,06)	0,282 (2,89)**	0,205 (2,61)***	-0,072 (1,56)
INFL	-0,193 (1,23)	-0,030 (0,39)	-0,06 (0,49)	-0,169 (1,47)	-0,18 (1,12)	-0,147 (1,38)	-0,458 (2,97)***
TRADE	-0,03 (0,18)		-0,102 (0,57)		-0,106 (0,48)		0,286 (2,12)**
COMPUTER	0,17 (0,67)	0,077 (0,38)	0,056 (0,24)	0,026 (0,13)	0,318 (1,13)	0,253 (0,86)	0,287 (2,1)**
CONCOR		0,054 (0,62)					
LAW			0,014 (0,12)				
VOA				-0,034 (0,44)			
ENFORCE					-0,107 (1,6)		
PROPERTY						-0,089 (1,27)	
TRUST							-0,145 (1)
Constant	-1,16 (1,98)**	-1,468 (2,28)**	-1,56 (2,23)**	-0,894 (0,98)	-1,973 (2,66)**	-1,29 (2,17)**	0,883 (2,59)***
Observations	41	41	41	41	41	41	36
Hansen Test	4,58 (1)	6,26 (1)	2,04 (1)	7,27 (1)	4,33 (0,998)	7,14 (1)	0,00 (1)
AR(1)	-0,89 (0,373)	-0,27 (0,785)	-0,57 (0,567)	-0,69 (0,49)	-0,69 (0,583)	-0,43 (0,667)	0,9 (0,366)
Wald Test	1264,87 (0,000)	545,87 (0,000)	1119,11 (0,000)	245,39 (0,000)	299,88 (0,000)	339,46 (0,000)	87,41 (0,000)

Notes: Figures in the parentheses are the t-statistics except for the Hansen test and autocorrelation errors test of Arellano-Bond (AR) which are p-value. ***, ** and * denote

significant at 1%, 5% and 10%, respectively. The dependant variable is banking development indicator.

The results of the estimations show that the coefficients of the banking regulations variables and of the Log of GDP per capita are significant. What confirms the theoretical assertions of Patrick (1966) who considers that the economic development exercises a positive effect on the financial development. He considers that the increase of the outcomes is normally followed by an increase in savings. Thus economic agents would be more able to get financial assets, contributing then in financial development. The works of the endogenous theory supported this idea of double causality. Sharing risks allowing by financial intermediation which eases investment in new technologies contains costs and implies itself a given level of GDP per capita. We can explain, as well, the significantly positive coefficients of GDP per head by the fact that the banking sector benefits, in the same way as the other sectors, from the economic development.

For the coefficients of the banking regulation variable, we can notice that they are significantly positive for all the estimated equations, except for estimation (3) where the variable « role of law » represented the institutional development. This informs us that a policy of control and rule of the banking activity, what we qualify by the concept of « banking rigor » can be beneficial and favorable to the banking development in these countries. This result does not keep pace with the assertions of the liberationist theories of the financial activity, because according to the followers of these theories, an increase in competition in the banking sector can be only beneficial for this sector, also in developing countries. The financial crises episode, known by some developing country shows the opposite. These policies were the cause of financial instability and banking system weakness, because of a lack of monitoring and banking supervision caused by the settlement of banking competition without safety nets. These financial turbulences triggered a series of systematic crises which touched the other financial places in the other emerging countries. Also let us remind that for the construction of this indicator of the banking regulation we used other variables: Entry into banking requirements index, capital regulatory index, banking activities restrictions, private monitoring index and official supervisory power. It means that today, following a restriction policy on the entry of new foreign banks and the imposition of limitations on the banking activity would be favorable to the banking development. In other words, the return in a certain financial "protectionism" in the countries which suffer from a lack of development of their banking systems would be favorable to the banking development progression.

For the other variables which interest us in these series of estimation, namely the variable of the institutional development, we notice that their coefficients were not significant. The explanation which we can find for this result is statistical. Because these institutional variables vary very little in time, thus they cannot explain the variation of the indicator of the banking development. We tried to solve this problem by subdividing the totality of period 1982-2005 into 6 under period of 4 years each, with the consideration of the averages of variables over these sub-periods. This improved the already found results, but did not lead to an explanatory power of the institutional development indicators.

For the estimation of the equation (8), we used the same technique of estimation as the other equations, namely the method of the GMM *system* on dynamic panel data. The standard deviations are calculated by using the procedure of White, what allows us to escape the problem of heteroscedasticity. The results of the regression about the link between the banking development and the economic development are presented in the table2.

Table 2. The link between the banking development and the economic development

	(1)	(2)	(3)	(4)	(5)	(6)
Développement économique initial	0,684 (4,35)***	0,676 (2,87)***	0,8 (7,05)***	0,603 (3,07)***	0,339 (0,85)	0,796 (6,1)***
Développement bancaire	0,5 (1,97)**	0,581 (1,75)*	0,173 (0,9)	0,617 (2,17)**	0,951 (1,97)**	0,227 (0,89)
Inflation	0,068 (0,28)	0,006 (0,02)		0,002 (0,01)	-0,239 (0,63)	
Trade	0,243 (1,13)			0,238 (1,22)		
Constante	2,267 (2)**	2,469 (1,4)	1,732 (1,92)	2,894 (2,03)**	5,07 (1,69)*	1,637 (1,65)*
Observations	72	72	80	72	72	80
Test de Hansen	8,23 (0,975)	8,67 (0,797)	10,97 (0,204)	5,4 (0,998)	6,47 (0,927)	7,58 (0,804)
AR(1)	-0,35 (0,727)	-0,09 (0,928)	-0,16 (0,875)	0,1 (0,919)	1,09 (0,274)	-0,25 (0,758)
Test de Wald	367,98 (0,000)	417,21 (0,000)	312,96 (0,000)	682,37 (0,000)	315,38 (0,000)	363,87 (0,000)

Notes: Figures in the parentheses are the t-statistics except for the Hansen test and autocorrelation errors test of Arellano-Bond (AR) which are p-value. ***, ** and * denote significant at 1%, 5% and 10%, respectively. The dependant variable is economic growth indicator.

For the first three estimations of this table, the variable of the banking development is constructed by applying the PCA on to three proxies: domestic credits to private sector, domestic credits provided by banking sector and liquid liabilities. The three variables are calculated as part of GDP. For the three other regressions, we followed the same method, but we just changed the variable liquid liabilities by commercial banks assets as part of GDP.

We notice that for all the estimated equations, the coefficients of the banking development are significant. The only cases where the banking development did not explain significantly the economic growth were the cases where we made the estimations, without adding the variables of control. This shows that although, taken individually they were not significant, the variables of control influence the meaning of the coefficients which interest us.

Indeed, we can see in the first estimated regression (1) that the banking development coefficient is significant at 5 %, at 10 % in the equation (2) when we made the estimation without the variable of the trade openness and not significant when we eliminate the control variables from the regression. It is the same result from the regression of the equations (4), (5) and (6). Because the probability to reject the hypothesis of significance of the banking development coefficient is 3 % for the case of the equation (4), 4,9 % for the case of the equation (5) and 37,3 % for the case of the equation (6). The regression result of the equation between the banking development and the economic development show us that there is a positive correlation between both types of development for considered period and for the whole studied sample. This result is important in the extent that it can encourages the political decision-makers in these countries to act directly on the banking development, given that it may acts on the economic development and the growth. We also notice that the banking development acts on the economic development in significant proportions. It explains, in most of the cases, more than 50 % of the economic development. This

importance of the banking development invites us to check its determinants. The first section of this document revealed us the importance of the legal, political and institutional environment in the financial development in general, and so for the banking development. But by studying the relationship between the institutional environment and the banking development, we did not find a significantly positive relation. For the countries that we studied, they have to implement reforms susceptible to revitalize the institutional and political development, so that it acts on the banking development and thus the economic growth. We also selected variables representing the institutional and political development, such as the control of corruption, the investor protection index, etc. to show what acts directly on the institutional development and thus indirectly on the banking development.

Conclusions

The problem of the financial development in the developing countries continues to be an important theoretical subject among the financial economists community. It continues, above all, to cause polemics and divergences between them. Indeed, the liberal economists believe in the advantages of the free market and the possibility of its enforcement on the financial field. Other economists, like the neostructuralists believe, in contrary, on the benefits of protectionism for a better functioning of the financial sector. The aim of this study was to show that the banking regulation what is a form of financial protectionism, would be a better way to realize financial development in the developing countries. The main results of our study are : (i) the existence of a positive and statistically significant effect of the economic development on the banking development, (ii) banking regulation affects positively and in a significant manner, the banking development, (iii) the non existence of a significant statistically relationship between institutional quality and banking development, (iv) and finally, our findings also suggest that economic growth is enhanced by banking development. The absence of a significant relationship between institutional environment quality and banking development can be explained by the nature of the institutional indicators, which vary very slowly through time. That's why, may be, banking development level reached by MENA region countries, cannot be explained by institutional development. We have chosen to assimilate the financial development to just banking development, given the relative importance of the banking sector, in comparison to the size and importance of the financial markets in these countries.

References

1. Aizenman, Joshua and Noy, Ilan. "On the two way feedback bandween financial and trade openness." *National Bureau of Economic Research Working Paper* N° 10496 (2004)
2. Angbazo, Lazarus. "Commercial Bank Nand Interest Margins, Default Risk, Interest Rate Risk and Off-Balance Sheand Banking." *Journal of Banking and Finance* 21(1) (1997): 55-87.
3. Arestis, Philip and Demandriades, Panicos. "Financial Development and Economic Growth : Assessing the Evidence." *Economic Journal* (107) (1997) : 783-99.
4. Baudassé, Thierry and Montalieu, Thierry. "Le capital social : un concept utile pour la finance et le développement.", *Document de recherche* N°25 du Laboratoire d'économie d'Orléans (2004) : 11-12.
5. Beck, Thorsten and Levine, Ross. "Legal Institutions and Financial Development." in Claude Menard, Shirley. M (eds) *Handbook of New Institutional Economics*, Kleuver Dordrecht, The Netherlands.
6. Bencivenga, Valeria and Smith, Bruce. "Some Consequences of Credit Rationing in an Endogenous Growth Model." *Journal of Economic Dynamics and Control* 17 (1993): 97-122.
7. Bousrih, Lobna and Trabelsi, Mohamed. "Libéralisation financière, développement financier et crises bancaires : le rôle du capital social." *Revue d'économie financière* N°81 (2005).
8. Bowles, Samuel and Gintis, Herbert. "Social Capital and Community Governance." *Economic Journal* 112 (2002): 419-36.
9. Calderon, César. Chong, Alberto. and Galindo, Arturo. "Structure and Development of Financial Institutions and Links with Trust : Cross-Country Evidence.", *Inter-American Development Bank, Research Department Working Papers* N°444 (2001)
10. Caprio, Gerard. Laeven, Luc. and Levine, Ross. "Governance and Bank Valuation" *mimeo* (2004), University of Minnesota.
11. Chinn, Menzie and Ito, Hiro. "Capital Account Liberalization, Institutions and Financial Development: Cross Country Evidence.", *National Bureau of Economic Research Working Paper* N°8967 (2002)
12. Claessens, Stijn. Djankov, Simeon. Fan, Josph. and Lang, Larry. "Expropriation of Minority Shareholders in East Asia." *World Bank Policy Research Working Paper No. 2088* (1999)
13. Demirgüç-Kunt, Asli. and Maksimovic. Vojislav. "Law, Finance, and Firm Growth" *Journal of Finance*, 53 (1998): 2107-37
14. Durlauf, Steven and Fafchamps, Marcel. "Social Capital" *NBER Working Paper Series* N°10485 (2004)
15. Ferrary, Michel. "Trust and Social Capital in the Regulation of Lending Activities" *The Journal of Socioeconomics* 31(6) (2003): 673-99
16. Fukuyama, Francis. *Trust: the Social Virtues and the Creation of Prosperity*. New York : United Free Press, 1995.
17. Greenwood, Jeremy and Jovanovic, Boyan. "Financial Development, Growth, and the Distribution of Income", *Journal of Political Economy* 98 (1990) : 1076-1107
18. Guiso, Luigi. Sapienza, Paola and Zingales, Luigi. "The Role of Social Capital in Financial Development" *American Economic Review* 94 (2004): 526-56
19. Haggard, Stephan. and Maxfield, Sylvia. "The Political Economy of Capital Account Liberalization" In H. Reisen & B. Fischer (Eds.) *Financial Opening: Policy Issues and Experiences in Developing Countries*. Paris: OECD (1993)
20. Hong, Harrison. Kubik, Jan and Stein, Jeremy. " Social Interaction and Stock Markand Participation" *NBER Working Paper*, N° 8358 (2001)
21. Hoskins, Ian. "Financial System Development, Bank and Non-Bank Finance, in Mediterranean Partner Countries" Paper presented at the second session of the Euro-Mediterranean Regional Economic Dialogue, Rome, Italy, October 20, 2003.
22. Ito, Hiro. "Financial Development and Financial Liberalization in Asia: Thresholds, Institutions and the Sequence of Liberalization" *The North American Journal of Economics and Finance* 17(3) (2005): 303-27
23. Kaufmann, Daniel, Kraay, Aart and Mastruzzi, Massimo. "Governance Matters V: Governance Indicators for 1996 to 2005" <http://www.worldbank.org/wbi/governance/govmatters5.html> (accessed, 2006)
24. King, Robert and Levine, Ross. "Finance and Growth: Schumpeter Might Be Right", *Quarterly Journal of Economics* 108 (1993a): 717-38
25. La Porta, Rafael. Lopez de Silanes, Florencio. Shleifer, Andrei. and Vishny, Robert. "Law and Finance" *Journal of Political Economy* 106(6) (1998): 1113-1155
26. Leblang, David. "Domestic and Systematic Danderminants of Capital Controls in the Developed and Developing World" *International Studies Quarterly* 41(1997): 435 – 54

29. Levine, Robert. "Financial Development and Economic Growth: Views and Agenda" *Journal of Economic Literature* 35 (1997): 688-726.
30. Levine, Robert and Zervos, Sarah. "Stock Markets, Banks and Economic Growth" *American Economic Review* 88 (1998): 537-558
31. McKinnon, Ronald. *Money and Capital in Economic Development*, Washington, DC : Brookings Institution. 1973
32. Rajan, R. G ; Zingales, L (1998): « Financial Dependence and Growth », Chicago University and NBER.
33. Roubini, Nouriel and Sala-i-Martin, Xavier. "Financial Repression and Economic Growth" *Journal of Development Economics* 39 (1992): 5-30
34. Shaw, Edward. *Financial Deepening in Economic Development*, New York: Oxford University Press. 1973
35. Tornell, Aaron, Westermann, Frank, and Martinez, Lorenza. "The Positive Link between Financial Liberalization, Growth, and Crises" *National Bureau of Economic Research Working Paper Series*
36. N° 10293 (2004)
37. Wei, Shang-Jin. "Local corruption and global capital flows". *Brookings Papers on Economic Activity* N°2 (2000): 303-54.

RESEARCHING THE GENDER ASPECT IN BUSINESS DEVELOPMENT (THE CASE OF MOLDOVA, UKRAINE AND BELARUS)

Elena ACULAI*
Adela BULGAC**
Vitalii GRYGA***
Olga KRASOVSKA****
Olga LINCHEVSKAYA*****

Abstract

The SME sector covers economic operators that substantially differ by many parameters: size of enterprises, types of activity, etc., including entrepreneurs' characteristics – their ethnic, gender, age and other peculiarities. The specificity of different groups of enterprises and entrepreneurs is important both for attracting attention of the society to their problems and for the elaboration of business regulation policy on local, national and international levels.

The purpose of the paper is investigation of characteristics of female entrepreneurship in some countries with transition economy – Moldova, Ukraine, and Belarus. In particular, possibilities of women–entrepreneurs to access different types of resources are presented, peculiarities of women's character that influence the entrepreneurial activity are elucidated, need of governmental assistance to women that initiate and develop own business is examined. Common characteristics and some peculiarities in the female business development in the three countries are outlined. The investigation is based on results of questionings and interviews with women – owners and managers of enterprises, first of all, SMEs, from Moldova, Ukraine, and Belarus.

Keywords: *SMEs, female entrepreneurship, countries with transition economy.*

Introduction

Since 1990th, in the New Independent States, including Moldova, Ukraine, and Belarus, the process of business establishment, where both men and women participate, is ongoing. Although the legislation that regulate entrepreneurial activity in the three countries declares equal rights for all citizens disregarding their gender, the real state of men and women in the social and economic life, including, business is different.

The attention paid lately by researchers and politicians from different countries and international organisation to gender problem is conditioned by its importance. The opinion of unequal possibilities of men and women in the contemporary world is widely spread and it concerns many countries, spheres of activity, and groups of population.

The purpose of supporting women in business is to offer those equal conditions and possibilities, but not facilities. In spite of importance and potential of female business in transition economies, this group of enterprises is not paid enough attention to.

* Researcher, Institute of Economy, Finance and Statistics, Academy of Sciences of Moldova.

** Researcher, Institute of Economy, Finance and Statistics, Academy of Sciences of Moldova.

*** Center for S&T Potential and Science History Studies of the NAS of Ukraine.

**** Center for S&T Potential and Science History Studies of the NAS of Ukraine.

***** Institute of Economics, National Academy of Sciences of Belarus.

The authors start from the point that female entrepreneurship, as a part of business community, mainly has analogical characteristics and faces similar problems as men-entrepreneurs do. Anyway, it makes sense to pay attention to existent peculiarities of women activity in business for a better consideration of their needs and problems, as they form a considerable part of entrepreneurship and have a substantial economic potential.

In the paper, some characteristics of female entrepreneurship in transition economies on the example of Moldova, Ukraine and Belarus are investigated. The elucidated peculiarities allow to precise more clearly the characteristics of different groups of entrepreneurs. At the same time, they can be taken into account in the elaboration of business regulating policy at national and regional levels, as well as, in the activity of institutions of infrastructure oriented to women-entrepreneurs.

Literature review

In many economies, female entrepreneurship for decades has been subject of research and discussions as a way of solving economic and social problems of the society due to the potential of women and, lately, due to the tendency of women to develop own carrier along with men. However, according to Baker et al. (1997), only 6-8% of surveys on entrepreneurship are related to female entrepreneurship. From existed investigations can be outlined that between male and female entrepreneurship there are many similarities, at the same time, obvious differences persist, as well (Birley, 1989; Cromie, 1987; Alsos and Ljunggren, 1999;). The purpose of this kind of surveys is to determine decision making bodies and business community as a whole to understand the situation and to contribute to creation of an adequate business regulating framework which would take into account the distinctions and will stimulate the women start-up (Kjeldsen and Nielsen, 2000).

Today, the preoccupation of researchers from developed countries is to explore the dimension of female business more deep and wide. McClelland at al. (2005) focus on the two dimensions: 1) the development of female-owned enterprises from inception to maturity; and 2) their growth not only in domestic but also in international markets.

In Ukraine, the analysis of gender problems in business is subject of investigation for more and more researchers. Among them, first of all, must be mentioned works of Zhurzhenko, Dovzhenko, Turetskaya, where change of the state of women in society is analyzed more detailed (Zhurzhenko, 1999; Dovzhenko, 1998; Turetskaya, 2001).

In Moldova and Belarus less researches of gender aspect in business are undertaken (Eliseeva, 2004; Lukashova, 2004; Petina, 2004). Based on the results of the international project "Female Entrepreneurship in Transition Economies: the Example of Ukraine, Moldova and Uzbekistan" and other projects, F.Welter, D.Smallbone, N.Isacova, A.Slonimski, E.Aculai and others published a range of papers where different aspects of female entrepreneurship are identified – its potential, main characteristics, barriers and factors that contribute to its development, the role in the development of region (F. Welter and others, 2003; F. Welter and others, 2002, D. Smallbone and others, 2001, N.Isacova and others, 2004; E. Aculai and others, 2006).

Lately, problems of women in business have been actively discussed in business community and media. For instance, in March month of current year, in Chisinau (Moldova) the national conference "Women-entrepreneurs in a changing world" took place, that found a sound response in newspapers and television.

In general, the problem of female entrepreneurship in Ukraine, Moldova and Belarus still needs investigation. One of the obstacles of investigation is lack of official statistics. This fact impedes realization of detailed analysis of activity of enterprises where women are business

owners/ managers. Another one is the opinion that today doesn't make sense to differentiate female entrepreneurship, when the whole SME sector needs attention and support from government.

Background Teoretic

The present paper material is based on the results of several projects, including the international research project "Female Entrepreneurship in Transition Economies: the Example of Ukraine, Moldova and Uzbekistan", realized with the financial support of INTAS (00-843) and oriented to the identification of gender aspect in the entrepreneurial activity. A determinant contribution to the project realization – discussion of methodology and results – had the project coordinator prof., dr. Friederike Welter (University of Siegen, Germany) and prof., dr. David Smallbone (Kingston University, Great Britain). During the project realization, questionings and interviews with women and men - owners and managers of SMEs from different regions of the countries participating in the project where undertaken. (Female entrepreneurship in the Ukraine, Moldova and Uzbekistan: National Report on Survey Data for the Ukraine. – prepared by N. Isakova, O. Krasovska, O. Lugovy, L. Kavunenko; Female entrepreneurship in the Ukraine, Moldova and Uzbekistan: National Report on Survey Data for Moldova. – prepared by E. Aculai, N. Rodionova, N. Vinogradova).

Besides, results of other projects – international and national – realized during 2001-2007 years and oriented to entrepreneurship investigation that at some extent concerned gender problems where utilized.

The main research method in all projects was questioning and semistructured interviews with women-entrepreneurs from Moldova, Ukraine and Belarus.

Research of the gender aspect in entrepreneurship

Identification of the peculiarities of female entrepreneurship can be base both on objective data, which confirm existence of differences in business conditions for representatives of different genders and on subjective opinion of women on their problems in business.

Size of female entrepreneurship in Ukraine, Belarus and Moldova

The published statistical data in Ukraine, Belarus and Moldova are not sufficient for the quantitative evaluation of the size and potential of female entrepreneurship. There is no solid data even about gender structure of proprietors of the enterprises, especially about parameters of their profitability, priority spheres, dynamics of development, etc. Relying on results of different investigations we can judge about separate parameters of entrepreneurship development with gender aspect.

For example, in Moldova, according to results of our previous projects, women represent around 1/3 of Moldovan entrepreneurs – owners or managers of SMEs (Aculai et all. 2006). Among them, about 25% of SMEs are women-owned (Fomin, 2008). In Belarus, according to authors' estimation, the share of enterprises managed by women is around 30-35%. Based on the demographic situation in the republic and the results of questionings, some researchers assume that the share of SMEs managed by women is even higher – around 50% (Eliseeva, 2003).

Results of several investigations have confirmed that enterprises owned and managed by women are usually SMEs with limited resources and possibilities, therefore, necessitating a special support. In Ukraine, according to one of the general business surveys (Gray, Whiston, 1999), 50%

of all enterprises with zero employees were women-owned. Among enterprises with 1 to 5 employees women business comprise 26,8%, and among the with 1 to 50 employees women business comprise 30%. The results for firms without employees are not surprising. Many of the small vendors seen in street markets of Ukraine are women.

Access to resources

The opportunity of attracting resources at stages of business initiation and development is an important condition of a successful activity. Questionings and interviews have shown that access of women - entrepreneurs to some kinds of business resources is more limited.

It is known, that lack of capital essentially affects development of business in all three countries. The given problem affects activity of women - entrepreneurs more sharply. For example, in Ukraine the mentioned problem was noticed as main at the moment of questioning by 24 % of women and 8 % of men engaged in business activity. Thus for search of sources of financing, the woman and the man tried different opportunities: women preferred to use personal savings or to address for financial support to other members of the family or friends, while men more often addressed for the credit in bank.

In Moldova, the problem of access of entrepreneurs to financial resources also stands sharply enough and gender differences exist: lack of capital was mentioned as the main problem by 14 % of women and 3 % of men. More than that, the Moldovan women face essential restrictions with regard to sources of financing. They not only relatively less often than men use bank credits, but also more seldom use family means and address for financial support to relatives. In interviews they explained it basically by reason of existing traditions in family and society. In many families, it is privately considered, that the assurance of means of living for family is, first of all, a duty of the man. He has also more rights, opportunities for use of family money resources, and it is easier to him to receive a loan from relatives.

Quite difficult is the problem of financing for women at the stage of initiating their business. In Belarus, women that opened own businesses basically used personal savings or loans from relatives and friends. Only few women managed to receive a bank credit or found an investor.

Considering the problem of access to resources in the historical plan, in the 1990th, women less often than men established their businesses by privatizing the state property. And gender distinctions are relatively more essential in Moldova. According to the carried out questioning, in Moldova, as a result of privatization, only 4 % of the "female" enterprises have been created, at the same time, 13 % of men have taken advantage from privatization opportunities. In Ukraine there are less gender distinctions: as a result of privatization 5% women and 7 % of men have created enterprises.

The results of monitoring of the Institute of Sociology of the National Academy of Science of Belarus, that reflect, including, development of female business, allow to note, that the majority among those who goes in business, organize it independently. O.Lukashova considers that the practice of purchasing before created enterprises or transfer of business by right of succession has not received yet a wide development. In result, 82 % of women have independently opened the business; 18 % of women have redeemed a share in already existing enterprise (Lukashova, 2004).

Analyzing access to resources, it makes sense to take into account both opportunities of maintenance with finance, consultations, information and limited time resources of some categories of entrepreneurs. In this context, it is necessary to notice double task of women who, as a rule, should combine business with domestic duties. The prevailing majority of women involved in business activity, including owners and main managers, participate in domestic duties (education of children, care of other relatives, etc.). In Moldova, only 6% of the interviewed

women engaged in business have noted, that they are not involved in domestic duties, among men there are such 22%.

In Ukraine, 5% of women, practically, are not occupied in domestic duties and 37% of men.

In the interviews carried out in Belarus, it is precisely observed, that women were able to combine successfully business and family duties, basically, when they received support from close relatives. For example, if their mothers helped with the children care, or they had rich husbands and presumed to take advantage of nurse service.

Impact of women character on the results of entrepreneurial activity

The researches have shown differences in psychology and behaviour of entrepreneurs of different genders.

For example, though enterprise activity by definition is always connected to risk, the tendency of women to risk is much lower. In particular, because of fear of risk, women try to avoid bank credits. So, an owner of the transport company in Kiev (Ukraine) did not dare to open the business until has collected all sum necessary for it in spite of the fact that the bank credit would allow her to make it much earlier.

The conclusion about unwillingness of women to risk is confirmed also by results of a self-estimation of women engaged in business. In particular, during a self-estimation, such quality as propensity to risk, was given by women in Moldova the lowest point - 2,98 (on a 5-mark scale). Ukrainian women-entrepreneurs appeared more self-assured and inclined to risk. Their self-estimation has made 3,54 points, that is higher than the parameter of Moldovan business-women, but, nevertheless, is lower than that of Ukrainian businessmen (4,14).

The interviews with women - entrepreneurs, carried out in Belarus within the framework of the research project on cross-border cooperation, have added "portrait" of the woman in business. As women appreciate stability and predictability, they are more cautious, try to find out full details – what to do and how to behave in different situations, what are the "rules of game" - in order everything to be considered beforehand. Frequently women do not have enough positive examples, so called "samples". They need to see how other women achieve success.

As a problem at the stage of establishing the business, some Moldovan women, sometimes mentioned psychological factors - shame, remorse. For example, the elderly teacher of school from Chisinau, starting to be engaged in tutoring, tested the big inconvenience, considering that teaching children is her work, and taking money for that is uneducationally, against conscience.

Interviews have shown that for potential and starting business-women psychological preparation play a special role. Women, especially in province, rarely take into account the opportunity of solving their financial problems by means of opening a business. Moreover, mentality of a part of citizens, especially the senior generation, impedes entering of women in business. In Moldova, till now family traditions with regard to girls' education don't foster the development of qualities needed in a business activity. In Ukraine, especially among urban population, traditions do not play such a main role.

In Belarus, women intending to initiate a business, also face internal barriers linked with existence of traditional stereotypes. Researches have shown that the woman definitely can rely on support of family and wider environment if she is engaged in domestic affairs, has a permanent job and stable earnings. In business, which demands risk, ingenuity and self-offering, society and frequently family, are not always ready to support the woman. As a rule, women have no place to address for the help. Especially, it concerns women living in small country towns, in a countryside where problems of unemployment and poverty are sharpest (Petina, 2004).

That fact that women, at least, in the countries with transitive economy, prefer to work in certain sectors (education, health service, social services, etc.) is well known. The carried out

interviews have shown, that in the certain directions of activity women are considered more successful, in others - on the contrary. According to female respondents, women in Ukraine are more successful in such areas as "growth of sales" (43,3 %), personnel management (42,7%), market development (36,6%). Women felt as weaknesses the following areas: exporting (39,4 %), innovation (36,9 %), production (36,8 %). Men were more critical of women's abilities in business. Actually, almost in every aspect of running business the majority of male respondents answered that "women are less successful".

Among women that recognized the influence of gender, there are opposite opinions concerning positive or negative impact of it on the effectiveness of their business development.

Thus, in Ukraine, only about 5 % of women have specified, that gender is an obstacle in the dialogue with authorities, whereas the majority (54,9 %) have told, that on the contrary, it helped. Also women have noted positive influence of the gender on dialogue with suppliers (63,5 %), customers (54,0 %) and other businessmen (54,9 %) and only in dialogue with bank structures the gender did not play a role for 74,7 % of women.

Not always is possible to identify precisely, whether the concrete case displays gender discrimination, or it is conditioned by other reasons. For example, in Ukraine there was a case when gender and age of a young woman turned into obstacles for business initiation. The firm has been created with use of means of the American grant with the purpose of realization projects in ecological field. In the respondent's opinion, in the beginning, the attitude of nongovernmental organizations and official bodies towards her enterprise was negative. When she started preparations of the first seminar, she faced threats and blackmail. The respondent explains such attitude, first of all, by conditions in city where nothing new is encouraged. The attitude of nongovernmental organizations was determined by their unwillingness to have a new competitor. The respondent considers that her age and gender have aggravated the negative attitude, as women, especially young, in business are not treated seriously, as an equal. At present the situation has improved due to high quality of services rendered by the enterprise.

While acquiring entrepreneurial experience, women more rarely connect their problems with gender aspect. Thus, 71 % of Moldovan women, at the moment of questioning didn't relate their problems of business development to gender (at the stage of business establishment, there were 60 %). In Ukraine the situation is similar - 68,2 % of women do not connect the initial difficulties with gender, further - there were 76,7 %.

Conclusions

The gender distinctions presented in the paper had the purpose to capture the attention of business association, institutes of support and the state on the need to take into account the peculiarities of different groups of entrepreneurs.

Women, as a part of business - community, simultaneously represent a special group of entrepreneurs which specificity is determined, first, by features of character of the "weaker sex"; second, by the difficult access to internal and external resources and traditions prevailing in the society.

In many interviews it is marked, that women are aware of their peculiarities - there are some "female" types of business, "a large business for men is a small business - for women". But as a whole, the antagonism was not present in relations between business women and businessmen. Many respondents - women displayed examples of good, equal in rights relations with business partners of a male. Examples of gender discomfort or discrimination were observed only in cases with young women, which could be caused both by gender and age prejudices.

The majority of interviewed women count, that the Government and local bodies should pay a special attention to them. It is indicative that the majority of the interviewed men also have answered this question affirmatively, that has actually recognized presence of the distinctions concerning female and man's business.

The need of women in special attention from the government differs for separate groups of entrepreneurs. More often the need was mentioned by elder entrepreneurs, starting entrepreneurs, and owners/managers of low profitability enterprises.

Women-entrepreneurs have specified the following measures which, in their opinion, could promote development of female business in the country:

- Improvement of legal regulation of business and development of programs specially focused on support of women-entrepreneurs.
- The positive attitude to female business, change of the traditional attitude of society towards women.

In order to develop female entrepreneurship it is necessary also to develop social partnership between authorities and business. Acceptance of measures on development of a female business network which in due course can be engaged in protection and lobbying of interests of women - entrepreneurs is expedient. Nevertheless, at present, real measures of both government and business support institutions on development of female entrepreneurship are obviously not enough.

References

1. Aculai, E., N. Rodionova and N. Vinogradova (2003). Female entrepreneurship in the Ukraine, Moldova and Uzbekistan: National Report on Survey Data for Moldova. RWI (Rheinisch-Westfälisches Institut für Wirtschaftsforschung), Essen.
2. Aculai, E., N. Rodionova, N. Vinogradova (2006). 'Women business owners in Moldova: proprietorship or entrepreneurship?' In: *Enterprising Women in Transition Economies* edited by F. Welter, D. Smallbone and N. Isakova, 67-91. Aldershot, Ashgate Publishing Ltd.
3. Alsos, G. A. and E. Ljunggren (1999). Does the Business Start-Up Process Differ by Gender? A Longitudinal Study of Nascent Entrepreneurs. Babson College.
4. Baker, T. H. et al. (1997). "Invisible entrepreneurs: the neglect of women business owners by mass media and scholarly journals in the USA." *Entrepreneurship & Regional Development* 9: 221-238.
5. Birley, S. (1989). "Female Entrepreneurs: Are They Really Different?" *Journal of Small Business Management* 27(1): 7-31.
6. Cromie, S. (1987). "Similarities and differences between women and those who choose business proprietorship." *International Small Business Journal* 5(3): 23-34.
7. Dovzhenko, V. (1998). "The situation of Women at the Labour Market under Social and Economic Transformation". In *The Now Days Problems of Women at the Labour Market and Possible Decisions, 196-205*. Ministry of Family and Youth Affairs of the Ukraine, Ukrainian Social Research Institute, International Bureau of Labour.
8. Eliseeva, O.V. Development of small entrepreneurs with the participation of women as a way of household self financing and forming the middle class of the state // *Successful women – Belarusian network of entrepreneurs*. <http://www.bb wom.net/ru/articles/13/detail/12/back.html>
9. Fomin, I. (2008). "9 ½ thousand of business women". Logos-press, 11 (2008), Chisinau, Moldova.
10. Gray, T., and W. Whiston (1999). A survey of Business in the Ukraine. Management Systems International and Development Alternative Inc. in collaboration with the Kyiv International Institute of Sociology.
11. Isakova, N., O. Krasovska, O. Lugovy, L. Kavunenko (2003). Female entrepreneurship in the Ukraine, Moldova and Uzbekistan: National Report on Survey Data for the Ukraine. RWI (Rheinisch-Westfälisches Institut für Wirtschaftsforschung), Essen.
12. Isakova, N., O. Krasovska, F. Welter und D. Smallbone (2004). "Women Entrepreneurs in Ukraine: Contribution to regional development". *Regional Economy* 31 (1): 98-107 (in Ukrainian).
13. Kjeldsen, John and Kent Nielsen (2000). The analysis of the Danish Agency for Trade and Industry: Women Entrepreneurs now and in the Future. Report published by Danish Agency for Trade and Industry. http://www.ebst.dk/publikationer/rapporter/women_entrepreneurs/index-eng.html
14. Lukashova, O. (2004). State and perspectives of female entrepreneurship development. First Forum of women entrepreneurs in Belarus. Minsk.
15. McClelland, Emma, J. Swail, J. Bell, P. Ibbotson (2005). Following the pathway of female entrepreneurs: A six-country investigation. *International Journal of Entrepreneurial Behaviour and Research*. v. 11, no. 2, p. 84-107.
16. Petina, L. (2004). "Female entrepreneurship – a strategy against poverty and unemployment". Informative bullet "We – Women" 17/1.
17. Smallbone D., F. Welter, N. Isakova und A. Slonimski (2001). "SMEs and economic development in Ukraine and Belarus: Some policy perspectives". *MOCT – MOST: Economic Policy in Transition Economies* 11: 252-274.
18. Turetskaya, G.V. (2001). "Business activity of women and family". *Sotsiologicheskie issledovania* 2 (2001) (in Russian).
19. Welter F., D.Smallbone, E.Aculai, N.Isakova, N. Schakirova (2003). 'Female Entrepreneurship in Post Soviet Countries'. In: *New Perspectives of Women Entrepreneurship* edited by J. Butler, 243-269. Information Age Publ.
20. Welter F., D.Smallbone, N.Isakova, E.Aculai, N.Schakirova (2002). Female Entrepreneurship: a conceptual and empirical view. RWI-Papers 15, RWI (Rheinisch-Westfälisches Institut für Wirtschaftsforschung), Essen.
21. Zhurzhenko, T. (1999). "Analysis of state of women in transition economy: finding feminist epistemology". *Woman. Gender. Culture*. 160-170 (in Russian). Moscow.

THE STATE AND THE ECONOMY UNDER THE IMPACT OF GLOBALIZATION

Ion BUCUR*

Abstract

The political and economical processes of globalization impose the necessity of re-evaluating and redefining the role of the state in the national and global economy, as well as the traditional vision on the ability to act as a general manager of economy.

The profound change of the role of the state is due to the ideological mutations that characterize the end of the millennium and is emphasized by the direct analysis of its relations with the market and globalization.

The new post-war wave of globalization has profoundly marked the economy and the policies promoted by the national states. There is a diversity of opinions regarding the nature and economical and political implications of globalization. The presence and magnitude of certain economical and financial phenomena of instability underline the boundaries of government outside the state's intervention. The market is viable only in the context of considerable political and social order.

The state is transformed by globalization but it will continue to play an important role in the regulation of economical and social processes, as well as of neo-liberal failures. The globalization doesn't signify the end of the state; however it compels to the reconstruction and reassessment of the way of intervention and its capacity of action.

Keywords: *globalization, nation-state, the new economy, geo-economy, global order.*

Introduction

The complex character, the multitude of facets and the profoundly unequal consequences have placed globalization in the centre of the main theoretical debates.

At large, globalization is a controversial process. As an economical process and political project, the globalization has inflicted profound mutations in the ideas regarding the economical role of the state. Its economical and political processes have affected the autonomy and aptitudes of the state to sustain the economical and social regulation.

The stressing of the global interdependencies indisputably affects the traditional vision of the state and its capacity of acting as an autonomous actor in an anarchic international system.

The realism and the rigor of the undertaken analyses represent an essential condition of the validity of different opinions regarding the intervening changes, the way in which the globalization affects the state's policies, as well as its capacity to react in the attempt to preserve the autonomy in a changing global order.

The correct evaluation of the new tendencies needs the insertion of new evaluation standards regarding the state's activity in the area of economy. The debates regarding the role of the state in the globalization era are concerned not only with the internal organizational frames, but also with its relations with economy and society. If the common note is the recognition of the state's metamorphosis, there are controversial opinions regarding the level of vulnerability or omnipotence, the crisis and erosion of the state determined by the forces of globalization, the existing bind between the market triumph and the state's withdrawal, the point at which the convergence of policies and economic structures is achieved, the relevance of the international

* Professor Ph.D., Faculty of Law, University of Bucharest.

operating level of the state in comparison to the local and regional level, the state's reactions to the globalization forces, and so on.

Globalization is often portrayed as a process that undermines the action capacity and as a factor responsible for the crisis of the nation-state. Other analysts consider that the overemphasis on the globalization phenomenon and its consequences is inopportune. Despite these differences, the growth of the oppositions against the state, the establishment of new types of authority, the substitution of some of its functions and their assuming of these functions by new actors, the change in the nature of state's power, the complexity of its relations with the non-statal actors, as well as the transfer of some decisions from the public sector to the private sector, become clearer.

The speed and impact of the changes generated by globalization are different. The asymmetrical distribution of globalization conditions the level of involvement and the reaction capacity of the world states.

The alteration of the realist paradigm and the ideological reorientation of the '80s acted as an impulse for the action of the factors that limit the state's government capacity. The choice for economical liberalism accompanied by the active policies of privatization and regulation had a profound impact on the role and status of the state.

New economical and political evolutions

The beginning of the third millennium evinces, on the background of the globalization intensification and the emphasizing of economical interdependencies, a profound global economical and political instability, asymmetries and imbalances, the double state and economy crisis in the developing countries, as well as important changes in the content of the economical and political ideology.

Globalization establishes unusual relations between the economy and the politics, as important alterations in the nature, content and manifestation area of these domains of the social life. Under these circumstances, the understanding of the main transforming powers of economy and politics, the identifying of new manifestation factors of their interaction, become essential.

The reassessment of the fundamental problems of politics, power and economy must be achieved by obeying some essential requirements and criteria: the political and economical transformations are registering different rhythms and intensities, the essential causes of the new evolutions are internal and external, the treatment of their alterations and implications at different levels (micro, macro and global-economical), the emphasizing of the importance of the socio-cultural and institutional factors, the materialization of synthesis based on the conclusions formulated by economical science, the international relations theory, political science and so on.

The dynamic character of the economical transformations, the political context and the ideology in which they were achieved are found in theses of great theoretical and practical importance: a profound transformation from a world dominated by the state to a world dominated by the market, the beginning of the new globalized capitalism, the second big era of capitalism and the new industrial revolution and so on.

The post-war economical crisis of the '70s forced national governments to take action by restructuring the economical policies and capitalism.

The theoretical and ideological fundaments of this new direction were offered by "the conservatory revolution" started in the '80s.

In this new vision, the states have no longer the capacity to handle the economy, which determines the dynamization of individual initiative. The neo-liberal revolution raised a new economical logic based on a real abhorrence regarding the state's intervention and the social protection.

Its recommendations turn the deregulation into the privileged instrument of change, being considered the prior and imperious condition for the development of the market laws.

As the regulations are considered to be ill-fated or implacable, only a free and developed financial market can allow the re-launching of investments or the economic growth.

The new reform policies with their main dimension: liberalization and deregulation were applied in the main industrialized countries and became an inspiration source for the defining and orientation of strategies in the developing countries.

The more and more powerful questioning regarding the neo-liberal ideology at the beginning of the third millennium reveals ill-fated consequences possible as a result of its precepts application, stressing the opportunity of another approach to globalization founded on durable development that makes possible the reconciliation between economical growth and social cohesion and environment protection. (D.Plihon, pg. 4-5).

The evaluation tendency of the economical and political mutations materialized in the elaboration of theses and ideas that fuelled many controversies.

One of these refers to the evaluation of crossing a new stage or a new form of capitalism. To what degree affect the transformations the nature and substance of capitalism so that such evaluations can be justified? Despite the controversies regarding the evaluation of the alterations and their implications, the globalization tendencies of capitalism as a consequence of the seduction of the market economy model are becoming clearer. The detection of the mutations that took place in the order and management of economical activities domain at all levels is also essential.

The consequences on the economy are multiple and manifest themselves at different speeds. In this way, the economy is slowly eluding the political control, the economical cycles are overthrown, the problems regarding the clarification of the role of public powers in the contemporary economy are becoming more difficult, some economical policies are proving to be inefficient in the new economy, the real economy functions and coexists with the immaterial, financial, symbolic economy and so on.

In some theoretical approaches, the present period is identified with the shift towards a new form of capitalism under the effect of the new technologies action and of the financial globalization. There is no significant agreement regarding the evaluation of the mechanisms and of the micro and macro-economical implications of "the new economy".

Based on the experiences registered in different countries, many studies and analyses, which have the goal to clarify the nature and content of this new episode in the history of capitalism, were elaborated.

In the '90s, the idea of a new type of capitalist economy (The New American Economy) established itself as a result of the market liberation from the excessive governmental regulations, of the reduction and restructuring of American corporations and of the fast technological progresses (R. Gilpin, pg.18).

According to other specialists, "the new economy" represents a myth, an intellectual speculation defused through the deceleration of the rhythm of development in the U.S.A. that started from March, 2000.

The expression "new economy" is usually used to define the economical mutations from the end of the '90s as a result of new technologies and of the considerable finances expansion. This new reality is seen as a progressive and profound change that marks the shift from a "fordist" capitalism that prevailed after the Second World War, to the new "shareholder capitalism".

The socio-cultural and institutional factors, in addition to the finances and the technological mutations, had an important contribution to the molding of the "new capitalism" (D. Plihon, pg.47-48).

If we take into consideration the economical implication, there is a tendency to compare the new period to that of “the 30 glorious years” (1945-1975) - the post-war economical boom.

In conclusion, we can't speak about a “golden age” characterized according to the analysis of the growth rhythm, the markets' capacity of self-regulating and the wealth dispersion degree between different areas of the world. Despite all this, we must not ignore or underestimate the magnitude of the changes that is the instauration basis for a new society and a new capitalism.

The theoretical reflections regarding “the new economy” are sometimes not too far from myths and prejudice. The vehemence of the speech in favor of the economical, the tendency to put first the financial and technological aspects and so on, stress the risk of identifying capitalism with the economy and of taking to the extreme the importance of the market mechanisms and of the economical individualism. Thus, an obvious collision with the opinions coming from outside the economic scope that are against the solving and adjustment of all social problems from the perspective of a narrow utilitarianism, takes place.

The great challenges with which the contemporary capitalism is confronting are determining the development of a new type of economical assessment and the shift from the economical criteria to the cultural criteria –aesthetic, based on ancient values, in the government of society.

Capitalism is more than an economy and, therefore, the new mutations do not regard only the goods and services production sector related to the new technologies or only the developments in the enterprise management area.

In fact, there is a profound restructuring in the developed countries in the last quarter of the 20th century which refers to the aggregate of new technologies, to their consequences on the economical growth, as well as to the self-regulating mode of the economy, to the articulation between a mode of developing the enterprise and a mode of consumption (L.Batsch pg.99).

An overview on the “new economy” must also include the restructuring of the enterprise based on more flexible frames and on the analysis of the micro-economical implications (the capitalization of financial assets and so on) and of the macro-economical implications (the influence on the inflation growth, of the building of work places and so on), as well as of the associated financial risks (P. Artus, pg. 3-5).

Such an integrated perspective may comprise the complexity of the “new economy” which means both the development of new goods and services specific for the new technologies, as well as the introduction of new financial circuits.

The corporate governance was one of the greatest debates of the '80s that kept the media occupied. There is a common agreement that its essence regards the structuring of the relations between shareholders and the enterprise leaders. The basis of this debate was the difficulties of the American and British organizations of this type in the '70s. The corporate governance progressed under the effect of a double impulse: the adaptation of the companies' right to the new instances of government and control organisms.

In the fordist capitalism period, the economy and finances were organized according to national bases with a higher interventionism from the states. The economic growth was the main objective of the macro-economical policies, whose conception and applying mechanism were dominated by the traditional keynesist conception. As this policy under the influence of the monetary doctrine was proven inefficient, the monetary policy is considered to be the prime instrument of macro-economical adjustment.

Its objective is the monetary stability; the economic growth and occupation are seen as consequences of the disinflation.

As a reaction to the fordist regime crisis at the end of the '70, the shareholder capitalism which has as an essential characteristic - the “financialization” of the enterprise management - is introduced step by step.

The loosening of the hierarchical organization model of mass production, characteristic to fordism, is also due to the result of stagflation that sealed the failure of the keynesist policies.

The progressive substitution of the “fordism” with the “toyotism” leads to the promotion of new strategies and supple and horizontal organizational structures. The effect of this new organizational model is the reduction of the exploitation cost and the improvement of firms’ profitability.

The development of network firms leads to the reduction of the independent enterprise role. A growing part of the commercial flows is active inside firms, and the production seems to be more and more outsourced and de-located towards other enterprises.

The financial disintermediation tendency that signifies the diminution of importance and weight of banks (indirect financing) in relation to the financial market (direct financing) becomes more and more obvious.

The collective management of economies by means of three categories of institutional investors (the superannuation fund, mutual funds or investment companies and insurance companies) leads to a strong development tendency of the illustrated goods through the rapid increase of the main stock market index as a result of the structural dissemblance created between, on the one hand, the massive creation of titles from the investors and, on the other hand, the insufficient offer of titles from the states which are reimbursing their debt and the enterprises that are buying back their own shares.

As a result of these new evolutions, the current capitalism is detaching from the post-war capitalism and is bringing back into debate the status of the traditional wage earner and introducing forms of inequality.

The edification of the new stage of economy is based on the political options inspired from the neo-liberal ideology which puts first the globalized market and the financial profitability logic. At the heart of it, there is a new type of development, a type of economy based on knowledge and marked by the central role played by the production and dissemination of knowledge.

Development and innovation are major elements of the growth policy promoted in the developed countries. The economy, in the framework of which the notion of informational asset covers a great variety of products and services, acquires more and more attributes of an innovation economy that makes adaptation and the strengthening of competitive rules elaborated for the classical economy necessary through its strong monopolist tendencies. By taking into consideration the extreme volatility of the enterprises’ quotations, the economy gives the impression of a high risk casino economy.

The changes in the nature and structure of production lead to the re-designation of the boundaries between assets and services in the framework of an “immaterial economy” in which the central relation is that established between man, idea and images.

The frontier between goods and services is beginning to fade, the material product representing something else than the “support” for the distribution of services. Another major transformation of the services hegemony insurance fund is also the personalization of the services production which explains the shift from the mass production of standardized goods to the production of specialized services.

In the framework of the new economical and political relations created through globalization, there are structural mutations, the most significant being the political authorities’ loss of control and the impregnation of the market domination, the opening of the economical spaces, the privatization of society and the activity and economical mechanisms deterritorialization.

The considerations regarding the evolutions in the political, authority and power domain are stressing the contradictory tendencies and opinions. On the one hand, the necessity of assuring

some solid political basis that provides the stability and prosperity of economy, as well as the widening of the political field and the acquiring of new functions under the terms of globalization, is not known. On the one hand, the decline of the state is interpreted as an impotence and a deadlock for politics and as the restriction of its scope. The opinions that support the anti-political character of the current era are more downright.

The impotence of politics or the withdrawal of the state from numerous domains can not be interpreted as the end of politics, rather its carrying on with other instruments. More than ever, the study outside politics is not possible and must be achieved from another perspective. The degradation tendency of the political activity does not exclude the politics capacity of returning and it imposes the preoccupation for the redefining the nature of politics and of political authority.

The reinvention of politics also involves significant mutations in the power domain as an instrumental dimension which determines the way in which the resources are distributed. The evolutions in the power domain are accompanied by attributes such as crisis, dispersion, dilution, delegation and so on.

The debates concerning power are old as the thoughts on the government frames. As a function of power, the government must provide balance between power centers. The need for political authority and for legitimacy must be harmonized with the tendency for power decentralization and for strengthening the local authority, of dispersion towards state and non-state agents. These new tendencies have implications on the power formation and organization domain. As a result of this, the power moved leaving precise places that are part of politics.

The crisis concerning the traditional concept of power (especially that of political power) is accompanied by alterations in the content of economical power.

On the global level, the transfer of economical power has as a consequence the loosening of the public actors and the growth of non-statal authorities' influence.

The promotion of a level politics, equal to the power commutation tendency, as the separation of economical power from the political power favors the rising of centers of power outside the government.

The multiplication of power centers can be made if the new institutions do not defy the power. While the old pluralism based itself on power, the new type of pluralism is different through the social function and through the functioning mode, thus through its apolitical character.

Conclusions

Because of the intensification of the globalization powers action and of the establishment of a new capitalism spirit, the debates regarding the reason of the state's existence in relation to the new economical and social conditions have grown.

In a changing global order, a world with government rules that can't keep up with the enormous alterations from the end of the past millennium appeared. The transformation of states and of the international scene was achieved under the impulse of financial shocks, foreign debt, prices, as well as the monetary shocks created by a more and more volatile and deregulated global economy (Naomi Klein, 2007, pg.160). The shift from the fordist revolution to the "new economies" triggered multiple consequences on the nation-state which is more and more affected, on the one hand, by the powers of the economical globalization and, on the other hand, by the political requests for power devolution (J. Stiglitz, 2006, pg.21).

The combination between the great power of affaires with that of the state ("big business" and "big government) represented the premise for the rapid development of capitalism in the post-war period. A multi-temporal and multi-causal process, the globalization generated debates characterized either by the virulence with which it is attacked, or by the exacerbation of its

benefits. The intense critiques come from those who identify only the destructive side of “the creative destruction” (A. Greenspan, 2007, pg.376), and in other cases the accusation and the attacks concerning globalization come from those with conservative conceptions (Dehesa, 2007, pg.10).

The evaluation of opportunities and constraints generated by the globalization must be based on an adequate perception of its operation. As a result of this, the debate consecrated to globalization that marked a clear delimitation between pro and anti-globalists, must contribute to the tempering of emotional states and to allow a fair appreciation of costs and benefits for the global economy and every single country.

Although the globalization developed rapidly, it is far from being complete. This fact generates divergent visions on its nature and consequences. These different opinions are not so much related to the globalization problems, but especially to the way in which it is managed. In this context, the neo-liberal discourse of globalization is dominated by the idea that the losers are not “globalization victims”, rather “victims of the lack of globalization” (Dehesa, 2007, pg.10). The globalization is also considered to have relatively more positive consequences than negative ones for the entire global economy.

Without a doubt, globalization generated enormous benefits for humanity. At the same time, we must notice their unequal distribution in relation to the capacity and endurance of the states to the generated impulses of globalization.

Most of the pressing issues of mankind have a global character and can't be solved through the individual action of each country. While the world has become more and more interdependent and integrated, there are different opinions relating their way of approach and solving. (J. Stiglitz, L. Bilmes, 2008, pg.162).

References

1. Naomi Klein, *The Shock Doctrine. The Rise of Disaster Capitalism*, Penguin Books, 2007.
2. Joseph Stiglitz, *Making Globalization Work*, Penguin Books, 2006.
3. Alan Greenspan, *The Age of Turbulence. Adventure in a New World*, Penguin Books, 2007.
4. Guillermo de la Dehesa, *Winners and Losers in Globalization*, Historia Printing House, Bucharest, 2007.
5. Joseph Stiglitz, Linda Bilmer, *The Three Trillion Dollar War*, Penguin Books, 2008.
6. Dominique Plihon, *Le nouveau capitalism*, Édition La Découverte, 2003.
7. Robert Gilpin, *The Global Economy in the XXI century*, Polirom Publishing House, 2004.
8. Laurent Batsch, *Le capitalisme financier*, Édition La Découverte, 2002.
9. Patrick Artus, *La nouvelle économie*, Édition La Découverte, 2001.

CONTENT AND DYNAMICS OF THE ROMANIAN ECONOMY

Elena CIUCUR*
Dumitru CIUCUR**

Abstract

*Inter-dependant economic activities, in the logical and preponderantly axiological chronology of their carrying out, represent the quintessence of the human society, its vital area. The coherent set of these activities, meaning the **economy** reflect the objective reality of the acts, facts, behaviors, phenomena and specific processes of the economic life, correlated with the scientific-technical progress and the natural environment.*

Key words: *Romanian economy, economic life, human nature, individual responsibility, social responsibility.*

1. The human content of the economy

Economy as basis of the society means that it represents the core element on which the system of inter-human relations is grounded, as such relations are historically defined and interests bearing.

Profound transformational moves generated by the scientific-technical and ecologic progress, by welfare and in the same time poverty expansion, substitution of gross labor with information or knowledge and understanding, amplification of sophisticated manufacturing methods, largely dependant on computers and information, enhancement of the crisis regarding mankind issues represent reasons for reflection, for inciting to thorough analysis of the Romanian economy's moves until this moment, to designing the present in the not so remote future.

The occurrence of new economic activity systems undermine the pillars of the old economic system, transforming the individual's life, the favorable ambiance, business, policy, morale, nation - state and the very essence of the economics, by placing the economy on the edge of the most profound switch, in line with a lasting, sustainable and then household economy.

But what does economy mean? Our walk through the old Romanian economic systems imposes that we should remind their content. **Economy represents a coherent set of relational activities in which people select what, how much, how and when they should produce in order to achieve their development purposes and those regarding the manifestation of their personalities in the community, people themselves representing a product of nature and of the society.** Economics, along with the other areas of the social life reflect in time and space man's continuous struggle with the nature and society within him, in order to adapt to the biological life needs, to the natural and social environment in which he is required to live. "Unless for such a system which could produce food, process, pack and distribute it, which could fabricate textiles and deliver medical and educational services, which could provide laws and maintain the order, which could prepare the collectivity's protection - life would be extremely difficult".

The genesis and development of the economics represent a permanent valorization process which has been consciously performed by people. Therefore, economics represents the real form of human action. It has occurred and developed by people and for them, and it has always been of

* Professor Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest.

** Professor Ph.D., Academy for Economic Studies, Bucharest.

human nature. Human economics is not a current concept; it has a long history and has evolved in steps². The content and permanent transformation of economics reflect the modality in which individuals succeed in correlating their unlimited, permanently diversifying needs, with the rare, yet alternatively usable resources. Depending on the relatively limited resources, people act reasonable in order to select the best option of the economic activity, upon defined conditions in time and space. The tension between needs and resources is permanent, and it manifests by human satisfactions or un-satisfactions on an individual and social level, by equalities, gaps, leaps or relative stabilities, etc.

In this process of choice, each individual is transiting through life, permanently registering joys and sorrows. **Economics as real form of human action is itself in continuous transformation and transition.** Economic life is an endless struggle of people with the principles of rarity, impossible and unknown, with the limits of freedom, in order to transform such in cert, possible and known elements of the day-to-day life, which they could then put in the service of achieving the set out aims. "The true issue is that in real life we normally don't have to choose between risky and cert situations, but between risk levels and various possible results."³

In this normal struggle with the limits of our existence, man and human collectivity, permanently under transition, learn to adapt to the natural environment they live in, by creating a **specific living environment** in which they act and produce what they need in order to live. "The progress of freedom in mankind history is not therefore a progress registered only in fighting against external imposed limits, but first of all in the dispute with the limits imposed by the nature in us and which represents a life time struggle of one with oneself."⁴

It results that human action has two groups of responsibilities:

a). Individual responsibility for the way in which the freedom of choice is reflected in what we need to do in respect with our own living;

b). Social responsibility for the way in which each individual's freedom of acting is reflected in the freedoms of choice of the ones with which that individual interacts, by the social nature of human action.

These two responsibilities should be compatible in time and space.

Obviously, many criteria exist for assessing the types of human activities. Given the relatively limited resources, the set of human activities pursuing to answer to the questions of what, how much, how and for who there should be produced are known as **economic activities**. In such, fundamental issues are solved regarding the volume, structure and quality of the goods that should be produced, regarding the present and future possibilities of producing - who, where, how much and with what costs - and also regarding the way in which we handle distribution and final using of the goods we produce, the ensuring of compatibility between the man-made and natural environments. By the economic activity those utilities are produced that people need in order to satisfy their life needs. Given the fact that satisfying people's needs represents a permanent process, the production answering to these exigencies is continuously carried out.

The economic activity or economy, in any times and historic circumstances represents people's primordial pursuit, their concern of ensuring species existence and perpetuation,

² The ample presentation of the aspect undertaken in the following can be found in the papers of: Constantin Popescu, Dumitru Ciucur, Ion Popescu - "The Transition to the Human Economics" (Romanian: "Tranzitia la economia umana"), Editura Economica, Bucuresti, 1997; Constantin Popescu, Dumitru Ciucur - "The Stages of Human Economics" (Romanian: "Treptele economiei umane"), Editura ASE, Bucuresti, 1997; Dumitru Ciucur, Hie Gavrilă, Constantin Popescu - "Economics" (Romanian: "Economie"), Editura Tribuna Economica, Bucuresti, 2004, etc.

³ Orio Giarini and Walter Stahel - "Limits of Certitude" (Romanian: "Limitele certitudinii"), Edimpress - Camro, Bucuresti, 1996, p. 256

⁴ Gabriel Liiceanu - "About Limit" (Romanian: "Despre limita"), Editura Humanitas, Bucuresti, 1997, p.69

satisfying vital needs regarding food, shelter, clothing etc. Once these needs are satisfied, the conditions are created for attempting to satisfy the other needs: cultural, spiritual, political etc. needs of the individuals and of the community as a whole. That is why economy represents basis, **vital and permanent area of the society**, and the economic activity is directly or indirectly involved in satisfying the needs of the society and represents the general fundament in the life of all people.

It is this sort of arguments we are considering when attempting to draw the overall picture of the human economy development, by reaching the conclusion that, in economy, transition is permanent; **regarded in terms of transformation, it cannot end, and any simplistic, insufficiently precise understanding over the end of transition is counter-productive.** Transition proves to be the permanent form of human evolution, whilst the costs of the transition through life are interested for any individual and for the social community as a whole.

Under the current circumstances, the Romanian economy is facing **great challenges** which are of substantial influence over the dynamics of the society in all its composing segments.

First of all we refer to ensuring **economic stability**, which must be achieved by judiciously relating such with the social measures such as increasing salaries, pensions and other monetary benefits. Under-evaluation of this relation generates larger demand for goods on the market, uncovered by the offer; hence resulting in increased inflation which would diminish the population's buying power.

Another challenge refers to observing the correlation between the **dynamics of the Gross Domestic Product and the dynamics of the inflation**. If this correlation is allowed to evolve by itself, the situation can be reached when the majority of the population would rather prefer high increases of GDP and implicitly of the salaries, without taking into consideration the danger of increased inflation. Nonetheless, both the economic theory and practice demonstrate that rapid and sustainable economic growth needed by our country in order to reach the developed countries, can only be achieved upon reduced inflation. That is because only then investors would trust to place their capitals in the real economy. In case of large inflation, in the country speculative capitals are attracted, which rapidly generate large profits and then hastily go.

In prolongation of such challenge there becomes necessary to peruse the correlation between the **rhythm of economic growth, the rhythm of consume growth, the rhythm of salaries growth and that of external deficit**. These correlations must be scientifically achieved and monitored, and should not be left to be regulated by the market, because any market failure leads to inflation and to the erosion of population's buying force.

Economic growth based on consume, instead of export, represents a very damaging tendency for the Romanian current economy. The more Romania consumes, the larger the external disequilibrium is, because the economy is not able to ensure a rhythm of increasing exports up to the level of the imports, as demand is larger than the offer of domestic goods.

Hence another important challenge referring to the fact that Romania needs not only the **statue of functionally competitive market economy, but also the statute of efficient, proficient economy**. Synthesized, this would mean that if higher levels of the leu are rather grounded on economic performances than on inflows of European or foreign capital, then the national currency would resist to shocks that might arise on an external level.

That is why by means of the macro-economical policies constant stimulation of economy performances are imposed and the creation by such of real anti-inflation anchors. Such a tendency based on authentic economic performances ensures effective resistance against potential external shocks caused for instance by more expensive loans or by the international oil price exceeding a certain psychological level.

An important challenge for the Romanian economy is that regarding the **labor force**. The economic environment has reached such a situation when the re-thinking is necessary on its

fundamentals of the training and use of the labor force. This should also take into consideration the criterion according to which the priority is to train workers for the existent labor places. It is necessary to train workers for the existent labor places by adequate training programs and then, if the case, to create new labor positions. The in force labor legislation should be improved and modernized, by revising its protectionist nature in favor of the employee.

The permanent changes in the Romanian economy involve people more and more profoundly both before and after the actual use of production factors. **Investing in people is the hope for mankind.** Man is the creator of all goods, and producing them produces transformations in the human life system. As industrial revolution generated a new system for creating welfare, and the smoke chimneys in their time stabbed the sky above once cultivated lands, the same robots proliferate in human economy deep changes in people's life and action, in propagating the tensions between needs and resources, and also in personal, political, national and international relationships imposed by the struggle for the equality of chances for coexisting and succeeding generations.

2. Inter-dependant stages in the economy evolution

Economy is by essence human, and it can be delimited as it follows: individual, family, company economy, as well as local, national, regional-international economy, world economy, and in perspective - cosmic or interplanetary economy. Identifying periods for such forms allows us to shape various stages within them, or multiple **different forms⁵ of evolution** in mankind's life history and **concrete existence forms** during the same horizon of time⁶. Thus, human economy has begun as a work economy upon a primary (primitive) stage, meaning the **first wave (stage)**, it continued with the second stage of work economy, upon slavery conditions, meaning the **second wave (stage)**, and then it underwent the feudal work economy, meaning the **third wave (stage)**, whilst at the present moment mankind faces the work economy upon freedom and non-freedom conditions (capitalism - communism), which represents the **fourth wave (stage)** of life evolution.

Obviously, each of these stages means important steps towards the freedom of choice in life and towards ensuring equal chances for generations that coexist and are succeeding on this earth. Any time these fundamental exigencies are breached in smaller or larger human collectivities and for a specific time period, both the need for change and opportunities for putting it into practice occur. This happened in Romania after the Second World War and until 1989, imposing the identification of evolution targets. Such has been erroneously set out as **the shift towards the market economy**, which is not entirely consistent with the logic and history of the evolution. The line of logics imposes that there should be taken into consideration the existence of centralized guided market economy, so that the target should imply the shift to the new type of market economy, namely **the performance competitive - functional market economy**.

The history of human economy stages' evolution demonstrates that between the freedom of choice in life, in business and equality of chances for succeeding generations, in certain circumstances profound contradictions can occur with implications over the compatibility of

⁵ The problem of identifying periods in the economic-social evolution represents an important concern for the economic science, and it is included in interesting opinions in the specialized literature upon various modal moments of the economic movement. Hence, see the works of the American Professor W. W. Rostow, ever since the beginning of the sixth decay of the last century regarding the theory of stage growth of the society, as well as numerous other representative specialists such as: A. Marshall, J.B. Clark, W.K. Michell, C. Menger, Leon Walras etc.

⁶ See Constantin Popescu, Dumitru Ciucur - "Stages in Human Economy" (Romanian: "Treptele economiei umane"), Editura ASE, Bucuresti, 1997, p. 6 and the following.

economic criteria, with the social and ecological ones imposed by the transition through life. Whilst the economic aspect of human action is imposed by the need for life evolution given the relative rarity of resources, the social criterion is the expression of the exigencies demanded for the coexistent and succeeding generations, and the ecologic aspect represents the major demand for the normal succession of the generations, for life on planet Earth.

The continuous deepening of gaps between world countries, in respect with ensuring equal chances for people undergoing their transition through life, in the same time with worsening the fundamental parameters for the natural environment are revealing the entrance of the fourth economy stage into a profound crisis. Such crisis is damaging the very nature of human economy.

That is why people, specialists and institutions feeling this danger are raising the issue regarding the need of reaching a new (fifth) stage in the human economy evolution. This is **the stage of sustainable economy (the fifth wave)** in respect with equal chances for the generations coexisting and succeeding on Earth.

In this stage the dynamic compatibility is pursued of four systems: economic, human, environmental and technological, such that to ensure satisfaction of the present's needs, yet without compromising the ability of future generations of satisfying their own needs. Sustainable development is defined by a **natural dimension** (in the sense that it only exists for as long as the manly created environment is compatible with the natural environment); by a **social-human dimension** (in the sense that all outputs from the manly created environment should answer directly to the present and future needs of the generations co-existing and succeeding; by a **national - state, regional and worldwide dimension** (in the sense of compatibility between the optimization criteria both within the country, and on a regional, continental or world, global level).

The transfer to the lasting, sustainable development marks mankind's entrance in the environmental (ecological) stage, in which the development risks should be strongly diminished. Also, in this stage the following problems should be solved differently: demographical, cultural, political, military. These imply a new set of values, as well as new sets of macro-economical assessment indicators.

In the specific circumstances of this stage or wave the concept of **new economy** is taking shape, as a reality of the third millennium beginning. The launching of this concept has generated serious concern for man economists, sociologists, psychologists and politicians from Europe, the USA and Asia, and both favorable opinions and nuances or even reticence occurred.

The new economy is defined as scientific knowledge based economy, with the following fundamental features: producing scientific knowledge by continuous innovation and disseminating such knowledge to all society members; using advanced knowledge in all areas, beginning with the technological and the management of human activities, concretized in a new production technical means, in educating the specialists and the entire population grounded on these knowledge, by an elevated education system and training supported by scientific innovation and creativity; the manifestation of the new economy on internationalized, continental and world integrated markets.

Unlike the traditional economy, the **new economy** is regarded as a complex, evolving and adaptive system, grounded on production neo-factors, which calls for electronic commerce and other modern tools for e-development, which puts accent on the competitive advantage, on multi-functional teams, which has as main topics disequilibrium, instability, fluctuations, chaos. It involves merger of large processes, such as: rapid technologic progress, mainly in regard to information and communication technology, speeding up of the internationalization process regarding a part of the economy and the modifications in the international financial framework. The content of the new economy tends towards a financially-monetary and currency economy.

Taking into consideration the natural limits of the Earth, as well as the possibilities provided by scientific knowledge in the Universe in which we live, it is not impossible for the

stage of lasting, sustainable economy, based on globalizing the freedom of choice and ensuring equal chances, to be gradually integrated into a "cosmolization" process. First, this would be obtained by cosmic micro-zones, and it would then unlimitedly expand in the area of possible Universe, either in the current life form or in another life form, difficult to imagine today in terms of its sense and evolution intensity. In any way, if imagination can take us tens or hundred of years ahead, as it is actually natural, such life economy could be named the **cosmic economy**, upon various extension levels. It would be based on a certain civilization, which would mean in our time's reasoning **the sixth stage (the sixth wave)** or a new type of human economy, in the sense in which we see and understand life today.

Of course, the evolution stages of the human economy known so far can be divided in a certain time horizon⁷. However, such an operation is difficult to achieve exactly in respect with the historic time, and that is why it would be better for us to consider the intensity of the process of transferring from a particular stage to another depending on its decisive variables. Thus, the human economy of the first wave lasted the longest, consequent to the low progress in man, to investments grounded exclusively on life experience and to the reduced tension between needs and resources.

Once the progresses in man integrated not only practical experience, but also science on the future, along with the occurrence of new economic and social-state factors, in the relationship with the enhancing for the tension between direct economic efficiency of the human action and the justice resulted from re-distributing such, the duration of the evolution stages of the human economy decreased. The transition period from one stage to the other depends both on becoming aware of the change, and on the political will for achieving it, on concrete opportunities, on the costs they imply and on their sustainability level⁸. The shift can be smooth, without any social convulsions, or sudden, sometimes even with social convulsions, with special and unpredictable costs and effects, because such are all dependant on man, on his training and evolution, on its psychology and morality, regardless which is his social responsibility upon a given time.

The reality of contemporary economies provides interesting signals regarding the permanent dialectic movement of the economic processes on a planetary scale, reflecting the structural convergence of the models and the joining of the relations between economy, society, politics, identities of the aggregated economic agents, pragmatic stakes, strategies and prospectus. The most sensitive issue proves to be at the present moment, and especially in perspective, that of power and spiritual-cultural and political-military decision centers, which reflect a set of interests which are continuously amplifying and diversification, depending on world's economic division or re-division, influenced by the limited nature of the resources, by their costs and by the difficulties in achieving them.

⁷ See Constantin Popescu, Dumitru Ciucur - Quoted paper, p. 7-8

⁸ Lester R. Brown (coordinator) - "Global Issues of the Economy. World Status, 1991" (Romanian: "Probleme globale ale economiei. Starea lumii, 1991"), Editura Tehnica, Bucuresti, 1994

References

1. Adler Alfred, "Sensul vietii", Editura IRI, Bucuresti, 1995
2. Albu Lucian Liviu, "Dezvoltarea durabila in Romania: modele si scenarii pe termen mediu si lung", Editura Expert, Bucuresti, 2005
3. Anghelache Constantin, "'Romania 2006. Starea economica inaintea aderarii'", Editura Economica, Bucuresti, 2006
4. Angelescu Coralia (coordinator), "Optiuni strategice de dezvoltare a economiei romanesti, Editura ASE, Bucuresti, 2004
5. Beatty Jack, "Lumea in viziunea lui Peter Drucker", Editura Teora, Bucuresti, 1998
6. Cosea Mircea, "Economia Integrarii Europene", Editura Pro Universitaria, Bucuresti, 2006
7. Covey R. Stephen, "Eficienta in sapte trepte, Un abecedar al intelepciunii umane", Editura All, Bucuresti, 1996
8. Dachian Anca, "Tranzitia si structurile industriale in Romania", Editura National, Bucuresti, 1997
9. Daianu Daniel, "'Pariul Romaniei. Economia noastra: reforma si integrare'", Editura Comario, Bucuresti, 2004
10. Dinu Marin, "Globalizarea si aproximarile ei", Colectia Prelegeri, Editura Economica. Bucuresti, 2004
11. Drucker F. Peter, "Inovare si spirit intreprinzator", Editura Teora, Bucuresti, 2000
12. Erisso H (coordinator), "'Instruments, tools and policies to anticipate the effects of industrial change on employment and vocational qualifications", Study for the European Commission, D.G.V., Country Report, Sweden, Stockholm, 1998
13. LaffarB, O'Donnel R and Smith M., "The Political Economy of Globalization", Macmillan Press Ltd, USA, 2000
14. Lispey R.G., Chrystal K.A.", "Economie pozitiva", Editura Economica, Bucuresti, 2002
15. Miron Dumitru, "Economia Uniunii Europene", Editura Luceafarul, Bucuresti, 2005
16. Negritoiu Misu, "Salt inainte", Editura PRO, Bucuresti, 1997
17. Puscas Vasile, "Romania si iar Romania- note despre o istorie a prezentului", Editura Eikon, Bucuresti, 2007
18. Popescu Constantin, "Rationalitate si speranta. Paradigma intregului viu", Editura ASE, Bucuresti, 2006
19. Stiglitz E. Joseph, Carl E. Walsh, "Economie", Editura Economica, Bucuresti, 2005
20. Suciu Marta Christina, "Investitia in educatie", Editura Economica, Bucuresti, 2000
21. Vasilescu I., Romanu I., Cicea C., "Investitii", Editura Economica, Bucuresti, 2000

TAXATION TRENDS IN EUROPEAN UNION

Maria GRIGORE*

Abstract

This work contains an economic analysis of the tax rates and revenue ratios of the European Union Member States. The paper also includes the structural reform initiatives that have been high on the tax policy agenda in last period. Despite the fairly short span of time, a wide spectrum of tax reforms was implemented or are going to be implemented (the Common Consolidated Corporate Tax Base, the key reform initiatives including dual income taxes and flat taxes, the elimination of harmful tax competition, the simplification and rationalization of the current VAT rates structure or key elements contributing to the establishment of the VAT anti-fraud strategy within the EU).

The main objective of this paper is to present a fairly view of the structure, level and trends of taxation in the European Union over the last ten years.

Keywords: *the overall tax ratio, tax revenue, implicit tax rates, harmful tax competition, tax reform*

Introduction

Based for the most part on the information given from the reports “Taxation Trends in the European Union” edited each year by European Commission, this paper describes and evaluates developments with respect to tax systems of the European Union Member States over the last years and discusses selected structural reform initiatives that have been taken lately or are going to be taken in the communitarian space.

Tax systems are continuously changing as Member States align their tax systems with evolving economic, political, and administrative conditions. A central policy issue in recent years has been the implications for the stability of tax bases of economic integration and the ever increasing mobility of capital, labor, and goods and services. The specific policy challenges differ widely across countries: developing countries focus, in particular, on attracting investment and raising revenue to promote development and developed countries are predominantly preoccupied by safeguarding their tax bases to preserve the welfare state and to meet the challenges of ageing.

Having a complete view of the structure, level, and trends of taxation and of the reform initiatives taken and those that are likely to be important in the coming years is useful both for corporations (that helps its with finding solutions to emerging challenges in growing and maintaining tax function efficiencies and productivity) and governments (that helps its to elaborate appropriate macroeconomic policies).

The paper content is divided into three parts. Part I examined the level and the distribution of the overall tax burden by major type of taxes. Part II presents the economic classification of taxes and conducts a comparison of implicit tax rates between Member States. Part III discusses selected specific commonalities in actual tax reforms implemented around the European Union over the last ten years.

Literature Review

There are many publications with helpful background on tax-related issues. I will enumerate only ones that I used in my work:

* Lecturer Ph.D., Faculty of Economic Sciences, “Nicolae Titulescu” University, Bucharest.

1. *The annual report "Taxation Trends in the European Union"*, edited by European Commission, contains statistics and an economic analysis of the tax systems of the European Union Member States. In the 2007 edition, the tax systems of each of the 27 Member States are compared within a unified statistical framework (the ESA95 harmonized system of national and regional accounts), at different levels of aggregation and classification of tax revenues. The framework utilized makes it possible to assess heterogeneous national taxation systems on a comparable basis.

2. *Taxes in Europe Database* (http://ec.europa.eu/taxation_customs/taxinv/welcome.do), a tool launched by European Commission on the internet, contains information on about 600 most important taxes in the EU Member States. Using a methodology agreed with the Member States, this database includes information about the main aspects of each tax, as well as economic and statistical data such as the revenue generated. The database allows comparison among Member States.

3. *Taxation Paper No 10/2007 - A history of the "tax package"*, written by Philippe Cattoir presents an overview of the EU "Tax Package", comprising the Code of Conduct for business taxation, the Directive on taxation of savings income and the Directive on taxation of interest and royalty payments. Its main objective is to offer a comprehensive view of the negotiation process, and a broad overview of the content of the package, as well as pending policy issues. This then allows drawing a number of lessons concerning the approach followed and the outlook for future European initiatives on direct taxation.

4. *Tax Policy: Recent Trends and Coming Challenges*, written by John Norregaard and Tehmina S. Khan and edited by International Monetary Found (WP/07/274), provides an overview of the key economic factors that shape tax policy reform in many high-income countries, developing countries, and/or transition economies. The paper describes global and regional developments with respect to tax rates and revenue ratios over the last some 20 years.

5. *Activities of the European Union in the Tax Field in 2007*, edited by European Commission, presents all the European Commission communications related to personal and corporate taxation, value added tax, excise duties and other indirect taxes, tax administration, tax avoidance and evasion measures.

Theoretical background

A. Formulas:

1. The overall tax ratio is the ratio between total tax revenues and GDP
2. The top statutory personal income tax rate reflects the tax rate for the highest income bracket without surcharges. For Denmark, Finland and Sweden the municipal income tax is also included.
3. Taxation of corporate income is not only conducted through the corporate income tax (CIT), but, in some Member States, also through surcharges or even additional taxes levied on tax bases that are similar but often not identical to the CIT. In order to take these features into account, the simple CIT rate has been adjusted for comparison purposes. Adjustments have been carried out for Germany, Estonia, France, Italy, Lithuania and Portugal.
4. Implicit tax rates (ITR) in general measure the effective average tax burden on different types of economic income or activities, i.e. on labour, consumption and capital, as the ratio between revenue from the tax type under consideration and its (maximum possible) base.
5. The ITR on consumption is the ratio between the revenue from all consumption taxes and the final consumption expenditure of households.
6. The ITR on labour is calculated as the ratio of taxes and social security contributions on employed labour income to total compensation of employees.

7. The ITR on capital is the ratio between taxes on capital and aggregate capital and savings income.

B. Statistical dates:

Table A. Total tax revenue (including social security contributions) in % of GDP

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Average 1995-2005	Difference 1995-2005
Belgium	43,8	44,4	44,9	45,5	45,5	45,2	45,2	45,3	44,9	45,0	45,5	45,0	1,7
Bulgaria	x	x	x	x	x	33,1	32,1	31,0	33,6	35,3	35,9	33,5	x
Czech Republic	36,2	34,7	35,0	33,3	34,0	33,8	34,0	34,8	35,7	36,8	36,3	35,0	0,1
Denmark	48,8	49,2	48,9	49,3	50,1	49,4	48,4	47,8	48,0	49,3	50,3	49,0	1,5
Germany	39,8	40,7	40,7	40,9	41,7	41,9	40,0	39,5	39,7	38,8	38,8	40,2	-1,0
Estonia	37,9	35,6	35,9	34,9	34,6	31,3	30,2	31,1	31,5	31,4	30,9	33,2	-6,9
Ireland	33,1	33,1	32,4	31,7	31,8	31,7	29,8	28,5	29,1	30,5	30,8	31,1	-2,3
Greece	32,6	33,0	34,3	36,3	37,3	37,9	36,6	36,7	35,5	34,3	34,4	35,4	1,8
Spain	32,7	33,1	33,2	33,0	33,6	33,9	33,5	33,9	33,9	34,5	35,6	33,7	2,9
France	42,7	43,9	44,1	44,0	44,9	44,1	43,8	43,1	42,8	43,1	44,0	43,7	1,3
Italy	40,1	41,8	43,7	42,5	42,5	41,8	41,5	40,9	41,3	40,7	40,6	41,6	0,5
Cyprus	26,7	26,4	25,8	27,7	28,0	30,0	30,9	31,2	33,1	33,5	35,6	29,9	8,9
Latvia	33,2	30,8	32,1	33,7	32,0	29,5	28,5	28,2	28,5	28,5	29,4	30,4	-3,8
Lithuania	28,6	27,9	31,0	32,0	31,8	30,1	28,7	28,4	28,2	28,3	28,9	29,4	0,3
Luxembourg	37,1	37,6	39,3	39,4	38,3	39,1	39,8	39,1	38,5	37,9	38,2	38,6	1,1
Hungary	41,6	40,6	39,0	39,0	39,1	38,5	38,9	38,5	38,4	38,6	38,5	39,2	-3,1
Malta	27,3	25,8	27,5	25,3	27,1	28,2	30,4	31,9	31,8	34,2	35,3	29,5	8,0
Netherlands	40,2	40,2	39,7	39,4	40,4	39,9	38,3	37,7	37,4	37,7	38,2	39,0	-2,0
Austria	41,3	42,6	44,0	44,0	43,7	42,8	44,7	43,7	43,1	42,8	42,0	43,2	0,7
Poland	37,1	37,2	36,5	35,4	35,3	34,0	33,6	34,3	33,4	32,6	34,2	34,9	-2,9
Portugal	31,9	32,8	32,9	33,1	34,1	34,3	33,9	34,7	35,1	34,2	35,3	33,8	3,4
Romania	x	x	x	x	x	x	27,8	28,2	27,6	27,3	28,0	27,8	x
Slovenia	40,2	39,1	38,0	38,8	39,2	38,6	38,9	39,3	39,5	39,6	40,5	39,2	0,2
Slovakia	39,6	38,0	35,0	35,6	34,2	32,9	31,6	31,9	30,9	29,7	29,3	33,5	-10,3
Finland	45,7	47,0	46,3	46,1	45,8	47,2	44,6	44,6	44,0	43,4	43,9	45,3	-1,8
Sweden	49,0	51,5	52,0	52,7	53,3	53,4	51,4	49,7	50,2	50,5	51,3	51,4	2,2
United Kingdom	35,6	35,1	35,7	36,7	37,1	37,6	37,3	35,8	35,6	35,9	37,0	36,3	1,4
EU-27 weighted average	39,7	40,4	40,7	40,5	41,0	40,7	40,0	39,3	39,3	39,2	39,6	40,0	-0,1
EU-27 arithmetic average	37,7	37,7	37,9	38,0	38,2	37,7	36,8	36,7	36,7	36,8	37,4	37,4	-0,4
EA-13 weighted average	39,9	40,9	41,3	41,1	41,6	41,3	40,4	40,0	39,9	39,6	39,9	40,5	0,0
EA-13 arithmetic average	38,6	39,2	39,5	39,6	39,9	39,9	39,3	39,0	38,8	38,7	39,1	39,2	0,5

Source: European Commission

Note: x - data not available

EU-27 European Union (27 Member States)

EA-13 Euro area (Belgium, Germany, Ireland, Greece, Spain, France, Italy, Lithuania, Netherlands, Austria, Portugal, Slovenia, Finland)

Table B. The structure of the tax revenues by major type of taxes (as% of Total Taxation)

	Indirect taxes		Direct taxes		Social contributions	
	1995	2005	1995	2005	1995	2005
Belgium	29,4	30,5	37,9	39,0	32,7	30,5
Bulgaria	x	52,8	x	17,9	x	29,3
Czech Republic	33,9	32,9	26,5	25,6	39,6	41,5
Denmark	34,9	35,6	63,5	62,5	2,2	2,2
Germany	30,2	31,3	27,5	26,6	42,3	42,1
Estonia	36,6	43,7	28,9	22,8	34,5	33,5
Ireland	43,9	44,2	41,2	40,3	15,0	15,4
Greece	44,1	37,4	23,8	27,5	32,1	35,1
Spain	32,6	35,1	31,4	32,0	36,0	34,1
France	37,6	36,0	19,7	27,1	43,5	37,2
Italy	31,0	35,8	37,5	33,2	31,5	31,0
Cyprus	42,7	48,1	32,9	28,7	24,4	23,2
Latvia	42,4	43,9	21,5	27,2	36,1	28,9
Lithuania	43,5	40,0	30,4	31,6	26,1	28,6
Luxembourg	31,9	35,0	41,6	36,9	26,5	28,1
Hungary	42,8	41,0	21,3	23,6	35,9	35,3
Malta	46,1	45,4	31,1	34,4	22,8	20,3
Netherlands	29,3	34,4	31,2	31,2	39,5	34,4
Austria	35,8	35,0	28,3	30,7	35,9	34,4
Poland	38,3	40,6	31,6	20,5	30,5	40,0
Portugal	43,5	43,3	26,6	x	29,9	32,1
Romania	x	46,3	x	19,1	x	34,6
Slovenia	39,5	40,5	17,7	23,0	43,0	36,6
Slovakia	38,0	44,3	29,0	20,8	35,6	36,9
Finland	31,0	32,1	38,2	40,7	30,8	27,2
Sweden	32,8	33,8	40,8	39,3	26,4	27,0
United Kingdom	39,6	35,8	43,1	45,4	17,3	18,8
EU-27 weighted average	33,8	35,0	31,4	33,1	35,0	32,2
EU-27 arithmetic average	37,3	39,1	32,1	31,1	30,8	30,3
EA-13 weighted average	32,8	34,4	28,5	30,0	38,9	35,9
EA-13 arithmetic average	35,4	36,2	31,0	32,4	33,7	32,2

Source: European Commission

Table C. The structure of the tax revenues by economic function (as % of Total Taxation)

	Consumption		Labour		Capital	
	1995	2005	1995	2005	1995	2005
Belgium	24,6	24,9	55,6	52,3	19,8	22,8
Bulgaria	x	51,3	x	33,0	x	15,8
Czech Republic	31,6	31,4	48,2	49,2	20,3	19,4
Denmark	31,6	31,9	55,9	49,3	13,0	19,0
Germany	25,9	26,1	60,0	57,4	14,0	16,5
Estonia	32,9	41,8	55,8	49,9	11,3	7,9
Ireland	39,2	37,1	40,9	34,2	19,8	28,7
Greece	41,3	34,9	36,1	40,8	22,6	24,3
Spain	27,3	27,5	50,0	45,1	22,7	28,6
France	28,2	25,8	53,8	53,0	18,8	21,3
Italy	25,9	24,8	45,1	50,3	29,0	24,9
Cyprus	37,4	41,4	38,6	31,8	24,0	26,8
Latvia	36,5	42,0	52,0	48,3	11,2	9,6
Lithuania	40,6	37,9	46,8	50,7	12,6	11,6
Luxembourg	27,1	28,5	41,8	40,7	31,1	30,7
Hungary	41,9	37,8	49,9	50,8	8,3	11,6
Malta	43,0	40,9	34,0	31,3	23,1	27,8
Netherlands	28,0	31,8	54,2	46,5	17,9	21,7
Austria	28,1	28,9	57,2	55,4	14,7	15,8
Poland	34,2	35,8	45,9	40,7	20,3	24,6
Portugal	39,4	x	41,6	x	19,0	x
Romania	x	44,3	x	39,1	x	16,5
Slovenia	38,5	34,5	56,3	53,6	5,4	12,0
Slovakia	36,8	42,7	41,9	43,0	24,0	16,2
Finland	30,3	31,2	57,1	53,1	12,6	15,7
Sweden	27,5	25,5	62,5	60,8	10,0	13,7
United Kingdom	34,7	30,9	39,3	39,0	26,0	30,1
EU-27 weighted average	28,5	28,1	52,6	49,8	19,1	22,3
EU-27 arithmetic average	33,3	34,3	48,8	46,1	18,1	19,8
EA-13 weighted average	27,3	26,8	54,1	52,0	18,8	21,4
EA-13 arithmetic average	31,1	29,7	50,0	48,5	19,0	21,9

Source: European Commission

Table D. The ITR by type of economic activity in EU-27 and EA-13 (arithmetic average)

Implicit tax rates (%) on:	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
- Consumption											
EU-25	21,5	21,1	21,3	21,3	21,6	21,2	20,8	21,2	21,3	21,7	22,1
EA-13	20,9	21,0	21,3	21,5	22,0	21,6	21,2	21,4	21,3	21,6	21,8
- Labour											
EU-25	35,8	35,8	36,2	36,4	36,3	36,4	36,1	35,9	35,7	35,3	35,6
EA-13	36,0	36,4	36,6	36,8	36,6	36,8	36,4	36,3	36,5	36,2	36,8
- Capital											
EU-25	24,2	24,7	25,5	26,0	27,2	26,5	25,0	25,0	24,6	25,3	27,3
EA-13	23,4	25,2	26,1	26,7	28,9	29,4	28,2	28,2	28,1	28,4	30,4

Source: European Commission

Table E. The ITR by type of economic activity in EU Member States

	Implicit tax rates (%) on					
	Consumption		Labour		Capital	
	1995	2005	1995	2005	1995	2005
Belgium	20,6	22,2	43,8	42,8	25,3	34,5
Bulgaria	x	24,6	x	34,2	x	x
Czech Republic	22,1	22,1	40,5	41,3	26,4	23,2
Denmark	30,5	33,7	40,1	37,3	30,0	46,5
Germany	18,8	18,1	39,4	38,7	22,4	23,3
Estonia	20,6	23,8	39,2	33,1	24,7	8,1
Ireland	24,9	27,2	29,7	25,6	25,9	41,4
Greece	17,6	17,0	34,1	38,0	11,8	15,4
Spain	14,6	16,3	28,9	30,1	20,3	36,0
France	21,5	20,2	41,2	42,1	31,2	38,9
Italy	17,4	16,9	37,8	43,1	25,9	29,0
Cyprus	12,1	19,3	23,1	24,6	x	x
Latvia	19,3	20,4	39,2	36,2	x	x
Lithuania	17,7	16,5	34,5	35,9	15,1	11,4
Luxembourg	21,1	24,3	29,3	29,5	x	x
Hungary	30,9	26,5	42,6	40,5	x	x
Malta	15,4	19,2	19,0	22,1	x	x
Netherlands	23,2	25,4	34,4	30,7	21,2	21,2
Austria	20,3	21,3	38,7	40,9	25,6	23,1
Poland	21,3	19,8	35,9	35,5	21,5	22,2
Portugal	19,1	x	28,1	x	18,8	x
Romania	x	18,5	x	26,7	x	x
Slovenia	25,1	24,5	38,9	38,5	x	x
Slovakia	27,1	21,9	39,5	33,7	33,5	14,4
Finland	27,6	27,6	44,3	42,0	28,5	26,7
Sweden	27,9	28,1	48,4	46,4	17,5	x
United Kingdom	20,1	18,7	25,8	25,5	33,3	37,6

Source: European Commission

Table F. Current flat taxes (%)

Country	Year of the last reform	Personal income tax			Corporate income tax		
		Before reform	After reform	In 2008	Before reform	After reform	In 2008
Estonia	1994	16-33	26	22	35	26	22
Lithuania	1994	18-33	33	24	29	29	15
Latvia	1997	10-25	25	25	25	25	15
Slovakia	2004	10-38	19	19	25	19	19
Romania	2005	18-40	16	16	25	16	16
Czech Republic	2008	12-32	15	15	24	22	22
Bulgaria	2008	20-24	10	10	10	10	10

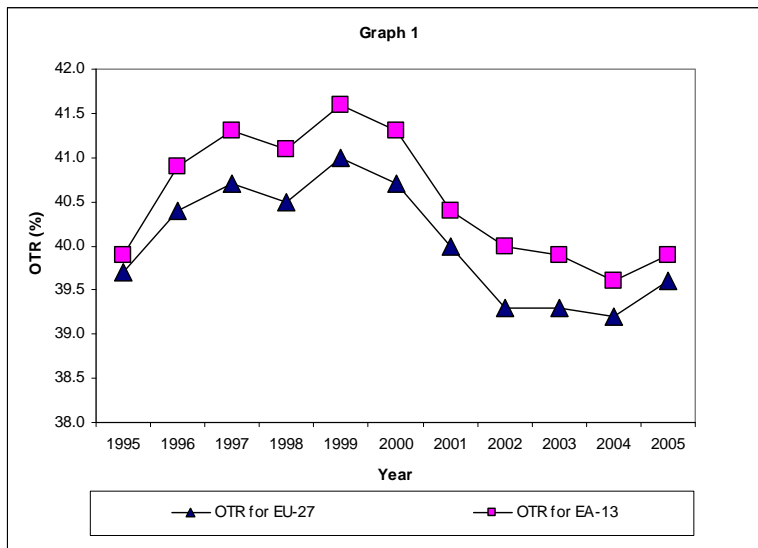
Source: Keen, Michael, Yitae, Kim, and Varsano, Ricardo. 2007. The "Flat Tax(es)": Principles and Evidence. *International Tax and Public Finance Journal* No 4/2007

Part I. The overall tax ratio and the structure of the tax revenues by major type of taxes in the European Union

The European Union (EU) is a high tax area compared with other international regions. In 2005 **the overall tax ratio** (OTR) in the 27 Member States (EU-27) amounted to 39.6 %, up from 39.2% in 2004.

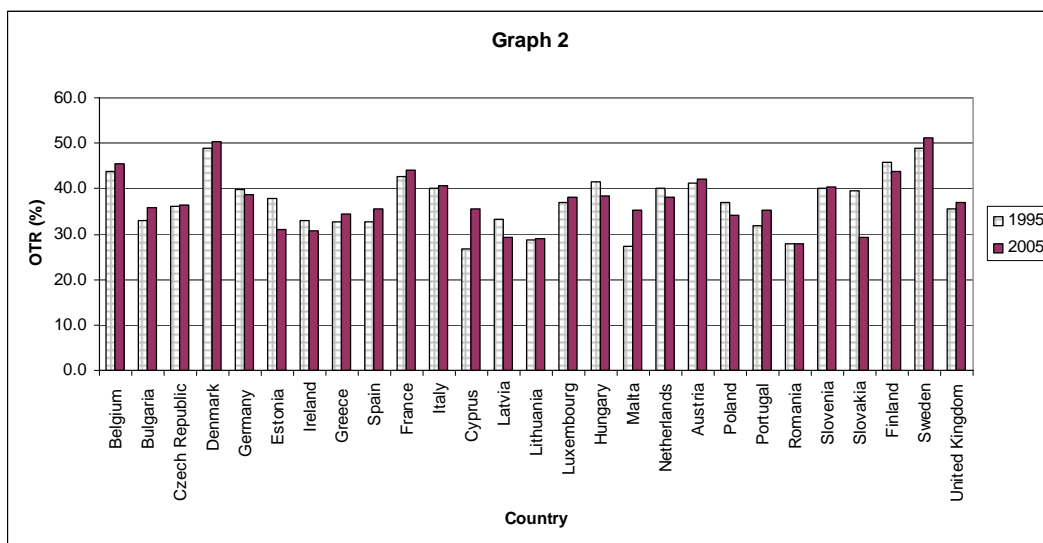
The EU-27 tax ratio is nearly the same as in 1995 (39.7%); nevertheless, the ratio is lower than the peak of 41.0% in 1999.

The downtrend which had started in 1999 in most countries stopped in 2005. In 2005 the overall tax ratio in the Eurozone (EA-13) was 39.9%, up from 39.6% in 2004. Since 1995 taxes in the Eurozone have followed a similar trend to the EU-27, although at a slightly higher level (Table A and Graph 1).



Cyclical factors contributed to slow the decline of the tax ratios after 2002. Particularly from 2004, growth in the EU reaccelerated, boosting the revenue of pro-cyclical taxes; in addition, Member States strove to reduce their deficits, which probably led them to postpone tax cuts. The 2005 upturn in taxation, however, coincided with a temporary slowdown in the pace of the recovery: EU-25 growth amounted to 1.7 % versus 2.4 % in 2004. This was only a pause as in 2006 growth again reaccelerated to around 2.8 %. The latest EU Commission forecasts project that total general government revenue will increase further in 2006 by a fairly significant 0.7 % of GDP in the weighted average and then decline slightly (by 0.3 points) in 2007. Growth has been following broadly the same trend in the euro area as in the EU as a whole.

As illustrated by **Table A** and **Graph 2**, there are wide differences in overall tax ratio levels across the European Union.



Note: Data for Bulgaria are from 2000 and 2005, and for Romania from 2001 and 2005

As a general rule, the overall tax ratio tends to be significantly higher in the ‘old’ EU-15 (Sweden has the highest overall tax ratio: 51.3 %) than in the 12 new Member States that joined the EU since 2004 (Romania has the lowest: 28.0 %). Given the usually significantly lower tax ratios in the accession countries, EU enlargement resulted in a decline for the EU mean value. In the arithmetic average, the total tax-to-GDP ratio of the new Member States is almost seven percentage points lower than the average of the EU-15.

There are substantial differences in the overall tax ratio not only between the EU-15 and the new Member States but also within this group. Between the new Member States one may distinguish two groups of countries:

- Slovenia (40.5 %) and Hungary (38.5 %) with a level exceeding the EU-27 average (37.4 %);
- the remaining new Member States with a level below the EU-27 average: from the Czech Republic (36.3 %, i.e. one point below average) to Romania (28.0 %, i.e. nine and a half percentage points below average).

Generally one might say that in terms of the tax ratio, the geographically peripheral countries (with the exception of the Nordics) tend to display lower taxation: the UK and Ireland, Portugal and Spain, Cyprus and Malta, the Baltic States and Poland, Slovakia and the newest two Member States Romania and Bulgaria have low tax ratios, whereas the “continental” countries have higher taxation: France, the Benelux, Germany, Austria, Czech Republic, Austria and Hungary, Slovenia exceed the average or are at least quite close to it.

Several facts result from a long-term comparison (1995-2005) of the overall tax ratio [1]:

- countries with higher-than-average tax ratios (i.e. essentially the old Member States) have tended to carry out limited adjustments;

- the most forceful changes tend to appear among low-tax countries;

- more countries have increased their tax ratios than reduced it;

- only four above average countries (Finland, Germany, Hungary and the Netherlands) have managed to reduce their overall tax ratio;

- more low-average Member states have increased their tax ratio than reduced it;

Interestingly, low-tax countries tend to display large adjustments in either direction, upwards or downwards, whereas above the average the picture appears much more static;

- amongst the new Member States, trends are quite diversified with further decreases in some Member States, increases in others. However, the divergence appeared after 1999; before that date, there was a common downward movement in the ratios; four Member States have shown much larger variation than the others: Cyprus and Malta (upwards) and Slovakia and Estonia (downwards);

- Cyprus and Malta represent the major exceptions to the decline in tax ratios common to most of the new Member States; these two countries in fact witnessed large increases in the ratio (with 8 until 9 percentage points), albeit from a very low base as these Member States started from the two lowest tax ratios in 1995. They now rank 17th and 18th of 27 respectively in terms of the tax ratio, still below average by around 2 points of GDP;

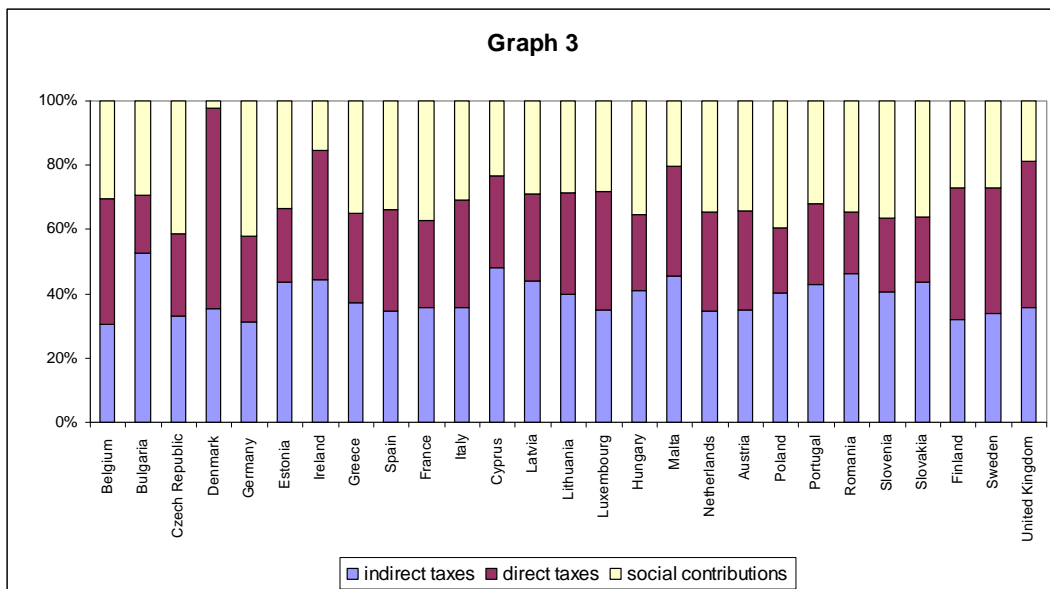
- In Slovakia the tax ratio, already low by 1999, fell by a further 3.6 points from 2000 to 2005. Overall, over the entire 1995-2005 period, Slovakia stands out as the Member State that has carried out the most profound restructuring of its tax system, with the tax ratio declining by over one quarter. The country thus changed its ranking significantly, from being essentially in line with the old Member States average in 1995 at 40.5 % of GDP, to having the third-lowest ratio in the EU-27 in 2005;

- In Estonia the bulk of the reduction in the tax ratio took place from 1995 to 2001; the ratio has remained roughly constant since;

- As for Bulgaria and Romania, data since the beginning of the series (i.e. 2000 for the former and 2001 for the latter) show respectively a trend increase (+2.9 points) and substantial stability (+0.2) to 2005;

- Amongst the old Member States, no dramatic changes in the tax ratio have taken place, although one might mention that the further decline in Ireland's tax ratio is noteworthy, given the already low starting point.

As for the *structure of the tax revenues by major type of taxes* (i.e. direct taxes, indirect taxes and social contributions), there are some differences too between Member States (see **Table B and Graph 3**).



Note: Direct taxes for Portugal are from 2004.

Generally, the new Member States have a different structure compared to the EU-15 countries; while most old Member States raise roughly equal shares of revenues from direct taxes, indirect taxes, and social contributions, the new Member states often display a substantially lower share of direct taxes on the total. The lowest shares of direct taxes are recorded in Bulgaria (merely 17.9 % of the total), Romania (19.1 %) and Poland (20.5 %). In the new Member States the share of direct taxes has diminished by one third since 1995. One of the reasons for this difference can be found in the generally lower tax rates applied in the new Member States on corporate (CIT) and personal income (PIT). A growing number of these states are moving away from graduated taxes on income, where marginal rates increase with income levels, toward systems in which personal income is subjected to a single (usually low) flat rate (often also applied to corporate income). As we see in **Table F**, the flat PIT rates are moving closer to the lowest pre-reform tax rate. In five cases from seven, the CIT is charged at the same rate as that on labor income. In Slovakia, VAT is also charged at the same rate.

Revenue effects of reforms have been mixed. Next table reflects changes in revenues in the next year after the reform [2].

Country	REVENUE EFFECTS			
	PIT revenue	CIT revenue	Indirect revenue	Total revenue
Estonia	decrease	decrease	increase	increase
Lithuania	increase	decrease	increase	increase
Latvia	increase	increase	decrease	increase
Slovakia	decrease	decrease	decrease	decrease
Romania	decrease	decrease	increase	decrease

Source: M. Keen, Y. Kim and R. Varsano, The “Flat Tax(es)”: Principles and Evidence, International Tax and Public Finance, 2007

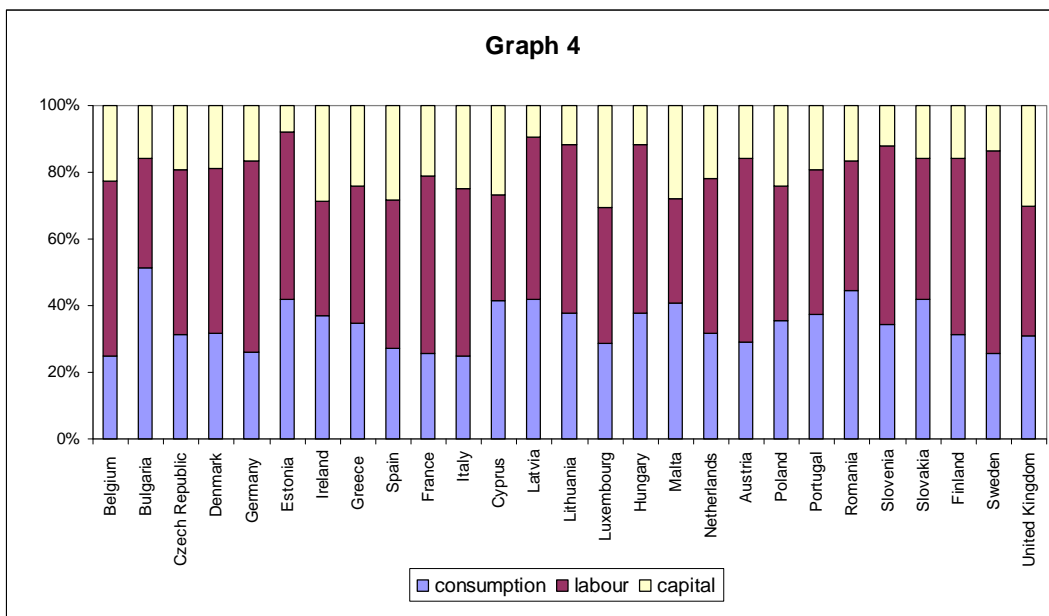
The low share of direct taxes in the new Member States is counterbalanced by generally higher shares of indirect taxes and social contributions on total tax revenues. The highest shares of indirect taxes are found in Bulgaria and Cyprus, where they account for about half of revenues; Romania and Malta are not far behind. As for social contributions, high shares, close to the 40 % mark, are found in the Czech Republic and Poland.

Amongst the old Member States, however, there are some noticeable differences. The Nordic countries (i.e. Sweden, Denmark and Finland) rely primarily on direct taxation, whereas some southern countries (in particular, Portugal and Greece) have relatively high shares of indirect taxes. Denmark stands out in another respect; most welfare spending is financed out of general taxation instead of social contributions; therefore, the share of direct taxation in total tax revenues in Denmark is in fact the highest in the Union, while social security revenue is very low. Germany shows the opposite pattern: it has the highest share of social contributions in the total tax revenues. Germany's share of direct tax revenues, on the other hand, is the lowest in the EU-15. France also has a relatively high share of social contributions and a corresponding relatively low share of direct tax revenues, compared to the EU-15 average.

Part II. Distribution of taxation by economic functions

The tax-to-GDP ratio and the breakdown of taxes into standard categories such as direct taxes, indirect taxes and social contributions tell little about the effective distribution of the tax burden amongst different categories of taxpayers (so-called *tax incidence*). Part II of this paper presents a broad classification of taxes into three economic functions: consumption, labour and capital (see **Table C**). This is an important result given the policy relevance of information about the balance of taxes on the two factors (labour and capital) and given the distributional consequences of consumption taxation.

Graph 4 displays a breakdown of the overall tax burden by economic function for the year 2005.



Note: Data taxes for Portugal are from 2004.

Taxes levied on **labour income** (employed or non-employed), mostly withheld at source (i.e. personal income tax levied on wages and salaries income plus social contributions), clearly represent the most prominent source of tax revenue in most Member States: labour taxes contribute around half of total tax receipts in the Member States.

The graph 4 shows a correlation between overall tax levels and reliance on labour taxation: Member States with a relatively high tax-to-GDP ratio also tend to collect a relatively high amount of labour taxes, and conversely. This is notably the case in old Member States such as Ireland, the United Kingdom, Greece and Portugal where both overall and labour taxes are low.

Taxation of the other economic functions typically yields less revenue. In the Union, **taxes on capital** usually account for one fifth of total tax receipts, while **consumption taxes** account for around one third. There are some differences in structure between old and new Member States. In the latter, consumption taxes usually account for a higher share of total tax revenues, while taxes on capital play, on average, a smaller role. The nine Member States with the highest share of consumption taxes on the total are all recently accessed countries. Bulgaria in particular is the only country where consumption taxes yield more than 50 % of the total; Romania displays the second highest share at 44.3 %, exactly ten points above the EU-27 arithmetic average. Differences in the shares of consumption taxes between Member States have been growing quite markedly in the past few years.

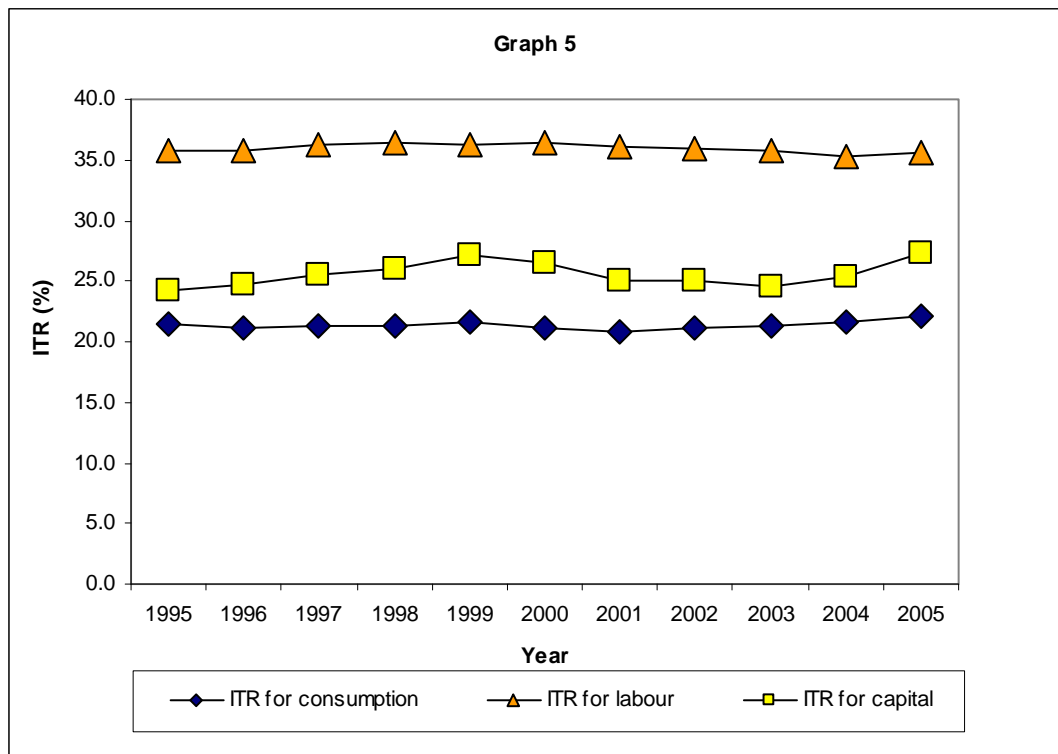
The share of revenue yielded by capital taxes is large in Luxembourg, the United Kingdom, Ireland, Spain, Malta, and Cyprus, where they contribute over one quarter of total taxes, and noticeably small in the Baltic Republics, Hungary, and Slovenia.

As for the composition of capital taxes, taxes raised on capital and business income are generally more important than taxes on the stocks of capital (wealth); one important exception is France, where high taxes on wealth lead to broadly equal proportions between the two types. The highest levels of taxes raised on stocks (wealth) of capital, as a share of GDP, are observed in France, the United Kingdom, Belgium, Spain and Luxembourg. In the recently accessed Member States, these taxes generally yield a lower share of revenue than in the EU-15; this might be linked to a lower aggregate value and productivity of the capital stock.

The distribution of the overall tax burden by economic function has undergone some important changes since the mid-1990s, and the pattern is rather mixed across Member States. The most striking feature of the past developments has been an increase in capital taxes as a percentage of GDP, and a slight decline of labour taxes since the late 1990s; labour taxes have indeed significantly increased only in five Member States.

Table D and Graph 5 display the evolution of all three main implicit tax rates, that on labour, on consumption and capital for EU-27, between 1995 and 2005. These ITRs are juxtaposed to highlight three main facts:

- average effective tax rates on labour remain well above those for consumption and capital;
- the decline in labour taxation is slow and has shown signs of slowing down;
- there seems to be some convergence between the ITRs as that on consumption and that on capital show signs of an increasing trend since their 2001 trough.



Despite a wide consensus on the desirability of lower taxes on labour, adjusted ITR on **labour** data confirm the persistent and widespread difficulty in achieving this aim. Although the

tax burden on labour is off the peaks reached around the turn of the century, the downward trend came to a halt in 2005.

In 2005, reductions exceeding one percentage point in the ITR on labour are visible only in four countries, all of them new Member States (Bulgaria, Estonia, Slovakia and Romania). Overall, despite the presence of a number of low taxing countries, taxation on labour is, on average, much higher in the EU than in the main other industrialized economies.

In most Member States, social contributions account for a greater share of labour taxes than the personal income tax. On average, in 2005 about two thirds of the overall ITR on labour consists of non-wage labour costs paid by both employees and employers. Only in Denmark, Ireland and the United Kingdom do personal income taxes form a relatively large part of the total charges paid on labour income. In Denmark, the share of social contributions in government receipts is very low as most welfare spending is financed by general taxation.

Since the second half of the 1990s, **corporate income tax** rates in Europe have been cut forcefully. The tendency has continued also in 2007, as shown by a 0.8 percentage point drop in the EU-27 average. The cut was even stronger in the euro area (1 point), where rates remain nevertheless significantly higher (the EA-13 average is at 28.5 %, four points above the average for the Union as a whole). Amongst countries cutting the corporate tax rate it is worth mentioning Bulgaria (which, upon accession to the EU, cut the tax rate by one third), Netherlands (down 4.1 points to 25.5 %), Greece (minus 4.0 points to 25 %), Spain (minus 2.5 points to 32.5 %) and Slovenia (down 2.0 points to 23 %). Belgium, which levies a relatively high rate (34 %), has not cut its rate, but has introduced an allowance for notional interests (also known as allowance for corporate equity), which, compared to traditional tax systems, leads to significantly lighter taxation.

Although the downward trend has been quite general, corporate tax rates still vary substantially within the Union. The adjusted statutory tax rate on corporate income varies between a minimum of 10 % (in Bulgaria and Cyprus) to a maximum of 38.7 % in Germany. As in the case of the personal income tax, the lowest rates are typical of countries with low overall tax ratios; consequently, the new Member States typically figure as having low rates (with the exception of Malta, whose 35 % rate is the third highest in the Union). The top positions in the ranking are occupied by Germany and Italy, whose overall tax ratios are not amongst the highest but traditionally impose relatively high CIT rates.

Data for the ITR on **consumption** confirm that taxation of consumption is, in most Member States, on an uptrend since 2001. The EU-25 arithmetic average went up by some 1 ½ percentage points since that year and by half a point in 2005. The trend is particularly visible in the smaller Member States; several of these are new Member States, which in the last years have been increasing excise duties to conform to the EU minima. The larger Member States in contrast generally show slightly declining taxation of consumption.

The trend towards an increase is quite broad; compared to 1995 levels, only ten countries have experienced declines. Since 2001 the trend has been even more general as only seven Member States have not experienced any pick-up; moreover, the only sizeable decline in the ITR took place in Greece (-2.5 percentage points since 2001), followed by more modest ones (less than one point) in Lithuania, Germany, Italy, the United Kingdom, and Austria.

A decomposition of the ITR on consumption into its constituent elements reveals that the role played by taxes other than VAT is usually quite important; taxes on energy (typically, excise duties on mineral oils) and on tobacco and alcohol contribute substantially to the overall revenue from consumption taxes; differences amongst Member States are, however, quite marked in this respect.

A comparison between the standard VAT rate and the VAT component of the ITR on consumption also highlights the significant differences amongst Member States in the extent of exemptions (either in the form of base reductions or of reduced rates) from VAT; in some Member States, their impact on the ITR is only equivalent to a couple of percentage points, but at the other extreme the impact reaches up to ten points.

Part III. Tax reforms in the European Union

As part of its efforts to counter harmful tax competition, the EU has adopted a series of measures in the last decade or so. Of particular importance in this context was the adoption by EU Ministers of Finance (the Council) in June 2003 of a “**tax package**” to tackle harmful tax competition and promote tax coordination, consisting of four elements [3].

First, a political *code of conduct* to eliminate harmful business tax regimes. The underlying report identified 66 tax measures with harmful features which member states agreed to revise or replace. Low statutory rates were not considered harmful; instead, criteria for the existence of harmful features included:

- a significantly lower level of effective taxation than that which generally applies in the country concerned;
- tax advantages reserved to nonresidents only;
- tax benefits available absent real economic activity;
- tax incentives for activities isolated from the domestic economy (ring-fenced);
- nontraditional rules for taxation of multinational companies (departing from principles set by the OECD);
- lack of transparency of tax provisions (including covert relaxation of rules at the administrative level).

The code remains “soft law” which does not bind member states.

Second, a legislative measure to ensure an effective minimum level of taxation of savings income of individuals. The directive on *taxation of savings* is intended to avoid distortions to the movement of capital and allow effective taxation of cross-border flows of interest payments to individuals, thereby limiting the evasion of capital tax by individuals who place their savings in other member states or third countries where there is no taxation. The provisions applied as of July 1 2005 in all 25 member states, as well as in 10 dependent or associated territories of member states. Equivalent measures applied to five European third countries (including Switzerland).

Third, a legislative measure to *eliminate source taxes on cross-border payments of interest and royalties between associated companies*. The “I + R directive” eliminates any taxes, including withholding taxes, on interest and royalty payments within a group of companies arising in a member state, where the beneficiary is a company or permanent establishment (subject to corporate tax in the EU and of a type listed in the annex to the directive) in another member state.

Finally, guidelines on the application of *state aid rules* (first adopted by the Commission in November 1998—98/C384/03) to measures relating to direct business taxation. These are based on the treaty’s competition rules which have the force of law. They seek to restrict member state competition through subsidy of business and have been held by the European Court of Justice to apply to indirect subsidies like tax breaks. In this way, these provisions “circumvent” the unanimity rule that applies on tax harmonization initiatives.

The Tax Package has brought major advances in matters of tax policy at EU level. Besides stimulating thought and discussion on tax competition, it has raised awareness among the Member States of the interdependence of their tax policies and of the potential benefits of cooperation at EU level [4].

Concerning ongoing tax policy discussions in the EU, the attempts to move forward the idea of a **common corporate consolidated tax base** (CCCTB) is of particular interest. At the ECOFIN meeting in 2004, a large majority of member states agreed that it would be useful to progress toward common tax base for companies operating in more than one member state to provide these companies with a consolidated corporate tax base for their EU-wide activities, but on an optional basis. More generally, proponents of the CCCTB argue that the proposal will be beneficial for two key reasons:

- it will reduce the costs of learning and operating with multiple tax codes to companies that operate in two or more tax jurisdictions
- it will reduce the opportunities for tax shifting by companies seeking to minimize their tax liabilities.

The EU commissioner for taxation, Laszlo Kovacs, is expected to introduce a legislative proposal on the CCCTB by the end of 2008 (possibly with effect from 2011). The commission has no plan to harmonize the rates or to impose statutory minimum corporate tax rates, because most empirical studies find welfare gains of tax coordination somewhere between zero and 1 percent of GDP.

On 22 November 2007, the Council adopted the *Fiscalis 2013* programme for the period 2008-2013 which will continue the works undertaken under the previous *Fiscalis* programme. It will continue to stimulate cooperation between tax authorities and assist them in developing an appropriate balance between efficiency of controls and burdens on taxable persons.

Main objectives of the *Fiscalis 2013* programme are [5]:

- Enhancing the fight against tax fraud, in particular against VAT carousel fraud;
- Reducing the administrative burden on administrations and taxable persons;
- Ensuring a performing exchange of information between national tax administrations as well as with traders through e.g. trans-European tax IT systems.

Since the mid-1990s, a number of Member States have implemented reforms to their tax systems.

Reforms of the personal income tax code have mainly consisted of lowering statutory rates, reducing the number of tax brackets and increasing the minimum level of tax-exempt income. Member States have also often increased family allowances, in particular for the tax relief for families with children. Some Member States have replaced tax allowances with individual tax credits. A number of Member States have introduced additional (earned) tax credits (or tax allowances) that are exclusively earned on labour income. Most of these credits or allowances phase in for lower incomes and phase out for higher incomes.

Reforms of taxes on capital income often aimed at improving the functioning of capital markets. Another aim was to create incentives for risk-taking, and support venture and intangible capital. Some Member States have fundamentally changed the taxation of capital income or capital gains in the personal income tax, often broadening the income tax base. Member States have also implemented reductions in statutory corporate income tax rates, but at the same time have reduced special incentive schemes, or cut back depreciation allowances.

Reforms are more diverse in the area of indirect taxation. In the second half of the 1990s, a number of Member States have implemented comprehensive green tax reforms (Sweden, Denmark, the Netherlands, Germany, Italy, Austria and the United Kingdom). Existing indirect taxes were increased and new environmentally related taxes were introduced, often to finance, at least partly, the reduction of taxes on labour income. The Nordic countries were the forerunners in introducing green tax reforms. Most Member States apply reduced rates on labour intensive service sectors. Other Member States implemented increases in the standard VAT rate, while others implemented general VAT reductions or targeted reductions for certain products and/or

sectors. Some Member States increased certain excise duties (e.g. on tobacco, diesel fuel or petrol), while others were being reduced.

Some Member States implemented general reductions in social contributions across the board. In line with similar measures taken in personal income taxation, a number of Member States have implemented targeted reductions of non-wage labour costs at the low end of the pay scale.

Conclusions

EU tax levels are generally high in comparison with the rest of the world, with the EU-27 tax ratio exceeding those of the USA and of Japan by some 13 percentage points. However, the tax burden varies significantly between Member States, ranging in 2005 from less than 30% in Romania (28.0%), Lithuania (28.9%), Slovakia (29.3%) and Latvia (29.4%) to more than 50% in Sweden (51.3%) and Denmark (50.3%).

In the past decade significant changes in tax ratios have taken place in several Member States. The largest falls were recorded in Slovakia, where the overall tax burden dropped from 39.6% in 1995 to 29.3% in 2005, and Estonia (from 37.9% to 30.9%). The highest increases were observed in Cyprus (from 26.7% to 35.6%) and Malta (from 27.3% to 35.3%).

The increase in tax ratios in 2005 involved a large majority of EU countries. This implies that, in Europe, the preferred avenue to deficit reductions remains an adjustment on the revenue side. The observation that many of the Member States that have cut tax ratios drastically during the 1990s seem to be on a slightly increasing trend in the last few years, also adds to this point; as does the fact that the latest European Commission forecasts project a further marked increase in general government revenues after 2005.

Since the mid-1990s, a number of Member States have implemented reforms to their tax systems. The reforms vary in coverage and depth, but they were often aimed at reducing the tax burden on labour, particularly at the low to middle end of the pay scale, at achieving a general reduction in corporate income tax rates and at improving the functioning of capital markets. Reforms of indirect taxation have been more diverse in nature. Increases in indirect taxation in some countries were driven by green tax reforms, often as counterpart to the reduction in the taxation of labour. Some Member States also implemented measures that resulted in increases in the shares of total taxes that accrue to state governments. The measures were sometimes part of a reform-package that was stretched out over several years. As for the future tax reform initiatives, there are a number of routes that these may follow:

- The experimentation with structural changes to the corporate tax will continue, probably combined with further rate lowering in some countries. Rate reductions will, though, be tempered by revenue needs, and the basic question is where the “equilibrium” level of the rate is. Similar considerations apply both to the PIT.

- The number of countries adopting flat tax reforms, in which the single income tax rate chosen is low, is likely to increase over the years. However, if considered in the context that pressures to reduce taxes on capital income are likely to increase, that the value of low flat rates as a signal is likely to diminish as more countries undertake flat tax reforms, and that currently buoyant economic conditions around the world will not last forever, significant fiscal strains may emerge, leading some countries to move away from flat tax systems.

- The VAT will be further scrutinized to find ways to limit the “frictions” it causes for cross-border movements of goods and services, and the very substantial revenue losses from fraudulent trade operations. The European Union will probably continue to spearhead the search for operational solutions.

References

- 1 European Commission. 2007. Taxation Trends in the European Union, <http://epp.eurostat.ec.europa.eu>
- 2 Keen, Michael, Yitae, Kim, and Varsano, Ricardo. 2007. The “Flat Tax(es)”: Principles and Evidence. *International Tax and Public Finance Journal* No 4/2007
- 3 Norregaard, John and Khan, Tehmina. 2007. Tax Policy: Recent Trends and Coming Challenges, *International Monetary Found Working Paper* No 07/274
- 4 Cattoir, Philippe. 2007. A history of the “tax package”. *Taxation Paper* No 10/2007
- 5 European Commission. 2008. Activities of the European Union in the tax field in 2007, <http://ec.europa.eu>

FINANCING SOURCES FOR COMPANIES AND THE IMPLICATIONS ON THEIR IMAGE

Mihaela SUDACEVSCHI*

Abstract

In a market economy in which competition is the main selection criterion for companies, decision taking concerning the financing sources is an extremely difficult process. Selecting and combining various financing sources, based on the updated netto value of each of them is the basis of business development, on which the success of the companies' activities itself can depend

Keywords: *Financing sources, securities, capital market, stock market, factoring*

Introduction

The financial stock market is extremely important for the development of modern economy, and it contributes to resource transfer, from the companies with surplus to those who seek financing resources for their activities. At this level of the financial market we find the „collection of temporary capital available in economy, it's reallocation of the insufficiently or inefficiently exploited one at a certain point and even favoring certain sector reorganization”¹.

Financing sources of a companies

During the development of a commercial society, an important role is played by financing, respectively the used financing sources. Enterprises can choose from a wide range of financing sources, more or less diversified, depending on the development level of the financial system.

Roughly, a commercial society can choose between the following categories of resources:

- Self-financing
- Discounting the commercial output and selling debts (factoring)
- Issue of financial titles on the capital market
- Loans on the banking market
- Commercial credits

Self-financing is constituted from the financial excess resulting from the commercial society's activity, which is used for financing subsequent activities.

Self-financing is the main financial resource used by enterprises, many times being the sole source for financing their activity. Depending on the level of necessary financial resources and the commercial society's capacity to cover this requisite by self-financing, external resources may be used. This position of self-financing – as an indicator in choosing financing sources is based on two elements:

- the number of resources assigned to self-financing emphasizes the performances of the commercial society, being a criterion for assessing the degree of remuneration for investors financing the commercial society;

* Lecturer Ph.D., Faculty of Economic Sciences, “Nicolae Titulescu” University, Bucharest.

- self-financing generates the capacity to reimburse the commercial society's debts, and the risk fund providers take can be assessed.

As opposed to the other financing sources of a commercial society, self-financing defines a society's capacity to independently proceed with its activity, generating the reproduction of available capital and ensuring the capacity to reimburse potential loans.

By self-financing, the company can ensure a viable financing policy, being able to increase the capital by reinvesting the resulting capital and at the same time ensuring the long term absorption of active elements, as well as compensation of risks that appear in a society's activity, for which they create supplies.

Thus, obtained through a profitable activity, self-financing represents a guarantee of autonomy and financial stability for the society, being the starting point in launching any long term business plan. The insufficiency of self-financing would determine a decrement of the possibilities for external financing, given that external fund suppliers will be ready to provide their resources only in the case of proper self-financing.

Discounting the commercial output consists in its being ceased to a beneficiary, in exchange for its value in the moment the operation was executed. This is one of most managers' favorite transactions, for it manages to obtain funds that do not generate future expenses, as in case of loans.

The issue of securities on the capital market results into the increment of the own capital through capital attraction from outside the society, brought in by holders of available funds, who wish to participate in the society's capital. These financial resources providers can be both old share holders of the society, and other investors, each of them placing their capital at the society's disposal and receiving in exchange shares, which prove their participation to the society's capital.

The reason for which external resources are called upon is the insufficiency of the self-financing resources. But turning to capital increment and the issue of financial titles on the capital market can have both advantages and disadvantages, given that the owners of the company can lose control over it, when new share holders own an important number of shares.

When movable assets are issued, the issue price is smaller than the stock market course, formed on the market through direct report between demand and offer, and greater than the nominal value of the shares. This price is thus established so it is attractive for the potential investors and to cover the company issue costs.

The shares issued for capital increment can be purchased both by the old share holders, and by new share holders. The privilege of the old share holders is constituted by the subscription rights they have based on the number of old shares they own, thus covering the losses brought upon by the issue of new shares. Theoretically, these subscription rights are materialized, in the sense that they can be separated from shares and are rated separately at the stock market. The old share holders, owning subscription rights, shall purchase the new shares at their issue price, whereas the new share holders shall purchase the shares at their issue price, plus a number of subscription rights purchased from the stock market. The number of subscription rights necessary for purchasing one share varies from one issue to another, depending on the report between the old number and the new number of issued shares. The same as for shares, the stock market rate of the subscription rights can be greater or smaller than its theoretical value, depending on the **offer and demand**.

These stock market rates of shares result into the fact that the company's value on the stock market is greater or smaller than its theoretical value. This situation is possible because during the patrimony assessment, the market takes into consideration the society's future evolution. Thus, when a company decides a capital majority by the issue of titles on the stock market, it must have a favorable image and a profitable activity, which should allow it to place shares at a high price and ensure sufficient resources.

As a result of that, stock assessment on the market is an extremely important element for a company who wishes to increase its capital.

Also, loans on the capital market can be materialized in **issuing bonds**, which can be purchased by physical and juridical persons, becoming creditors of the society and not co-owners, as when purchasing shares. The value of the bonding loan is established by the SGA (Stock holders' General Assembly), depending on the offer on the capital market when they are being issued. As in the case of shares, most of the times, the issue value of the bonds is lower than their rated value, in order to make them more attractive and to beat the competition determined by the other titles quoted on the market.

Societies who do not quote on the market usually prefer **loans on the banking market**, which represent for them one of the most accessible options in order to attract capital.

In order to be granted bank credits, societies must provide the creditor with the accounting synthesis documents, based on which there shall be performed an assessment of the economical-financial situation, important for taking the decision of crediting.

The information from the last three years' balance shall be analyzed by the credit officers and used in order to determine the real value of the assets and of the entire patrimony, and for the correct establishment of the risk level for the client, comparing to the risk taken by the bank.

The profit and loss account expresses the way the patrimony figures from the balance were obtained, which was the income and expense fluctuation, which has defined the economical agent's economical-financial evolution, from the beginning until the end of the exercise.

Based on the information submitted by the credit solicitor, the bank shall determine the indicators on which the analysis and assessment of the potential debtor's eligibility were based, respectively how shall be analyzed the level and structure indicators, liquidity, solvability and performance indicators. To all these indicators, the analysis of the investment projects add up, as well as the analysis of the economical agent's internal factors, determined by the society's management, the applied strategy and performed activity, and the loan shall be granted only if it's before deadline reimbursement is certain.

The **commercial credit** is used between economical agents and is manifested in the form of payment postponements granted by providers. A commercial society can be granted such credits, but it can also grant them, in all, the deadlines for received and made payments exerting the need for a redemption fund for the enterprise.

The advantages of financing companies through the capital market, as opposed to the banking market

The financial market provides societies with a series of financing resources, which either taken singularly or combined, are at a certain point, the best solution for a certain investment.

Self-financing is the main option for developing an activity. But when their own resources are not enough, societies must turn to gathering capital through various types of loans, either from the banking market or the capital market.

Financing commercial societies through rented resources is a very difficult decision which can affect not only their economical-financial performances, but also their survival capabilities. Choosing the financing methods depends on the number of necessary financial resources for the period they are intended to be mobilized, on the price of the borrowed resources and especially on the society's capacity to reimburse the contracted funds. To these factors, the method used for activity administrations also adds up, the company's relations with the providers and customers, the administration of the cash-ins and payments, as well as the company's financing policy, the manner in which it decides to use the profit resulting from its current activity.

Depending on all these factors, as well as on other factors specific to every society, they must choose one of the following external financing solutions:

- Banking loans (credits), contracted for different periods of time (short, medium or long term);
- The financing obtained through the capital market, by stock and bond issue.

Each of these financing variants has both advantages and disadvantages, which will make them more or less attractive for the subjects searching for financing resources.

On the Romanian market, **bank loans** are still the most popular method for acquiring the financial resources necessary for the development of a commercial society. No matter if we are talking about contracting short term credits, usually used for acquiring goods and services and for financing an exploitation cycle, or about long term credits, for financing investments or acquiring real estate, economical agents prefer bank credits, as opposed to loans on the capital market.

Banking societies have also diversified their offer of credits for juridical persons. There are credits for realizing new objectives or production capacities, for the expansion, modernization and technological improvement of the existing capacities or for purchasing machines, equipment, means of transportation, or other fixed assets. There are also credits destined for large, medium or small societies, capable to correspond with the reimbursement capacity of each potential debtor.

The value of the credit that can be contracted is generally established based on the proportion of the investment project, on the credit size, as well as on the debtor's reimbursement capacity.

But financing through a long term bank credit has the disadvantage of high costs and the increment of the company's indebtedment, which can affect the activity for the next period (for example, it can affect the society's eligibility for certain bids).

Financing through the capital market is an alternative to bank loans, but it is unfortunately not used very often by Romanian societies. It is materialized through sales issues, mainly stock and bonds, but other financial titles as well. One of the most important roles on the capital market is actually attracting financing for societies who wish to develop their businesses.

Financing through the capital market is more advantageous than through banks. In case of banking financing, companies are placed at the banks' disposal and their regulations for being granted the funds necessary for their activity, but when they publicly issue movable goods, the issuing company dictates the conditions of the title sale. Also, being listed in the Stock Market brings companies benefits related to the financing cost, respectively attracting financial resources with advantageous cost conditions, as well as an image improvement.

If until 2005 few companies were interested in entering the Stock Market ring, or even on the contrary, many of them chose to withdraw from the Stock Market Rate, this year more and more companies want to be rated in the Stock Market. Proof of this we find in BVB statistics regarding the evolution of movable goods transacted during 1995-2006. (Table no. 1.1).

**Evolution of financial titles transacted at Bucharest Stock Market (BVB)
during 1995 - 2007**

Table no. 1.1

Year	2nd Category	1st Category	Liabilities	Total
1995	9	0	0	9
1996	17	0	0	17
1997	63	13	0	76
1998	105	21	0	126
1999	101	26	0	127
2000	92	22	0	114
2001	46	19	2	67
2002	46	19	6	71
2003	44	18	10	72
2004	43	17	25	85
2005	44	20	19	83
2006	46	20	17	83
2007	40	19	17	76

Source: Annual statistical report regarding the activity of BVB

The main reasons that can determine a company to start the stock market rating procedures can be represented by the company's expansion and of its market to a level that requires financing.

The first phase of participating in the capital market is the transformation of the commercial stock society from a "closed society" into an "open society" by building a public offer, certified by CNVM. The object of this public offer is drawing money resources on the capital market, by new issued of other movable values (stocks, bonds etc). The open commercial society must draw up a public offer folder, where it should mention that it has set as target for the next phase to be registered within the Stock Market Rate. Being registered with the BVB Rate facilitates any subsequent operation of capital attraction from the market, making it possible for the company to find the resources necessary to the further development of its activity. Compared to the "closed" commercial societies, where the real share value is more difficult to measure, **commercial societies with shares rated in BVB Rate, are easily granted credits**, because it's easier for creditors to use the current stock market share value than the theoretical approximation which they must perform for unrated issuers.

Investors are generally tempted to buy stock from rated issuers or from future rated issuers, rather than from non-rated issuers. This tendency will make it easier for "open" societies rated on BVB Rate to successfully issue new movable goods and thus attract important cash resources from the capital market.

Subscribing a commercial society in the BVB Rate brings more practical financing means, materialized by the existence of a wide range of instruments specific to the capital market. This category includes the issue of convertible bonds or shares, with attached warrants. These instruments grant the right to subsequently buy share of the issuer's, for a previously established price. Investors will easily be convinced to buy such instruments that grant the right to subsequently buy shares rated on BVB, rather than unrated shares, due to this market's transparency and accessibility.

Another advantage of stock market quotation of commercial societies' shares is publicity. All commercial societies that have movable goods rated on BVB Rate benefit from free publicity all over the country and also internationally, through the following methods:

- The name of a certain company appears in the main newspapers and on the national television stations, after each transaction session;
- The name of rated issuers appears in the Dow Jones telerate international network.

Also, commercial societies rated on BVB Rate benefit from a reputation that can increase the commercial market segment where they act, this being an important element against competition. Reputation improvement can be manifested directly – through commercial crediting and payment facilities which the issuer can get from its providers and clients.

International statistics show that the admission on the stock market of movable goods issued by a society publicly owned increases its reputation and there's a growth of its shares' prices with an average of 20%.

By subscribing movable goods issued in the BVB Rate there's a growth of the respective society's assets, because than the issuer's activity is performed in good conditions, it's shares' value on the market is greater than their accounting value, having a great request on the market and as a result, increasing their price constantly. Stock market rating also leads to the increment of the commercial fund and movable goods liquidity.

The Bucharest Stock Market (BVB) is an institution specific to the capital market, which by the available means imposes on quoting companies to distribute the information related to their activity and financial situation, to the general public. This information reaches the final investor, directly or indirectly, through studies performed by specialized analysts and advisors. The transparency of issuers rated on BVB contributes the easier follow up on transactions and ratings on the stock market and attracts investors by the easy and viable access to this capital market, thus increasing the liquidity of movable goods.

Other advantages granted by stock market quotation of commercial society's stock:

- **getting employees interested by distributing shares** – through market transparency they avoid social tensions that might appear;
- **the existence of an acknowledged market value**– potential creditors of the issued have the possibility to compare the accounting value of shares with their value on the market;
- **increasing the rate of market management – this being influenced by the activity of the rated society, well known on the market;**
- **simplifying registration in the stock holders' registry,** by having the issuers subscribed to BVB Quote draw up a Registry Contract with BVB, which transfers the obligation to keep account of the property right over issued real estate to BVB;

A financing possibility for Romanian companies is quoting at other stock markets. The main advantages brought by these solutions are:

- better protection of small investors;
- increasing transactions and stock liquidity;
- access to financing sources at a level much higher than the one offered by the capital market in Romania.

But quotation with other stock markets is risky, because the interest of investors in the respective titles can not be estimated. In 2004-2005, foreign investors have manifested an interest for Romanian stock, but the weight of foreign funds in BVB has not raised, one of the reasons being given by the complicated investment procedure, which imposed the use of a local broker and fund transfer. Should the Romanian stock be available on markets which foreign investors usually place their money, the operational difficulties would disappear, and the investors would be granted easier access to the Romanian titles.

Conclusions

Choosing the financing sources for developing the activity of an economical agent is an important and extremely difficult decision, given that the Romanian financial market is not very well developed and it does not provide a very wide range of instruments to attract the necessary financial resources.

Any of the financing methods presented above can be the ideal solution for a company, depending on its activity, on its economical financial results, but also on its being open to the financial market's opportunities and to the new means of accessing financing.

References:

1. Ovidiu Stoica – “Mechanisms and institutions of the capital market; emerging capital markets”, Ed. Economy Publishing House, Bucharest, 2002
2. Dardac N., Vâșcu T. – „Monedă – credit 1”, Ed. ASE, București, 2001
3. Stancu I. – “Finanțe. Teoria piețelor financiare. Finanțele întreprinderilor. Analiza și gestiunea financiară”, Ed. Economică, București, 1997
4. www.bvb.ro

YOUNGSTERS' MOTIVATION TO COMPLY WITH ONLINE GAMES RULES

Rita Yi Man LI*

Key words: *online games, compliance behaviors, theory X, theory Y*

Introduction

Online internet games are information technology based entertainment (Griffiths et al., 2004). Online games generally referred to those computer or video games that players play via computer network and internet. In the olden days, there were only text-based role playing games. Computer games at present, however, usually made up of a virtual world simulating real life environment and science fiction settings (Weibel et al., 2007), for example, graphical operations can enable players to enjoy more user friendly interfaces and multimedia effects than those provided by traditional Multi-User Dungeons (MUDs) (Hsu and Lu, 2004). Besides, players can play against other users. Players in the virtual world can enjoy the flexibility provided by the game designers that you can play solo or in group. Usually, social communication and interaction can be carried out via on screen test box. Game providers usually will enable them to communicate between the groups of people within the same game or across game zones, i.e. they are not playing the same game, for example car racing, but are playing different games. Massively multiplayer online role-playing games (MMORPG) are one of the most up-to-date fashionable internet-based only computers games. This form of game is a well-developed multiplayer world with a sophisticated and comprehensive world both auditory and visually (Griffiths et al., 2004). These virtual environments in the internet are often crowded by human controlled virtual characters to participate in simulated adventures. There is a noticeable staggering trend in using virtual characters to interact online. As social interaction is a basic need of people, the social elements of online games could be a key to explain their popularity (Weibel et al., 2007). Besides, games are considered as a good method to promote brand name. Games online such as Nike and Tango are used to boost the popularity of the brand and collect information via players online (Spero and Stone, 2004). Latest research nowadays mainly focus on negative impacts of online games on adolescent playing, for example, the effects of playing aggressive games and addiction (Griffiths et al., 2004). While it is not uncommon to see those players gamers cheat during playing games, few or even no research has studied how to enhance rules compliance, this paper aims to fill this gap from the angle of two traditional motivation theories: theory X and theory Y.

Popularity of online games

Online game did not exist a decade ago. Yet, millions of players all over the world enjoy the fun of multi-players online games (Weibel et al., 2007). Popularity of online games can be best represented by the following five reasons: (1) because the games can be played simultaneously with many people at the same time, some people play for social reasons. Mahjohn in facebook, for example, provide a chat box for players online to chat with the others while they are playing the

* The University of Hong Kong.

games at the same time. Players can enjoy the games and chat with those whom you do not know or with friends and colleagues invited which can save much transportation and time costs (2) while there might be restrictions in initiating violent activities in real world such as killing the people, bullying the animals, such kind of 'dreams' can come true in virtual world, for example, youngster can enjoy shooting the animals (<http://game.hoplay.com/playgame.php?id=11484>) without paying a price for it; (3) being able to play alone, for example, one can play goldminer on web; (4) game-specific features, for instance, character role-play, casting magic; and (5) other features such as character building, strategic thinking, exploring etc. After all, there is evident shown that the most popular games features among both adult and adolescent players were those the social features (Griffiths et al., 2004), this might be able to explain the popularity of Facebook and why the Asian Richest people Mr Li Ka Shing have become a shareholder of it finally. Games providers which include KTZone, Asiadog, Games.com challenge players to reach specified targets. Within the five-year-period in 2000-2005, the number of online gamers in the USA increased by more than twofold to 17 million people; near 90% of youngsters aged between 12-17 use the Internet and 81% of them play online games (Weibel et al., 2007). It is predicted that the global market value of online games will soar from US\$ 5.2 billion in 2006 to more than US\$ 9.8 billion in 2009. The number of users in the online games rises sharply as well. Take Taiwan as an example, it is estimated that 40% of the Internet users have played online games (Hsu and Lu, 2007). One of the most popular and largest scales of online games nowadays among all the multiplayer online role-playing games (MMORPG) is Everquest which has more than 400,000 people all over the world playing it. There are approximately 2000 players play the game simultaneously at each and every time slot (Griffiths et al., 2004).

Online games rules

There are six components in internet games: 1) Variable, 2) quantifiable outcomes, 3) Value assigned to possible outcome, 4) Player effort, 5) Player attachment to outcome, 6) Negotiable consequences and last but not least Rules. Although they are common elements in online games, they help us distinguish from one game to the others (Dovey, 2006a). In view of this, rules are vital in games making. Distraction on any online games causes failure of a game.

Generally speaking, there are two different kinds of play rule: 1) Ludus - rule-based games, for instance, chess and mahjong. Players have an exact idea on whether they have won or lost the game. 2) Paidia - open-ended games. Here we might apply the term to simulation games like Las Vegas Goldminer. Players have no clear idea on whether they have win or lose the games. The games designed like a dynamic sandbox and there are no endings. Players can only count the number of hurdles they have passed but can never see words such as "you are the winner" as it can be found in car racing games etc (Dovey, 2006b).

Cheating and/or rule breaking behaviors online

The cheat-proofness of a game ensures fairness of the game to all players. Online games designers also concern whether the game is able to detect and prevent cheating in different forms by other online game players. Cheat proofing characters become more important if games winners are entitled to have some presents. It is undeniable that game cheat-proofness may not be effortlessly guaranteed via third party seal as in a classic e-commerce website. Users build up their confidence towards a game's cheat-proofness little by little through their gaming experience and understanding the cheat-proof protocols adopted. After all, similar to the perceived security control of a website, the cheat-proofness perception of a game can be anticipated to have a noteworthy impact on player trust in an online game (Gao, 2005).

In order to win a game among all the players or to achieve a sense of success, some players may act against rules set by the game programmers. It is not uncommon to see players steal weapons from the other players. These players might attack online games via various ways which include hacking user ID, modifying data, exposing information and obtaining the password from the other players without permissions. They bypass firewalls and other relevant security systems to infect other servers with a virus, they can then encrypt important data of another users (Anonymous, 2003). Many notebook users of wireless access points do not have sufficient security features to protect computer networks from hackers' attack. By means of simple tools, for instance, notebook computers and PDA can be used to get access to the computer network; youngster can decode the information transmitted to the destined access point or interfere wireless signals. These equipments can be used to interrupt all the information transfer within the network as long as the attackers are near the transmission devices. It is probable for a network attacker to impersonate the server and establish an access point. Access points can be bought at a cheap price and configured with some degree of computer knowledge easily. Frankly, the scoundrel access point only requires a stronger signal than the existing access point so as to interrupt the signals from users. When the users connect to the attacker's computer, the attackers can ask the users to give his/ her password and/ or some other imperative information. After that the attacker can use the account and password to attack the network on net. It is not a difficult task to search a Wireless packet analyzers for the captioned purposes from the Internet. By way of this, attackers can obtain the account names and passwords of a user easily provided that this information is sent over a wireless network without protection properly. The attackers can then subterfuge as a user to attack the user's corporation if there are not enough security measures. Similar camouflaged attacks are much more difficult in the computer network (Choi and Loo, 2004).

Another common method for getting Jamming Jamming can break communication between users and the access point. The attacker can, by some means, listen to the conversation first and collects background information of the players simultaneously. After obtaining necessary information, he breaks the conversation and impersonates the jammed user to continue communication. It is certainly not realistic to expect 100 per cent network safety for players online. Information technology alone cannot get to the bottom of all the security problems (Choi and Loo, 2004).

Undeniably, all the existing dangers of a conventional wired network are due to wireless technologies. Maintaining a secure wireless network is an ongoing process which needs larger effort than a conventional traditional network (Choi and Loo, 2004). To overcome the actions done by hackers, Game programmers and information technology personnel has proposed and implemented plenty of solutions to online games rules security. Take for instance; they have proposed cryptographic algorithms which protect against malicious and hacking at the same time.

Compliance of rules in the internet and cheating behaviours

Compliance behaviors depend on an individual's expectations of remuneration from their actions, associated with the norms and results of their behaviors. It is beyond all doubt that Individual and organizational calculative restraining forces can affect the chances of compliance, equally important is combinations of the compliance strategies with suitable management techniques (Lai et al., 2007).

Traditional motivation theories

It is highly impossible that all the hacking activities can be identified by the access point and server itself. While improvement in games' design and security check can lower the chance of

cheating behaviors via hacking etc, some people suggest to educate the owners of notebook computers to be aware of the security threats in using these devices (Choi and Loo, 2004). It is never in doubt that how to enhance compliance has long been regarded as a mystery for regulatory scholars (Prior, 2000). Rooted in 1770, the theory of motivation was based on Adam Smith's proposition that men are selfish. They try to maximize their gains subject to the constraint they face. "Performance is a function of ability and motivation" (Erez and Isen, 2002) Motivation is the set of processes that arouse, direct, and maintain human behaviour toward achievement of certain goal (Cesare and Sadri, 2003). Motivation is determine by free will, goal directedness and sustaining the actions of individuals in relation to their perceived desires. It is the values which activates human behavior in response to their goals. Motivation is the incentive of any individual which led them to act or not to act. Psycho biologically speaking, perceptions of positive or negative phenomena stimulate an individual's behavior (Moody and Pesut, 2006).

Theory X

The basic postulation of Douglas McGregor's Theory X is human are not self motivated. They need to be threatened with punishment, control and coercion (Li, 2007). Punishment of violators is one of possible ways to achieve certain level of compliance. A well-developed system of reward and punishment, therefore, is necessary. Jeremy Bentham's research reviews that the compliance level depends on the *level of penalty* and the *chance of being caught*. This review forms the basic foundation of Nobel laureate Gary Becker's well-known theory on law and punishment. Other researchers, however, contend that reward is an important approach to ensure compliance. Behaviour of violations can be explained by the direct tangible end results of their acts (Kuperan and Sutinen, 1999). In the light of this, prosecution and punishment as one of the best ways to cure the non-compliance acts. Apart from that, level of punishment also influences the end results of compliance behaviors. Increase the probabilities of detection would lead to an decrease in the number of people who have committed an offense of being caught (Lai et al., 2007).

Theory Y

In stark contrast, however, theory Y assumes that people are self-motivated, they can be trusted and can exercise prudence subject to constraints and rules (Cooper and Phillips, 1997, Morden, 1995), external control and the threat of punishment are not the only ways for bringing about effort toward organizational objectives (Stroh, 2005). As a result, only limited supervision is sufficiently required (Morden, 1995). Trustful relationships can be built between people, a major criteria in their attaining high performance, called for meeting the antecedent condition of credibility (Burack, 1999). By adopting Theory Y, Maslow saw as an built-in trait of human beings that people should be treated like a precious member in our society (Kock, 2005). Without trust we lack the credibility for open, mutual communication and learning. The win-win approach of high trust is the ideal vehicle for noteworthy synergy. It removes the negative energy which are usually focused on variances in character, position and creates a positive cooperative power. To construct and build a trustful relation through open communication: people need to disclose, consult the opinions of the others, listen, and be positive (Rogers, 1995).

These two theories, however, represent two polar cases that could not be easily found in their pure form in our real world (Kock, 2005), a combination of the two is more likely to offer the best picture in ensuring motivation (Cole, 2004, Li, 2007, Kressler, 2003). Besides, studies which have done previously have illustrated that there is only limited success in the use of disciplinary

action with the aim to motivate people, largely because punishment is time and again held to be less effective than positive reinforcement (Li, 2006). Punishment is doubtful to be effective if it is not recurrent and of mild intensity (Peters, 1991). Nevertheless, these theories can provide us an alternative way in observing human behaviors and means to motivate youngsters in compliance of games rules.

Conclusions

Human nature is always both interesting and challenging so as compliance behaviors among all the game players in our virtual world. Though theory X and Y provides a picture of two incompatible extreme cases, they provide us insight on the importance of disciplinary actions (theory X) and the importance of communications (theory Y) on establishing games rules. After all, Compliance should be viewed as a social progression that alterations develop gradually over a long period of time among stakeholders (Lai et al., 2007).

References

1. Anonymous (2003). Large online gamer paid ransom to hacker extortionists. *Network Security*, 2003, 3.
2. Burack, E. H. (1999). Spirituality in the workplace. *Journal of Organizational Change Management*, 12 (4), 280-292.
3. Cesare, J. D. & Sadri, G. (2003). Do All Carrots Look The Same? Examining the Impact of Culture on Employee Motivation. *Management Research News*, 26 (1), 29-40.
4. Choi, C. & Loo, A. (2004). Infrastructure for games on wireless Internet. *The Electronic Library*, 22 (1), 8-15.
5. Cole, G. A. (2004). *Management: theory and practice*, Thomson Learning, London, UK.
6. Cooper, M. D. & Phillips, R. A. (1997). Killing two birds with one stone: achieving quality via total safety management. *Facilities*, 15 (1/2), 34-41.
7. Dovey, J. (2006a). *Games Cultures : Computer Games As New Media*. Berkshire, McGraw-Hill Education, UK.
8. Dovey, J. G. (2006b). *Cultures : Computer Games As New Media* Berkshire, McGraw-Hill Education, UK.
9. Erez, A. & Isen, A. M. (2002). The Influence of Positive Affect on the Components of Expectancy Motivation. *Journal of Applied Psychology* 87 (6), 1055–1067.
10. Gao, Y. (2005). Factors influencing user trust in online games. *The Electronic Library*, 23 (5), 533-538.
11. Griffiths, M. D., Davies, M. N. O. & Chappell, D. (2004). Online computer gaming: a comparison of adolescent and adult gamers. *Journal of Adolescence* 27, 87-96.
12. Hsu, C. L. & Lu, H. P. (2004). Why do people play on-line games? An extended TAM with social influences and flow experience. *Information & Management* 41 853–868.
13. Hsu, C. L. & Lu, H. P. (2007). Consumer behavior in online game communities: A motivational factor perspective. *Computers in Human Behavior* 23, 1642–1659.
14. Kock, N. F. (2005). *Business Process Improvement Through E-collaboration: Knowledge Sharing Through the Use of Virtual Groups* Idea Group Publishing, Hershey PA USA.
15. Kressler, H. (2003). *Motivate and Reward : Performance Appraisal and Incentive Systems for Business Success.*, Palgrave Macmillan, Gordonsville.
16. Kuperan, K. & Sutinen, J. G. (1999). A socio-economic theory of regulatory compliance. *International Journal of Social Economics*, 26 (1/2/3), 174-193. <http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=Published/EmeraldFullTextArticle/Pdf/0060260108.pdf>
17. Lai, L. W. C., Yung, P., Li, R. Y. M. & Ho, D. C. W. (2007). The private supply of and public demand for planning: compliance with planning conditions in the absence of direct statutory enforcement measures. *Planning Practice and Research*, 22 (4), 535 - 557.
18. Li, R. Y. M. (2006) "Effectiveness of various construction safety measures in Hong Kong." BSc Thesis, The University of Hong Kong.
19. Li, R. Y. M. (2007) A critical review of construction safety motivation in Hong Kong. *Management Science and Engineering Academic Conference*. Tianjin, Tianjin University.
20. Moody, R. C. & Pesut, D. J. (2006). The motivation to care: Application and extension of motivation theory to professional nursing work. *Journal of Health Organization and Management*, 20 (1), 15-48.
21. Morden, T. (1995). International culture and management. *Management Decision*, 33 (2), 16-21.
22. Peters, R. H. (1991). Strategies for encouraging self-protective employee behaviour. *Journal of Safety Research*, 22 (2), 53-70.
23. Prior, A. (2000). Problems in the theory and practice of planning enforcement. *Planning Theory and Practice*, 1 (1), 53-69.
24. Rogers, R. W. (1995). The psychological contract of trust – part II. *Executive Development*, 8 (2), 7-15.
25. Spero, I. & Stone, M. (2004). Agents of change: how young customers are changing the world of marketing. *Qualitative Market Research: An International Journal*, 7 (2), 153-159.
26. Stroh, L. K. (2005). *International Assignments: An Integration of Strategy, Research, and Practice* Lawrence Erlbaum Associates, Mahwah, N.J., USA.
27. Weibel, D., Wissmath, B. u., Habegger, S., Steiner, Y. & Groner, R. (2007). Playing online games against computer- vs. human-controlled opponents: Effects on presence, flow, and enjoyment. *Computers in Human Behavior*, doi:10.1016/j.chb.2007.11.002

BEYOND THE LIMITS IN AMERICAN AND ROMANIAN FINANCIAL MARKETS

Serghei MĂRGULESCU*
Elena MĂRGULESCU**

Abstract

This paper focuses on few arguments backing up the idea that “beyond the limits” in American and Romanian financial markets implies, putting aside the semantic equivalence, an entirely different content: exceeding of a reasonable top limit, in the case of the USA, while for Romania it means the need of surpassing a bottom limit that reveals the actual underdevelopment of this market. However, beyond this huge gap, a common issue can be revealed: the failure of the central banks in both countries to foresee the developments and to take measures in due time in a market they supposedly carefully survey.

Keywords: *American financial market, Romanian financial market, central bank*

American financial market dimensions

Capital markets soared since 1980s. A crucial part in the spectacular growth of the financial markets was played by the investment banks and the exchange markets, while the last six years accelerated even more dramatic this evolution.

The stock of shares and public and private debt held in America grew from 2.4 times GDP in 1995 to 3.3 times in 2004 [1], while in Europe the increase was even more dramatic, albeit from a lower base.

Derivatives markets posted also impressive growth.

If we look at the exchange-traded derivatives, we will see that the global futures and options trading grew by 30% in 2003, by 9% in 2004, by 12% in 2005, by 19% in 2006 and by 28% in 2007. During that last year a number of 15 billion contracts were traded on 54 major worldwide exchanges, compared to the 6.2 billion contracts traded in 2002.

This explosive growth in 2007 was triggered by a sharp increase in the volatility of the stock markets and by the massive shift to commodity related derivatives.

Due to the fact that **stock-related derivatives**, including both index and single-stock futures and options, accounted in 2007 for 64% of the market, the American subprime credit crises substantially raised the volatility of quotations and triggered the boom of hedging transactions, in parallel with volatility speculation.

Commodity derivatives were booming in 2007 due to some factors like the widespread use of electronic transaction systems, the growth in precious metals and bio-energy transactions, the increased interest of institutional investors in this market and the steady development of commodity derivatives markets in some countries like China, which has become a giant worldwide player in metals and agricultural futures transactions, India and Hong-Kong where the volume of derivatives transactions doubled during the last year.

* Professor, Ph.D., Faculty of Economic Sciences, “Nicolae Titulescu” University, Bucharest (margulescu@univnt.ro).

** Lecturer, Ph.D. candidate, Faculty of Economic Sciences, “Nicolae Titulescu” University, Bucharest.

An exchange submarket that exploded few years ago is that of the investment vehicles known as **ETFs – Exchange-traded Funds**. These instruments are quoted on the stock market and are structured on baskets of shares designated to track certain benchmarks offered by a wide range of assets and characteristics of these assets (oil, gold, Asian property, combinations of corporate financial data regarding sales, profits, dividends and book value which are meant to replace the traditional benchmark offered by the market value, and so on).

The first instrument of that kind was launched in 1993 and by 2000 ETFs had just \$ 74 billion in assets. The real boom was recorded in the last five years so that by June 2007 there were more than 1,000 products with just over \$ 700 billion in assets.

The success of this market, especially in the USA, is due to the fact that unlike index transactions, ETFs give investors flexibility in choosing exposure. This flexibility is offered by the investment funds as well, but not at that low cost that stock exchanges are able to provide due to standardization, volume of trade and non-invoicing the alpha (as a measure of a fund-manager skill).

If we look at the **over-the-counter derivatives**, we will see that their notional value has reached \$ 370 trillion, based on International Settlement Bank data, showing a spectacular growth from the \$ 258 trillion two years earlier. On the top of this wave are the earnings from capital market transactions of the first 10 investment banks which soared from \$ 55 billion in 2004, to \$ 90 billion in 2006.

It is important to notice that, in the last few years, the investment banks business registered **a significant shift from corporate stocks to “the mysterious world of debt”** which in many investment banks’ trading accounts is known as FICC (fixed income, currencies and commodities).

So for the five big Wall Street firms (Goldman Sachs, Morgan Stanley, Merrill Lynch, Lehman Brothers, Bear Stearns) taken together, revenues from share-trading were in 2000 twice as much as those from fixed-income transactions, while in 2006 figures reverted due to the boom in **fixed-income securities** transactions revenues, up to \$ 44 billion, and to a slow growth of share-trading, to just \$ 27 billion.

The variety of assets that can be seen in the FICC accounts today is vary large indeed: from American subprime mortgages to futures on copper, gold and Japanese yen, from corporate bonds to natural catastrophe insurance, foreign debt instruments of some African states, and so on. However, beyond this diversity, the structural dynamics of the recent years show a **stagnation of the corporate bond issuance** (the „direct debt” chapter) **and a rapid increase of securities issuance backed by other assets**, as for example by commercial or residential mortgages (the „collateralized debt” chapter).

The most profitable area has been the growth of **derivatives** and **structured credit products**, such as CDSs (credit-default swaps) and CDOs (collateralized-debt obligations).

These instruments have enabled banks to separate the credit risk of the underlying bonds from the movement of the interest rates and to create a secondary market activity.

By 2006 the volume of American outstanding securitized (restructured, bundled up) loans had reached \$ 28 trillion, and by 2007 almost 60% of the American mortgages and 25% of the consumer debt were bundled up and sold on.

The cornerstone of the new market are the **CDSs (credit-default swaps)**, a form of insurance contract linked to an underlying debt that protects the buyer in case of default. This market has almost doubled in size every year in the past five years, reaching \$ 20 trillion in notional amounts outstanding in June 2006, far bigger than the underlying debt markets. Some 70% of these products are linked to individual issuers and are not much more complex than selling a bond short. The interesting part starts with the other 30% for which mathematicians have found

ways of bundling indexes of CDSs together and slicing them into tranches, based on riskiness and return. The most dangerous tranche exposes the holder to the first 3% of losses in exchange for a large portion of returns. At the opposite side, the risks and returns are much smaller, unless there is a systemic failure.

CDOs (collateralised-debt obligations) grew out of the market for asset-backed securities which took off in the 1970s and encompassed mortgages, credit card receivables, car loans and even recording royalties.

But the **structured CDOs** are a more complex variation using lots more leverage and bundling bonds, loans and CDSs into securities that are sold in tranches.

The USA market for CDOs was estimate dat \$ 489 billion in 2006, twice the level of 2005. One-third were based on corporate loans and are known as CLOs (collateralized loan obligations), while the rest involves securities backed by mortgages, CDSs and even other CDOs (which become supertankers of leverage, known as CDO² and CDO³).

Another component of the market of new financial innovations is the **SIV (structured investment vehicles)**, securities that are backed by corporate asset-backed commercial paper. This market brought some \$ 136 billion to the accounts of the American investment banks in 2006 alone.

New players and new approach of the market. The 2000-02 bear capital market pushed the pension funds to search for widening their range of assets towards such alternative assets that could offer returns independently of the market index trend. This idea opened the door to private equity funds (PEF) and to hedge funds (HF).

Private equity funds invest in businesses that are not quoted on the stock market, betting on higher returns due to the fewer constrains existing outside the stock exchange and also due to the suitable incentives given to the managers in the form of share-options and the chance of a takeover through a leveraged buy-out process.

By some estimations 62% of the American private- equity assets in 2006 were in the hands of the top 20 firms and the market reached \$ 700 billion, following an increase of 120% between 2000 and 2006. If we add the venture capital, which is the close cousin of the private equity fund, but concentrates on start-ups, the value of the managed funds exceeds \$ 1,000 billion.

Selling the products offered by these large funds raised doubts regarding the ability of the unquoted firms to avoid the macroeconomic factors and to perform better, and recent studies revealed that the average investor in private equity has not seen particularly better returns compared with those available in the public market.

Hedge funds came with a different philosophy of management, if compared with traditional funds, even if they still mostly invest in the same types of assets – equities and bonds. What make them different are the following two aspects:

- their greater flexibility due to their ability to bet on a bear market, going short;
- the possibility of using borrowed money to enhance returns.

This was the reason to claim that hedge funds can produce an „absolute return” regardless of market conditions. The hedge funds market grew from \$ 39 billion in 1990, to \$ 500 billion in 2000 and to \$ 1,000 billion at the end of 2007 (but allowing for the use of borrowed money, the total assets under management are estimated at \$ 6,000 billion).

Hedge funds searched from the start to produce portfolios that are not correlated with the stock market indexes. Recent analyses show nevertheless a high and raising correlation between the returns of American hedge funds and the S&P 500 index.

Recently Bill Fung and Narayan Naik, professors at the London Business School, have analyzed the performance of the hedge fund industry over the last decade and identified eight factors that seem to produce the bulk of its returns. But fascinating was the conclusion of this

study, namely the fact that the bulk of these returns can be replicated in the normal market and at much lower costs than those charged by the hedge funds.

Investment banks embraced rapidly the idea and piled in to create **funds that clone individual hedge-fund strategies**. Hedge-fund representatives claim that these clones have no chance to capture the alpha of the industry as far as they are backward-looking instead of looking ahead.

Cloning represents also a particular threat to the representatives of the quantitative school of fund management (known as „quants”). They use computer models to identify patterns and correlations in the markets that have been profitable in the past. Their analyses aims to put aside any subjectivity arising from the quality of corporate management or the nature of competition and concentrates on numbers alone, trying to shorten to milliseconds the gap between computing the data and trading on the stock exchange.

These “quants” have been remarkably successful over the past decade, but in august 2007, paradoxically, within the space of just a week, many of their models ceased to work and some funds scored dreadful performances (for example Goldman Sachs’s Global Alpha fund lost 38% on a year).

Under the circumstances in which many of the preceding investment instruments showed their limits when put under the stress of a crises, investors started , beginning with the second half of 2007, to look more eager for **alternative investments**. Among these we can mention:

1. **Investments in “frontier markets”**, known also like “emerging markets”, made in the hope that countries like Kazakhstan or Vietnam will eventually achieve growth rates comparable with those in China or India,

2. **Investments in the so-called “exotic beta”**, a class of assets which includes weather derivatives, derivatives on carbon dioxide and sulphur dioxide emissions. The main attraction of these products is that the factors that move the prices of these contracts are so remote from the forces that drive the S&P 500 index that any correlation between them is more than unlikely.

3. **Investments in “event-loss swaps”**, a natural disaster version of the credit-default swap.

4. **Investments in the so-called “mortality catastrophe bonds”** through which investment banks bundle up life insurers risks in the form of bonds linked to life insurance and mortality rates and sell them to hedge and pension funds. This market has reached \$ 5.4 billion in 2006. Despite the fact that trading the catastrophic risks on the capital market was under discussion for at least a decade, investment banks have been slow in delivering this opportunity. However the market for insurance-backed bonds rose to \$ 25 billion in 2007 and there are estimations that it could reach at least \$ 150 billion by 2015.

5. Investment in instruments backed by receivables from credit cards, car loans, loans for students, sport and fast-food franchises, royalties from audio-video productions, intellectual property rights and many others.

On such a trend of capital markets expansion and matchless diversification of the investment vehicles, an American study covering a period of time from 1990 to 2006 suggests that the increase of “securitization” resulted in a series of positive effects among which the lower spreads in consumer credits and the softening of interest-rate shocks for banks, especially smaller ones.

At the same time the subprime crises in the USA exposed at least 4 **deep flaws in the practice of securitization**:

1. By splitting the direct link between those who scrutinize borrowers and those who undertake the risk when they default, securitization has lead to a lack of accountability on behalf of the lending banks. Suggestions for overcoming this shortage vary from establishing of adequate capital provisions, to issuance of “origination certificates” guaranteeing the quality of the underwriting, or to just neutralizing the exposures through derivatives markets.

2. The difficulty of understanding of some investment instruments. Overcoming the lack of transparency, particularly for those in leveraged structures such as CDOs, would be essential and could be reached, among other ways, through the opening of a central trade-quoting facility. CME Group, which runs the world's largest futures exchange, intends to answer these demands by expanding its clearing operations to over-the-counter securities.

3. The poor structuring of some securities, often because their risks were not fully understood.

4. The over-reliance on the rating agencies data while neglecting own evaluations of risks.

Conclusions

The distribution of financial risks is by all means a necessity and has turned into an attribute of modern markets. But a measure of rationale is badly needed on this field.

Wall Street is moving along a spiral of excesses which seem to broaden its frequency and amplitude. In the 80's the investment banks created a large array of new products, with junk bonds among them, developed markets for these securities and then abused these markets in their own benefit. This scheme repeated itself in the 90's when banks rushed to take advantage of the boom of internet transactions, amplifying another illusion for the investing public. "There is always someone that misses the moment when a limit is reached" said a broker at that time. The subprime credits crises showed in 2007 that the one who missed the moment and was taken by surprise as well as in 2001 was no one than Fed itself, the supreme authority in the market.

During the unusually benign economic climate characterized after 2001 by an euphoria that struck consumers, investors, banks, funds, stock exchanges and market authorities, the financial market seemed to respond better and better to the investment boom through the rapid diversification of investment tools. There were developed more and more sophisticated markets for the distribution and redistribution of risks and returns. The increased possibilities of risk redistribution (through derivatives and financial repackaging) has brought a sizable surplus of risks on the market, on top of the rational ones (through the risky lending in the mortgage industry, through the import of exotic risks or through the increase of the financial instruments leverage).

Bringing new risks in place for the sole purpose of profit making, without necessarily responding to some overall needs, proved to be threatening the entire system. When the lending institutions subsequently redistribute these risks without any accountability and without any honest disclosure of the risks involved in their investment products, the issue turns into a moral one too.

A public morality can be also revealed when the state, in a way or another, through regulation or deregulation, patronizes such games and their effects become wide or even social. When sentences like: "It is a free market and the investors should bear the risks and be careful" are heard from governors of central banks, they are certainly out of scale in such a context. References to be made are the American financial crises or the fall down of the National Investment Fund in Romania which was endorsed by the state through CEC, a state-owned savings house.

When talking about the responsibility of the institutions enforced with the surveillance of the financial and banking markets, fortunately some positive effects of the recent financial crises can be foreseen.

By the end of '90s Paul Krugman draw the attention on the increasing risks due to financial innovations, argueing on the lack of insurance tools for the non-bank financial institutions similar to those made operational for commercial banks through the Basel 1 agreement. The situation recently changed by the enforcement of the Basel 2 agreement in 2007 in the European Union and in 2008 in America.

But the American crises showed that this important regulation turned itself into a crises fostering factor due to the fact that its trickier provisions encouraged banks to make more use of credit derivatives (CDOs) to diversify their credit portfolios, selling the granted loans into the capital markets.

It is a proper moment to remember that the remarkable Alexander Lamfalussy stressed since 2000 the necessity of an undelayed compromise between financial innovation and the stability of the system as a whole. In addition, we point out that financial innovation must be kept within rational limits and the stability of the system must be managed more adequate and through a closer relationship between financial market authorities and the private sector, in order to achieve a real control of the systemic risks induced by financial innovations.

The Romanian exchange-market

The exchange trading in Romania started and developed shy and slow:

- stock-trading started in 1995 on the BVB and in 1996 on the RASDAQ;
- derivatives-trading started in 1997 on the Sibiu BMFM;
- municipal and corporate bonds trading started in 2001 on the BVB.

In 2007 the size of these markets is still far from impressive:

- stock-trading on the BVB reached 4 billion Euros, and on the RASDAQ just 1.2 billion Euros;
- derivatives-trading reached 5 billion Euros in notional value, with futures accounting for 70% and options 30%. Even the number of derivative instruments is small – just 35 (28 on shares quoted on BVB and RASDAQ, 3 on exchange rates, 2 on indexes, 1 on interest rate and 1 on gold).
- Municipal and corporate bonds trading reached 230 million Euros.

Conclusions

Year 2007 has put two stress-tests and also major goals in front of the Romanian government and the central bank: to avoid the inflation slippage and to reduce the current account deficit from the 13% of the GDP.

Observing the rule that crises situations always reveal better the existing shortages, the above mentioned stresses, on top of the international financial turmoil, draw the attention on the following two facts that seem to relate directly to the Romanian financial market:

- the lack of a strong and articulated monetary policy;
- the lack of sufficiently developed primary and secondary financial markets.

While in the USA it was the financial market that has developed a “speculative balloon” in the real estate sector by tolerating the idea that the market will show exclusively an upward trend, in Romania it was the Central Bank itself that fostered the creation of an “irrational balloon” of money supply which has lead, in the second part of the 2007, to the sharp depreciation of the national currency and to sizable price increases in a moment when everyone knew the bank was fighting with inflation. The NBR regulation of march 2007 relaxed the lending terms for private citizens and pushed up the aggregate M_2 money supply by 33% in a moment when the inputs of foreign capital were also increasing after the capital accounts liberalization and the integration of the country in the European Union.

Is that wise to raise the money supply not having in place enough absorbing investment vehicles or not developing liquid markets for these vehicles?

These instruments, and first of all treasury, government and public authorities securities, should have been diversified and quoted on the stock exchange long before 2007, with the effect of a diminished sterilization effort on behalf of the Central Bank.

As an excuse, the NBR was greeting itself in 2008, when the effects of the American financial crises were widespread, in the same way it did in 1998 when the financial crises in Russia produced international effects, that the underdevelopment of the Romanian securities market has helped Romania to avoid the turmoil of the foreign markets.

Developments on the market pointed out that this assessment was also false. The exit of foreign capital from Romania, triggered by the subprime credit crises in the USA, was not significant and was limited to those banks and funds that were forced to undertake a restructuring process. Investments stay in places that offer good and stable returns and the investments placed in Romania recorded vary attractive returns in the last period of time. A new wave of international investment funds is on the way to Romania this year and will rise their number from 22 to 60. They invest in shares, bonds and domestic monetary assets which, in spite of their increased sensitivity to foreign capital markets volatility, are still in a closer correlation with the domestic and European economic climate, than with the markets of financial innovations. The market for basic securities, traded on primary and secondary capital markets, will certainly be contagious, to some extent, to the international turmoil, but it is and always will be analyzed through the particular investment opportunities.

The shortage of liquidity absorbing instruments can be observed in the currency exchange market too. Although there are examples in the neighbourhood to be followed, such as Poland which gave up the practice of market interventions since 2000, the NBR continues to build up intervention reserves and to intervene on the market, unfortunately mostly post-factum and through non-transparent measures.

We can consequently conclude that for Romania the matter of “exceeding the rational limits” consists of the need of developing the actual immature financial market towards treasury, government, public securities and commercial paper, as well as to derivatives and other financial innovations that can be met on mature markets. It would certainly have been more decent to hear the financial market institutions of Romania commenting on the negative impact of the financial markets globalization upon Romania only after they would have put in place the proper instruments and markets and would have implemented a better mix of policies.

References

- 1 According to McKinsey, a consultancy from the USA.
- 2 Estimation of Morgan Stanley.
- 3 According to McKinsey, a consultancy from the USA.
- 4 According to McKinsey, a consultancy from the USA.
- 5 A study by NERA, an economic consultancy from USA.
- 6 In "Financial crises in emerging markets", Yale University Press, 2000.
- 7 <http://www.economist.com>
- 8 <http://www.ft.com>

SOME PARTICULARITIES OF THE MONETARY TRANSMISSION CHANNELS IN ROMANIA

Ramona DUMITRIU*
Cornel NISTOR**
Răzvan ȘTEFĂNESCU***

Abstract

In the last decade the monetary policy from Romania was deeply changed. The inflation decreased considerably in comparison with the 1990s. From a few years National Bank of Romania adopted the inflation targeting strategy that implied a careful use of the monetary instruments. The success of the Central Bank depends greatly on understanding the monetary transmission mechanism. Using the VAR methodology, we analyze in this article the particularities of the monetary transmission mechanism in Romania.

Key words: *Monetary Policy, Transmission Mechanism, VAR Analysis, Inflation Targeting, Transition Countries.*

Introduction

In 2005, the National Bank of Romania (NBR) adopted the inflation targeting regime as an explicit anchor for conducting the monetary policy. It was proved that strategy could lead to an improvement of the monetary policy performance if it was applied properly. Among the main conditions for an adequate inflation targeting implementation it is an institutional commitment to price stability as the monetary policy primary goal, backed by a significant credibility in the central bank capacity to achieve it. In the case of Romania, some important challenges make the inflation targeting regime very difficult for the near future. First, in order to participate to ERM II and then to the euro zone, the process of reducing inflation has to be continued. Second, a major financial crisis affecting the world economy is still a significant threat. Third, the elections programmed for 2008 could put in danger the financial equilibrium.

In these circumstances it is very important that central bank capacity to intervene efficiently in order to maintain the monetary stability. This capacity is conditioned by the understanding of the mechanisms through which the monetary policy affects the economy. In Romania, the monetary transmission channels have some particularities that have to be approached for a proper inflation targeting regime.

In the last decades, the vector autoregressive (VAR) models became widely used in the analysis of the monetary transmission channels. This methodology facilitates the study of the complex interactions between the factors affecting the monetary equilibrium. Some papers approached the NBR monetary policy by VAR analysis revealing the actions of some relevant factors affecting the macroeconomic performances. However, the complexity of this subject makes useful any new attempt to assess the macroeconomic variables responses to the monetary policy changes. In this paper we try to study, using a VAR model, the particularities of the main monetary transmission channels in Romania in relation with the inflation targeting regime adopted by NBR.

* "Dunarea de Jos" University Galati, Faculty of Economic Sciences.

** "Dunarea de Jos" University Galati, Faculty of Economic Sciences.

*** "Dunarea de Jos" University Galati, Faculty of Economic Sciences.

Literature Review

The transmission mechanisms of the monetary policy were approached more than a half of century ago, in the traditional Keynesian model. The key role was assigned to the interest rate channel. For example, an expansionary monetary policy is supposed to cause a fall in the real interest rates and that leads to a cost of capital decrease. This will cause a rise in the investment spending which will stimulate the aggregate demand increasing the output¹.

In the last decades, after significant changes occurred in the monetary policy perspective, other transmission mechanisms were approached: exchange rate channel, equity price channel, bank lending channels, balance-sheet channels a.s.o.

The monetary policy could affect the output through exchange rates. For example, an expansionist monetary policy leads, usually, to a depreciation of the national currency. That raises the net exports stimulating the economic growth². Another way that monetary policy could affect the output is through the equity price. In the specialized literature many such transmission mechanisms were approached. Tobin (1969), for example, proposed *q Theory* of investment and wealth effects on consumption by which an expansionist monetary policy could cause an increasing of investment spending and hence in aggregate output³. The important role of lender that banks play make them part of the monetary transmission channels. For example, an expansionist monetary policy could lead to banks deposits increase. That generates a rise in the bank loans that will stimulate the investment consumer spending, leading to an increase of the output. However, in the industrialized countries, after the decline of the traditional bank lending business from the last decades, this channel became less important⁴. The monetary policy could have an important impact on the net worth of a firm registered in the balance-sheet. Because of this situation, in the specialized literature there were approached some balance-sheet channels. For example, an expansionist monetary policy could lead to a rise in equity prices which raises the net worth of firms. This increases the investment spending, stimulating the economic growth⁵.

For the emerging markets, there were revealed significant differences in comparison with the industrialized countries, especially because of the insufficient development of the financial markets, the bigger importance of bank lending and the ambiguous autonomy of the central banks. The macroeconomic systems circumstances lead to important particularities of the monetary transmission channels. Some recent researches find out major differences not only between the emerging markets and the industrialized countries, but also between the emerging markets⁶.

It is useful that monetary transmission channels to be studied in relation with the applied monetary policy regime. In the recent years, many industrialized and transition countries implemented the inflation targeting regime. This could increase the monetary policy efficiency under the condition of a properly use of the monetary transmission channels. The adoption of inflation targeting impact was approached largely in the specialized literature. Mishkin and Schmidt-Hebbel (2006) found evidences that inflation targeting adoption in 1990s improved macroeconomic performance such as:

- decline of the inflation levels;
- attenuation of the inflation volatility;
- decline of the interest rates;
- attenuation of the exchange rate pass-through.⁷

However, Ball and Sheridan (2003) didn't share this point of view arguing that such improvements were experienced in the 1990s by most of the industrialized countries although some of them didn't implement inflation targeting.⁸

The inflation targeting suitability for the emerging markets is still a controversial subject. Jonas and Mishkin (2003) studied the effects of inflation targeting in three countries: the Czech

Republic, Hungary and Poland. Their study revealed the difficulties of this strategy implementation in the context of a significant uncertainty that usually characterizes the emerging markets. They found out the complex relations that occur sometimes in the transition countries between the central bank and the government could hamper the inflation targeting sustainability. Despite these aspects, they concluded that inflation targeting in the transition economies could be implemented reasonably successfully⁹. Other studies revealed the disadvantages associated to the adoption of inflation targeting in the emerging markets. Masson, Savastano and Sharma (1997) considered this regime as unsuitable for the emerging markets because in these countries central banks are not allowed to carry out an independent monetary policy. They also point out that in emerging markets the exchange rates remain an important objective which could be in conflict with the inflation targeting¹⁰. Kumhof (2000) revealed that credibility is hard to be achieved for the central banks from transition countries¹¹.

The monetary transmission channels in Romania were subjects for some papers. Pelinescu (2001) revealed some circumstances such as weak competition, soft budgetary constraints and lax corporate governance that lead to a short transmission period of the mechanism in the Romanian economy¹². Popa *et al* analyzed the impact of inflation targeting regime on the monetary transmission channels¹³. Antohi, Udrea and Braun (2003) realized an econometric modeling of the monetary policy transmission mechanism in the period October 1999 - May 2002¹⁴.

Theoretical Background

We study the effects of the Romanian monetary policy using a VAR methodology. This technique was proposed by Sims (1980) almost three decades ago¹⁵. Since then it suffered a lot of improvements and it took several versions¹⁶. In this paper we use a version of non-structural VAR innovation response analysis applying the econometric software *EasyReg International* proposed by

Professor Herman J. Bierens (2007) from Pennsylvania State University¹⁷.

In the VAR analysis of monetary transmission channels we used monthly time series data provided by NBR. Because of the structural changes experienced by Romanian economy during the 1990s, these time series data start from January 2000. It weren't included values after December 2006 because of the temporal effects induced by Romania's adhesion to the European Union. Because of the short sample of relevant data we limited to six the variables included in the VAR model, although a larger model with more variables would be desirable to capture the finer details of monetary transmission channels. These variables are consumer price index (CPI), exchange rate (ROL/EUR), industrial production (PRIND), money supply (M2), non-government credit (CRED_N), and three month offered interest rate from Romanian Interbank Offered Rate (ROB3M).

VAR innovation response analysis

In order that effects of monetary policy became more obviously we transformed the variables by taking logs. Also, because they proved to be nonstationary, we took them in the first differences. The resulted time series were named:

- DIF1[LN[IPC]], for consumer price index;
- DIF1[LN[ROL/EUR]], for exchange rate;
- DIF1[LN[PRIND]], for industrial production;
- DIF1[LN[M2]], for money supply;
- DIF1[LN[CRED_N]], for non-government credit;
- DIF1[LN[ROB3M]], for three month offered interest rate from Bucharest Interbank Offered Rate.

Because of the short degrees of freedom we didn't include the seasonal dummy variables, although some time series exhibit a significant seasonality. The short sample of data we used made us choosing a lag order of two although the information criteria Akaike, Hannan-Quinn and Schwarz could allow us to use a bigger value (Table 1).

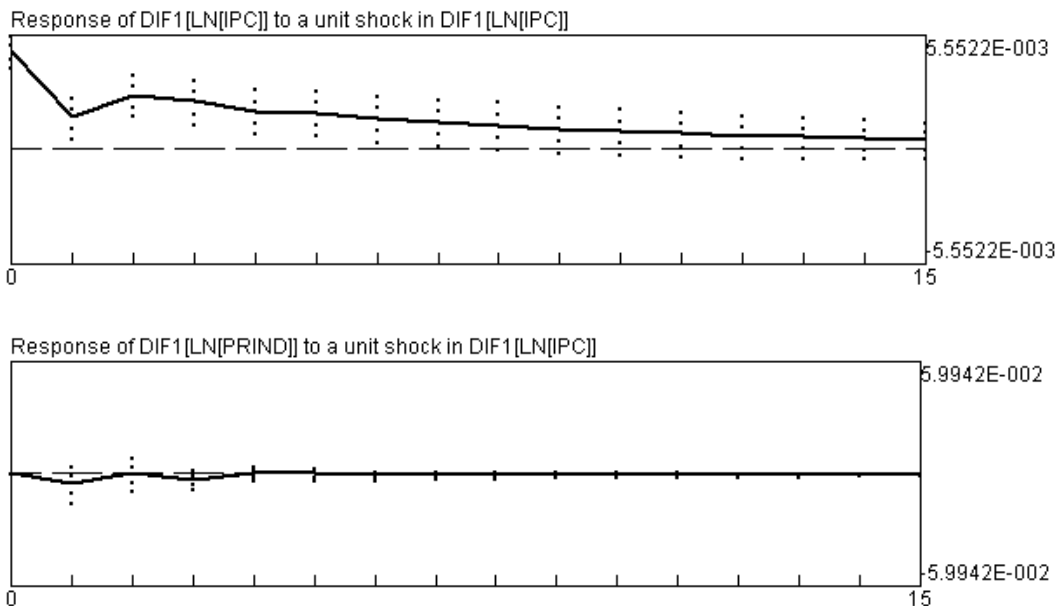
Table 1 - Information criteria for choosing lag length

Lag order (p)	Akaike	Hannan-Quinn	Schwarz
1	-4.45747E+01	-4.40798E+01	-4.33420E+01
2	-4.50864E+01	-4.41613E+01	-4.27806E+01
3	-4.53254E+01	-4.39645E+01	-4.19310E+01
4	-4.53623E+01	-4.35599E+01	-4.08633E+01
5	-4.51708E+01	-4.29210E+01	-3.95509E+01
6	-4.53338E+01	-4.26309E+01	-3.85764E+01
7	-4.57258E+01	-4.25637E+01	-3.78136E+01
8	-4.62837E+01	-4.26563E+01	-3.71991E+01

We analyzed innovation responses using forecast error variance decomposition. From the perspective of inflation targeting regime there are important responses of prices and output to the shocks of the six variables.

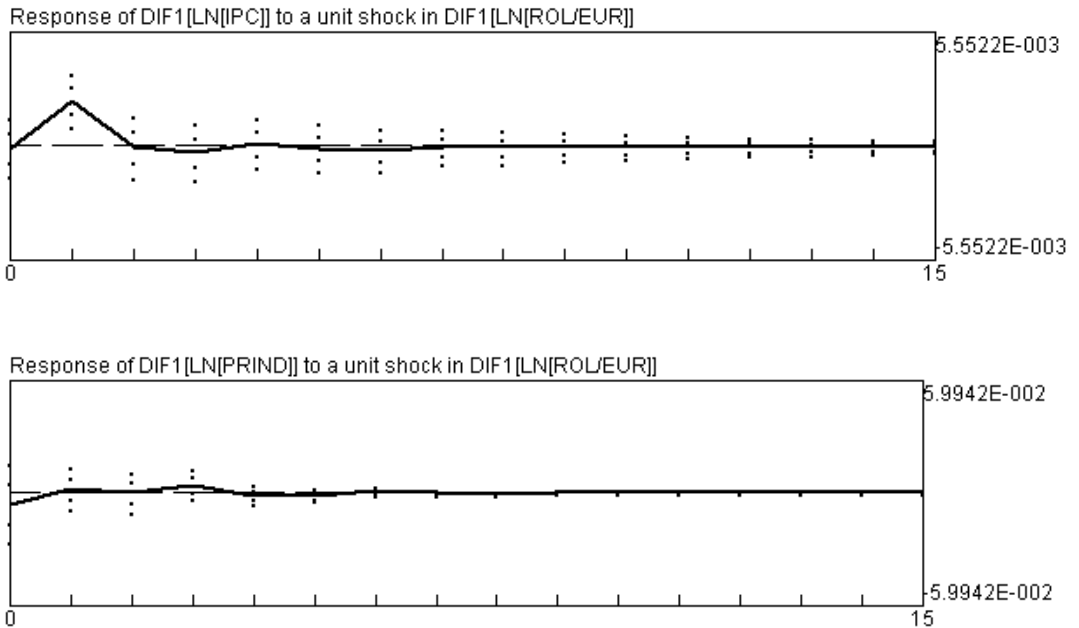
a. Responses to the inflation shocks. From the VAR Analysis it resulted that a unit shock in DIF1[LN[IPC]] affects the prices for a long time. Instead, the effects on the industrial production are much less significant (fig. 1.)

Fig. 1 - Responses to the inflation shocks



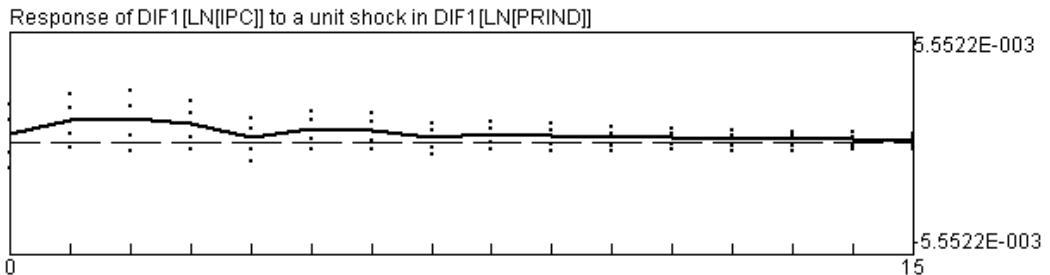
b. **Responses to the exchange rates shocks.** A unit shock in $DIF1[LN[ROL/EUR]]$ provokes a significant increases of prices that is shown especially in the first three months. It also causes a decrease of industrial production that lasts for about a month (fig. 2.).

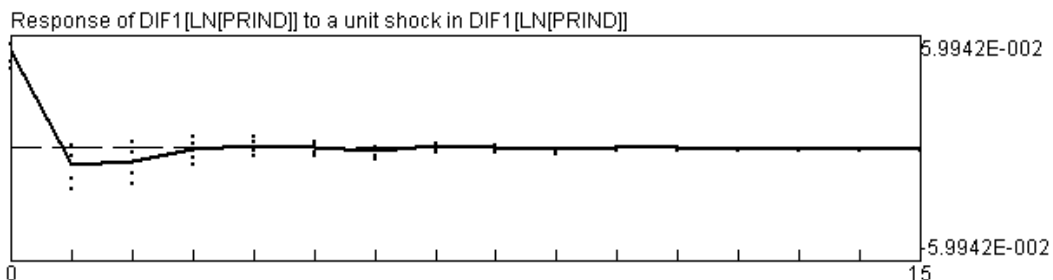
Fig. 2 - Responses to the exchange rates shocks



c. **Responses to the industrial production shocks.** A unit shock in $DIF1[LN[PRIND]]$ increases the inflation for many months. The responses of the industrial production to this kind of innovation consist in an increase for about a month followed by a decrease in the next (fig. 3.).

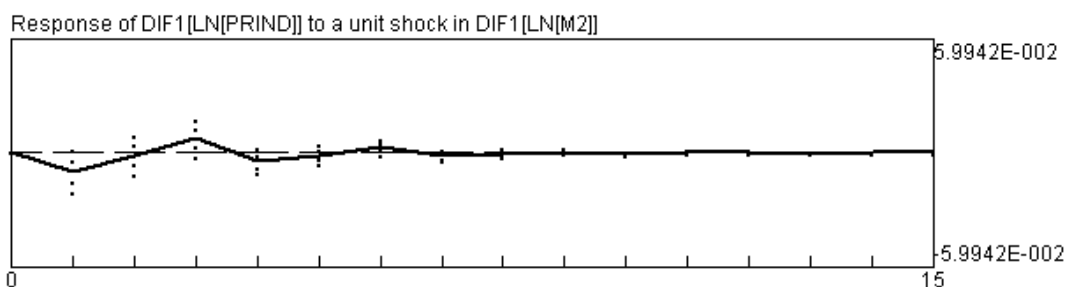
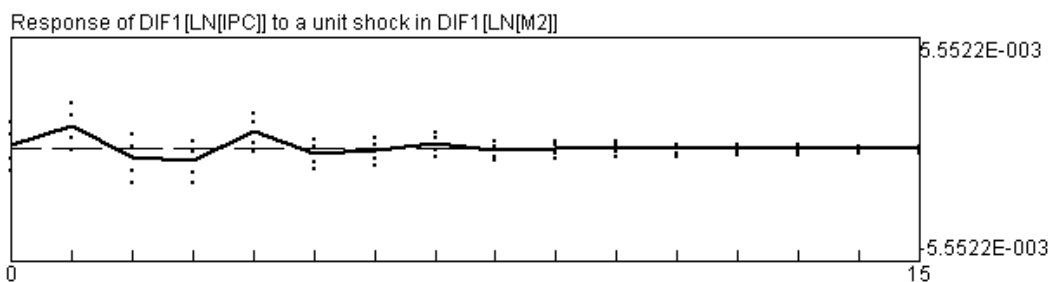
Fig. 3 - Responses to the industrial production shocks





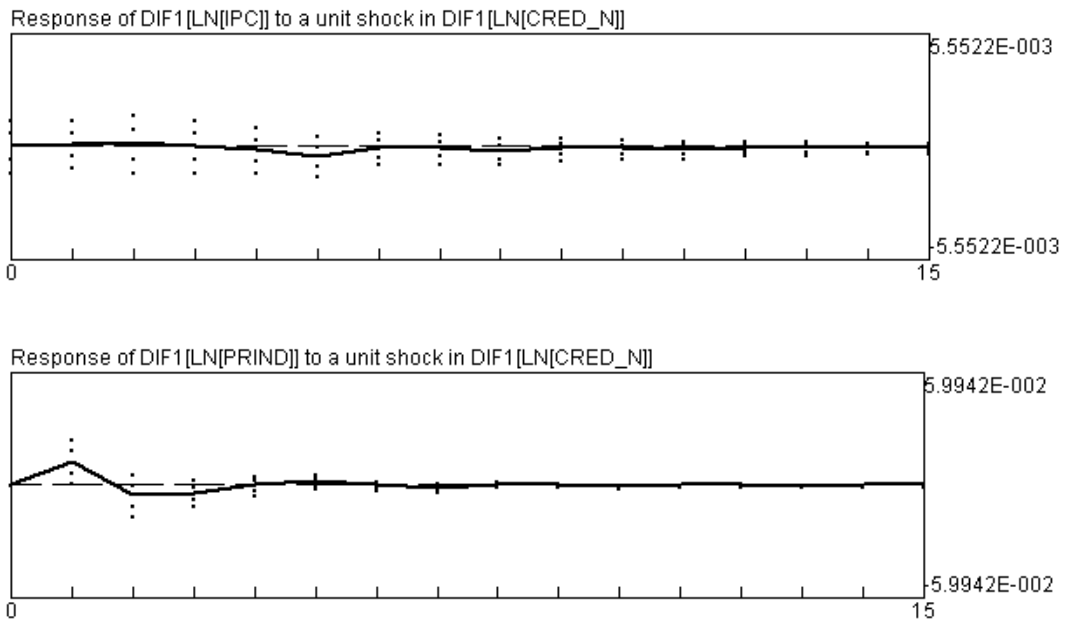
d. Responses to the money supply shocks. A unit shock in DIF1[LN[M2]] causes increases of inflation followed by decreases. Instead, for the industrial production, the effects consist in a decrease followed by an increase (fig. 4.)

Fig. 4 - Responses to the money supply shocks



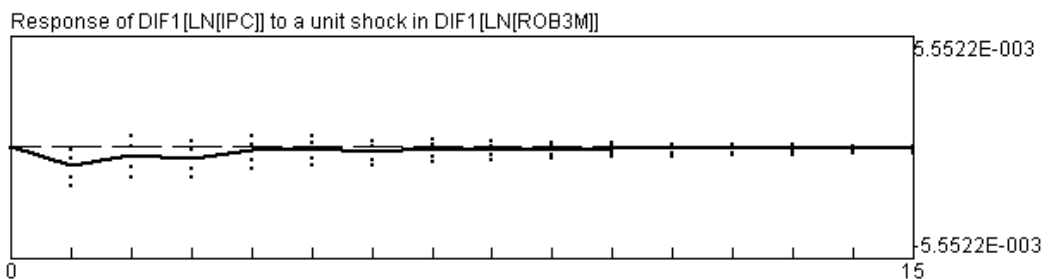
e. Responses to the non-government credit shocks. Inflation proved to be not very sensitive to non-government credit variation. Instead, a unit shock in DIF1[LN[CRED_N]] causes a significant increase followed by a decrease of industrial production (fig. 5).

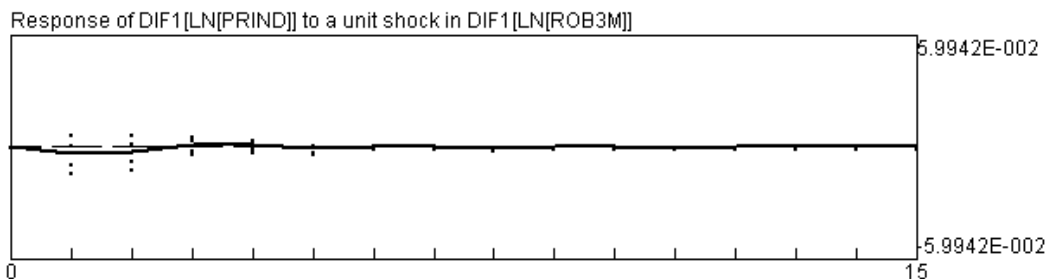
Fig. 5 - Responses to the non-government credit shocks



f. **Responses to the interest rates shock.** A unit shock in DIF1[LN[ROB3M]] causes a significant decrease of inflation, lasting for many months. It also leads to a decrease of industrial production but less significant and less persistent (fig. 6.).

Fig. 6 - Responses to the interest rates shocks





Conclusions

In this paper we approached the monetary transmission channels in Romania. We applied a non-structural VAR innovation response analysis using monthly data from January 2000 to December 2006. We found out that inflation had significant responses to shocks from exchange rates, industrial production, money supply and interest rates but was not very sensitive to non-governmental credit variation. We also found out that industrial production reacted significantly to the exchange rates, to the money supply, to the non-governmental credit and to the interest rates variation, but had a much less significant response to the shocks from inflation. For each variable we identified different persistence of the effects.

The short sample of data we used in this analysis affects the robustness of our results. However, the VAR methodology provided indices of the monetary transmission channels particularities in Romania.

Because of the short period of time it passed from Romania's adhesion to the European Union, this analysis couldn't take into consideration the structural changes induced. For that reason, we consider the result of our analysis should be completed with future researches approaching the new context of the monetary transmission channels.

References

1. Modigliani, Franco. *Monetary Policy and Consumption*, in *Consumer Spending and Monetary Policy: The Linkages*, Boston: Federal Reserve Bank of Boston, 9-84, 1971.
2. Taylor, John B. *The Monetary Transmission Mechanism: An Empirical Framework*, *Journal of Economic Perspectives*, 9, 11-26, Fall 1995.
3. Tobin, James. *A General Equilibrium Approach to Monetary Theory*, *Journal of Money, Credit, and Banking*, 1, 15-29, February 1969.
4. Bernanke, Ben S., and Mark Gertler. *Inside the Black Box: The Credit Channel of Monetary Policy Transmission*, *Journal of Economic Perspectives*, 9, 27-48, Fall 1995.
5. Mishkin F., *The Channels of Monetary Transmission: Lessons for Monetary Policy*, Banque de France Bulletin No. 27, March 1996.
6. Coricelli, Fabrizio, Balázs Égert, and Ronald MacDonald. *Monetary Transmission in Central and Eastern Europe: Gliding on a Wind of Change*, William Davidson Institute Working Paper No. 850, November 2006.
7. Mishkin, F., and K. Schmidt-Hebbel. *Does Inflation Targeting Make a Difference?'*, NBER Working Paper No. W12876, January 2007.
8. Ball, L., and N. Sheridan. *Does Inflation Targeting Matter?*, NBER Working Paper No. W9577, March 2003.
9. Jonas, J., and F. Mishkin. *Inflation Targeting In Transition Countries: Experience and Prospects*, NBER Working Paper No. W9667, April 2003.
10. Masson, P.R., M.A. Savastano, and S. Sharma, *The scope for inflation targeting in developing countries*, IMF Working Papers, WP/97/130, 1997.
11. Kumhof, M. *Inflation Targeting under Imperfect Credibility*, Stanford University, April 2000.
12. Pelinescu, Elena. *The Monetary Policy Mechanism of Transmission in Romania*, Proceedings of the Romanian Academy, Series C, pp. 219.222, Volume 1, Numbers 2.3/2001.
13. Popa et al. *Direct Inflation Targeting: A New Monetary Policy Strategy for Romania*, National Bank of Romania, Occasional Papers, N0 1, October 2002.
14. Antohi, Doina, Ioana Udrea, and Horia Braun. *Monetary Policy Transmission in Romania*, National Bank of Romania, Occasional Papers, N0 3, March 2003.
15. Sims, C.A. *Macroeconomics and Reality*, *Econometrica*, Vol. 48, pp. 1-48, 1980.
16. Christiano, L. J., M. Eichenbaum, and C. L. Evans. *Monetary policy shocks: What have we learned and to what end?* In Taylor, J. B./ Woodford, M. (Eds.) *Handbook of macroeconomics*, Amsterdam: Elsevier, 65-148, 1999.
17. Bierens, H. J. *EasyReg International*, Department of Economics, Pennsylvania State University, University Park, PA 16802, USA (<http://econ.la.psu.edu/~hbierens/EASYREG.HTM>) 2007.

A CRITICAL VIEW ON HPWS AND EMPLOYEE COMMITMENT-FORM OF COMMITMENT MATTERS

Kaushik Chaudhuri*

Abstract

This paper has examined critically the impact of HPWS on types of commitment through literature surveys of HPWS and commitment. Particularly the employee behaviors towards job stress and intensity as possible outcomes and predicted their roles between HPWS and employee commitments viz. affective, continuous and occupational commitments in Japanese organizations. The author has argued that in 'reality' HPWS may not have an 'ideally' positive effect on "affective commitment" in the presence of job stress and work intensity. There may be an increase of "continuous commitment", whereas their "normative" and "occupational commitment" probably will remain unaffected. The author has also argued possible relations of job stress and job intensity to different forms of commitment against researches showing commitments giving rise to job stress to the employees, thus a reverse phenomenon can also be observed in organizations at Japan. The arguments and view points expressed may also serve as an extension to Takeuchi et al (2007) study on HPWS in Japan.

Key words: HPWS, Job intensity, Job stress, Commitment, Japan

Introduction

The author has raised questions on the implications of HPWS on employee - commitment and how job stress and job intensity as outcomes of HPWS will influence inter relationships between HPWS and different forms of Employee commitments. The paper consequently unfolds reasons and arguments leading to hypothesize relationships between HPWS, employee commitments, job stressors and job intensity. Working definition of employee commitment has been adapted as state psychological attachments that lead to ideally positive relationship between an actor (individual or employee) and entity (organization and occupation). The types of commitment conceptualized in this paper are derived from Meyer and Allen commitment(1991) theory of employees' psychological attachment to their organization due to their emotional (Affective), costs or economical relationship(Continuous), obligation or duty (Normative) and occupational or job related attachment derived from Blau' 's career commitment (1993).

A large number of US researchers made intensive studies of a newly emerging work system called high performance work systems (HPWS) from the nineties Cappelli and Rogovsky (1994); Osterman (1995); McDuffie and Kochan (1995) Arthur (1994) ,McDuffie (1995), Becker and Huselid,(1998),Huselid,(1995;) and this continued in the twenties like (Appelbaum et al, 2000, Bae and Lawler 2000, Guthrie 2001, Lepak and Snell 2002, Zachratos et al 2005, Takeuchi et al 2007) both in the Western and non-western settings and today also being widely followed in

* Ph.D. candidate Chikuro Hiroike School of Graduate Studies, Reitaku University, Japan. The author sincerely acknowledges vital advises and comments from Prof. Oba Hiroyuki and Prof Nakano Chie of Reitaku University and also expresses sincere gratitude to Kambayashi Scholarship Foundation, Prof. Kambayashi. R (Hitotsubashi University) and Prof. Hiroike.M (Reitaku University) for their constant encouragements. Correspondence regarding the article may be addressed to Kaushik Chaudhuri, Chikuro Hiroike School of Graduate Studies, Reitaku University, 2-1-1 Hikarigaoka, Kashiwa, Chiba Prefecture, Japan-277-8686. Email:chaudhuri kaushik@yahoo.co.in or kchaudhu@cs.reitaku-u.ac.jp.

different economies including that of the developing economies (Lawler et al 2000). HPWS, had its roots to HR practices related with the Japanese production systems, most significantly the lean system of Toyota, documented extensively in the book titled “*the machine that changed the world*” written by *Womack, Jones and Roos in 1990*. A number of terms had often been used interchangeably to describe HPWS– high performance work organization (Ashton and Sung, 2004), high involvement work systems (Felstead and Gallie, 2002), high performance employment systems (Brown and Reich, 1997) and high commitment management (Wood, 1999; Baird, 2002) or as high performance management HPM (Butler et al 2004). The development of new forms of work processes with the usage of high technology, the HRM practices under these high performance work systems become a critical factor for the organizational success. Such HR practices in HPWS were designed to elicit deep commitment of workers to fulfill the desired objectives of the organizations. In this respect, the concepts of human resource management and HPWS might be said to be largely similar in function and objectives.

HR practices and policies in HPWS

There had been considerable lack of consensus as to what constitutes HPWS like Becker and Gerhart (1996), Youndt et.al (1996) and the problem persisted till date (David Lepak et al 2006). There had been some conflicts in conceptualizations of the usages of same HR practices in different HR systems increasing confusions in reader’s mind. Most of these HR practices known as the soft approach or the Harvard model in HRM (Beer et al 1984) or the best practices or the commitment model (Johnson 2000) and “development humanism” (Guest (1999)), were all conceptually found to be similar to Japanese people management systems. Huselid (1995) developed 13 best HR practices as “high performance work practices” and later Pfeffer (1998) outlined seven best practices similar to these practices which had a resemblance to the Harvard model. The *commitment* oriented HR systems consist of practices such as intensive training and development, socialization, promotion from within, high compensation, selective staffing to forge a stronger psychological connection between employees and organizations. (David Lepak et al 2006). Similarly authors like Osterman (1994), McDuffie (1995) Zacharatos, et al (2005) used *high intensity* oriented HR practices focusing the use of formal or self directed teams, employee involvement participatory groups, and product-related suggestions made and implemented by employees, job rotation and carrying out quality tasks. ‘flexible work systems’ employee problem-solving groups (or quality circles), and total quality management overall empowering employees through increased flow of information and devolution of decisions making power, leading to greater productivity. HPWS comprises both these *high involvement* and *high commitment* HR practices. Several researchers have used these conceptualizations interchangeably (Wood & de Menezes, 1998; Zacharatos et al. 2005). They had reached to a consensus that the ultimate objective of commitment, or involvement in high performance work system or some other HR systems are the same the productivity and profitability of the organization. Belanger et al (2002) have sought to justify some of the conceptual confusions surrounding high performance work system through a) Production management: which involves the greater use of flexible production systems with an emphasis of quality b) Work organization which involves the use of production processes based on knowledge and cognition, especially the use of teamwork and c) Employee relations: harnessing of employee commitment in the service of the organization. He theorized that high performance work systems practices were to be implemented in a “bundle” in order to get the maximum results. Without the supports of the similar practices the implementation of a single high performance practice may achieve little or may become counterproductive. Most referred HR practices in HPWS literatures can be tabulated below:-

HR Policies , practices in HPWS	Authors (date of Publications)
Performance based pay	Guthrie (2001) Pil McDuffie(1996) Huselid (1995) Wood (1996) Snell and Dean (1992) Guest (1999) Appelbaum (2000) Zacharatos et al (2005)
Teams as a fundamental unit of organization	Guthrie(2001) Pil McDuffie (1996) Wood (1996) Appelbaum (2000) Zacharatos (2005)
Employee participation programs	Guthrie(2001) Huselid (1995) Pil and McDuffie (1996) Wood (1996) Guest (1999) Zacharatos et al (2005)
Formal communication programs to keep employees informed about the firm	Guthrie (2001) Huselid (1995) Guest (1999) Zacharatos et al (2005)
Regular use of employee attitudes survey	Guthrie(2001), Huselid (1995) Guest (1999)
Employee job security policies such as no compulsory redundancies.	Wood (1996) Guest (1999) Becker and Huselid(1998) Zacharatos et al (2005)
Formal training as the indicator of employers' commitment to invest n human capital	Huselid (1995) Snell and Dean (1992) Truss (2001) Zacharatos et al (2005)
Reduced status differentials between managers and employees (egalitarian)	Pil and McDuffie (1996) Wood (1996) Guest (1999) Zacharatos et al (2005)
Internal promotions or selections to fill vacant positions	Guthrie (2001) Huselid (1995) Guest (1999)
Formal performance appraisal	Huselid(1995) Wood (1996) Truss (2001)
Development appraisal	Whitener (2001) Snell and Dean (1992)
Formal grievance or complaint resolution systems	Becker and Huselid (1998) Huselid (1995) Guest (1999)
Targeted selections , recruitment	Truss (2001) Huselid (1995) Zacharatos et al (2005)
Merit based promotions	Guthrie (2001)
Formal Job analysis(Job description) Job design ,safety	Huselid (1995) Zacharatos et al (2005)

Adapted from : David P. Lepak, et.al (2006) and Macky and Boxall (2007)

How HPWS relate to employee behavior in the work places?

“There are burgeoning researches on organizational outcomes but there is far less systematic data regarding employee experiences of HPM.”(Butler et al 2004) Most of authors believed HPWS would promote positive behavior in the employees. The HR practices normally used in HPWS has its sources from the soft Harvard model (Beer et al 1984)These HR practices were generally supposed to provide mutuality in all affairs of running business between employee – employer and the employees were significant stake holder in an organization. Guest (1999) in an analysis of a survey of 1,000 workers carried out for the Chartered Institute of Personnel and

Development (CIPD) in the UK, found that workers seemed to react positively to human resource management practices which he termed as “*positive psychological contract*” Arnold & Feldman (1982), Cotton & Tuttle (1986), Freeman and Kleiner (2000) also rated positive impact on the employees satisfaction and intention to stay in the company or increase morale of the employees as HPWS did increase the value of the human capital in the organization (Huselid 1995, Zacharatos et al 2005) Most authors assumed (Edwards & Wright, 2001, p. 570). “Systems... are established; they influence workplace practice; employee attitudes change, with increased satisfaction or commitment; there is a consequent effect on behavior; and this in turn feeds through to the performance of the work unit and eventually the company...”

Does HPWS also have a negative effect on the employee behavior?

Even though in theory HPWS should elicit commitment, it had been identified that in practice this was not necessarily the case. There had been considerable negative impacts of HPWS amongst the employees. Ramsay et al. (2000) found some evidences of negative effect on the employees in his study in U.K. He divided the HR practices into two groups of HPWS practices. In one he included HR practices as EEO policy, employee union representation, and family-friendly policies amongst other things. The second system included grievance procedures, formal teams, appraisals and formal training. Ramsay described the first system as a ‘politically correct system,’ but showed a statistically negative significant relationship to the commitment while the other group of system produced no effect. He concluded that the HPWS could have a marginally positive effect on employees’ attitudes to commitment but actually an overall negative effect on employees’ affective commitment to their organizations.

The ‘high involvement’ working practices creating commitment were statistically insignificant Arthur (1994). Authors analyzing self directed teams have found to increase autonomy or empowerment allow for greater discretion over their work, which are all important aspects of HPWS (Edwards & Wright 2001). But such autonomous team work had also been linked as an augmentation of Foucault's ideas in building a new model of labor process control. Here the centre of control had shifted from the management to the workers themselves, establishing their own norms for their team's activity. The concept of self managing teams had also been closely linked to “concertive control” or “panopticism” through horizontal surveillance, and peer group scrutiny (Garrahan and Stewart, 1992; Hetrick and Boje, 1992 Barker, 1993; Barker and Cheney 1994). Life in teams might also bring about stressful experiences. Individual could unambiguously identify those team members who were above average or “good” workers in addition to those who were below average or “poor” performers. Such scrutiny would support the operation of concertive control in a team by enabling the establishment of collective norms based on a detailed comparison of individual’s performance. Exerting oneself in these norms of team could also give rise to “charlatan behaviors” in the organizations, detrimental to fairness of the appraisal system and could also relate to the commitment levels of the employees (Gbadamosi 2006, Parnell and Singer 2001). In the event of wrong perceptions of fairness or justice in the organizations might also give rise to disharmony of team work and in the altruism of the employees (Jex, et.al.2003, Sewell and Wilkinson 1992).

White et al.(2003, p. 177) said “..plausible that high commitment or high-performance management will have a negative impact on the home domain of workers to the extent they are designed to elicit greater discretionary effort in pursuit of the organizations goals.” The effectiveness of HPWS could be diminished through the lack of employee organizational commitment which might be directly related to the increased employee discretion that caused to increase negative job-to-home spillover. Even though as employment might continue, good

relations with management could strain. And organizations often had to struggle with “continuance commitment” of the employees. Similarly Danford (2003) cited research that evidently shows that HPWS go hand in hand with downsizing and led to job insecurity and cautioned that HPWS did not escape the “capitalist logic” of “maximizing profits”(p. 73). Danford et al. (2004), in a case study of British aerospace workers, found that HPWS produced a number of negative impacts on the employees. For example, employee workloads increased, older workers complained about loss of job variation, worker stress levels rose, workers and managers especially came under increasing time pressure and this also had a negative spill-over into the workers some lives. Looking at workplace changes in the EU from 1997-2000, Godard’s (2004) wide ranging critical assessment of the HPWS literature also suggested quite pessimistic views that the impact on worker job satisfaction of HPWS practices such as autonomous teams could in fact produce negative effect to the employees. Also drawing on Canadian material, Kumar (2000) found a reduced quality of work-life, due to increased workloads, job insecurity, and a decline in the influence on the job and confidence in the management. Oeij and Noortje (2002) found that 32% of employees were reportedly being subjected to high speed work for over 50% of their working time, and there had been general move across Europe to an intensification of work. A New Zealand case study (Cochrane et al., 2005) about the implementation of HPWS in the dairy industry’s Whareroa plant, (describing it as Manufacturing Excellence) found a mixed set of responses from workers. Most respondents felt they had limited involvement in key decision making of the plant even though a majority felt that the workplace had become safer. Berg and Kalleberg’s (2002) survey of over 4000 US workers provided a similarly mixed set of findings. They reported that the increased communication and participation could lead to role overload for workers, but also at the same time could also reduced co-worker conflict, but the level of stress varied according to industry and practice. Anderson-Connolly et al. (2002), Batt (2004) found a complex pattern where some aspects of workplace transformation proved harmful to workers’ well-being and decreased job satisfaction while other aspects were beneficial and contributed to increased levels of satisfaction. Some components of workplace transformation, such as autonomy contributed to the satisfaction and well-being of non-managers but were stressor to the managers.

Does HPWS increases Job/work intensification ?

Intensity in jobs or work can be understood by the intensity that covers heavier workloads, tighter deadlines and faster work paces (Gospel ILO 2003) Studies of many scholars have shown a positive relation between a better balance of work load and private life of employees in HPWS work places like Walton (1985); Osterman (1995) Berg et al. (2003) Heywood et al (2005) Appelbaum et al.,(2000).

Whitfield and Poole (1997, p. 757) suggested that HPM techniques typically involve higher start-up costs and needed to yield higher returns to justify their maintenance. Thus companies would look for more efforts from the part of the employees HPWS practices resulted in greater time pressure on employees, higher demands, and an increased work load (Godard 2001; Lewchuk, Stewart and Yates 2001). Studies reported HPWS intensified the required work effort by ‘speeding up the line’ and by forcing employees actually to ‘work harder, not smarter’ to achieve greater efficiencies as these systems were basically designed to eliminate wastes, including unnecessary work time and redundant labor (Babson 1995; Parker 1993, Green 2004). It could be argued that a greater intensification of work could directly lead to greater labor productivity as a result of greater effort made by employees. Thus, employees would perceive that they were both more competent and had greater impact on the performance of their working areas. But equally, could produce higher levels of exhaustion, physical pain, and tension and were likely

to diminish both employee's satisfaction with work and employee motivation to continuously improve performance. Whether greater intensity had more of a positive or negative effect on employees' performance capacities should demand an empirical answer and further research in future. But general assumptions of most of the workplaces were to have a reciprocal relationship that facilitate collaborations in the domains of knowledge and skill development climates (Cook and Meyer 2007). If team members were absent, other team members had to provide a back –up cover for them as no replacement staff were provided thus intensifying work to considerable extents. Greary and Dobbins (2001) Edwards et al. (1998: 40-45) point out that workers were not necessarily dissatisfied with their level of effort, in the six organizations studied by Edwards et.al (1998) suggested 57% of the sample could be classified as "committed," in that they were working harder and liked doing so. But the concept of "effort" is in itself ambiguous. If the fluidity of work and the flow of production were to be improved, workers might produce more without necessarily giving more "effort" and without experiencing more fatigue. It could be possible that workers would not object to this type of improvement, but increasing the work pace and "speeding up" might become an issue (Belanger 2000). As training could lead to broaden tasks of a given job (Kalmi and Kauhenen 2005) organizations would like to get the return of their investment in the human capital in the form of increased productivity(McDuffie 1995) which could induce further intensification of works.

Do HPWS increases job stress?

Many studies also found that heavy job demand, and low control, or decreased decision latitude led to job dissatisfaction, mental strain, and cardiovascular disease. Research also showed that this could be the influence resulting out from participation, rather than "participation per se", which might affect job stress and health of the employees (Israel, et al 1989).

Delbridge and Turnbull (1992) cited high trust employment relations contradicted by the process of tight surveillance and extreme standardizations of jobs. The concept of workers' empowerment or multi- skilling were a gimmick as works continually intensified leading to a "management by stress" (Berg and Kallberg 2000, pg 60). Hochschild (1997) claimed that HPWS with their participatory and supportive environments actually could become safe haven of stresses and produce conflicts at home. 61% of unionized workers surveyed "reported that their workload was either too fast, too heavy, had to be done by too few people, or in too little time" (Lewchuk and Robertson, 1996: 66). No less than 44% reported that "compared with a couple of years ago, their current job was more tense" (ibid. 67). Guest and Conway (1999) argued that the work had been intensified amongst the professional workers and the managers. Recent survey confirmed that employees with high levels of supervisory support shared information were healthier than other employees who did not. But supportive relationships between line managers and employees could possibly ease the impact of work-place stress but they might not cure it. The root cause of work intensification was the reduced staffing levels pursued by senior managers in response to the market pressures exerted by their competitors and dominant stakeholders. Some forms of supervisory support could actually increase stress. For example, the introduction of performance appraisal systems and other forms of 'feedback' could generate feelings of frustration and hostility if they were meant to evaluate pay hike rather than personal development, and particularly when employees were subjected to inadequate staffing levels and unrealistic targets. For the short term, the drive to reduce costs and/or increase profits might well have increased 'efficiency'. But in the long term, could have worrying implications not just for individual employees and their families but the health of its 'social environment' as a whole. Pressure 'from the sheer quantity of work' had the greatest impact equally both for men and women, and for the full and part-timer(JIWIS

survey 1999, Green 2001, Jex 2003). Ramsay et al. (2000) used the UK 1998 Workplace Employee Relations Survey to show that workers in HPWS report greater job strain and lower pay satisfaction. Gallier et al. (1998) used earlier survey data to show the characteristics of HPWS were associated with greater "work pressure" for employees. Godard (2001) surveying Canadian workers argued that higher levels of employee involvement, through teamwork, could produce stress that counter-weighs the positive impacts on workers of empowerment and task involvement.

The ultimate response to frequent and intense periods of stress is burnout (Koeske & Koeske, 1993). The job-stressors identified were poor working conditions (Cross & Billingsley, 1994); no building level support, no administrative support, role dissonance, and role ambiguity (Gersten, et al 2001, Elitharp, 2005). Those who were extremely competitive, committed to work and strong in time urgency, were more likely to be subjected to emotional distress and suffer from stress symptoms (Chesney and Rosenman, 1980; Ganster, 1986; Lee and Ashforth, 1990). Stress could also occur as a result of role conflicts, particularly those arising out of the different expectations of superiors (Gross et al, 1985; Moorhead and Griffin, 1995), and the various behavioral expectations of their positions (Van Sell et al, 1981). Excessive workload could increase fatigue and could reduce efficiency as a result of increased stress levels (Alluisi, 1982). Time pressure deadline was examined as a potential stressor since it was an important precursor to stress (Srinivas and Motowidlo, 1987). The demands of the external environment could be greater than the time available to meet them and thus an individual facing severe time constraints might experience significant levels of stress. The proponents of fun claimed that when people have fun doing their jobs, they experienced less stress (Abramis 1989; McGhee 2000) and are less likely to be absent or leave the organization (Marriotti 1999; Zbar 1999). There could be possibility that performance gains usually come with a decreased level of emotional and psychological well being, as evident by the emotional dissonance, and subsequently led to stress and burnout experienced by individuals. (Liu 2006). Such dissonance occurs when employees express emotions according to the employers' expectations (Witt, 1999) or could result because of the norms set up by the peers in a working team or when the co-workers or when the company ignored plea of social support. Social support could also play a role in elevating one's affective well being at work. There were evidences of significant negative relationship between social support and occupational stress (Beehr et al 2000). It could be plausible that employees experiencing high levels of stress would be less likely to engage in altruistic behaviors or organizational citizen behavior. If employees feel the organization had failed to fulfill their promised obligations they could be less likely to give their best effort and less likely to engage in organizationally-directed citizenship behavior (Eisenberger, et al 1986)

Does HPWS, job intensity or stress influence different forms of employee commitment?

There had been a strong relation between job satisfaction and commitment to the organization in HPWS workplaces (Mathieu and Zajac 1990). High commitment HR practices increased employee commitment and thus the organizational effectiveness Arthur (1994), Wood and de Menezes (1998). Macky and Boxall (2007) in their study of HPWS from a sample of 424 found a direct correlation of employee perception of HPWS as a single bundle with employee affective commitment and to behavior commitment (intention to stay back to the firm). The employee HPWS scores were positively correlated to the employee satisfaction and to the trust to the management. HR practices normatively associated with the HPWS would have a positive and additive effect to the employee attitudes. More HPWS practices if added to the bundle will have a better effect. Their causal path found variables like employee job satisfaction and employee trust

in management, had a mediated relationship between HPWS and employee affective commitment but could not find a direct causal relation between HPWS and commitment. They also did caution over zealous adoption could also lead to increased work load and hence a negative effect to the employees. HPWS might have a win-win situation between company and its employees (Machin and Wood 2005) but could have an opposite effect where the employee might suffer or could be that both the company and the employee had to pay price (Boxall and Purcell 2003). Goddard (2004) using data from a telephone survey of 508 Canadian concluded that "it is the interest of only the minority of employers to adopt the high performance paradigm fully and even when it is adopted it may not have a positive implication for workers..." (ibid pg 371). Ramsay et al. (2000) found that, on the one hand, the data pointed to some association between HPWS and higher job discretion and commitment, however, on the other hand some proof of job strains were also found. Harley (2002) in his Australian study could not find a direct relationship between HPWS with either positive or negative effect to the employees. But found HPWS were negatively associated with employee continuance commitment. Butler et al (2004) hypothesized adapting Ramsay's model of both being optimistic and exploitative. a) optimistic: HPWS could produce higher employee commitment as a result of higher levels of job discretion, job satisfaction good managerial relations and b) exploitative: HPWS could produce higher job strain through work intensification, higher job insecurity and increased job responsibility. The stressor-strain relations were stronger for individuals with higher levels of both affective organizational commitment and continuance commitment and certain types of organizational stressors might make employees more vulnerable regardless of the basis for their commitment to the organization. (Irving, P Gregor et al 2003). But how stress and intensity could relate to different forms of commitment in HPWS domain has yet been studied empirically. Could there be any causal models where employee perceptions of increased job intensification and job stress mediate HPWS and forms of employee commitment? The phenomenon can be discussed in the backdrop of HPWS practices in Japanese organizations.

HPWS in the context of Japan:

There had been a very limited study on HPWS in Japan. Takeuchi et al (2007) found positive correlations between HPWS (aggregated by both the average ratings of employee perceptions and managerial perceptions) and the collective human capital of the employees (aggregated, managerial average ratings) and social exchange (average ratings of employee perceptions). The human capital and social exchange variables had a mediating relation to the Relative Establishment Performance of the firm (Aggregated, managerial average ratings) They adopted scales of Lepak and Snell (2000) high commitment work practices in the Japanese context by selecting 21 items HR scales. But we could not gather much information on an important aspect of work practices in Japanese organizations, how the team functioned. Even though there had been strong references of team work historically and traditionally in Japanese society and in organizations (Tudor et al 1996). Team work frequently had also been referred in HPWS literatures Pil and McDuffie (1996) Wood (1996) Applebaum et al (2000) Rubenstein and Kochan (2001). Traditionally Japanese organizations believed all employees were to have equal abilities thus used principle of equality to motivate employees to compete and simultaneously to cooperate with one another. The usage of the performance related or merit based payment hikes or promotions were limited only after employees reached at a certain age of employment in the same organization, could be well after 10 or 12 years of extensive experiences in the company (Takeuchi, Shimada in Thurow ed. book 1986). But recently this had been revised for pay hike and promotion related to performances or results. This had become an issue to many authors in Japan.

These were claimed to be negatively effective in terms of lowering motivations in the employees most importantly could lead to disharmony in team functioning in Japanese organizations (Ohtake and Karato, 2004), Kishita (2006). Takeuchi et al (2007) adopted Youndt et al (2004, 2005) to assess human capital of the organizations and justified perceptions of the managers to have high value of employees' ability, considering high resources of competitive advantage for their organizations. As a consequence HR systems would likely increase employee discretions and would emphasize achievements or results (Kerr, 1985; Snell and Dean 1992). Lepak and Snell (1999) in their concept of human resource architecture found that the core employees performed all the essential tasks within the organizations and the organizational human resource systems are designed to support and manage this human capital (Gramm and Schnell 2001) As discussed before a firm would invest in the human capital only if there were any expectations of return of investments. Increasingly companies were found to be strengthening development for talents through competency analysis, input on individual interests, different assessment of abilities and needs and the formulation of the action plans (Clarke 2001, Messmer 2000).

Japanese domestic firms had traditionally institutionalized a practice of lifetime employment and extensive trainings to foster human capital investments more than foreign firms in Japan (Yoshikawa et al 2005). But when economic conditions worsen, companies might find extremely difficult to maintain such institutional safe guards. Although cutting wages and employment could be an economic necessity to improve cash flows (Cascio, 1993), this could also hurt performance by undermining employee trust, loyalty, and commitment (Mroczkowski & Hanaoka, 1997).

After the economic bubble burst, the Japanese economy grew at an average annual rate of 1.7% between 1992 and 1997 and saw further declines to 0.2% between 1998 and 2002. This financial sluggishness with global competitiveness increased the pressure for economic efficiency on managers, and shareholders, leading to the advent of hybrid form of corporate governance and HRM (Aoki et al 2007). The lifetime employment system had also started declining and now could exist in few companies and could have a bleak future (Ahmadjian & Robinson 2001, JILPT 2006).

Consequently, during the prolonged recession, many firms had restrained hiring and encouraged middle-aged and older employees to opt for early retirement, thus increasing the workload of employees in the "core" age groups, and raising the likelihood of more work accidents. (see notes iii) The increase in workload per individual were due to recent measures to reduce workforces, and intensified competitions among workers due to the introduction of performance-based wage systems resulting in excessively long working hours (Japan Labor Bulletin no 42 Pg 2-3). But larger workload did not result in increased salaries or promises of better treatment in the future (ibid pg 9). Statistics showed the salaries Japanese employees received were much lower than USA or Europe (See Fig 3).

There had been increased "service overtime" overtimes without any payments in Japan. In a survey conducted recently by Genda (2003) figured the most reasoned for working hard many hours voluntary were "to reach the norms assigned to me" (44.7%). While 21.6 percent answered, "to improve my own ability," a large percentage gave negative reasons for working overtime without pay, "because my colleagues also worked overtime without pay" (22.4%) (ibid. Pg 2) But it actually appeared that the main reason was that "they are afraid to stop working" (Genda 2003).

Another possible reason could be the fading popularity of enterprise unions in Japan. Most of these enterprise unions were controlled by their companies with identity closely linked with its firms. There were few independent resources to counter management pressures. Thus the labor movement failed badly to secure implementation of a 40-hour work week for all workers (Weathers 1997).

Thus from the findings of Takeuchi et al (2007) it can be said when the employees were given more discretionary powers to carry out their works diligently and the pressure of the results and performance in work would increase intensity of job functions. This might be needed to achieve company goals particularly return on investment on human capital as discussed before, along with a lure of increased incentives or rewards of the employees. It thus becomes reasonable to predict further that in such pressure and induced competitions amongst the employees might bring disharmony in the working teams, possibly negative emotions and create stressful workplaces. With an increase incidents of over work and unpaid overtimes or *service overtime*, (see note i) leading to occasional death or job burn out known as *kharoshi* (see notes ii) may prevent employees' emotional attachment or trust in the management thus to their affective commitment. But to be eventually rewarded in the end and unable to find a suitable job in other organizations would probably lead to increase their continuous commitment to the organizations and the occupational commitment for the career oriented individuals. These careerists may feel these stressors were just professional hazards in their occupation as research showed educated workers were deeply disappointed to seniority wages and long term employment system in Japanese organizations (Kiyokawa and Oba 2003).

Then why do Japanese employees work harder? Dilemma of forms of commitment

Barnlund (1989) said commitment in Japan exists as a complex construct controlled by the concept of *on* and *giri*. Wierzbicka (1991) said *on* is given (favor) *on* carries the sense of obligations of repayment on reciprocity with it. The repayment could be seen in a positive or in a negative light but it has always been viewed as an obligation known as *giri*, and still continued as a powerful cultural norm even today. The "*giri* is never independent of what people might say" (ibid pg 366) even is a matter of honor and integrity Minami (1971). Markus and Kitayama (1991) supported "one's behavior is determined and contingent on to a large extent organized by what the actor perceives to be thoughts feelings and actions of others in the relationships" (p227) Hofstede (1991) reasoned this because Japan being a collective society , "what is expected is more important than enjoying what is done." They have to be committed in order to maintain harmonious relationships within the in group Triandis (1989). There has been no Japanese word that directly expresses the word "commitment". Japanese interpretation to the meaning of commitment is "connection, membership, responsibility, cooperation, and interest to the in group" (Ruth Guzley et al 1998, pg 12).

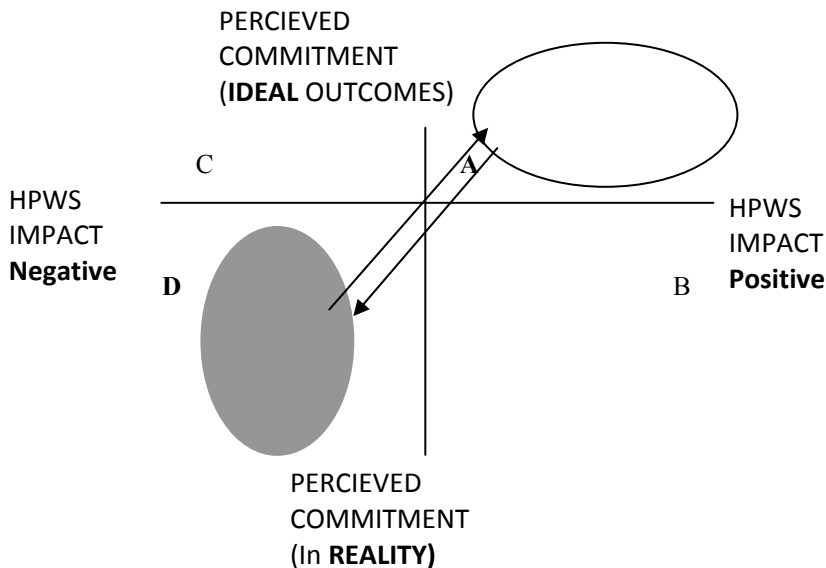
Traditionally there had been a unique Japanese working culture known as *gambaru* (Kodansha 1996, Meek, 2004) meaning to exert one's best efforts towards group objective without trying to disappoint the related members of the group. This was an essential virtue of the samurai warriors and still being used to denote rigorous continuous efforts. It symbolized one had to endure, persevere, and to be patient and a long suffering of unpleasant situations without complaining or anger. This was an essential attitude for collective survival and success.

Such *gambaru* attitude to sacrifice personal desire and individual needs for the good of their company than their private life could be a result of *tatemaie* (public self) and not always *honno* (real self) thus were forced to do so to conform to the norms of society. Japanese workers demonstrated commitment to avoid ostracism in the company leading to *kharoshi* or job burnout (Miyamoto 1995).

In reality however Kang (1990) found that the workers' mobility in Japanese domestic firms were highly constrained by their reputation, and acquisition of un-transferable skills to other firms. Japanese workers are not culturally or intrinsically more committed. Rather, the Japanese

organizational environment shaped worker attitudes and behavior in such a way that the end result we observe was a low turnover, which could be “misconstrued as higher worker commitment” (Ono 2006). In reality it could be very costly for workers to quit the organization in Japan they have worked for years, since they normally could not find almost no alternative organizations to employ them for better, at least, in the same conditions. So they had to remain in the company even if they no longer had any emotional attachments to their organizations. Organization usually believed that development of “continuance commitment” goes with the development of “affective and normative” ones. The idea that “they (employees) must be having emotional attachment to the company and have ethically correct ideas, as they never quit the company” usually prevailed and accepted by top management. As a result, the employees had to pretend as if they had certain level of affective and normative commitment to the organization as high as they did on continuance commitment in order to prevent the top management to uncover their “spurious loyalty” to the company. (Watanabe and Takahashi 1999). Today Japanese employees have become more multi commitment, not only want to be committed to their jobs but also to their family, his likes and dislikes (Tokoro 2005) But the falling numbers of permanent core employees (see fig 1) and increasing disparity of “working poors” could now point fingers to the once glorified egalitarian Japanese organizations for possibly abusing the Japanese *ganbaru* culture by imposing employees to over work, forcing unlimited exhaustions leading to *kharoshi*. Saruta (2006) after his extensive study on HR practices in Toyota Production system concluded “if workers fails to retain their own independence of will and become subordinate in the body and soul to Toyota with no hope in a precarious future then this system cannot be given high appraisal...that exploits subcontractor companies and workers has a detrimental influence at social and regional levels...” The Toyota ways failed “to respect workers family and social life and lacks a sense of plenitude in the working environment” (ibid pg 504).

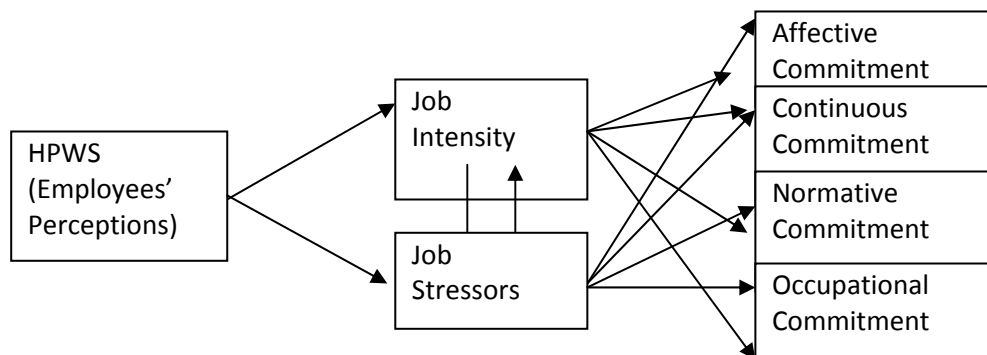
This phenomenon can be explained by the matrix shown below by referring to the Oba’s theory of “value – conscious matrix” (Oba et al 2007), Oba (2008 forthcoming).



Adapted from Oba et. al. (2007) “Gakumon ryoku no susume”

Let us relate this issue of HPWS and employee commitment relationship by drawing to axis X and Y. The perpendicular Y axis is the perceived commitment axis. The positive side of the Y axis is the perceived *ideal* commitment, positive outcomes of HPWS policies where the employees voluntarily exert efforts having supposedly high emotional affective attachment to the company. Whereas the lowermost of the y axis, is the *reality* of perceived commitment showing negative effects of HPWS. This zone may have some compulsions on the employees to exert efforts having less emotional affective commitment towards the company. The horizontal X axis is the impact of HPWS on employee commitment. It shows about the employees' perception of HPWS, how they value these policies. Left hand sides are the positive impact and the right hand sides are the negative impact zones. The zones A, B, C and D are denoted as four possible relationships between HPWS impact and perceived commitment. We could see a shift of the most ideal situation of perceived commitment from A zone to the D zone. We can denote people in the A as Alive (lively) and people in the D as Depressed. This shift of commitment from the *ideal* perspective of lively employees to the *reality* perspective of depressed people may be due to negative fall out of excessive job intensifications and increasing job stress of the employees in HPWS work places. Thus if we can control these two mediating variables of job intensifications and job stressors in HPWS workplaces we can see a reverse shift from D to A.

From the above discussions we can now propose hypothesis in the context of employees' perceptions of HPWS in Japan:



The proposed model showing a relationship between HPWS, Job stressors, Job intensity, Affective, continuous and occupational commitments of the employees, where Job stressors and Job intensity may act as mediating variables.

The employee perceptions of HPWS have positive relations to employee job stressors and job intensity.

Job Intensity and Job stressors are positively correlated.

HPWS has negative impact with affective commitment through Job Stress and Job Intensity.

HPWS has a positive impact with each of normative, continuous and occupational commitment.

Job stressors and job intensity has positive impact with continuous commitment.

Job stressors and Job Intensity each has no impact with occupational and normative commitment of the employees.

Does “HRM use soft rhetoric to disguise hard reality” as if “a wolf in sheep’s clothing”? Caroll Gill (2007) .Organizations actually adopts both hard and soft models of HRM in a

functional system to realize goals, objectives (Gill 2007). In her arguments she cited references of Wilmott (1993) who asserted that “HRM’s unitary rhetoric disguises the pluralist needs of employees turning them into ‘willing slaves’ who forgo their own interest as they believe the organization will take care of them. This unitary rhetoric disguises employee pluralist needs and facilitates advantages to the organizations at the expense of employees Vaughan (1994). Quite interestingly authors in Japan also started to opine that “empowerment” disguises a transfer of responsibility from the organization to the worker (Kishita 2006). Is HPWS also a party to this disguise?

John Budd (2004) conceptualized employment with a “human face” rather than as a purely economic transaction and emphasized the importance of ethics and human rights in employment relationship. The performance oriented HR policies, market oriented efficiency had embrace a utilitarian ethical foundation that advocated to maximize aggregate welfare by creating the “greatest good for the greatest number.” Utilitarianism possibly glorifies consequences. Performance is the main and ultimate goal. The ends justify the means. Does HPWS ignore the human face of employment?

Conclusion and implications

Increasing cost of production is an important issue but costs of job stress and lack of committed employees will further exacerbate such costs. Challenge is to find ways to strike the balance by using HPWS like a velvet hammer in the workplaces. HPWS practices that balance employer and employee interests will be more successful, while those who will strike this hammer too hard likely to fail (Delaney and Godard, 2001). In fact, the moderate adoption of high-performance work practices has been found to increase employee satisfaction, esteem, and commitment (Godard, 2001). HR policies need not make employees give their lives to sacrifice for job sake but to dedicate their career to the organizations. Further researches in collaboration with the academics, corporate and the labor representatives should be directed towards these goals.

Notes

i) The survey, conducted in June 2002 and targeting 23,000 workers, showed that 17.8 percent of the respondents “frequently” performed “service overtime;” (overtime without payment) 6.2 percent answered that about half of their overtime hours were unpaid; and 23.5 percent said that they “occasionally” worked overtime without pay, for a total of 47.5 percent. Of this 47.5 percent, the average amount of unpaid overtime was found to be 29.6 hours: 30.5 hours for male workers and 20.5 hours for female workers. (Japan Labor Bulletin (2003) No. Vol 42: No: 2)

ii). Among male worker According to the results of the Labour Force Survey, the percent of male employees who worked 80 or more hours of overtime a month — the yardstick for judging *karoshi* moved around 18 percent between 1993 and 1999, but exceeded 20 percent in 2000, and has increased for the three consecutive years since. By age group, it is workers aged 30 to 34, followed by 35 to 39 year olds and then those aged 40 to 44 who are hit the hardest (including those who responded that they did not work unpaid overtime), a conspicuously large number in their early 30s worked more overtime than any other age group, an average of 11.8 hours, while the same age group registered the highest proportion, 2.9 percent, of those whose overtime hours totaled 80 or more in a month. (Japan Labor Bulletin (2003) No. Vol 42: No: 2)

iii). The Japan Federation of Employers' Association (1995) categorizes the employment portfolio in three groups: (1) long-term skill-building group (employment agreement with no limited term; with pay raise, severance pay and pension; in core positions, including management, career positions and technical personnel; some 20 percent of all), (2) highly-skilled professional group (employment with limited term; with no pay raise, no severance pay or pension; professionals (planning, sales, research/development, etc.), (3) flexible employment group (employment with limited term; with no pay raise severance pay or pension;

general, technical and sales staff). It is advocated that these groups be used flexibly in companies. (Position Paper 2006 on Management and Human Resources Summary of “Part 2 Management and Labor Issues” December 13, 2005 Committee on Management and Labor Policy, Nippon Keidanren.)

Graphs and figures:

Fig (1a) Decrease in the permanent employees in the Japanese companies.

Fig (1b) Compensation of Japanese employees’ vis-à-vis employees in USA and Europe.

Source: Silent spring Mar 19th 2008 From The Economist

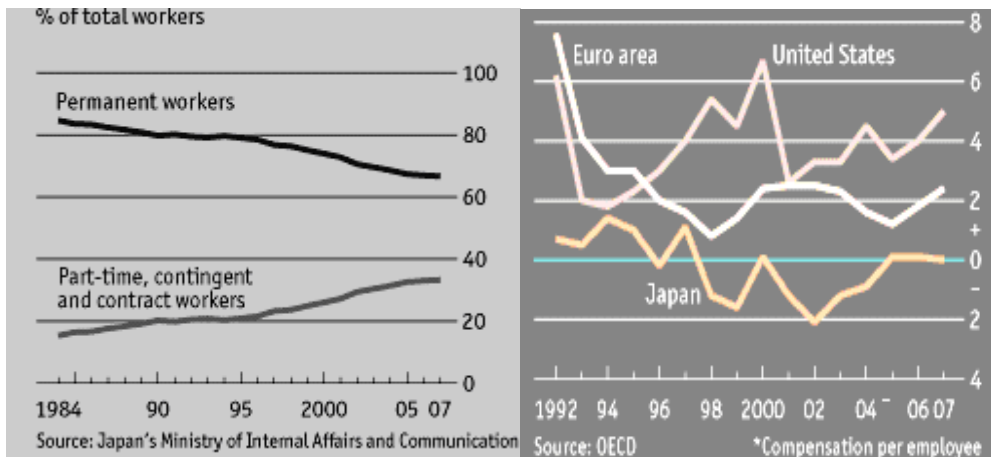


Fig 1(a)

Fig 1(b)

Fig (2) Overtimes of employees in Japanese organizations

Source :RENGO Japan Labor Bulletin

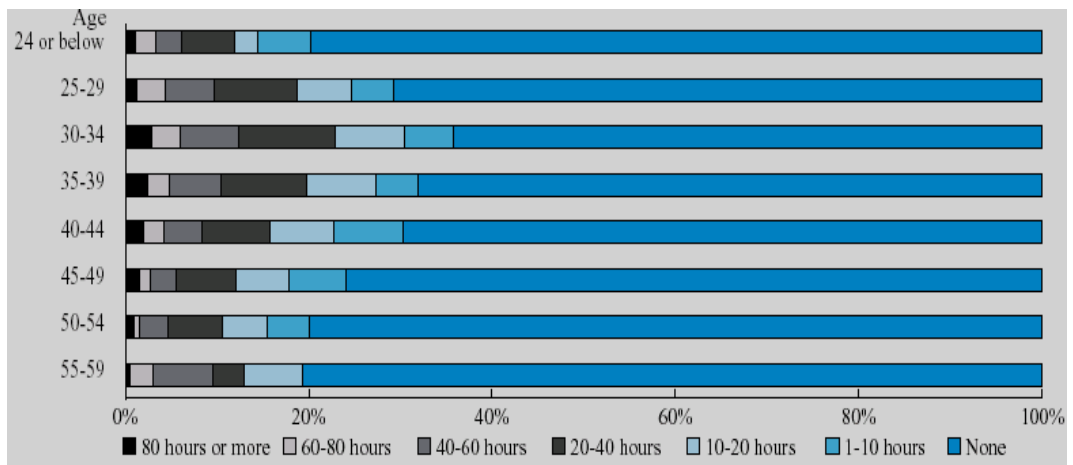
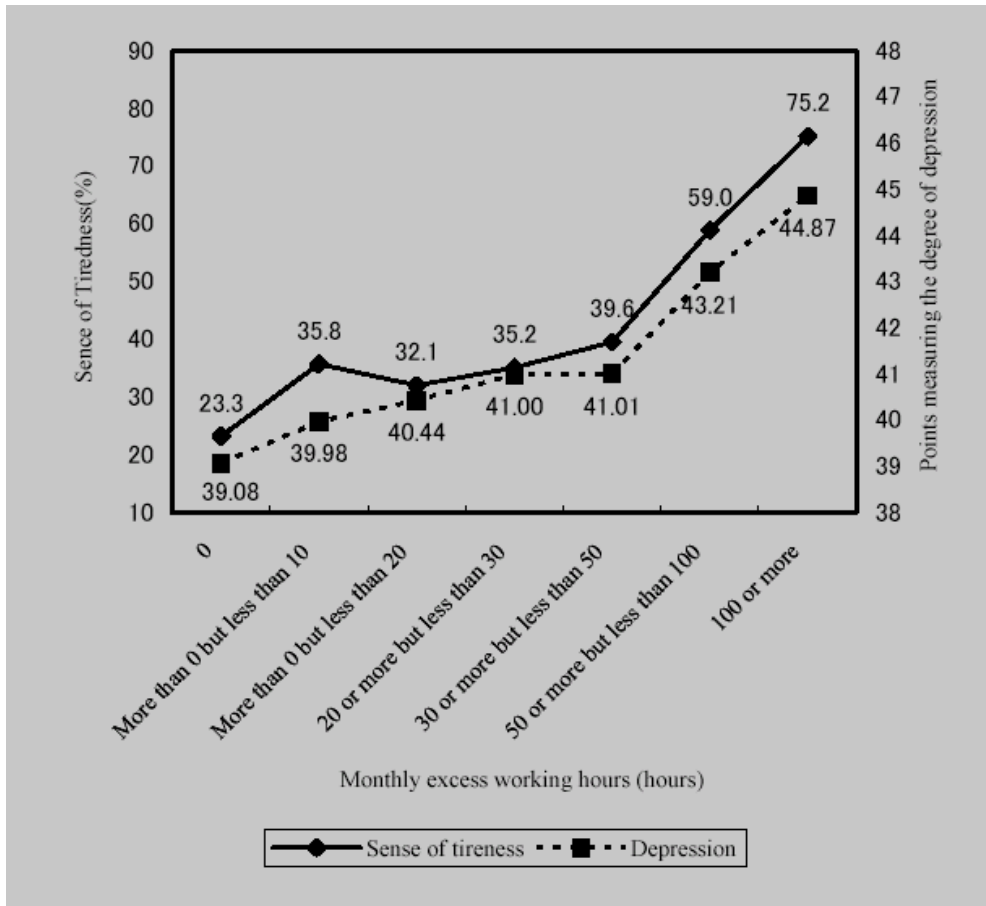


Fig 3: Relationships between Monthly Excess Working Hours, and Sense of Tiredness and Depression



Source: pg 13 Contemporary Working Time in Japan -Legal System and Reality
 Kazuya Ogura Current situation of work hours and vacations in Japan,
 Japan Labour Review Vol 3 No 3 (2006)

References:

1. Abramis, D. (1989). "All work and no play isn't even good for work," *Psychology Today*, March, c, pp. 34-38.
2. Ahmadjian, C. L., & Robinson, P.(2001) "Safety in numbers: Downsizing and deinstitutionalization of permanent employment in Japan.", *Administrative Science Quarterly*, 46:pp622-654.
3. Alluisi, E. A. (1982) "Stress and stressors, commonplace and otherwise," In Alluisi, E. A. and Fleishman, E. A (ed.), *Stress and Performance Effectiveness*, Illsdale.
4. Anderson-Connolly, R., Grunberg, L., Greenberg, E.S. & Moore, S.(2002), "Is lean mean? Workplace transformation and employee well-being," *Work, Employment and Society*, vol. 16, no. 3, pp.389-413.
5. Appelbaum, E., Bailey, T., Berg, P. and Kalleberg, A (2000). *Manufacturing advantage: why high performance work systems pay off.*, Cornell University Press, Ithaca, NY. ILR Press (an imprint of Cornell University Press)
6. Aoki, M, Jackson, G and Miyajima, H (2007), "The diversity and change of corporate governance in Japan," in Aoki, M, Jackson, G and Miyajima, H ed., *Institutional Change and Organizational Diversity*, Oxford University Press.
7. Arnold, H.J. and Feldman, D.C. (1982). "A multivariate analysis of the determinants of job turnover", *Journal of Applied Psychology*, 67(3):pp 350-360.
8. Arthur, J (1994) "Effects of human resource systems on manufacturing performance and turnover.", *Academy of Management Journal*, 376:pp 670-687.
9. Ashton, D. and Sung, J (2004), Australian Bureau of Statistics. (1997). Employer Training Expenditure Australia, July to September 1996. Canberra, AGPS.
10. Babson, S. (1995). "Lean production and labor: Empowerment and exploitation" in S. Babson (Ed.) *Lean work: Empowerment and exploitation in the global auto industry*. Detroit: Wayne State University Press. 1-37.
11. Bae, J., & Lawler, J. J. (2000). "Organizational and HRM strategies in Korea: Impact on organizational performance in an emerging economy". *Academy of Management Journal*, 43, pp 502-517.
12. Barker, J. R. (1993). "Tightening the iron cage: Concertive control in self-managing teams", *Administrative Science Quarterly*, 38, pp 408-437.
13. Barker, J. R., & Cheney, G. (1994). "The concept and the practices of discipline in contemporary organizational life". *Communication Monographs*, 61, pp 19-43.
14. Barnlund, D.C. (1989) "*Communicative Styles of Japanese and Americans: Images and Realities*," Belmont, C.A. Wadsworth.
15. Baird, M. (2002), "Changes, dangers, choice and voice: understanding what high commitment management means for employees and unions." *The Journal of Industrial Relations*, 44:3,pp 359-375.
16. Batt, Rosemary. (2004) "Who Benefits from Teams? Comparing the Outcomes for Managers, Supervisors, and Workers," *Industrial Relations*. 43(1): pp 183-213.
17. Becker Brian and Barry Gerhart (1996) "The Impact of Human Resources Management on Organizational Performance: Progress and Prospects", *Academy of Management Journal*, Vol.39 No.4, pp 779-801
18. Becker, B.E. and Huselid, M.A. (1998). "High performance work systems and firm performance: a synthesis of research and managerial implications.", *Personnel and Human Resources Management*, 16: pp 53-101.
19. Beer, M., Spector, B., Lawrence, P.R., Quinn-Mills, D. and Walton, R.E. (1984). *Managing human assets*. Free Press, New York.
20. Beer, M and Spector, B (1985) "Corporate wide transformations in human resource management" in R.E. Walton and P.R. Lawrence (eds) *Human resource management: trends and challenges*, Harvard Business School Press, Boston.
21. Beehr, T. A., Jex, S. M., Stacy, B. A., & Murray, M. A., (2000). "Work stressors and coworker support as predictors of individual strain and job performance," *Journal of Organizational Behavior*, 21, pp 391-405.
22. Beehr, T. A (2000) "Work stressors and coworker support as predictors of individual strain and job performance," *Journal of Organizational Behavior*, 21(4), 391.
23. Belanger, P., Giles, A. and Murray, G. (2002). "Workplace innovation and the role of institutions" in G. Murray, J. Belanger, A Giles and P. Lapointe (eds) *Work and employment relations in the high commitment workplace*, Continuum, London
24. Berg, P, Kalleberg, A.L. and Appelbaum, E (2003.) "Balancing Work and Family: The Role of High-Commitment Environments," *Industrial and Labor Relations* 42:168 – 88.

25. Berg, P., & Kalleberg, A. L. (2002). "The effect of high performance work practices on job stress: Evidence from a survey of U.S. workers". *Conference on Work Intensification*. Paris.
26. Blau, G., Paul, A. & St. John, N. (1993). "On developing a general index of work commitment." *Journal of Vocational Behavior*, 42, pp 298-314.
27. Boxall, P. and Purcell, J. (2003) *Strategy and human resource management*. Palgrave Macmillan, London.
28. Brown, C. and Reich, M. (1997). "Micro-macro linkages in high performance employment systems.", *Organizational Studies*, 18:5, pp 765-781.
29. Budd, John (2004) In Focus Programme on Social Dialogue, Labour Law and Labour Administration Achieving Decent Work by Giving Employment a Human Face, , Paper No. 7 International Labor Office Geneva
30. Butler, P., Felstead, A., Ashton, D., Fuller, A., Lee, T., Unwin, L and Walters, S. (2004). "High performance management: a literature review. Learning as Work" Research Paper No1, Centre for Labour Market Studies, University of Leicester.
31. Cappelli, P. and Rogovsky, N (1994). "New work systems and skill requirements" *International Labor Review*, 133:2, pp205-20.
32. Cappelli, P. and Neumark, D. (2001). "Do 'High Performance' work practices improve establishment-level outcomes?" *Industrial and Labor Relations Review*, 54, pp 737-775.
33. Cascio, W. F. (1993). "Downsizing: What do we know? What have we learned?" *Academy of Management Executive*, 7(1): pp 95-104.
34. Chesney, M. A. and Rosenman, R. (1980) " Type A behavior in the work setting, " in Cooper, C. L. and Payne, R. (eds.), *Current Concerns in Occupational Stress*, John Wiley and Sons, New York, 187-212.
35. Clarke, K.F. (2001). What businesses are doing to attract and retain employee -becoming an employer of choice. *Employee Benefits Journal*, 3, 34-37
36. Cooke N William & Meyer, G. David(2007), " The Effects of Workplace Climates on Employee Performance Capacities: A Knowledge Based Perspective", <http://web.mit.edu/sis07/www/cooke.pdf> downloaded 4.4.2008
37. Cochrane, W., Law, M., & Piercy, G. (2005), "*Lean, but is it mean? Union members' views on a high performance workplace system.*" In M. Baird, R. Cooper, & M. Westcott (Eds.), *Reworking work ARAANZ 05 Refereed papers. Proceedings of the 19th conference of the Association of Industrial relations Academics of Australia and New Zealand.* (pp. 129-138). Sydney: University of Sydney.
38. Cross, L., & Billingsley, B. (1994) "Testing a model of special educators' intent to stay in teaching." *Exceptional Children*, 60, pp 411-421.
39. Cotton, J.L. and Tuttle, J.F. (1986) "Employee turnover: A meta-analysis and review with implications for research." *Academy of Management Review*, 11(1): pp 55-70.
40. Cully, M., Woodland, S., O'Reilly, A. and Dix, G (1999). *Britain at work*. Routledge, London.
41. Danford, A., Richardson, M., Stewart, P., Tailby, S. and Upchurch, M.(2004). "High performance work systems and workplace partnership: a case study of aerospace workers". *New Technology, Work and Employment*, 19:1, 14-29.
42. Danford, A. (2003) "Workers, unions and the high performance workplace." *Work, employment and society*, 17(3), 569-587
43. David P. Lepak, Hui Liao, Yunhyung Chung and Erika E. Harden,(2006) " A Conceptual Review of Human Resource Management Systems in Strategic Human Resource Management Research," *Research in Personnel and Human Resources Management*, Volume 25, pg 217- 271
44. Delaney, John T., and John Godard (2001) "An Industrial Relations Perspective on the High- Performance Paradigm," *Human Resource Management Review* 11 (Winter), pp. 395-429
45. Delbridge, Rick and Peter Turnbull,(1992) "Human Resource Maximization : The Management of Labour Under Just -in -time Manufacturing Systems" in P.Blyton and P.Turnbull eds *Reassessing Human Resource Management*, London, Sage.
46. Drago, R., Colbeck, C., Stauffer, K. D., Pirretti, A., Burkum, K., Fazioli, J., et al. (2005). "Bias Against Care giving". *Academe*, 91(5),pp 22-25.
47. Edwards, P.K., Margaret Collinson, and Chris Rees. (1998). "The Determinants of Employee Responses to Total Quality Management: Six Case Studies." *Organization Studies*, Vol. 19, No. 3, pp 449-475.
48. Edwards, P., & Wright, M. (2001) "High-involvement work systems and performance outcomes: The strength of variable, contingent and context- bound relationships" *International Journal of Human Resource Management*, 12(4), pp 565-85.
49. Elitharp,Toni(2005)"The Relationship of Occupational Stress, Psychological Strain, Satisfaction with Job, Commitment to the Profession, Age, and Resilience to the Turnover Intentions of Special Education Teachers" unpublished PHD thesis Blacksburg, Virginia Polytechnic Institute and State University

50. Eisenberger, R., Huntington, R., Hutchison, S. and Sowa, D. (1986), "Perceived organizational support" *Journal of Applied Psychology*, Vol. 71, No. 3, pp. 500-507
51. Felstead, A. and Gallie, D. (2002). "For better or worse? Non-standard jobs and high involvement work systems." SKOPE Research Paper No 29, University of Warwick.
52. Freeman, Richard B. and Morris M. Kleiner. (2000). "Who Benefits Most from Employee Involvement: Firms or Workers?" *American Economic Review* 90 (May):pp 219-223.
53. Gallier, D., Michael White, M. Tomlinson and Y. Cheng.(1998). *Restructuring the Employment Relationship*. Oxford: Oxford University Press.
54. Garrahan, Phillip, and Paul Stewart,(1992) *The Nissan Enigma: Flexibility at Work in the Local Economy*. London: Mansell.
55. Ganster, D. C. (1986) "Type A behavior and occupational stress," *Journal of Organizational Behavior Management*, 8(2), 61-84.
56. Genda Yuji(2003) "Dangers Facing Businessmen in their 20s and 30s Who Work for Large Companies", *Japan Labor Bulletin* issued by the Japan Institute of Labour Vol-42. No-2 pp 7-11.
57. Gersten, R., Keating, T., Yovanoff, P., & Harniss, M. (2001). "Working in special education: Factors that enhance special educators' intent to stay." *Exceptional Children*, 67, 549-567.
58. Gill, Carol (2007) "A Review of the Critical Perspective on Human Resource Management", Melbourne Business School. http://works.bepress.com/carol_gill/11/PDF downloaded in 4.4.2008
59. Godard, J (2004). "A critical assessment of the high performance work paradigm". *British Journal of Industrial Relations*, 42:2, pp 349-378.
60. Godard, J. (2001). "High-performance and the transformation of work? The implications of alternative work practices for the experience and outcomes of work." *Industrial and Labour Relations Review*, 54,pp 776-805.
61. Godard, John (2001) "High Performance and the Transformation of Work? The implications of Alternative Work Practices for the Experiences and Outcomes of Work," *Industrial and Labor Relations Review* 54 (July), pp. 776-805.
62. Gramm, C. & Schnell, J. (2001). "The Use of Flexible Staffing Arrangements in Core Production Jobs," *Industrial and Labor Relations Review*, 54(2): pp 245-256.
63. Graham Sewell , Barry Wilkinson (1992), "Someone to Watch Over Me': Surveillance, Discipline and the Just-in-Time Labour Process," *Sociology*, Vol. 26, No. 2, pp 271-289
64. Green, F. (2001). " 'It's been a hard day's night': The concentration and intensification of work in late twentieth-century Britain." *British Journal of Industrial Relations*, 39, pp 53-80.
65. Green, F (2004), "Why has Effort Become More Intense", *Industrial Relations* 43(4) pp 709-741
66. Greary, J. and Dobbins, A. (2001) "Team working: A new dynamic in the pursuit of management control," *Human Resource Management Journal*, 11/1:3-23.
67. Gross, N., Mason, W. and McEachern, A. (1985) *Explorations in Role Analysis*, New York: Wiley.
68. Godard, John (2001) "High Performance and the transformation of work? The implications of alternative work practices for the experience and outcomes of work," *Industrial and Labor Relations Review*, Vol.54. No.4 (July) pp 776-805
69. Gbolahan Gbadamosi(2006) "Predictors and Correlates of Charlatan Behavior in a Non-western Context", *Journal of Global Business and Technology*, Volume 2, Number 1, Spring pp 23-32
70. Guest D and Conway N (1999) *How dissatisfied are British workers?* ,London, IPD,
71. Guest, D (1999). "Human resource management – the workers' verdict." *Human Resource Management Journal*, 9:4,pp 5-25.
72. Guthrie, J. (2001). "High involvement work practices, turnover, and productivity: Evidence from New Zealand", *Academy of Management Journal*, 44 ,pp 180-192.
73. Harley, B. (2002). "Employee responses to high performance work system practices: An analysis of the AWIRS95 data." *Journal of Industrial Relations*, 44(3), pp 418-34.
74. Hetrick, W.P. & Boje, D.M.(1992) "Post modernity & Organization: The Body & Post-Fordist Control," *Journal of Organizational Change Management*, Vol. 5, No. 1, pg : 48-57.
75. Heywood John S., W.S. Siebert, Xiangdong Wei October (2005), "High performance Workplaces and Family Friendly Practices: Promises Made and Promises Kept," *IZA Discussion Paper No. 1812* IZA Bonn, Germany <http://www.uwm.edu/~heywood/dp1812.pdf> downloaded on 13.4.2007
76. Hochschild, Arlie. (1997). *The Time Bind: When Work Becomes Home and Home Becomes Work*. New York: Metropolitan Books.
77. Hofstede, G (1991) *Cultures and organizations: software of the mind*, London: McGraw Hill.

78. Howard Gospel(2003), "Quality of working life: A review on changes in work organization, conditions of employment and work-life arrangements", *Conditions of Work and Employment Series No. 1*, ILO – GENEVA
79. Huselid, M. A. (1995). "The impact of human resource management practices on turnover, productivity and financial performance." *Academy of Management Journal*, 38: pp 635-672.
80. Irving, P Gregory, Coleman, Daniel (June 2003) "The moderating effect of different forms of commitment on role ambiguity-job tension relations," *Canadian Journal of Administrative Sciences*, downloaded from http://findarticles.com/p/articles/mi_qa3981 on 13.5.2007
81. Israel, B. A., House, J. S., Schurman, S. J., Heaney, C., & Mero, R. P., (1989). "The relation of personal resources, participation, influence, interpersonal relationships and coping strategies to occupational stress, job strains and health: A multivariate analysis" *Work & Stress*, 3, pp 163-194
82. Japan Labor Bulletin (2003) No. Vol 42: No:2, Feb, issued by The Japan Institute of Labour. "Working Condition and the Labor Market"
83. JILPT Research Report No.2 ,2004
84. JILPT Research Report No.33 dated 2006
85. Job Insecurity and Work Intensification Survey (JIWIS) (1999)
86. www.jrf.org.uk/Knowledge/findings/socialpolicy/pdf/F849.pdf, on 4.12.2007
87. Kang, T. W. (1990). *Gaishi: The Foreign Company in Japan*. Tokyo: Charles E. Tuttle Company.
88. Kalmi Panu, Kauhanen Antti (2005) "Work place innovations and employee outcomes : evidence from a representative employee survey", Helsinki School of Economics Working papers: W-395 <http://hsepubl.lib.hse.fi/pdf/wp/w395.pdf> Downloaded on 2.10.2007
89. Keith Whitfield, Michael Poole (1997), "Organizing Employment for High Performance: Theories, Evidence and Policy," *Organization Studies*, Vol. 18, No. 5, pp 745-764
90. Kerr, J.L.(1985). "Diversification strategies and managerial rewards: An empirical study". *Academy of Management Journal*, 28: pp 155-179.
91. Kishita, T. (2006). "The HRM of Japanese Firms in the Days to Come of Global Competition," *Research and Practice in Human Resource Management*, 14(1), pp 29-48.
92. Kiyokawa, Y and Oba, H (2003), "Nihonteki keiei banare wa jakunenno no kojinhugika ga shuin ka", (Which generation is Least Receptive to the Japanese Style of Management? an examination based on a Job-consciousness Survey) *The Economic Review (Keizai Kenkyu)* Vol 54, No.4(October), pp 336-352.
93. Koeske, G., & Koeske, R. (1993). "A preliminary test of stress-strain-outcome model for reconceptualizing the burnout phenomenon." *Journal of Social Research*, 17, pp 107-135.
94. Kochan, T.J. and Dyer, L (1993). "Managing transformational change: the role of human resource professionals." *International Journal of Human Resource Management*, 4:5.pp 69-90.
95. Kodansha International Ltd (1996), "The social concept", in Kodansha published book, *Eigo de hanasu Nihon no kokoro, Keys to the Japanese Heart and Soul*, Kodansha International Ltd, Japan.
96. Kumar, P. (2000). *Rethinking High-Performance Work Systems*. Kingston Ontario: Queen's University.
97. Lawler, J. Chen, S. & Bae, J. (2000). "Scale of Operations, Human Resource Systems and Firm Performance in East and Southeast Asia," *Research and Practice in Human Resource Management*, 8(1), pp 3-20.
98. Lepak, D and Snell, S. (1999) "The Strategic Management of Human Capital: Determinants and Implications of Different Relationships", *Academy of Management Review* 24(1) pp 1-18
99. Lepak, D. P., & Snell, S. A. (2002) "Examining the human resource architecture: The relationships among human capital, employment, and human resource configurations." *Journal of Management*, 28, pp 517-543.
100. Lee, R. T. and Ashforth, B. E. (1990) "On the meaning of Maslach's three dimensions of burnout," *Journal of Applied Psychology*, 75(6), pp 743-748.
101. Leung, M-y and Ng, S T and Skitmore, R M (2005) "Critical stressors influencing construction estimators in Hong Kong." *Construction Management and Economics* 23(1):pp. 33-43.
102. Lewchuk, Wayne, and David Robertson. 1996. "Working Conditions under Lean Production: A Worker-based Benchmarking Study," *Asia Pacific Business Review*, Vol. 2, 60-81.
103. Lewchuk Wayne, Stewart Paul, Yates Charlotte, (2001) "Quality of working life in the automobile industry: A Canada-UK comparative study," *New Technology, Work and Employment*, Blackwell Publishing, Volume 16, 2, July, pg. 72-87
104. Liu, Y (2006) "The Antecedents and Consequences of Emotion Regulation at Work," The Florida State University College of Business, Unpublished PhD Thesis.
105. Minami, H. (1971) *Psychology of the Japanese People*, Toronto, University of Toronto Press.

106. McDuffie, J.P. (1995) "Human Resource bundles and manufacturing performance: organisational logic and flexible production systems in the world auto industry.", *Industrial and Labor Relations Review*, 48: pp 197-221.
107. McDuffie, J.P. and Kochan, T.A. (1995). "Do US firms invest less in human resources? Training in the world auto industry." *Industrial Relations*, 34:2, pp 147-168.
108. Markus, H.R., Kitayama, S (1991) "Culture and the self: implications for cognition, emotion and motivation." *Psychological Review*, 98 (2), pp 224-253.
109. Mathieu, J. E. & Zajac, D. M. (1990). "A review and meta-analysis of the antecedents, correlates, and consequences of organizational commitment." *Psychological Bulletin*, 108, pp 171-194.
110. Mariotti, J. (1999). *A company that plays together, stays together*. *Industry Week*, 248 (6), 63.
111. Machin, S, and Wood, S,(2005) "Human Resource Management as a Substitute for Trade Unions in British Work Places", *Industrial and Labour Relation Review* 58(2):201-218
112. Macky,K& Boxall,P(2007), "The Relationship between High Performance Work Practices and Employee Attitudes: An Investigation of Additive and Interaction Effects," *International Journal of Human Resource Management*, 18:4, pg 537-567
113. McGhee, P. (2000). The key to stress management, retention, and profitability? More workplace fun. *HR Focus*, 77(9), 5-6.
114. Meek Christopher (2004) "The dark side of Japanese management in the 1990s: Karoshi and ijime in the Japanese workplaces," *Journal of Managerial Psychology*, Vol 19 No 3 pg 312-331.
115. Mercer *Human Resource Department Report*. (2003, May). Findings of the 2002 People at work survey. (8-15).
116. Messmer, M. (2000), "Performance reviews", *Strategic Finance*, Vol. 82No. 6, December, pp. 10-12.
117. Meyer, P.J., & Allen, N.J. (1991) "A three-component conceptualization of organizational commitment," *Human Resource Management Review*, 1, pp 61-89
118. Moorhead, G. and Griffin, R. W. (1995) *Organizational Behavior: Managing People and Organizations*, Boston.
119. Mroczkowski, T., & Hanaoka, M. (1997). "Effective rightsizing activities in Japan and America: Is there a convergence of employment practices?" *Academy of Management Executive*, 11(2): pp57-67.
120. Oba Hiroyuki and Oba "zemi" (Seminar) (2007), "Gakumon ryoku no susume- ikikata gakumonwo tanoshimutameni, (Power of Wisdom and Value Realization Studies- A New Paradigm in Studying Social Sciences)", Reitaku Daigaku Shuppan Kai (published by Reitaku University Publishing Department), *Reitaku University*.
121. Oba Hiroyuki (2008) "Naze ima (gakusaigaku) na noka- chiteki kakusei no tameno gakumon wo mezashite (why it is necessary to have the Discipline of disciplines? – Towards the wisdom of intellectual awakening," *Gakusai, Kozokeikaku kenkyujo, Tokyo(forth coming)*
122. Oeij, P. R. A., & Noortje, M. W. (2002). "New work organisation, working conditions and the quality of work: towards the flexible firm?" Dublin: European Foundation for the improvement of Living and Working Conditions.
123. Ohtake, Fumio & Karato Koji,(2004) "Performance Wage System and Motivation to Work," Paper presented in International forum for ESRI Collaboration Projects 2004, University and the Kansai Labor Forum.
124. Ono, Hiroshi (2006) "Embeddedness and the Constraints on Labor Mobility: An Organizational Perspective on Labor Market Stratification" Stockholm school of economics." www.kellogg.northwestern.edu/mors/faculty/seminars/ono050506.pdf.
125. Osterman, P (1994). "How common is workplace transformation and who adopts it?" *Industrial and Labor Relations Review*, 47:2, pp173-188.
126. Osterman, P (1995). "Skill, training and work organization in American establishments." *Industrial Relations*, 34:2, pp125-146.
127. Osterman, P (2000). "Work reorganization in an era of restructuring: trends in diffusion and impacts on employee welfare." *Industrial and Labor Relations Review*, 53:2, pp 179-196.
128. Parker, M. 1993. Industrial relations myth and shop floor reality: The "team concept" in the auto industry. In N. Lichtenstein & H. J. Harris (Eds.) *Industrial democracy in America: The ambiguous promise*, Cambridge: Cambridge University Press. 249-274.
129. Parnell, J.A. and Singer, M.G. 2001 "The organisational charlatan scale: developing an instrument to measure false performance", *Journal of Management Development*, 20(5), pp 441-455.
130. Pfeffer, J. (1998). *The human equation: building profits by putting people first*. Harvard Business School Press, Boston, Mass.

131. Pil, F.K. and McDuffie, J.P. (1996). The adoption of high involvement work practices. *Industrial Relations*, 35: 423-455
132. Ramsay, H., Scholarios, D. and Harley, B. (2000). "Employees and high-performance work systems: testing inside the black box." *British Journal of Industrial Relations*, 38:4, pp 501-531.
133. Ruth M. Guzley, Fumiyo Araki, & Linda E. Chalmers (1998) "Cross- Cultural Perspectives of Commitment: Individualism and Collectivism as a Framework for Conceptualization," *The Southern Communication Journal*, Fall 1998, 64,1,pg 1-19.
134. Saruta ,Masaki(2006) ," Toyota production systems: The Toyota Way and labour – management Relations,," *Asian Business and Management* (5) pg 487-506
135. Saul A. Rubinstein and Thomas A. Kochan , (2001) "Learning from Saturn: Possibilities for Corporate Governance and Employee Relations" Ithaca, NY, Cornell University Press, 156 pp
136. Sewell, G. and B. Wilkinson (1992) "Someone to watch over me: surveillance, discipline and the just- in-time labour process". *Sociology* 26(2): 271-289
137. Shimada Haruo (1986) "The Perceptions and the Reality of Japanese Industrial Relations,," pg 42-68 in "*The Management Challenge Japanese Views*" edited by Lester C. Thurow, MIT Press.
138. Snell, S.A. & Dean, J.W. (1992.) "Integrated manufacturing and human resource management: A human capital perspective". *Academy of Management Journal*, 35(3): pp 467-504.
139. Srinivas, S., & Motowidlo, S. J., (1987). "Effects of raters' stress on the dispersion and favorability of performance ratings". *Journal of Applied Psychology*, 2,pp 247-251
140. Steve M. Jex., Gary A. Adams, Daniel G. Bachrach, Sarah Sorenson, (2003) "The Impact of Situational Constraints, Role Stressors, and Commitment on Employee Altruism," *Journal of Occupational Health Psychology*, Vol. 8, No. 3,pg 171-180
141. Takeuchi Hiroshi(1986) " Motivation and Productivity" pg 18-30,in " The Management Challenge Japanese Views" edited by Lester C. Thurow, MIT Press.
142. Takeuchi R, David P. Lepak, Heli Wang, Takeuchi K(2007) "An Empirical Examination of the Mechanisms Mediating Between High- Performance Work Systems and the Performance of Japanese Organizations,," *Journal of Applied Psychology* Vol. 92, No. 4, pp1069-1083
143. Triandis, H.C.(1989) " The Self and Social Behavior in Differing Cultural Contexts,," *Psychological Review* 96(3), pp 506-520.
144. Tokoro Masabumi (2005) "The Shift Towards American-style Human Resource Management Systems and the Transformation of Workers' Attitudes at Japanese Firms", *Asian Business & Management*, 4, pp 23-44.
145. Truss C,(2001) "Complexities and Controversies in Linking HRM with Organizational Outcomes,," *Journal of Management Studies*, 38:pp1121-1149
146. Tudor, Thomas R; Trumble, Robert R; George, Gerard (1996), " Significant Historic Origins That influenced The Team Concept in Major Companies", *Journal of Applied Business Research*; 12, 4;pp 115-128
147. Van Sell, M., Brief, A. P. and Schuler, R. S. (1981) "Role conflict and role ambiguity: integration of the literature and directions for future research,," *Human Relations*, 34(1), 43-72.
148. Vaughan E (1994) "The trial between sense and sentiment: a reflection on the language of HRM,," *Journal of General Management* 19(3):pp 20-32.
149. Walton, R.E (1985) " From control to commitment in the workplace.," *Harvard Business Review*, 63:2, pp 77-84.
150. Watanabe Naotaka ,& Takahashi Koji (1999) "Spurious Loyalty of Japanese Workers: In Search of Psychodynamics of Substitutive Mother in the Form of Organization,," www.isps.org/Symposia/Toronto/1999watanabe-takahashi.htm
151. Weather Charles, (1997) "Japan's Fading Labor Movement" *JPRI Working Paper No. 35*
152. Wierzbicka, A.(1991) " Japanese key words and core cultural values,," *Language in Society* , 20,pg 333-385
153. Wilmott H (1993) "Strength is ignorance; slavery is freedom: Managing culture in modern organizations", *The Journal of Management Studies* 30(4): pp 515-553.
154. Whitener, E. M. (2001) "Do "high commitment" human resource practices affect employee commitment? A cross-level analysis using hierarchical linear modeling." *Journal of Management*, 27, pp 515-535.
155. White, M., Hill, S., McGovern, P., Mills, C., & Smeaton, D. (2003) "High performance' management practices, working hours and work-life balance." *British Journal of Industrial Relations*, 41(2), pp 175-195
156. Witt, L. A. (1999). *This job is too much: Emotional labor on the job*. Paper presented at the Annual Meeting of Society for Industrial and Organizational Psychology, Atlanta, GA.

157. Wood, S (1999). "Human resource management and performance." *International Journal of Management Review*, 1:4, pp 367-413.
158. Wood, S (1996), "High Commitment management and Payment systems," *Journal of Management Studies*, 33(1):pp 53-77
159. Youndt, M. A., Snell, S. A., Dean, J. W., & Lepak, D. P. (1996) "Human resource management, manufacturing strategy, and firm performance." *Academy of Management Journal*, 39, pp 836-866
160. Yoshikawa Toru, Phillip H. Phan, Parthiban David (2005), "The Impact of Ownership Structure on Wage Intensity in Japanese Corporations", *Journal of Management*, Vol. 31 No. 2, April pp 278-300
161. Zacharatos, A., Barling, J., & Iverson, R. D. (2005). "High-performance work systems and occupational safety." *Journal of Applied Psychology*, 90, 77-84.
162. Zbar, J. (1999). "Are we having fun yet?" *Computerworld*, 33 (38), 70.

EDUCATION AND ECONOMIC GROWTH

Sasha OBRADOVIC*

Abstract

This article considers relation which is established between education, human capital and economic growth. The goal of the article is to show concrete suggestions in relation to the influence of education on raising the living standard, based on up-to-date researches. Education itself represents one of the primary components in human capital formation, which is an important factor in modeling the endogenous production functions. The more important the component of human capital in modeling the economic growth is, the more significant the influence for using the technical progress achievements is. Human capital is of essential importance for achieving the sustainable growth rates for developed countries, but the greatest contribution is accomplished through the investment in quantity and quality of primary and secondary education for developing countries. On the quality of the education system depends formation of the human capital that is an important factor and supposition of the economic growth.

Key words: *human capital, economic growth, education, rate of return, capital.*

Introduction

The subject of this paper is to examine the influence and relations between human capital and economic growth. The human capital is the most important determinant of a capability of the country's national economy to produce and acquire technological innovations, i.e. technical processes achievements. Technical process is the key element in growth decomposition. As Simon Kuznets once said, the key element for the growth of the western countries is not the material capital, but knowledge mass gained through verified research, empirical science breakthroughs, as well as the population's capacity and training to efficiently use the above mentioned knowledge (Kuznets 1955, 7).

Thus, for example, the major part of the material capital in both Germany and Japan was destroyed during the II World War. However, these economies succeeded to recover in a relatively short time because the skills, experience, education, discipline and motivation of the existing workforce remained untouched. The concept of capital is traditionally placed within the framework of the material means of production, but in this way, skills and capabilities that are justified by investing in human capital are indirectly excluded. In 1960, Theodore Shultz suggested that activities related to education and training should also be regarded as a process belonging to capital accumulation i.e. by investing into human capital which could be translated into productivity and income growth (Schultz 1961, 12).

Investment in human capital includes both tangible assets and intangible assets that are used for the purpose of improving the quality of workforce by means of healthcare, education and existing workforce skills improvement. Like any other investment, these investments also require some kind of sacrifice on the part of the individual. These individuals are, again, willing to make such kind of sacrifice if they expect to be rewarded for it in the future with, some sort of benefit. The human capital is formed, initially, by person's education and training which in turn enables the better productivity of that individual, i.e. enables him/her to earn higher wage.

* Faculty of Economics, University of Kragujevac, Serbia.

Investment in human capital

Education is a key investment in human capital. It helps a person to achieve and apply his/her abilities and talents. In developed countries in the process of determining wages, intellectual capabilities are much more important than physical (abilities), when great majority of people is concerned. The school system in the majority of world countries is employed to essentially reproduce class structure; for example the graduates from the best schools earn significantly higher wages than those from inferior institutions. The high quality of education is the best guarantee for the capability to acquire new skills and knowledge. Precondition for investing and spending money on education and healthcare, either by a private person or by the state, rests on a belief that in this way one increases the income and productivity in the long run. The additional income and output that are produced in this way are simply the result of investment yield.

Education yield can be defined as a discrepancy between the increase in wage that one worker receives on the bases of one year of schooling compared to others. The effect of education on wages, based on a research, point to the following: yields from education are 13.4% higher per one year of schooling during the first four school years, i.e. 10.1% higher in the following four years and 6.8% higher after the completion of the eight grade (Hall and Jones 1999, 6). This means that a worker would earn 13.4% higher wage after the completion of the first year of schooling, i.e. 1.134^4 times more when he/she finishes elementary school (first four grades), than a worker that has no formal education at all. If the worker completes 5 years of schooling this difference would be even greater and it would be 1.82 ($1,101 \times 1,134^4$) since the yield per year from the 5th – 8th grade is 10.1%. The education, thus, contributes to differentiation in wages for different individuals.

Such yield could also be measured by workforce pondering index, where the particular ponder is measured by contribution though which education influences discrepancies between wages of individuals. In order to determine and derive this index, the data on distribution of workforce per year of schooling should be collected first, as well as information on discrepancies between wages that is caused by difference in quality and duration of education. One of the assumptions related to in index derivation states that the discrepancies in wages are produced by differences in education. This approach is in some way arbitrary, because basically it is very hard to determine education yield within the proportion of wage differences.

However, economic and real yields from education can be different which results in lower yields or insufficient exploitation of human capital for the following cases:

- Quality of education during the schooling is low;
- The knowledge acquired by education process does not match the knowledge demanded by the labor market;
- Insufficient demand for human capital due to the low rate of economic growth;
- There is a relative balance in workers' wages whether they have lower or higher qualifications, or the differences are so small that the motivation for additional investment in the quality of workforce decreases;

Considering the number of completed school years (defined by school years or by the highest level achieved), as a rule, the employees' wages increase till the maximum level, which is usually reached at the age of 40 or after; and it is only then that wages stabilize or possibly decrease. For those who have higher education wage curve is higher and the increase phase is sharper compared to those who have lower wages and have started their working career earlier - but whose educational level is lower. Those who have higher educational level reach their maximum wage later, but then again they have higher pension compared to those who have lower level of education.

The education itself is followed by two types of costs: implicit and explicit. Implicit costs are related to loss of wages during the studies, which would have been otherwise earned if that particular individual had been working instead of studying. As a person gets older and the level of education becomes higher, these costs increase. Explicit costs are related to monetary expense. The obvious example of such expenses is school fees. Even if the studies are “for free” there are expenses related to the purchase of books, travel and other purposes. Although such expenses can be moderate they can also represent the real obstacle for education of children that live in poor families.

On the other hand, in order to improve educational level subventions should be reduced, because there is a natural tendency to purchase too much goods which are cheaper than other products and services. Reduction of the level of subventions related to education and getting nearer to the real costs represents the application of market-related solutions but does not take into consideration the criterion of equal distribution. Some of these measures by which we reach more adequate distribution (by applying market principles on education) are related to liberal application of scholarship for poor students who earn it by their good learning record, as well as by using loans and vouchers that could be distributed to a larger interest group. This interest group would make purchase of the above mentioned loan/voucher according to the consumers’ choice of the type of studies that is in his/her opinion most useful.

There are different issues that are the part of investment in human capital and they include: organized formal education, additional education of adults, institutionalized training, study programs, improvement of the healthcare service efficiency, etc. So, there are three main types of learning, i.e. education:

- Formal education in schools/educational institutions, for that part of the population that does not belong to workforce category;

- Non-formal education which is implemented through organized learning programs outside formal educational system whose participants are adults and whose training programs are usually focused, concentrated and short. This particular type of education is easily available and it occupies short time period. This particular type of education is practical, cheap and flexible and it is available for those groups that have lower income. Although there are successful non-formal education programs, they can only be treated as a supplement to the formal education.

- Informal education is the form of education that exists outside the institutional educational framework or organized programs; it is characterized by home-schooling, on-the-job training or learning from a member of a local community. This type of investment can overcome many workforce characteristics that appear as limits to increased production (for e.g. lack of private initiative and lack of workforce mobility, fear of changes, not educated well or at all), not accepting new knowledge, etc.

Improvements in healthcare, education and other social activities can have a significant influence on workmen’s wages and productivity and they can also represent the precondition for introduction of more sophisticated, more advanced technologies into manufacturing processes. Better competence of workers would improve economic growth, because as a rule qualified workers are more productive. There are many ways in which the workers by investing in themselves improve and develop their natural capabilities – but most of such activities include learning and practical work. To sum up, education, practical training and experience are the basis of working capability improvement.

Practically, specifically produced knowledge about manufacturing processes is gained through experience and it is disseminated between the workers by means of informal training. All

of this enables future improvement of production efficiency. A country can advance technologically not only through educational training, but also through gradual production increase as a process of experience accumulation from the part of the workers, managers and other persons who take part in the manufacturing chain (learning by doing) (Arrow 1962, 1). This enables improvement of productive efficiency in the future when this particular learning process is concerned. Adam Smith used the term division of labor. The advantage of the division of labor can be seen in improvement of worker's skills, time saving and further improvement of machines that are used by the work force. Division of labor leads to improvement of the accumulated knowledge base. Also, through learning process workforce gains experiences and skills that help them to better perform their job tasks. If the work process is seen as the production system input, through addition of new factors, then the same process can be characterized as endogenous. In any moment in time, new machines in the production process, develop as a result of the available knowledge and accumulated experience related to the existing technology. Learning curve connects direct working input per unit of output with cumulative output as a measure of experience. For any product in question, learning cannot maintain the growth of the corresponding rate of productivity permanently. However, product types continuously change and this prevents occurrence of limits in the learning process that is on the aggregate level. This stands for a large number of business activities. When studying the manufacturing processes, it is virtually impossible to establish conformation of the work input to the process of learning through practice, thus contribution of this factor remains residual factor in economic growth.

Education as a macro determinant of the economic growth is an important variable for each research. Contribution of education to the economic growth can be measured if this variable is used for description of discrepancies in growth rate. The simple expression by which education would be included into determination of the growth rate would be the following:

$$g = a + b(PCY) + o$$

g – average growth rate during determined period of time;

PCY – initial rate of per capital yield;

o – education measured by proportion of age groups which are registered in primary and secondary schools in each country, i.e. average value of schooling years;

$a + b$ – exogenously determined parameter constants.

Coefficient o measures contribution of 1% point of difference in years of schooling and the differences in growth rates. According to one research, each additional school year would be on average related to 0.3% higher growth rates of per capital yield during the time period from 1960-1990 (Barro 1991, 2). The rapid growth of East Asian economies is undoubtedly the result of great investments in education. Some earlier studies also determined the importance of the education for the economic growth. Denison found that contribution of education to the increase of per capital growth is actually 40% (Denison 1962, 5). On other hand it is very hard to determine yield rate from education. Yield from investments in education is higher than the yield from investments from other forms of capital (Schultz 1961, 12). The importance of the education in the economic growth process is proved by the research conducted in developed countries and it is supported by quantitative evidence (Navaretti and Tarr 2000, 8). The importance that the investments in human capital have is the same as the importance of investments in material capital, and empirical research justifies this thesis. Economic yields on investments in education in most cases transcend yields from alternative forms of investment and so developing countries, in this respect, usually have higher yields than developed countries.

The highest yield rates originate from investments in primary education, which is consistent with the fact that there is a strong link between the level and growth rate of per capital yield and

population proportion within the primary education framework (Colclough 1982, 4). Majority of countries is, thus, dedicated to providing free of charge primary and secondary education, because it is here where the positive results of the externalities have the biggest value (considering reduction of poverty and salary discrepancies). Although primary education is universal, for many developing countries it is the goal that is still impossible to achieve. Countries which are characterized by low income do not have sufficient public funds which can satisfy the growing needs of population for education. These funds are not only insufficient but their allocation is also unevenly distributed between rural and urban, poor and rich part of population. There is also the issue of gender gap that is reflected in the smaller number of girls that are entered to schools compared to the number of boys; this is especially evident in primary schools. This gap actually reflects cultural norms and traditional perception of the female role in society i.e. those women should stay at home and take care of the household and family; this conception is present in many parts of the world (Middle East, South Asia and Sub-Saharan Africa).

The whole country benefits if its citizens know to read and write, i.e. if they fully take part in the economic and social life. Traditional customs and attitudes cannot be significantly changed until the greater part of the community becomes acquainted with new ideas through educational process and does not achieve elementary literacy. Thus, the yield rate is as a rule greater when the share of population included in education increases. At the same time tertiary educational institutions (both public and private) usually charge school fee because the individual receives greater part of benefits compared to the society as a whole. Yield rate from education at all levels (primary, secondary and higher education) tends to decrease with higher level of development. Since the rates of inclusion in educational processes are higher in developed countries, such attitude suggests effect of the law of decreasing yields. Considering the higher education in countries of high per capital yield, social and private yields from education are almost equal, because the most direct costs are paid by the participants in education, i.e. students themselves. And besides the mentioned expenses there are also opportunity costs such as loss of wages which is caused by inability to work during studies. Investments in education in all countries, especially in the less developed countries are cost-efficient. Social yield from investments is the highest when the primary education is concerned (in developing countries) which is verified by empirical research (Psacharopoulos 1994, 11).

Table 1 shows how the level of education changed between 1960 and 2000 monitored on the observed sample: 73 developing countries, 23 developed countries and the USA. In 2000 about 34% of adult population did not have any kind of education in developing countries, in developed countries this figure was 3.7% while in the USA it was 0.8%. In developing countries only 3% of adult population has higher education, in developed countries 13% and 24.5% in the USA. On average, when the adult part of population is concerned, the number of school years has risen in developing countries for 3.1 and in developed countries for 2.7 years. The costs for education in the USA in 2000 were 6.2 from GNP, while in the same year the investments in material costs for education in the USA were 17.9% from GNP. In many developing countries, the rapid growth of population results in the great share of young people in schools (concerning the total population), thus the burden of educational expenses is also large, and also the quality of investment is much more different from those in developed countries.

Table 1: Changes in the Level of Education, 1960-2000

		Percentage of the Adult Population with				
		Average Years of Schooling	No Schooling	Complete Primary Education	Complete Secondary Education	Complete Higher Education
Developing Countries	1960	2,05	64,1	17,1	2,5	0,4
	2000	5,13	34,4	43,0	14,8	3,0
Developed Countries	1960	7,06	6,1	72,9	20,2	3,0
	2000	9,76	3,7	84,6	44,7	13,0
United States	1960	8,49	2,0	78,4	31,0	7,0
	2000	12,05	0,8	94,9	68,1	24,5

ISource: Barro, R. and J. Lee, International Data on Educational Attainment Updates and Implications, NBER Working Paper 7911, 2000.

There is no doubt that need for education is a very popular one. In developing countries, the number of people who request the admittance to school is much bigger than the number of available posts. All over the world there is the opinion that education is beneficial for everyone, primarily, because it is in high correlation with income concerning the individual as well as total population. This not necessarily means that university educated people earn more money than people with high school diplomas, but on average great majority of people with university degree earn more money. Correlation between the level of national income and educational achievements is also strong. People intuitively tend to secure maximum level of education for themselves as well as for their children, thus this item represents great expense for the budget of one household and also at the level of national economy, because each state gives significant funds for functioning of educational system.

Expansion of capacity at one level of education only increases number of people that apply for the next higher level of education. Paradoxically, the continued boom related to demand for education is followed by the decrease of benefits for an individual. The growth of unemployment of the educated part of population posts logical question on magnitude of funds that are given for the expansion of the educational system. The differences between different countries, concerning the education, reflect governmental efforts in those countries to increase the flow of human capital. A particular level of education is naturally required for certain job positions. In growing economy, the occupational structure is changing dynamically as well as the need of economy for particular occupational profiles, so it is necessary to define the patterns and direction of education first. In many developing countries, the number of people that have adequate academic references increases more rapidly than the number of available jobs; in this way the graduates are left without job for longer periods of time and they accept lower salaries than the salaries which their employed colleagues have already secured for themselves.

Table 2: Education Statistics in relation to GDP per capita and for selected countries (1995)

GDP PER CAPITA (PPP)	% of illiterate adults	Enrollment Ratios				Public Expenditure per pupil (\$)			
		Primary school		Secondary school, gross	higher education, gross	% GNP	Primary	Secondary	Higher
		Gross	Net						
<i>By Income Group</i>									
Below \$1,000	49	68	42	20	1	2.4	25	100	1950
\$1,000-4,000	31	105	93	55	8	2.9	120	400	950
\$4,000-7,000	12	105	91	67	25	4.5	400	400	1300
\$7,000-12,000	12	108	92	72	23	5.7	870	900	2700
Above \$12,000	^b ₅	103	97	106	59	5.0	4500	5800	8500
<i>For selected countries</i>									
Tanzania	28	66	48	5	1	3.4	N.A.	N.A.	N.A.
Sri Lanka	9	109	100	75	5	3.4	N.A.	119	678
Bolivia	16	95	91	37	24	4.9	N.A.	N.A.	N.A.
China	17	120	100	75	5	2.3	56	129	2110
Indonesia	15	115	97	48	11	3.4	N.A.	73	143
Brazil	16	120	90	45	12	5.1	N.A.	N.A.	N.A.
Columbia	9	113	85	67	19	4.4	227	249	815
Hungary	1	103	97	98	25	4.6	929	916	2120
Chile	5	101	88	75	30	3.6	487	521	906
S. Korea	3	94	92	102	60	3.7	1983	1361	633
Japan	2	102	100	103	43	3.6	7365	7250	5304
United States	2	102	95	97	81	5.4	5380	6921	7183

Source: UNESCO Statistical Yearbook 1999 (Paris: UNESCO, 1999) i World Bank, World Development Indicators 1999 CD-ROM.

The growing economies give more funds for improvement of all forms of investment in human capital. This in return influences the economic growth, above all through increase of productivity. Table 2 points to the value of public expenses in countries that have average income from 4-6% BNP. The countries with low income give smaller proportion of BNP for the same purposes. From 15-20% of government budget is on average given for education, which makes this activity one of the biggest activates, considering the newly added value as well as the number

of employees. Regardless limitations, education is good investment in majority of countries with low or medium income, because yield rates from education are very high. The highest social yields come from primary education, especially in the countries where this type of education is far from universal.

In countries where almost everyone has primary education, the yield rate becomes undetermined because there is no lower level of education to which a comparison could be made. The margin between private and social yield rate can be large, especially where the countries themselves pay for the largest part of educational expenses. Where the expenses of education are financed privately (as for example higher education expenses in OECD countries) margin between these two yield rates is much smaller. Yields from education tend to decrease as a country becomes more developed because the workers with some level of education are not scarce anymore and thus "regulate" lesser share on the labor market.

Conclusion

Rational state and government would invest in these forms of education that bring the highest national yield and would reduce the funds for those forms of education with low yield rate concerning the society as a whole. From the society's point of view, higher wages are not justified if they are not caused by higher productivity, thus the role of education is not only to educate people but also to select individuals that would have the best references on the labor market.

In order to generate balance of economic and real national yield, the changes on labor market must be monitored as well as the request for knowledge and skills that are being established in one economy. The capacity of absorption of the social capital can depend, among other things, on investments in human capital. Thus the proximity of relations between determinants of human capital and economic growth is created. There are at least several ways in which education can influence and improve growth performances:

- Education has the effect of externalities on other sectors in society, which prevents influence of decreasing yield on capital; thus, for example, population characterized with higher education will probably have more honest and more efficient government. Educated people, as a rule, are the first to accept innovations, and only then are those innovations disseminated to and copied by less educated population.

- This activity has one of the most significant influences on attracting foreign investments;

- Education represents the most important input activity for research and scientific development;

- The influence by which application of knowledge improves the quality of material capital and workforce skills cannot be doubted.

The whole system of education should create and develop person's capability for innovations and their acquisition in order to provide effective support to the processes of economic development. In competitive economy, educated individuals that lack the ability to think innovatively and who are not skilled in problem solving are faced with a greater risk of low wages and unemployment. Thus the investment in education is not only the need to increase human capital stock but also a necessity to achieve higher standard of living. Data on education represent an important indicator which reflects the quality of living in some country.

References

1. Arrow, K. (1962) 'The Economic Implications of Learning by Doing', *Review of Economic Studies*, June.
2. Barro, R. (1991) 'Economic Growth in a Cross-Section of Countries', *Quarterly Journal of Economics*, May.
3. Barro, R. and J. Lee, (2000) International Data on Educational Attainment Updates and Implications, *NBER Working Paper* 7911.
4. Colclough, C. (1982) 'The Impact of Primary Schooling on Economic Development: A Review of the Evidence', *World Development*, April.
5. Denison, E. (1962) *The Sources of Economic Growth in the US and the Alternatives Before Us* (New York: Committee for Economic Development, Library of Congress).
6. Hall, R. and C. Jones (1999) 'Why Do Some Countries Produce So Much More Output per Worker than Others?' *Quarterly Journal of Economics* 114.
7. Kuznets, S. (1955) Toward a Theory of Economic Growth in Lekachman R., ed., *National Policy for Economic Welfare at Home and Abroad*, N.Y.
8. Navaretti, G. B. and D. G. Tarr (2000) 'International Knowledge Flows and Economic Performance: A Review of the Evidence', *World Bank Economic Review*, January.
9. Psacharopoulos, G. (1985) 'Returns to education: A Further International Update and Implications', *Journal of Human Resources*, April.
10. Psacharopoulos, G. (1991) *Education for Development* (Washington, DC: World Bank).
11. Psacharopoulos, G. (1994) 'Returns to Investment in Education: A Global Update', *World Development*, September.
12. Schultz, T. W. (1961) 'Investment in Human Capital', *American Economic Review* 51, March.
13. UNESCO, (1999) *UNESCO Statistical Yearbook 1999*, Paris.
14. World Bank, *World Development Indicators 1999* CD-ROM.

DEVELOPMENT OF CAPITAL MARKET AND ITS IMPLICATIONS UPON THE ECONOMIC DEVELOPMENT

Carmen RADU*

Abstract

This work is conceived as a comparative study regarding the occurrence, development and implication of the capital market in the economic development of states located in the area of emergent countries and of those under development. This study peruses in parallel the evolution of the emerging countries which absorb capital and those granting funds within the environment of the security markets. The study's purpose is to prove the capacity of a well developed capital market to generate economic growth and, moreover, durable economic development. The data grounding this study, used as well in previous personal research, support the hypothesis according to which the capital market can and must represent a viable alternative for the funds' capitalization before the market of short term titles.

Keywords: *capital markets, economic growth, financial systems, banking system.*

Introduction

Our work mainly endorses a comparative study upon the emergent and under development countries which have developed a financial system based on the capital market and of the countries where the financial system has been controlled by banks' development. The study plays a significant role in researching the consequences related to the place and role of the capital markets within the ensemble of the financial mechanisms. In terms of the place occupied by the capital market within the ensemble of financial mechanisms, we mention that there cannot be drawn a firm border of its range. Thus, the differences between the financial market, capital market and monetary market are entailed by each country's legal regulations with respect to the financial instruments used, which require distinct features and distinct operators for each individual market.

It is well known that, according to the Anglo-Saxon economic doctrine, the capital market is identical with the securities market and differs from the financial market and monetary market. Thus, the capital market and the monetary market are comprised by the financial market. In such context, the capital market is deemed as being the financial system where international organizations, trading companies and the government may invest substantial amounts of money or may borrow/lend capital; also, natural persons are entitled to make profitable investments on medium and long term.

On the other hand, the monetary market finances the capital needs on short term or keeps the financial surpluses on periods with due dates shorter than one year.

In line with the continental European experts, both the financial market and the monetary market are elements of the capital market. This fact is due to the theory, according to which the capital is divided in physical assets (lucrative technical capital), financial assets (valuable papers which certify the ownership right upon the technical capital) and monetary assets (financial capital). Therefore, the capital market comprises the following elements: the financial market where the issuance, placement and negotiation of securities, is carried out and the financial market, having the role to attract and keep available funds in the company, on medium and short term. The

* Lecturer, Ph.D., "Nicolae Titulescu" University, Bucharest (e-mail: lgradu2005@yahoo.co.uk).

operators, specific for this market, different from those acting on the financial market are the central bank, commercial banks and other financial-banking type institutions. Also, the capital market includes the mortgage market, which operates with financial resources necessary, specially, to the housing construction.

According to the regulations in force in Romania (the law no. 52/1994 and no. 297/2004 regarding the capital market, securities and stock exchanges), the capital market is an element of the financial market. Taking into account the Romanian legislation for this field and its specific operators, the structure of the capital market is as a network of relations, mechanisms and efficient allotment levers of the available financial resources, accessible to the economic agents and the state.

Literature review

These aspects are researched, relating firstly to the Romanian literature and to the foreign one, which equally comprise the capital market within the financial market and, on the other hand, they see it as a global market arising from the financial and banking markets, such: Anghelache Gabriela, „Bursa si piata extrabursiera”, 2000 or Basno, Cezar August, Nicolae Dobrache, Floricel Constantin – „Moneda, credit, banci”, 1997. The best management of the “capital market” term is meat at Stoica Victor, Galiceanu Mihaela, Ionescu Eduard, - „Piete de capital si burse de valori”, 2001. By means of this approach, its authors get the closest to the foreign literature represented Laporta, Rafael; Lopez-de-Silanes, Florencio; Shleifer, Andrei; and Vishny, Robert W. "Law and Finance," *Journal of Political Economy*, December 1998, Levine, Ross. “Law, Finance, and Economic Growth”, *Journal of Financial Intermediation*, January 1999 as well as Demirgüç-Kunt, Asli and Maksimovic, Vojislav. "Law, Finance, and Firm Growth," *Journal of Finance*, December 1998.

The clarification of this aspect has deep connotations, meaning that we perceive the economic development of a state related to a global financial-banking market in a way and in a different way if we compare the same development with a sector of the financial market.

1. The connection existing between the capital market and the economic growth

There is an inseparable liaison between the economic development of each human society and the way that society's institutions function. Specialists associate economic development with the industrialization level of a country and with the development and modernization degree of that country's agriculture. Also, economic development is often mistaken for economic growth, although these two terms have a relation similar with the one between entirety – part, such development automatically implying the growth of all economic markers. However, not any economic growth implies development.

The economic growth, in a wide sense, comprises the multitude of quantitative, qualitative and structural transformations occurred within a state's economic life. Such transformations are followed throughout a long period of time as they follow the ascendant evolution of the agreed economic markers. The compatibility between the results of the economic growth and the social and ecologic ones becomes the essential criterion of economic development. Thus, we may consider that economic development implies the existence of deep mutations within manufacture technologies, within the organizational mechanisms and structure of the economy's functioning, within the human way of thinking and behavior. Moreover [1], a durable economic development is the form or type of development which blends in a harmonious and balanced way the fulfillment

of economic growth, the environment protection, social justice and democracy. Therefore, we may, by means of this definition, to deem that there is a series of elements or vectors of the economic growth, such as:

- Re-sizing economic growth taking into account the preservation of natural resources;
- A better satisfaction of needs of work, food, energy, water, housing and medical care for all the inhabitants of a country;
- Preservation and increase of a basis of material and human resources that any state has;
- Technological reorganization and control over its risks;
- Integration of decisions regarding economy and environment within a sole process;

It is understood that these elements and vectors of economic development are generally considered given the existence of major differences according to each country's particularities and features. That's why our specialists' opinions are different regarding the Romanian economic development. On one hand, it is considered that the economic re-launching may be ensured by: macro-stabilization strengthened by reorganizations on microeconomic level; stringent need of investments for the reorganization of existing economic units and stopping of financial indiscipline and granting of non-performing loans. On the other hand, notorious economists deem that the Romanian economic development should "borrow" successful methods from other states' experience, emphasizing the development of infrastructure, tourism and encouragement of investments in small companies with risk capital. What matters in the purpose of the present paper is the existing liaison between the capital market, as financial institution which may ensure the investments' increase and how such market helps a country's economic development.

The capital market, by means of its organization and functioning, has a significant role in the economic development progress. The level of such markets has become a standard of the development level of the emergent countries and under transition towards the market economy. International organizations, such as the World Bank and the International Monetary Fund, by their characteristic action means, promote a series of guidelines on behalf of the establishment of functional market economies, including by the support they provide for the capital markets' establishment. It is known that the capital market may ensure financial resource allotment forms on the level of economic agents and, in parallel, to stimulate their economies and, thus, a series of long term measures can be identified regarding the financial services' development and modernization [2].

1. to ensure the financing preponderance by means of the capital market related to financing by banks;
2. to develop institutional investors, including privately managed pension funds;
3. to create all the circumstances necessary for the development of stock markets and shareholding capitalism, to stimulate the development of the entire range of instruments and services;
4. to develop norms and corporate governing practices, according to the European and global trends;
5. to establish a sole authority for the regulation and supervision of all classes of financial-banking, investment and insurance services;

The historic evolution of developed countries point out a revolution in the capital markets field. According to Alvin Tofler in his famous work – "The Third Wave" – computer science changes dramatically the entire economy and, thus, it can be deemed if the capital market is experiencing a revolutionary process on various layers.

Firstly, the financial globalization manifested by the accumulation of huge funds available to private banks, budgetary deficits and due payments registered mainly in emergent countries transform international capital flows into a major phenomenon of the global economy. Given the

desire of the capital markets to attract as many funds as possible, we are witnessing a vast opening of the national financial markets towards private funds.

Secondly, the financial revolution is manifested by deep changes in the structure of the financial instruments, weight and size of the institutional investors, transaction systems and competition manifestation. The patrimony financial instrument are becoming more divers in order to allow the financing of companies based on share issuance. Also, it is increasing the significance of high outturn bonds, deemed in the United States of America as ordinary or second-hand bonds. These bonds are called junk bonds and together with loans and municipal bonds they may wide significantly the opportunities to invest on the capital market. Regarding institutional investors, we can notice the increased degree of the investing easiness for the public at large by means of the pension and insurance funds where everyone can contribute with significant amounts. Together with the increased use of computer science for transactions, operations are carried out faster, it increases the safety of clearings and, not lastly, the transaction costs are significantly reduced. In other words, the transacting activity is becoming more efficient in parallel with the decrease of the capital costs. The de-regulation of the economy and the free competition have triggered the abandonment of the exchanges' control, restrictive measures regarding interests' rates, levy of bonds held by foreigners or fix fee system. All these measures have been taken in order to ease the capitals' circulation on global level.

Capital markets are experiencing a deep modernization process and, also, the banking system. Probably the most developed payment, clearing and saving techniques and instruments will always be held by the banking system and that's why it will be more sensitive in the event of economic and politic changes. Stock exchange analysts and practitioners of the capital market deem that the banking system is ideal for the funds' collection and their transformation into large capital deposits, for the transformation of short term deposits into long term assets with low cash flow or transfer of financial funds from risking activities with low outturn towards more risking activities, but which are profitable. In exchange, it is considered that the capital market is more anchored in the financial-economic and even social reality. This conclusion arises from the fact that the capital market adjusts more rapidly to the market's evolution by revising the assets' value and by means of the complete image discovered with respect to the listed companies. Moreover, it is assumed that in the vent of a banking crash, the economic balance is re-established herder that in the event of a stock exchange crash because banks are more sensitive to political interferences and population psychosis. This can be proved easily in our country and maybe even better in Bulgaria, where a crisis of the banking system, very sensitive to the information which should not have been published, has severe consequences on long term. It could be a matter of perception, as it is known that in a transition economy, the society does not handle risk too well (aversion before risk), putting its hopes in the safety of the banking system, while in a developed economy, a population which is not so afraid of risk, undertakes easily the risk and prefers the stock exchange system.

The crucial issue of the secondary market is its credibility, how investors and the business world, generally, credit the stock movement. We have here the field of the symbolic values which need a real business basis to be viable economically because, otherwise, the businesses' instability generates the speculative trend. On one hand, if the market functions, titles are bought and sold, thus acquiring an economic support; on the other hand, if the titles are transacted, they support and develop the market. But this virtuous circle may transform into a "vicious" one when the market "does not function": titles loss their value; and when the market crushes, valuable papers may become mere papers and the speculative trend may lead to a stock exchange crash. These crashes are significantly felt when a country's economy is fragile.

In this respect, the secondary market must fulfill a series of **requirements** in order to complete it role, such as:

▪ Cash flow, namely lots of available funds, on one hand, and financial assets, on the other hand. The cash flow ensures the permanent functioning of the market and this is a condition for the uninterrupted accomplishment of the general economic circuit;

▪ Efficiency, namely the existence of mechanisms for operative accomplishment regarding transaction costs as low as possible because such costs affect the attractiveness degree of the assets;

▪ Transparency, respectively direct and fast access to information important for the holder of financial assets. Transparency is a condition of efficiency and, thus, it reduces transaction costs;

▪ Free market is tightly connected to transparency. In principle, complete information is sufficient in order for the market regulation mechanisms to be able to act. In practice, it is necessary the creation of a strict frame for the transaction's regulation, for counter-acting the trend for market manipulation and the establishment of a proper frame for the free competition;

▪ Adaptability, which implies the prompt answer of the market to the new economic extra-economic conditions, new opportunities; a financial market is efficient if it is innovative, if it finds new ways to reply to the demand and supply characteristics and of the norms established within the general economic system.

Drawing a conclusion, we can say that the stock exchange is a *sine qua non* condition for the existence of a viable and efficient market economy.

2 Occurrence and development of the capital market on global level

Occurrence of capital markets

The developed capital markets are beneficial for the national economy of the host-states. They increase the economic performances making available for companies new ways to attract capital against low costs. These companies can develop faster because they do not rely on the domestic financing.

One of the advantages of the developed capital markets is the one that, in these countries, companies are less dependent on the banking financing which leads to the decrease of the loan risk. Financial markets allow companies to rely more on securities and less on debts instruments, creating a less risking financial structure in the event of economic crisis.

Not lastly, capital markets increase the efficiency of the corporate investments and management by means of corporate governing. In general, a mixed policy based on banking agency and capital market leads to the increase of the economic degree development.

Capital markets are not newly formed in certain countries in transition - Warsaw Stock Exchange was opened in 1817 and Prague Stock Exchange in 1871. But, due to socialist systems, all capital markets were closed; throughout the passage from planned economy to market economy, these have been reestablished in 20 of 26 economies in transition. They have been used to list mandatory shares of the companies under mass privatization and less for the initial public shares' sale offers.

The first capital markets in countries under transition appeared in 1999, followed by Bulgaria, Lithuania, FYR Macedonia, Moldova and Romania. The main characteristic of the first group of markets was the transfer between investors, attendees to the mass privatization of state companies, ownership rights. In the beginning, these markets listed a large number of shares, lots of them being fixed. Once these markets became more stable, the number of listed shares decreased and the shareholding structure became more focused. Some economists such as Claessens and Djankov claim that it was the case of the Czech Republic and similar patterns can be found in the main countries which have adopted the mass privatization process. However, the economists Earle and Telegdy have found few evidences of a focus of shareholding on the extra-stock exchange Rasdaq in Romania.

Recent research has shown that the markets of mass privatization have been poorly understood by foreign investors who found out later that published information was not enough or complete and that they did not have the means to fight against illegalities as the legal frame was undeveloped. In some countries, these foreign capital flows seem to have slowed down the focusing process of the ownership rights.

The second type of markets – occurred in Croatia, Estonia, Hungary, Poland and Slovenia – have listed a small number of shares by means of initial sale offers (the shares were moderately transacted).

A third group of capital markets was established in 7 countries under transition - Armenia, Azerbaijan, Kazakhstan, Kurd Republic, Russia, Ukraine, Uzbekistan – and were a mixture of the two types. All these countries initiated mass privatization processes, but the initial share exchange was carried out outside the capital market. Some companies under the mass privatization process were listed publicly, but such listing was not mandatory for all companies. In several countries (Kazakhstan, Kurd Republic), it was pursued the development of the capital market and mass privatization in parallel. During the privatization, the capital markets formed by means of the public sale/purchase offers of the companies whose major shares were sold to strategic investors. The government listed a small number of company shares, thus being created a highly varied shareholding structure.

Finally, 6 economies in transition - Albania, Byelorussia, Bosnia-Herzegovina, Georgia, Tajikistan and Turkmenistan – have not established capital markets.

Evolutions in Europe

In Europe, the evolution of the capital market has become, in a certain way, convergent with the one of the United States of America, by means of the fact that the European economy has been influenced by the implementation of the sole currency – euro, on one hand, and by the expansion of the globalization process, on the other hand. In this environment, the European companies are trying to strengthen their position on the market in order to exploit the European and global financial potential. European companies have depended on the banking system with respect to the foreign financing sources. For instance, at the beginning of the 80's, over 80% of the foreign financing of the continental European countries was carried out by means of the banking system, and the trading effects were almost inexistent. But this situation has changed in 25 years and at present the financing by issuance of shares and bonds exceeds the foreign financing provided to companies by the banking system. Obviously, among securities, the shares issuance is preferred as financing source, made for the capital increase, an increase of almost 30% per year from 1995 to 2000.

Later, after 1998, the value of the bonds issued by companies has become increasing (from 18% in 1998 to 58% in the following year), which highlights a higher absorption capacity of the companies. This is point out by the stock exchange capitalization in the domestic gross product in 1999, year when several countries reached record levels, such as Finland with 272%, England with 206% or Luxembourg with 192%. In 2000, transactions on the European markets recorded a very high quota. These aspects point out the fact that the European capital market has developed very late (compared with the United States of America), being tributary to a “emerging shareholding culture” or that it has been preferred the development by means of the banking system.

After 2000, there have been registered certain trends regarding the development of the European capital markets. Firstly, significant increases of the securities transactions and shares demands, noticeable by means of the fact that the number of direct number of shares increases and, as well, the weight of the shares in the investment funds' structure. Secondly, the capital markets

become international together with the preference for European national instruments due to the economic and legal difficulties occurred upon the issuance, transacting and clearing of securities on international level. Other trends consisted of competition sharpening and collaboration between stock exchanges and transacting systems, noticing a higher pressure of the capital markets regarding the strengthening of the compensation and clearing activities and registration of an increased instability of the financial assets' prices.

For the last decades the experience of emergent countries in Latin America and Asia proves that many countries, which have initiated a strong offensive regarding the economic reform and modernization, have been successful in the development of the capital markets and stock exchanges, with favorable effect over markets' capitalization and companies' financing input.

It has been said, based on the actions carried out by international companies, that developed capital markets offer an increased degree of financing, reduced capital costs, higher cash flow and good name. When companies in the emergent economies use deposit certificates GDR or SDR or they list their shares on the capital markets in the USA, their financial restrictions loosen up – and this means that new investments are less sensitive to international cash flows. Moreover, domestic companies which enter international markets obtain better financing opportunities and may increase their debts' due dates. Transactions on foreign markets have an increased cash flow than on local markets. For instance, Mexico's shares based on the American deposit certificates ADR are transacted more in New York than on local markets, having multiple benefits for investors.

Due to the fact that the rules of corporate governing are stricter for international listings, companies have addressed to them to signal that they intend to protect the right of minor shareholders. Companies in countries with weak legislation regarding corporate governing are willing to list their titles on other foreign markets as well if they are allowed to. By listing on foreign markets (especially the USA), corporations undertake to act on behalf of the investors and to reduce the costs of loans, to increase the investors' welfare.

Newly established Internet companies from Latin America and Israel establish their legal headquarters in the USA to ease capital access. Simultaneous listing on multiple markets becomes easier and due to the new international accountancy regulations, announced by IOSCO – the International Organization for the Settlement of Capital Markets. These standards endorse multinational companies which list and offer their shares publicly and simultaneously on multiple markets.

These trends are influenced by the IT technologies which allow the players of the capital markets easy access to transacting systems from their terminals.

Transactions are going to be more and more carried out electronically and they are no longer connected to a particular location. The computers of the Nasdaq markets are located in Turnbull, Connecticut, but traders are worldwide.

Electronic communication networks have been established recently. These networks have begun by integrating on the existing markets as “cash flow pools”, but, more and more, they are transforming into alternatives of regular transactions. A large number of shares on developed markets are transacted by means of the electronic communication networks – for instance, they transact ¼ of the total transactions in US dollars on Nasdaq.

Alternative transacting systems are established worldwide, usually connected to the exiting ones. For instance, Instinet was established as a brokerage system and now it is connected to a significant number of capital markets. There are speculations that several transacting systems will be established which will allow investors to carry out transactions 24 of 24. The existing markets acknowledge that their transacting services are more and more surpassed. Observers foretell that traditional capital markets (such as NYSE) will cease their existence under their current form in order to reflect better the corporate structural changes, changes of the transacting locations and institutional organization (such as the distinction between specialized and retail brokers).

To cope with these competitive changes and the general desire to increase cash flows by means of developed markets, many capital markets in the developed countries have merged or have tight collaborations. Recent proposals address the merger of the capital markets from Amsterdam, Brussels and Paris, on one hand, and the alliances between Nasdaq and the capital markets from Australia, Canada, Japan and Hong Kong, on the other hand. NYSE has allied with Tokyo Stock Exchange, Australian Stock Exchange, Toronto Stock Exchange, Mexican Bolsa, Sao Pulo Bovespa and Euronext to carry out non-stop transactions. The strengthening of these markets – which comprise more than 60% of the international market's output – leads to the occurrence of a small number of markets of large dimensions.

With few exceptions, the economies under transition have not attended these new trends of market growth. The sole merges which have been taken place were the three “Baltic” markets (Estonia, Latvia and Lithuania), which, on their turn, connected to the capital market on Helsinki (Finland). The other countries are still implementing “made at home” strategies. International trends suggest that many of these “important substitutes” are due to fail. Even according to the most optimistic scenario, most markets of economies in transition will remain small compared to most emergent markets – not including the developed markets. Because of this, the question is if capital markets from economies in transition will be able to reach a sufficiently high level of savings to face the international competition individually or they will have to join international alliances?

To reach the level where the increasing activity on the capital market leads to the decrease of the transacting costs, they must have a capitalization level higher than USD 15 billion. Using the most optimistic scenarios from table 5, we notice that only 4 of the 6 economies in transition will reach this level until 2005 - Czech Republic (with an estimated capitalization level of USD 19 billion in 2005), Hungary (USD 16 billion), Poland (USD 46 billion) and Russia (USD 53 billion). The next markets in terms of size, Romania and Slovakia, will have, each, a stock exchange capitalization lower than USD 5 billion. This suggests that, because of their size, most capital markets from the economies in transition will not be able to face other markets in rendering transaction services. Moreover, these arguments are grounded on the existing economies.

The globalization of the capital markets increases the value of such scale economies necessary for the transacting systems to operated competitively and to provide the necessary cash flow – the accomplishment of an independent capital market is basically impossible even for those economies in transition which seem to have the appropriate dimension.

The low level of scale economies corroborates with the costs' structure of the capital markets from economies in transition. There are defined explicit and implicit costs of the shares transactions; explicit costs include fees and duties and implicit costs are indirect transacting costs (the main cost is represented by the transacting price). Even if most economies in transition do not have explicit costs which might increase the transacting prices and would reduce cash flows, the total costs of the two markets considered more developed (Budapest and Prague) are twice bigger than the average, thrice bigger than of the most developed markets in Latin America and Eastern Asia.

The conclusion is that even the most developed markets of economies in transition will face competition issues.

Capital migration from emergent and in transition economies towards international markets

Financial markets, in general, and capital markets, in particular, have experienced a spectacular growth in the developed and developing countries for the last two decades. A proper

infrastructure (a higher economic growth, macro-economic stability), structural reforms (and, especially, the privatization of state companies), changes of political orientation (regarding the reforms of the domestic financial markets and the liberalization of the capital account) are vectors of the economic growth. The globalization degree, on its turn, has developed for the last two decades: cash flows are freely circulate among countries, financial markets are more integrated, higher trading representation of foreign financial organizations worldwide.

A globalization feature is the migration of the activities specific to the capital markets over border, especially in the emergent economies. Many companies in the emergent economies list their shares both on the domestic and international markets. Also, new IT technologies have sped the markets' globalization trend.

Moreover, these global trends will tone up as the access to information improves, standards – related to the corporate government, listing and accountancy – harmonize, technology develops and the connection between markets improves. These new tendencies raise new questions for countries regarding the development of their own capital market, as a way to ensure an effective use of resources and their distribution in the corporate sector.

There is a relatively small number of fundamental factors which affect both the development of a local market and the attendance on the international markets. As a country's infrastructure improves, the capital market activity increases, but, at the same extent, the activities on the foreign markets increase as well. This suggests the existence of two complementary processes.

There is a limit of domestic development associated with an increase of the activity over border. The migration of most part of market capitalization and of the transactions' volume has adverse consequences over the cash flow of the remaining companies. This large scale migration will render more difficult the support of a mature domestic market and, strictly – it refers to the fix costs for the preservation of the transacting system, clearing and liquidation operations, among others – at a greater extent – it refers to their capacity to generate enough flows for local brokers and sufficient opportunities for domestic investment banks, accountancy companies and other capital market related services.

Conclusions

Regarding Romania, the financial market has been created and comprised two main elements: the monetary market and the capital market. In a developed economy, the organization and functioning characteristic to the capital market has a definitive role in the social-economic progress. This role is underlined by the functions of the capital market in an industrialized economy, such as:

- It ensures the cash flow necessary to carry out transactions, by means of large available funds;
- It ensures efficiency, by carrying out transactions against costs as low as possible;
- It ensures business transparency and accuracy by careful information and transaction surveillance;
- It ensures adaptability, by flexible orientation of investments towards more lucrative economic fields;

From the perspective of these economic advantages, the capital markets have occurred as necessity and not as a form of mandatory completion of the banking system. The economic development and stock exchanges' occurrence are tow economic realities deeply and organically connected. The economic development implies both quantitative changes (manufacture factors, economic markers, etc) and qualitative changes. In such economic environment, people's

mentality changes, desires get new manifestation forms, the concern for property and earning desire increase – and they all are ensured by financial stability. That's why an institution such as the market exchange is able to cope with these new economic requirements detailed in the present study.

[1] Dictionar de economie, editia a II-a, Editura Economica, Bucuresti 2001, pg. 159

[2] Prof. dr. Gheorghe Dolgu” Revolutia financiara mondiala implicatii pentru Romania” – Institutul National de Cercetari Economice, grupul de reflectie Evaluarea Starii Economiei Nationale

References

1. Anghelache Gabriela, „Bursa si piata extrabursiera”, Ed. Economica, Bucuresti, 2000;
2. Basno, Cezar August, Nicolae Dobrache, Floricel Constantin – „Moneda, credit, banci”, Editura Didactica si Pedagogica, Bucuresti, – 1997;
3. Berea A, Berea O, „Orientari in activitatea bancara contemporana”, Editura Expert, Bucuresti, 1999;
4. Demirgüç-Kunt, Asli and Maksimovic, Vojislav. "Law, Finance, and Firm Growth," Journal of Finance, December 1998;
5. Fama E. F., *The Behaviour of Stock Prices*, Journal of Business, 38, 1965;
6. Friedman Milton – *The Quantity Theory of Money: A Restatement*, in „Studies in the Quantity of Money”, Chicago University Press, 1956;
7. Laporta, Rafael; Lopez-de-Silanes, Florencio; Shleifer, Andrei; and Vishny, Robert W. "Law and Finance," Journal of Political Economy, December 1998, 106(6), pp. 1113-1155.
8. Levine, Ross. "Law, Finance, and Economic Growth", Journal of Financial Intermediation, January 1999;
9. Sharpe W., *Capital asset prices : a theory of market equilibrium under conditions of risk*, Journal of Finance, sept. 1964;
10. Solnik B., 1973, *Note on the validity of one random walk for european stock prices*, Journal of Finance, decembrie 1973;
11. Stoica Victor, Galiceanu Mihaela, Ionescu Eduard, - „Piete de capital si burse de valori”, Ed. Economica, Bucuresti, 2001;

TRANSNATIONAL COMPANIES AND THEIR ROLE IN GLOBALIZATION

Liviu RADU*

Abstract

This work attempts to prove the correlation between the globalization phenomenon and transnational companies, starting from the following assessment: "globalization is the economic phenomenon which has caused the occurrence of transnational companies and subsequently, they have become the grounds for the preservation and expansion of this process on global level". In other words, transnational companies represent today the main globalization initiator, player and beneficiary. The demonstration of the above said will be supported by several factors such as: the development of the financial-banking system, international trade, services and technology sectors. These factors are the means by which transnational companies interfere with the integration of each state in the environment of the economic activity's globalization, even this is accomplished with large compromises detrimental to national economies.

Keywords: *transnational companies, globalization, direct foreign investment flows, financial-banking system, international economic system.*

Introduction

The topic approached hereby focuses on the study of the interdependence existing between the occurrence and development of transnational companies and the evolution of the globalization phenomenon. The issue of interference between the economic activity's globalization and transnational companies has always represented an outstanding challenge among researchers.

The complexity of the globalization's implications has required a quite restrictive approach mainly related to the effects triggered by the evolution of the transnational companies on sectors specific to the global economic activity, such as the financial-banking sector or the international trade sector. Approaching this approach by means of the aforementioned implications, we can notice the establishment of power centers within the global financial-banking system and the international trade system, generated by the transnational companies, real monopolies which can control the activity of the respective systems. For instance, only in the global financial-banking system, these companies carry out foreign direct investments in amount of over USD 200 billion and they control over half of the activity of the global trade with goods and services.

Therefore, we can assess that the existence and development of transnational companies represent a sign of changes (managerial, technologic and human) initiated and imposed by the said, but appreciated and acknowledged by the countries where these companies expand their activity. In this respect, the recent dispute – highly detailed in the Romanian and German mass-media, started from the manufacture activity transfer of the Finish company Nokia from the German town Bochum in Romania, near Cluj (Jucu Locality) represents, probably the best example. The Finish company, which manufactures four of ten mobile phones sold worldwide, has a labor force comprising 113,000 employees and a profit of Euro 1.56 billion in the third semester of 2007, 85% increase. The withdrawal of the Nokia Company from Germany, highly industrialized country, but with an extremely high cost of the labor force and the manufacture's

* Lecturer, Ph.D., "Nicolae Titulescu" University, Bucharest (e-mail: lgradu2005@yahoo.co.uk).

establishment in Romania, country with many legal and economic problems, but with cheap labor force, represents an event with deep implications on politic, economic and even diplomatic level.

In conclusion, we can say that due to the size of their manifestation on economic and social level, transnational companies may entail certain reactions both from their origin countries and, moreover, from host countries, the latter being motivated by the infusion of direct foreign investment flow carried out by such companies.

Literature review

Starting with the question: “transnational companies – cause or effect of globalization?” the specialized literature has benefited from the competent answers of many notorious authors, among whom John H. Dunning (Multinational Enterprise and the Global Economy), William Northaus (Managing the Global Commons: The Economics of Climate Change) or Ngaire Woods (The Political Economy of Globalization). In the Romanian economic literature we can notice the remarkable contribution of the researchers Costea Munteanu and Alexandra Horobet (Finante transnationale), Anda Mazilu (Transnationalele si competitivitatea - o perspectiva est-europeana) as well as Liviu Voinea (Corporatiile transnationale si capitalismul global).

Without trying the place this work among the studies carried out by the field’s renowned authors, we attempt a personal approach of the topic in order to bring our humble contribution to the research of the respective topic.

1. Main factors of globalization

The factors which influence the globalization process may not be seen unilaterally, but only within the historic context of the evolution of the globalization phenomenon. In such context, globalization is a historic phenomenon marked by the fall of the “iron curtain” and the beginning of the symbiosis between state and expansionist capitalism. We can say that the existence of the “iron curtain” was the element which has drawn the definitive characteristics of the global politics carried out until 1990. This period was characterized by the existence of a bipolar structure USA-URSS. It is the period when there were established sophisticated systems of alliances and economic regimes in West and East which supported and strengthened this structure. The confrontation West-East surpassed the real level into the ideology level, taking place between the different “isms” of liberalism and socialism, each trying to shape the future in the name of a modern politics¹.

Contrary to this trend, Western Europe began to shape a new continent architecture. Thus, the globalization of the concerns regarding the cold war and the fall of the iron curtain marked an intensification of the actions for European accession and abandonment of former structures. This process has begun issuing signals since the 70’s. At the same time, the United States of America marked the development of a new highly industrialized economic sector, which concluded with the beginning of a new era of market economy (the 90’s).

The fall of the Cold War system, at the beginning of the 90’s made the global politics face new challenges²: “the black hole” entailed by the collapse of the Soviet Union, the occurrence of the new states in the Central and Eastern Europe, the radical changes of the governing systems and the transition towards a market economy of the same states, the U.S.A.’s position in the newly formed structure.

¹ Richard Higgott and Simon Reich: “Globalization and Sites of Conflict: Towards Definition and Taxonomy” (March 1998). CSGR Working Paper No. 01/98.

² Kenichi Ohmae: “The Borderless World”, New York, Harper Books, 1990.

These events have been specific to the beginning of a new globalization age characterized by the development of human relations, where the capacity to act in an innovative and collaborating way is proved after centuries of structural restrictions.

The end of the Cold War at the beginning of the 90's made the global politics face new challenges: "the black hole" entailed by the collapse of the Soviet Union's external power, the occurrence of the new states in the Central and Eastern Europe, the radical changes of the governing systems and the transition towards a market economy of the same states, the U.S.A.'s position in the new international structure.

These events have been specific to the beginning of a new globalization age characterized by the development of human relations, where the capacity to act in an innovative and collaborating way is proved after centuries of structural and intellectual restrictions.

In this historic frame, the globalization phenomenon has begun settling on certain sectors:

On global level³: globalization refers to the increase of the economic interdependence between states, mirrored by the increase of the trans-border flows of economic goods, services and know-how. A proof of this is the registered tendencies:

- In 1970, the trans-border transactions of capital markets, as percent of the GIP, were below 5% both in the USA and Germany or Japan. In 1996, the percents in the GIP increased to 152%, 197% and 83%.
- From 1980 to 1994, the volume of the foreign direct investments increased from 4.8% to 9.6% of the global GIP;
- In 1989-1996, the trans-border trade with goods and assets increased with a yearly percent of approximately 6.2%, almost double from the yearly increasing percent of the GIP for the same period.

This historic evolution from 1950 to 1970 may be considered as being the beginning of the crystallization of the globalization term, without losing sight of the fact that the respective process occurred a lot earlier in the historic frame, together with the expansion of the goods exchange between states.

On the level of a certain country: globalization is manifested by means of the expansion of the interconnections between the country's economy and the global economy. This may be proved by using certain markers to measure a country's integration degree, such as the percent of the exports in GIP, the volume of the incoming and outgoing flows of direct and portfolio foreign investments, as well as the size of the incoming-outgoing payment flows like royalties associated to the international technological transfer.

On the level of industrial sectors: globalization manifests itself as position held by a company in an industrial sector in its country and the position held by the same company of the industrial sector in another country. As more globalized an industry is by its companies, larger the advantages the companies may held. Such advantages arise from using own technologies, manufacture capacities, plant brands, and not finally, available capital.

On the level of an individual company, globalization is expressed by the way a company increases its incomes from extern relations and how it manages to place immovable assets in various host-countries, thus, undertaking trans-border exchanges of goods, services and know-how with its branches.

Therefore, both in terms of historic evolution and positioning of the globalization on different markets, we can notice a series of factors which marked the understanding of this phenomenon.

³ Costea Munteanu, Alexandra Horobet "Finante transnationale", ed. All Beck, București, 2003, pg. 60.

Firstly, we speak about⁴ the increase of the number of countries which have undertaken the mechanisms of the market economy. As mentioned in the beginning of this sub-chapter, many countries start to pass gradually from planned economy to market economy, which affects the decisions of the economic policy both in industrialized and developing countries. Another historic moment appears at the end of the Second World War when market economy spreads in countries such as South Korea, Taiwan, Hong Kong and Singapore, followed after 1980 by the “tigers” of the South-East Asia, China, India, countries from the Latin America and even Africa.

Secondly, there takes shape a movement of the gravity center from developed countries to developing countries. This phenomenon encourages competition, promotes efficiency and innovation, simulates new opportunities for capital investments and, consequently, economic growth. Proofs of the aforesaid are that economies such as those of Taiwan, Hong Kong and Singapore, which in 1950 were among the poorest of the world, are nowadays among the most advanced worldwide.

Thirdly, the technical and technologic progress has allowed the permanent improvement of communications, which entailed a significant decrease of the costs of air transport, telecommunication and use of computation engineering.

Finally, a fourth definitive element of globalization is the increase of international competition. The borders’ opening for international trading flows, foreign investments and technology transfer has allowed competing companies from abroad to enter the developing countries’ markets.

2. Transnational companies and their role in the globalization process

Transnational companies, as global players, enforce, using expansionist economic forces, their own strategies, purposes and organization and functioning rules which, together with the decisions of the management boards of the parent-company, are often detrimental to the interests of the host-state. To resist to trans-border economic expansion, states are compelled, often in their efforts to attract direct investments, to make concessions detrimental to national economies facing the risk of creating tension between the national economic interest and the interests of large transnational companies in order to resist to the economic feature of global interdependence.

Reducing the borders of commercial exchanges by bilateral or multilateral agreements, states have created, implicitly, for the trans-national companies, large markets and opportunities for these non-state players to develop and adjust their private economic purposes to the requirements of a global economy, where decision-making players are not the states any longer. The most aggressive companies, which are adjusting more and more their command structures to the internationalization trend of global exchanges, are the American companies.

From 1950 to 1960, companies experienced a multi-nationalization period, the contemporary “company” period beginning after 1990 as a trend to form a global economy, independent of state pressure, exclusively based on the private transnational flows and on a main role of the global players represented by private banks, financial organizations and transnational companies.

For the present international law doctrine, transnational companies are a controversy because of two major trends. One claims the subordination of transnational companies to the internal legislation of the host-state or origin state, despite their major economic power and the position held by them internationally, they are not acknowledged with a real international legal

⁴ Costea Munteanu, Alexandra Horobet, quoted paper pg. 61.

personality. Another trend⁵ assesses that they are international law topics because of their capacity to conclude international relations with other subjects of the international law, to conclude contracts with the states, thus contributing to the development of the international legislation.

According to UN statistics, transnational companies are true leaders of the manufacture of goods and services in host-countries and their trade on the international market entailing, by their activity, transnational capital flows. The globalizing impulse is given by the alliance between transnational companies, stock exchanges and banks, with a tendency to have an advantage over the states' policies, especially, in the economic-financial sector.

Globalization⁶, defined as international system which has replaced the Cold War's old relation system, based on the integrationist trend, the relentless interconnection between markets, state-nations and technologies with reach an unprecedented level, is grounded on two main vectors – international economic organizations and transnational companies⁷.

The democratization of investments, main lever of the increase of the degree of transnational companies' participation to the development of economic businesses increased globally when the system of the fix exchanges flows and the strict controls of the international capital flows, established after 1945, failed in the first half of the 70's and was abandoned. At the beginning of the 21st century, transnational companies are deemed as one of the greatest challenge for the current international economic order. According to specialists, 90% of them are located in the developed countries of the strategic triad: USA, Japan and the European Union – holding specialized markets such as car industry, research, chemistry and oil industries. Some authors, such as Martin Carnoy⁸, deem that the transnational companies' decisions influence at a high extent, national economies, planning to neglect the harmonization with the states' commercial policies.

The source of major changes in the international economic system, based on manufacture internationalization, fast development of foreign direct investments and international trade, appeared as a reason for transnational companies to become responsible agents within the new global economic frame regarding, in particular, directing foreign direct investments based on private transnational strategies. The distribution of transnational companies mirrors, worldwide, the difference between developing countries and highly industrialized states, which have a high number of foreign direct investments and which are the most attractive for the CMNs trading activities and investments.

According to the statistics of UN and the World Trade Organization in 1997, only 8% of the direct foreign investments, was supplied by developing countries, which was almost 15% of the international economy flows.

The end of the 90's acknowledged an increase of the transnational companies' power, which became a real globalization expression, dominating the trade between developed countries and controlling the international capital flows. The most important boost of these companies was in the banking system, where share capitals reached a percent of over 7% yearly. *The Economist*

⁵ Serge Sur "Les relations internationales", Montchrestien, Paris, 1995, p. 3.

⁶ In other opinions, globalization is only one aspect, along with the fragmentation of state's identities, of a complex phenomenon such as globalization. See René – Jean Dupuy – "Le dédoublement du monde", *Revue Générale de Droit International Public*, vol. 100/1996/2. With an increased level of integration between non-state players and a transfer in the problems on a universal level, also, from the shift of the state from interdependency to a common dependency compared to the laws of the market, these two worlds are one conducted by the force of law and dominated by states, and the other conducted by the players of the free trade and transcends national borders.

⁷ Thomas L. Friedman - "The Lexus and the Olive Tree", translated Adela Motoc, Ed. Fundatiei Pro, Bucuresti, 2001, p. 29.

⁸ Martin Carnoy- "New Global Economy in Information Era", the Pennsylvania State University Press, 1993.

considered in 1999⁹ that these companies experienced a remarkable process of major international mergers, involving capitals of over USD 100 billion.

For the contemporary economic order, **companies experience a specific stage, form multi-nationalization to trans-nationalization**¹⁰, as trading companies focused on an transnational element such as: capital origin, management boards of the company located in different states, lack of existence of legal relations grounded on undertaking a certain nationality, with a certain state. These features grant to these companies their transnational nature, which is difficult and almost impossible to be framed under the provisions of a national law, under a uniform legal regime. The main reasons identified regarding the increase of the transnational companies' power are: decrease of state intervention in economy, increase of exports in the countries with reduced customs costs and expansion of free trade.

According to the World Investment Report/New York, 1998¹¹, the first transnational companies, such as Ford Motor Company/USA, General Electric Company/USA, General Motors/USA, Toyota Motors/Japan, Shell Royal Dutch/Great Britain and Holland, Hitachi/ Japan, Exxon Corporation/ USA, IMB/USA, Mitsubishi/ Japan, Itochu Corporation /Japan are gathered in the advanced hi-tech states within the strategic triad, whose capital and total sales are superior to the domestic gross product of several states.

The current economic order is, also, characterized, by the presence of a high number of small and medium transnational companies, representing almost 50% of the total number of transnational companies in USA, Canada, Japan, France and Great Britain. Many small and medium transnational companies are from the developing countries, interested in investing in the tertiary sector.

The wide process of power transfer from national economies to free trade on the global markets, classified as the most important change of the last half of the 20th century, was mainly due to the power and influence of these companies and the networks where they operate on global level.

Economists intend to acknowledge for these companies the capacity of being central organizations, engines of economic activity, leading forces of international trading transactions. For instance, in 1998, the sales recorded by the first 50 transnational companies reached almost USD 3.4 trillion and their incomes exceeded USD 130 million.

Authors such as C. Kindleberger¹² state that the state is already an organizational form surpassed by multinational players; other opinions¹³ support the hypothesis of a progressive integration of global economy from state to international markets, including transnational companies. A general analysis shows that a quarter of the global trade is carried out within the said.

If during the first stage of their international activity, transnational companies were specialized on ore extraction and plantation exploitation, the second major change in their historic development was the multi-nationalization stage; and, the third major change has as priority the seizure of the services market.

At present, transnational companies are playing an essential role in specific sectors of the economic activity, such as:

⁹ The Economist, 9-15 January 1999.

¹⁰ Ion Anghel- "The subjects of international law ", Ed. Lumina Lex, Bucuresti, 2002, p. 435.

¹¹ World Investment Report 1998 – "Trends and Determinants", United Nations, New York and Geneva, 1998, p. 4.

¹² Charels Kindleberger - "Power and Money. The Economics of International Politics and the Politics of International Economics", New York, Basic Books, 1970.

¹³ Susan Strange – "The Retreat of the State. The Diffusion of the Power in the World Economy", trad. Radu Eugeniu Stan, Ed. Trei, 2002, p. 66.

▪ The financial and banking sector where transnational companies establish real monopolies on the global banking system, with foreign direct investments of USD 200-300 billion; their stock of foreign direct investments have been assessed as close to USD 2000 billion; the first 100 banks have over 4500 agencies, branches, subsidiaries, dominating in percent of 75-80% the international financial market;

▪ Regarding international trade, transnational companies impose their highly competitive products on all the national markets; over 50% of the global goods trade is controlled by them, as well as the manipulation of the transfer levels, prices in the internal trade of agencies, branches and subsidiaries of the same company;

▪ On technological level, by means of direct foreign investments, representing contributions to the development of the host-state's technologic level development;

▪ With respect to the economic development of the state-host, by contribution with financial, technologic, management resources, new jobs, company establishment and development or companies' up-to-date technologies and modernization;

▪ In the services field, mainly hotel, banking, travelling, transportation services, their high quality bringing significant profits;

▪ Environment issues, by reducing polluting fumes or by influencing the enacting of less restrictive legislation regarding polluting investments;

▪ Implementation of modern management in the host-states by training staff, providing experience, by exchanges between transnational companies and their agencies, branches and subsidiaries;

▪ In the politic environment, as consequence of their importance for the production and exports of the host-state and of the origin country of the parent-company;

▪ Legally, as controversial legal issue, deemed by some authors as a true international legal matter, having its own international legal personality, contributing to the codification of the transnational legislation as part of the international law¹⁴, and seen by others as domestic legal issue, subject to the national legislation of the origin country of host-state¹⁵.

The factors which stimulate the development of the transnational companies are: development of international investments; production settlement near raw material sources; energetic and ecologic crises pushing these companies towards countries with non-restrictive legislation regarding the protection environment or rich in natural energetic resources; employments' increase; hi-tech monopolies held by a small group of transnational companies.

During the last decade of the 90's, it was recorded a constant growth of the transnational companies' expansion by mergers, fact noticed in 1999 by *The Economist*. The mergers and acquisitions between transnational companies develop fast and intensely, namely: strategic alliances in the car industry between Renault and Nissan – transaction expected to lead the new group on the forth position in the car industry; merger between Amoco/Great Britain and Atlantic Richfield-Arco/ USA in the oil industry, making the Amoco Group the most important private manufacturer of oil worldwide, with a capital of USD 190 billion; establishment of a third significant bank in the USA – Fleet Boston – with assets of USD 18 billion, by means of a merger of USD 16 billion between Financial Group and Bank Boston – are few examples mirroring the tendency of capital concentrations, as materialization of their significant role internationally.

In the study carried out by Keinichi Ohmae¹⁶, the radical change in the international system is seen as new stage in the development of transnational companies, as their and their networks'

¹⁴ Jean Touscoz - "Droit international", PUF, 1993, p. 198.

¹⁵ François Rigaux – "Les sociétés transnationales", in M. Bedjaoui, coord. – "Droit international, bilan et perspectives", 1991, p. 138-139.

¹⁶ Citat de Paul Hirst, Graham Thompson – "Globalization under the Question", Ed. Trei, Bucuresti, 2002, p. 125-126.

separation from the national frame, which implies the establishment of a new borderless global economy, based on the interconnections of companies which do not belong to any state. For Ohmae and Robert Reich¹⁷, the age of the efficient national companies and state policies on international economic level has passed.

Authors like Bartlett and Goshal¹⁸ have identified four types of companies characterized by different elements such as:

- Transnational companies, with strong local base, depending on different national legislations;
- International companies, arising from a parent-company and observing a global strategy, exploiting the abilities and know-how of the parent-company;
- Global companies, centralizing operations on global scale;
- Transnational companies, with activities distributed in autonomous and specialized units, with global competences and individual know-how.

Analyzing the frequency degree for the establishment of these companies, authors such as Leong and Tan (1993)¹⁹ discovered that, in fact, the most common type is the multinational company, inspiring a tendency for the study of the global economy and the impact of new players in the international order oriented towards challenging the ubiquity and omnipotence of the transnational corporate pattern.

The reality of empiric tests highlight the powerful connection between existing international companies and the nationality state of the company and, implicitly, it shows the national market's capacity to adjust to the transnational flows by means of private persons with lucrative purpose, subject, as domestic law matters, to their legislation and control.

The role of the international companies, as state instrument for the management of globalist trends, must not be over-estimated or their internationalization degree of their activities. A quantitative research shows that 65-70% of the added value of the transnational companies is achieved in the origin state. Despite such fact, the transnational companies' activities in other states keep remaining important and diverse. Some authors²⁰ (Hirst and Thompson – 2002) warn that global economy must not be mistaken for the permanent growth of international investments nor trade for a global economy exclusively decided by the new players, forces of the global market and decisions of transnational companies.

At present, we can notice the dominant connection between the most advanced and industrialized states and the most powerful transnational companies in the USA, European Union and Japan, which show the significant role of national economies and, at the same time, the discrepancies existing between developing countries and the aforementioned triad with respect to the management of the transnational goods and capital flows. On the contrary, those who support the important role of these companies emphasize that their size, centralized decision-making process and global flexibility²¹, create an unprecedented opportunity for new players to influence the international exchanges' scene. However, from this and until stating that the state, in the globalization age, is meant to disappear because it cannot control or manage the transnational flows of capital, goods and persons, is a long way given that the state structure is a flexible and

¹⁷ Paul Hirst, Graham Thompson – quoted paper, p. 126.

¹⁸ Bartlett, C. A., Goshal, S – “Managing across Borders. The Transnational Solution”, Boston, Harvard Business School Press, 1989.

¹⁹ Leong, Siew Meng and Tan, Chin Tiong- “Managing across Borders – an Empirical Test of the Bartlett and Goshal Organizational Typology”, *Journal of International Business Studies*, 1993, 24/ 3, p. 449-464.

²⁰ Paul Hirst, Graham Thompson – quoted paper, p. 374.

²¹ Dannel S. Papp- “Contemporary International Relations. A Framework for Understanding”, Allyn and Bacon, USA, 1991, p. 107.

dynamic one, subject to adjustments and transformations, proof in this respect being the regional integration process started in Europe and completed by the birth of the European Union. We cannot help but notice, when we speak about transnational companies or firms, the influences they exercise upon the capital markets of the countries where they carry out their activity. By their expansion, most economies have become more open and huge capitals are moving freely, searching profit and the most favorable economic placement.

The globalization of the capital markets has entailed a higher growth degree of global economy by means of the permission granted to capital to exit the countries with low productivity and to be transferred in countries with high productivity; it has determined the surpassing of the debt crisis by granting higher access to the international capital market, by supporting economies in transition for their integration in the international economic system, as well as, the capitals' movement from countries with a surplus of current accounts to those with deficits²².

Also, we have to add that the activity of transnational firms and companies is often above the fiscal authorities of the respective countries and, thus, controls are frequently impossible with regard to the legality of their economic activities. This favors easy transfer of amounts of money arising from trading activities and even the risk of their dissimulation in order to avoid payments due to state budgets or, when financial means are not legally achieved, even money laundering activities.

The international money laundering has entailed significant costs for the global economy, having as consequences the impairment of the efficient operations of national economies and, by promoting a non-performing economy policy, the slow corruption of the financial market, the decrease of the public trust in the international financial system and, therefore, the decrease of the global economy's growth²³.

Facing these problems, a country's authorities would be forced to restrict its fiscal policy in order to try to create a budget surplus which would be used to neutralize the monetary effects of the capital investments' influences.

Conclusions

Transnational companies, the main player and beneficiary of globalization, have known a remarkable expansion, influencing all the sectors of the social-economic life. It may be said that today they have a large impact on: technical progress and economic development of origin and host countries, increase of the services sector, involving, as well, in environment issues, management, political and legal matters.

Contrary to these assessments, we have to say, without attempting to form a negative opinion of the activities carried out by transnational companies or firms, that, because of the internationalization of this activity, a transnational crime has developed, which tries to hide profits by means of their successive transfer in countries where the companies work.

The ideas and intentions grounding the establishment of these international economic organizations intended to be benefic for all states. Unfortunately, their rules have served to most industrialized countries, which have established strong economies, protecting certain activity branches until they've become strong enough to face the international competition.

²² Raportul anual al Departamentului de Justitie al Statelor Unite ale Americii – 1997, p. 1 and the following.

²³ Raportul Natiunilor Unite, Oficiul de Control al Drogurilor si de Prevenire a Crimei. Programul Global contra Spalarii banilor – 29 mai 1998 p. 1 and the following.

References

1. Amoroso Bruno, - On globalization. Capitalism in the 21st Century, Macmillan Press Ltd., N.Y. 2001;
2. Anghel Ion - The subjects of international law, Ed. Lumina Lex, Bucuresti, 2002;
3. Badrus Gheorghe, Radaceanu Eduard, - Globalitate si management, Editura All Beck, Bucuresti, 1999;
4. Bartlett, C. A., Goshal, S – Managing across Borders. The Transnational Solution, Boston, Harvard Business School Press, 1989;
5. Borregos J., Bejar A.A., Jomo K.S., - Capital, the State and Late Industrialization, Westview Press, 1996;
6. Boyd, John H.; Levine, Ross; and Smith, Bruce D. - The Impact of Inflation on Financial Sector Performance., January 1999. University of Virginia;
7. Braithwaite John, Drahos Peter, - Global Business Regulation, Cambridge University Press 2000;
8. Braudel Fernand - La dynamique du capitalisme, Paris, Arthaud, 1985 ;
9. Carnoy Martin - New Global Economy in Information Era, The Pennsylvania State University Press, 1993;
10. Demirguc-Kunt Asli and Levine Ross - Bank-based and market-based financial systems: cross-country comparisons, Development Research Group, The World Bank, and Finance Department, University of Minnesota, 2000;
11. Doole I., Lowe R., - International Marketing Strategy, International Thomson Business Press, London, 1997;
12. Friedman L.Thomas - The Lexus and the Olive Tree, trad. Adela Motoc, Ed. Fundatiei Pro, Bucuresti, 2001;
13. Giddens Anthony - *Europe In The Global Age*, Polity Press, Cambridge CB2 1UR, UK, 2007;
14. Held, David, McGrew, Antony, Goldblatt, David, Perraton, Jonathan, - Transformari globale. Politica, economie si cultura, Editura Polirom, Iasi, 2004 ;
15. Hill Charles, - International Business-Competing in the Global Market, Postscript,1997;
16. Hirst Paul, Thompson Graham – Globalisation Under the Question, Ed. Trei, Bucuresti, 2002 ;
17. Kindleberger Charels - Power and Money. The Economics of International Politics and the Politics of International Economics, New York, Basic Books, 1970;
18. Laffan B. Kevin, O'Donnell R. and Smith M, - Europe's Experimental Union: Rethinking Integration, Routledge, London, 2000;
19. Moisuc Constantin, (coord.) – World Economy, I, Global Problems of the World Economy, Ed. Fundatiei Romania de Maine, BUCuresti, 2001;
20. Munteanu Costea, Horobet Alexandra - Finante transnationale”, Editura All Beck, Bucuresti, 2003;
21. Ohmae Kenichi, - The Borderless World, New York, Harper Books, 1990;
22. Papp S.Daniel - Contemporary International Relations. A Framework for Understanding, Allyn and Bacon, USA, 1991;
23. Popescu D. Maria – Globalizarea si dezvoltarea trivalenta, Editura Expert, Col. Sec. XX, Bucuresti, 1999;
24. Rollet Ph., Huart Fl., - Du grand marche a l union economique et monetaire, Ed. Cujas, Paris, 1995 ;
25. Rosenau N. James – Distant Proximities: Dynamics beyond Globalization, Princeton University Press, 2003;
26. Strange Susan – The Retreat of the State. The Diffusion of the Power in the World Economy, trad. Radu Eugeniu Stan, Ed. Trei, 2002;
27. Strange Susan, - The Retreat of the State, Cambridge, Univ. Press, 1997;
28. Sur Serge - Les relations internationales, Montchrestien, Paris, 1995 ;
29. Touscoz Jean - Droit international, PUF, 1993;
30. Woods Ngaire – The Political Economy of Globalization, MacMillan Press Ltd, U.S.A., 2000;

CONVERGENCE PROGRAM AND MACROECONOMIC POLICIES FOR ROMANIA JOINING THE EURO-ZONE

Magdalena RĂDULESCU*
Carmen SECARĂ**

Abstract

Romania submitted a new update of its convergence program on 5 December 2007, covering the period 2007-2010. The budgetary strategy outlined in the program is not in line with the prudent fiscal policy necessary to contain the growing external deficit and inflationary pressures which put the convergence process at risk.

In view of the Commission assessment and the need to ensure sustainable convergence, Romania is invited to: (i) significantly strengthen the pace of adjustment towards the MTO by aiming for substantially more demanding budgetary targets in 2008 and subsequent years in order to contain the risk of an excessive deficit, foster macroeconomic stability and rein in widening external imbalances and address the risks to the long-term sustainability of public finances; (ii) restrain the envisaged high increase in public spending, review its expenditure composition so as to enhance the economy's growth potential and improve the planning and execution of expenditure within a binding medium-term framework; (iii) adopt policies to contain inflationary pressures, complementing the recommended tighter fiscal stance, with appropriate public wage policy and further structural reforms.

Key words: *The budgetary strategy, external deficit, macroeconomic stability, euro-zone, macroeconomic policies for Romania*

Introduction

According to the Treaty of Maastricht, the countries that adhere to the European Union become member states having a temporary derogation regarding adopting the common currency. This means that, at a certain time, subsequent to the adherence, the new member states shall enter the ERM II, and then, conditioned by meeting the nominal convergence criteria, they shall adopt the EURO currency, which grants a full content to the integration into the Economic and Monetary Union. Although after the adherence to the European Union, the monetary and currency policies of every state become the object of common interest, is, at the same time, obvious that the monetary and currency strategy options after the adherence to the E.U. constitutes, mainly, a responsibility and a prerogative of that member state.

To the Romanian economy, the integration to the EURO area represents a very important strategic objective, and the achievement schedule has been made taking into consideration the benefits and costs which this process draws. The first edition of the convergence Schedule, definitive and published in 2007 – after the previous months it's project had been submitted to public debate -, has to Romania a special importance, being the first document which evaluates the economic development possibilities in the conditions of promoting the achievement of nominal and real convergence policies.

Taking into account the necessity of implementing structural reforms to lead to the increasing of the Romanian economic capacity to handle asymmetrical shocks, within the

* Associate Professor, Ph.D., University of Pitești.

** Lecturer, Ph.D., University of Pitești.

convergence schedule it is appreciated that Romania will not be able to adhere the ERM II sooner than 2012. Within the conditions of joining the ERM II in 2012 and minimizing the participation time to this mechanism, EURO adoption could take place around 2014.

Within the preparation process of the convergence Schedule efforts have been made from all the institutions involved (Labor, Social Security and Family Ministry, National Bank of Romania, the Forecast National Commission, the National Statistics Institute, etc.) under the coordination of the Public Finance Ministry, in order to give eloquent and detailed data and information, in concordance with the European Commission demands through which to substantiate the macro economical increasing and economic and budget stability policies. In 2006, NBR, which had showed since 2003 its preoccupation for submitting a vision upon the EURO adopting process course, has started to attend the meetings of the common work group in order to issue the convergence Schedule.

The current edition of the Convergence Program was elaborated in correlation with the provisions in the National Reform Program 2007-2010, as drawn up and sent by Romania to Brussels in July 2007.

In 2007, the NBR's Administration Board has analyzed the scheme regarding the BNR strategic options for the convergence Schedule and also the material regarding meeting by Romania the economic convergence criteria, made by specialists within the central bank.

This paper aims to present some considerations about the Romanian convergence criteria comparative to the other CEE states, some monetary, fiscal and structural measures needed for achieving the nominal and real convergence and some scenarios of adopting euro in a short-run or in a long-run. The convergence matter is important for all EU new member states that aim to adopt euro for achieving a complete integration also in the monetary area. The paper is based on the Convergence Programs realized by the new member states and try to present from these some scenarios for adopting euro in the short-run and in the long-run.

Section 2 presents the CEE countries' experience in the convergence area and section 3 presents the feature of the Romanian monetary and fiscal policy and structural reforms according to the Convergence Program elaborated in November 2007. Section 4 presents the advantages and disadvantages of adopting euro in the short-run and in a long-run and section 5 concludes.

CEE Countries experience in the convergence area

Nominal convergence criteria are somehow also inspired by the OCA theory (R. Mundell, 1961), stability prices criteria being in center and the others are complementary with it. Regarding the criteria of the relative stability of the exchange rate with no de-valorizations, the OCA theory states that if the exchange rates of the potential partners didn't face tensions, this means that their economies are compatible for achieving a monetary union and that exist some conditions of symmetry and flexibility. Fiscal Maastricht criteria can be seen as being related to the criteria regarding the fiscal discipline and integration (Demertzis, M., Hughes Hallet, A. și O. Rummel, 2000). The regulations of the SGP related to the balanced budgets in the view of using some fiscal stabilizers during the recession periods represent in a way a concern for potential adjusting mechanisms. In case of the fiscal des-centralization, although that in reality the SGP leaves less possibilities of using the national budgets for sustaining the markets flexibility, the SGP reform will allow some adjustments by using fiscal policy instruments. But the quality of the Maastricht criteria is given by their clarity and the possibility of measure them and these features were very important and they made the deciders' task to be easier.

Generally, the nominal and real convergence criteria suggest that the new member states have a high level of macroeconomic convergence with the euro-zone, especially in the nominal

convergence area. Still, for some countries this pattern is a quite recent one. But regarding the real convergence, in different area of the macroeconomic policies, the convergence results are more different and mixed (Ciupagea C. - coordinator, 2006).

For example, the public finances represent a problem for many new member states. Shortly, the public finances situation per total seems to be relative comfortable in present, if we look at the present indebtedness level. Still, existence of an average high deficit accompanied by a high and increasing level of public consumption (difficult to reduce in the future) don't allow a future convergence. Another aspect that deserves to be considered is the macroeconomic context of the new member states. These countries have a high level of economic growth comparative to the average level of the euro-zone that makes the actual fiscal situation in many new member states to be critical.

If we analyze the structural factors, we notice that while the commerce integration with the EU-15 evolved very quickly in the last years and it is now at a very high level, the convergence of the GDP structure to the EU standards (characterized by a low share of the agriculture and a high share of services) was very slow, especially if we measure it in real terms (excluding the relative prices changes). This aspect suggests that, while the relative prices changed in a flexible way, a part of the processes that causes real adjustments (that these prices are supposed to stimulate them) don't converge (N. Pop – coordinator, 2007). A conclusion could be that the development degree of the financial sectors is significantly lower in the new member states comparative to the euro-zone (Sebea M., Ionescu A., 2006). After entering in the EU in May 2004 and January 2007, the new member states become automatically candidates for EMU and some of them have already announced the schedule regarding euro adoption.

Only Slovenia entered in euro-zone in 2007. Slovak Republic plans to do the same in 2009, although some analysts are afraid that the new social oriented governments could postpone this accession date.

In the present, the Baltic states watch their ambitions being shattered by a too high inflation rate. First, EU refused Lithuania's request of entering the euro-zone, the last rejection being in 1999 when the euro-zone was created. The reason was that Lithuania had a too high inflation to afford adopting euro in 2007.

This decision gives a negative signal for the other new member states too, states that hope that the EU accession will rise their competitiveness and so they will manage to complete their transition to the Western economies. In the same time, the largest Eastern economies (Hungary, Poland, Czech Republic) postponed the entering in the euro-zone mainly because of the political debates and feuds that followed the elections in 2007 and 2006 (Hungary, Poland and Czech Republic Convergence Program, 2004-2005).

The new political deciders in Poland (which represents the half of the GDP of the total new member states) affirm that they will be able to achieve the economic criteria for entering the euro-zone this decade, but they are sceptic regarding the adoption of euro.

Hungary also intends to enter the euro-zone, but it struggles with the largest public deficit of EU after many years of high public expenses. The social oriented government faces many protests against the austerity measures introduced so it couldn't settle a new target date for adopting euro.

Czech Republic which has represented for a long time an example of economic stability and healthy performance, states that accession in 2010 at the euro-zone is a quite improbable date if we consider an increasing fiscal deficit and a rather inflexible labor market.

According to the latest prognosis, Poland and Czech Republic will enter in the EMU in 2012, while Hungary will do the same in 2014. The economic growth, mainly induced by the domestic demand, is expected to keep on being important for the whole South-Eastern Europe.

The situation of the balances of payments will worsen as a result of a strong increase of imports and this effect will also be sustained by the appreciation of the exchange rates in real terms. Macroeconomic stability will maintain although inflation will rise.

Summarizing, we can state that the new member states faced a significant progress in what integration concerns, but many things remain unsolved. There are still many differences between these states. There are some analysts that consider that the requests for a full monetary integration weren't fully achieved by the new member states and, as a result, it becomes necessary a specialized approach (respecting the features of each country) for adopting euro (Convergence Report of European Central Bank, 2007).

For Romania, it is important the experience of the other new member states for understanding the diversity of integration paths of these countries, because the trend of achieving an average level brings advantages and so, the integration becomes functional (Convergence Program of Romania 2007-2010, 2007).

Macroeconomic policies in Romania and the economic environment

The fundamental objective of the Government's economic policy is to promote sustainable economic growth, in conditions of competitiveness, which will in turn ensure nominal and real convergence with the European Union. To guarantee the success of this strategy the Government will give top priority to investing in human capital and in infrastructure. The most important prerequisite for meeting the fundamental objective is the implementation of the right mix of macroeconomic policies to ensure **the continuation of the disinflation process and to preserve the external sustainability.**

At the same time, meeting the economic and occupational performance, correlated with a sound social system represents the essence of the durable development oriented policies of Romania in 2007-2010.

Regarding the stage of meeting the nominal convergence criteria, the Romanian economy does not have problems from the perspective of sustaining the public finances, the shares within the PIB of the public debt and budget deficit being in the last years' net inferior to the ones established by the Maastricht Treaty. Romania's performance regarding the inflation has improved throughout 2000 – 2006, the annual average inflation rate in 2006 being with 3.76 percent points' superior to the reference level of the criteria. In 2006, there weren't issued public securities on a 10 years' term, and the interest rate for the public securities having this due date issued in august 2005 has been 7.49 % (to the reference level of 6.2%); in order to meet the specific criteria, it is imposed to make a long term internal capital market and the convergence of the interest rates. Regarding the exchange course of the LEU to the EURO, in 2005-2006 it has been registered a variation margin of + 10/-6.1% to the average of the 2 year interval considered. The evolution is bordered in the standard-interval of fluctuation of the ERM II, but not in the asymmetrical band of +15/-2.25% which could be used to evaluate the meet without severe tensions of the currency exchange stability criteria.

Although the real convergence criteria are not mentioned in the Maastricht Treaty and they are not expressly followed by the European Commission, these have a high predictable content regarding the success of adopting the common currency by a country, respectively registering a favorable account between the benefits and costs. The unique monetary policy, made by the Central European Bank, can't and shouldn't aim every economy's particularities, it addresses to a group of economies assumed to be homogeneous.

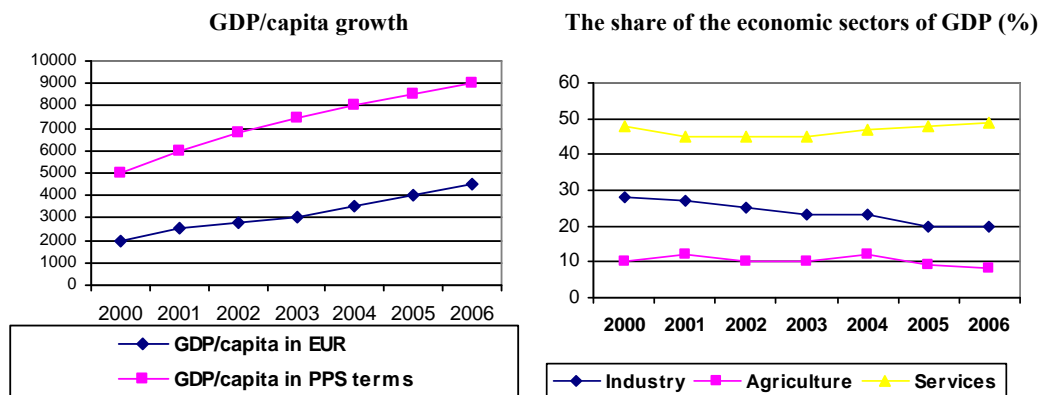
In this context, a premature approach of the monetary policy by a country which has an insufficiently structured economy can produce more costs than benefits. That is why, the people who decide must grant a special attention also to the real convergence criteria, even if they are not

part of the "rough core" of the communitarian acquis. Meeting these real convergence criteria insures a high degree of cohesion to the member states economy structures of a monetary union. The main real convergence criteria are (see Figure no.1):

- PIB/habitant level, both in nominal term and the par of exchange of the purchasing power;
- economy sector structure;
- economy opening degree;
- EU trade share in the total of exterior trade.

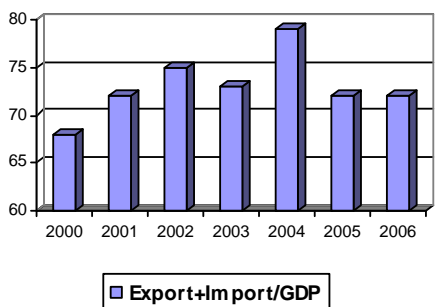
BNR perspective regarding the EURO adoption process is favorable to joining the ERM II in 2012 and, in the context of creating the corresponding conditions for minimizing the participation time to this mechanism, the passing to the EURO in 2014. National Bank of Romania's policy has as objective supporting the macro economical development and encouraging the concentration of structural reforms within the first years of post-adherence time, including by the existence of a limited flexibility of the monetary and currency exchange policy (subordinated to the scheduled deflation achieving objectives and approaching the BCE definition regarding the price settlement) during this interval.

Figure no.1



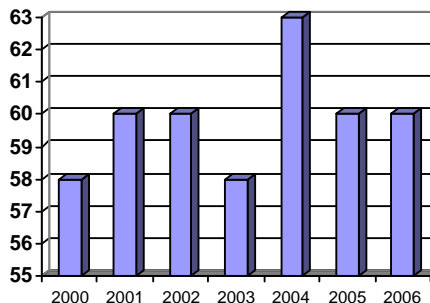
Source: National Statistics Institute, NBR, EUROSTAT.

Openness of the Romanian Economy (%)



Source: National Statistics Institute

The share of the commerce with EU in the total Romanian commerce (%)



Romania's indebtedness stays under 20% of GDP, which is by far under the threshold of 60% of GDP set in the Maastricht Treaty. Hence, against the background of a sustained economic growth, at the end of 2006 the government debt calculated according to the EU methodology (ESA95) was 12.4% of GDP, out of which the domestic debt was 2.7% and the foreign debt 9.7%. At end 2007, this index is estimated to reach the level of 11.9% of GDP.

The structure of the government debt as at 31.12.2006 on debt instruments shows that the government securities issues account for 28.4% of the total debt, with the difference covered by loans. Regarding the initial maturity of the government debt, 9.5% of the debt was short-term and 90.5% medium and long term, whereas the average maturity of the debt balance at the end of 2006 was 5.1 years. At the same time, it is worth mentioning that 33.4% of the debt was floating interest rate debt. The local currency debt at end-2006 was 21.5% of the total debt, while in the foreign currency debt the highest share was represented by the debt in Euro, namely 63.2%.

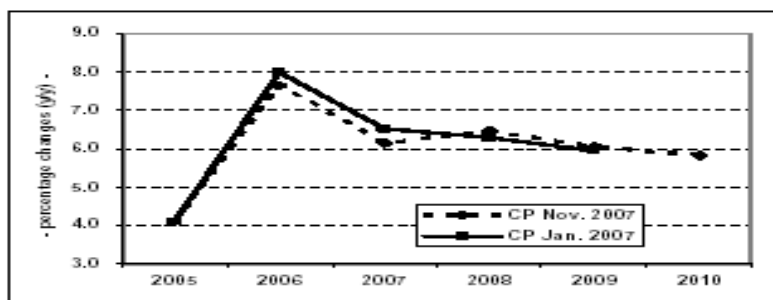
The macroeconomic development scenario on medium term laid down in the current program is not substantially different from the one presented in the latest edition of the Convergence Program.

The differences between the two programs are mainly related to the following elements taken into account:

- (a) the evolution of the economic context during 2007;
- (b) the up-grading of the statistical data for 2006;
- (c) the increasing estimation of the economic potential.

Thus, the real GDP growth achieved in 2006 was basically lower than estimated one in the previous version by 0.3 pp (Figure no.2). The economic evolution in 2007 was characterized by two phenomena with a significant impact: an unprecedented increase in construction and a decline in agricultural output as result of the drought. The projections regarding the economic potential growth were upwardly revised by 0.5 pp, in average, based on an increase in the contribution of the stock of capital.

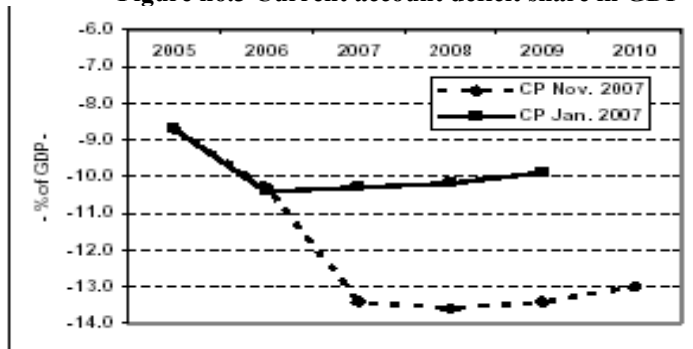
Figure no.2 GDP growth



Source: National Commission for Prognosts
 CP Nov 2007=Convergence Programme, November 2007 Edition
 CP Jan 2007= Convergence Programme, January 2007 Edition

As a result of this evolution of the domestic demand on a trend superior to the previous program and in a more moderate perspective regarding the domestic supply's ability to meet the additional demand, the imports of goods are estimated with higher growths than exports of goods that will lead to deterioration of external balances compared to the previous one. Hence, the current account deficit was estimated at over 13% of GDP in the interval 2007-2009 and in slight decline in 2010 (Figure no.3).

Figure no.3 Current account deficit share in GDP

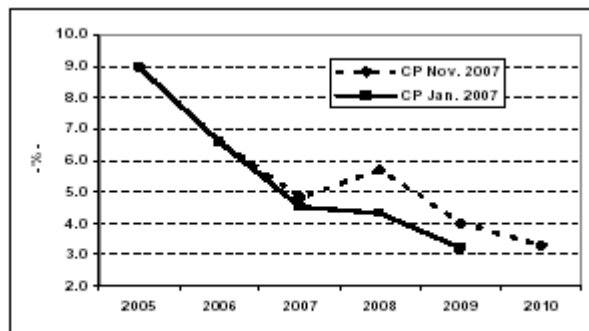


Source: National Commission for Prognosis

The evolution of the consumer prices in 2007 was different from what had been predicted in the previous edition of the program. The initial inflation target set up by the central bank at the beginning of the year at 4% plus/minus 1 percentage point was overshoot.

Consequently, the forecasted evolution of the annual average inflation is significantly different, meaning that in 2008 we will witness an increase as compared to 2007, under the circumstances of higher agricultural products prices both on internal and external market during the first part of year and the base effect stemmed by the 2007 evolution. Afterwards, the annual average inflation rate is expected to start declining again (Figure no.4).

Figure no.4 Annual average inflation



Source: National Commission for Prognosis

Under the current circumstances, characterized by the simultaneous expression of many inflationary risk factors, as well as by persistent turbulence on the international financial markets, maintaining the macroeconomic stability and consolidating the progress in the nominal convergence require the direct approach of the higher inflation event by the overall macroeconomic policy and structural adjustment mix, as its consistency is more important than the focus on each of its individual components.

At the same time, it is necessary that the fiscal and revenue policies substantially support the disinflation, in order to facilitate the monetary policy mission, which is to anchor the inflationary expectations to the low inflation levels that have been reached so far. The implementation of this task has already been started by the central bank; however, the effectiveness of the monetary policy is limited by the existence of a significant external imbalance.

The economic policy mix consisting of a restrictive monetary policy (focused only on relatively high interest rates, translated in a slightly higher exchange rate), alongside a rapid revenue increase, exceeding by far the labor productivity dynamics, leads to unwanted consequences which may undermine the sustainability of the short run disinflation process: (i) a more deepened current account deficit of the balance of payments, persisting at levels which are difficult to sustain on a long term without a substantial increase of productive capital autonomous inflows; (ii) an increased risk of a sudden correction (in the sense of depreciation) of the exchange rate, resulting in a rise in inflation; (iii) a negative impact on the financial situation of the businesses and households which contracted foreign currency loans by counting on a continuous appreciation of the domestic currency, without taking adequate protection against the currency risk.

Hence, promoting a coherent economic policy mix is all the more necessary since: (i) the international financial turbulence will continue to persist, as shown by the developments of the *sub-prime* credits in the American real estate industry, their duration being difficult to anticipate. The probable consequence for Romania would be an increased aversion of the foreign investors to risk, which will lead to higher costs for accessing the foreign financing, leaving the room to significant spontaneous corrections of the exchange rate; (ii) the increase of the food prices on the international markets seem to be a lengthy phenomenon, reflecting both a higher pressure on the demand side (especially coming from a number of highly populated developing countries), but also supply side pressures (taking into account the new fuel-producing technologies using agricultural raw materials); (iii) the most significant increase in the oil price within the past 25 years occurred, due to a difficult geo-political context and against the background of shortfalls of the extraction and refining capacities relative to the rapid increase of the demand; (iv) Romania's current account deficit reached a high level. Although this deficit does not represent a target-size for NBR, as its correction is the responsibility of the fiscal and revenue policies, there is a risk to be unevenly reflected on the price level and on the inflation rate, due to corrective depreciation as a result of an unsustainable appreciation.

This risk goes up with the inflation targets becoming more and more ambitious, on a medium term. The long term sustainable convergence process with EU living standards requires both the maintenance of the macroeconomic stability and the continuation of structural reforms. The main challenge is the convergence with the European living standards, simultaneously with maintaining the macroeconomic stability (in other words, with the evolution of the nominal parameters towards the levels stipulated in the Maastricht Treaty) while preserving, at the same time, the economy's international competitiveness.

Given the above, in the next period of time, the economic policy mix needs to be conceived, as follows: (i) continue the structural reforms, so that the constraints on the aggregate supply could be eliminated, by stimulating the increase in productivity and foreign competitiveness of the Romanian products; (ii) maintain the monetary and fiscal policy in a relatively highly restrictive environment, alongside with a better coordination of such policies; (iii) a revenue policy which does not put additional pressure on the demand side.

a. Monetary and Exchange Rate Policy

In accordance with its statute, the National Bank of Romania has a primary objective to ensure and preserve the price stability. As of August 2005, the monetary policy has been implemented in the context of the inflation targeting strategy, co-existing with the managed floating exchange rate environment. This exchange rate regime is in compatible with the use of inflation targets as a nominal anchor for the monetary policy, allowing a flexible response of this policy to unexpected shocks which may affect the economy.

Considering the need to implement additional structural reforms that will increase the Romanian economy's capacity and flexibility to face asymmetric shocks, Romania will not be able to join the exchange rate mechanism (ERM 2) sooner than 2012. Joining ERM 2, expected in 2012, will represent an important stage on the convergence

A higher degree of exchange rate stability can be ensured by increasing the credibility of the convergence process and by the stabilization of the long-term exchange rate expectations. In line with the expected productivity growth and the inflow of foreign direct investments, a gradual appreciation of the ROL versus the Euro is likely to continue, this adjustment supporting the nominal and real convergence of the Romanian economy.

With the Romanian economy still in disinflation process – the medium term sustainable inflation rhythm compatible with the quantitative definition of the price stability hasn't been reached yet – the inflation targets are annual (December/December) and set by NBR together with the Government for a two-year period. Consequently, the annual inflation targets set for 2008 and 2009 continue to show an descending trend, with levels of 3.8 per cent ± 1 percentage point and 3.5 per cent ± 1 percentage point, respectively.

These target values satisfy, on one hand, the requirement for attaining, according to the Euro joining schedule, an inflation rate level which is compatible with the inflation criterion stipulated in the Maastricht Treaty, as well as with the quantitative definition of price stability adopted by the European Central Bank.

On the other hand, the targets for 2008 and 2009 reflect the NBR's concern to consistently reach the set inflation objective, which is essential for strengthening the central bank's credibility – in the context of the relatively short history of the direct targeting strategy in Romania – and eventually for effectively anchoring the inflation expectations on a medium term.

NBR's precaution – highlighted by this *pattern* of the inflation targets – is justified under the current circumstances by the anticipation of persistent inflationary factors outside of Central Bank control, the most important factors we can mention: (i) the influence on the price development by the continuation of the convergence process in the Romanian economy; (ii) the programming of administered price and indirect tax adjustments during this period of time; (iii) persistent asymmetrical nominal rigidities; (iv) the risk of manifesting of significant external shocks on the aggregate price level in Romania.

Maintaining the annual inflation rate on a trajectory compatible with attaining the medium term inflation targets has recently become a real challenge for the central bank, in the context of the consistent disinflation process started in 2000 being interrupted in the third quarter of the current year under the impact of the shocks occurred on the domestic as well as the foreign markets during this period of time; these triggered an increase of the annual inflation rate, in October, up to the level of 6.84 percent (3.7 percent in March this year) – which is incompatible with attaining the inflation target set for 2007 (4 percent ± 1 percentage point).

During this interval, the major cause for the spike of the consumer price index was the inflation effect of the drought related lower agricultural output, whose level substantially exceeded the forecast; this effect was also intensified by the increase of the prices of the agricultural products on the foreign market. This was accompanied by the impact of the exchange rate correction in nominal terms due to turbulences on the international financial markets.

Against this background, the inflation perspective on the monetary policy transmission horizon has deteriorated. Thus, according to the most recent forecast by the NBR, the projected annual inflation rate is in December at 5.7 percent, and at the end of 2008 at 4.3 percent, until the third quarter of 2008 its trend going beyond the upper limit of the variation interval which frames the central point of the inflation target.

At the same time, the complexity and the size of forecast-associated risks deepened, especially the one related to: (i) the revenue increase not sufficiently sustained by a boost of productivity, (ii) the potential deterioration of the public's inflationary expectations, mainly under the impact of adverse supply shocks and (iii) the uncertainty related to the investors' behavior towards the emerging markets.

Under these circumstances, NBR responded promptly by strengthening the monetary policy, with the monetary authority increasing, on October 31, the monetary policy interest rate up to 7.5 percent, by 0.5 percentage points, after the central bank in September had pushed up the sterilized liquidity volumes in a move to bring the levels of the interest rates on the inter-bank monetary market closer to the monetary policy interest rate level, which was translated into an increase of the inter-bank interest rates on the short term by around 2 percentage points.

Moreover, in order to consolidate the restrictiveness of the monetary conditions in a broad sense and taking into account the rapid growth of credits granted to the private sector, in terms of all the components thereof and especially the credits in foreign currency, the Management Board of NBR decided to keep at the current levels the rates of the minimal obligatory reserves applicable to both liabilities in lei (20 percent) and in foreign currency (40 percent), respectively, of the credit institutions.

In this context, was reiterated the need to orient the monetary policy, alongside the other components of the macroeconomic policy mix, to anchor, in a firm and sustainable way, the inflationary expectations to the low inflation levels reached previously to the recent inflationary shocks, in order to keep the annual price increase on the medium term disinflation trend set in a joint effort with the Government and, in a broader horizon, to ensure the convergence of the aggregate price level in Romania to the price stability as defined in EU.

This orientation of the macroeconomic policies is considered to be all the more necessary since the foreign deficit is at levels which are difficult to sustain in the long run, in the context of deepened uncertainties which affect the international economic environment.

From this perspective, through the increase of the monetary policy interest rate, NBR aims at ensuring an adequate level of the real interest margin, expected to stimulate savings and to improve the relationship thereof with investments, having as effect the gradual reduction of the foreign deficit in the future.

Putting the annual inflation rate back on the trajectory that is compatible with attaining the inflation targets is expected to happen in the last quarter of 2008; the main cause of this evolution is the action of a number of real monetary circumstances, the restrictiveness of which shall be ensured by the adequate calibration of the interest rate policy, correlated with the forecasted appreciation trend in real terms of the domestic currency in the longer term, under the impact of continuing productivity gains to be recorded in the Romanian economy and the persistence of sustainable productive capital inflows.

Hence, in the next period, the adequate restrictiveness degree of the monetary conditions shall be ensured through the monetary policy operational framework specific to the direct inflation targeting strategy. Including through an adequate management of the liquidity conditions on the monetary market, the central bank will seek to consolidate the role of the interest rate policy in transmitting the impulses of the monetary policy, as well as the signalling role of the monetary policy interest rate and implicitly the capacity thereof to anchor the inflationary expectations.

The minimal obligatory reserves mechanism will continue to be, at least on the short term, an important pillar of the liquidity management and control policy; a higher austerity of this instrument related to the ECB practice in the field is justified, on one hand by the persistence of a substantial structural liquidity surplus in the banking system and, on the other hand, by the still very high dynamics of the credits in foreign currency, based on the increasing level of foreign resources drawn by the credit institutions.

In exchange, the leveraging role of the monetary policy given to a number of prudential and administrative measures the central bank resorted to since 2005 in order to slow down the growth pace of the credits in lei and foreign currency granted to the private sector, has been in part cancelled by NBR in the first quarter of the current year. Hence, in early 2007, NBR cancelled the ceiling imposed to the credit institutions' exposure to the unhedged currency debtors, because of the limited and asymmetrical effects that this measure was generating in the context of the cross-border mobility of the financial service supply within EU.

b. Fiscal policy

A top objective for the Government in the next years is the consolidation of the predictability, the stability and the transparency of the fiscal policy. The Government' fiscal policy is designed to support the convergence objectives, by maintaining the budgetary deficit at a prudent level in order to continue the disinflation process and maintain the external deficit within sustainable limits, by stimulating improved collection rates, by promoting measures for enlarging the tax base and increasing the quality of the public expenditures. Consolidating the quality of public finance in a coherent medium term budgetary framework represents the priority objective of the Government, and its success thereof is the main prerequisite for reaching the medium term budget objective and for promoting the efficient functioning of the automatic stabilizers.

Regarding the specific medium-term objective, we started from the premises that the cyclically adjusted budget deficit will be 0.9% of GDP by 2011. This level provides a satisfactory safety margin to prevent breaching the budget deficit ceiling of 3% of GDP in the context of possible future adverse shocks to the rate of economic growth.

The Government's efforts over the medium-term are directed towards the provision of improved public services, including a high-quality educational and vocational training system, a modern and reliable transport network and a responsive and efficient health service, through sustained increases of the net investments in the public sector, including the effective appropriation of the EU funds. Moreover, measures will be taken to create adequate conditions for maintaining the long-term sustainability of public finance.

Managing financial resources efficiently is central to this objective, with a view to allow sustained improvements of the fiscal policy performance in the long term. In this respect, the introduction of program budgeting, increasing the expenditure flexibility and the consolidation of the three year medium term budget framework in government financial planning will ensure the expected efficiency gains in public sector spending.

c. Structural reforms

The targets set by Romania, through the National Reform Program, are similar to the targets assumed at European level, but adjusted to the level of performance of the labor market and of other connected areas, with the purpose of ensuring economic stability and public finances sustainability, increasing productivity and economic competitiveness and improvement of the labor force market functioning.

In the labor market area, Romania assumed two priorities: improving the labor market activity rate and improving the quality of human resources. The objectives established for these two priorities aim at ensuring a favorable environment, from a legal and institutional point of view, for the creation of new jobs and attracting the highest number of persons to the labor market (reduce the inactivity rates within socially vulnerable groups).

The labor market in Romania is characterized by a relatively low activity rate as compared to the EU average, high unemployment rates for the age groups of 15-19 years and 20-24 years, a high percentage of early retirement from the formal labor market and significant employment in the agriculture sector with work relationships that are not subject to taxation.

The Government aims at increasing on average by 1.1 percentage points annually of the activity rate for the active population in the age category 15-64 years. Reaching the total employment rate target of 62.1% and the ILO unemployment rate target of 6.6% before 2010 requires reforms on the labor market, to allow an increase of the competitiveness.

The Government will concentrate its efforts on the three priorities laid down in the Re-launched Lisbon Strategy: attract and uphold more people in the labor market improve adaptability and boost investments in human capital, correlated with the demographic problem and migration, social exclusion as well as the associated elements such as population's health and sensitive aspects of poverty.

In the context of the ongoing adjustment of the labor market, the government focuses to ensure equal access and reinsertion for the youths, women, elderly people and the persons considered disadvantaged. Thus, special attention will be paid to the consolidation of the institutional capacity, especially at local level, with a view to efficiently use the grants of European Social Fund. The objectives set by the government regard the decrease in the long-term unemployment rate from 4.1% in 2006 to 3.4% in 2010, the ILO unemployment rate from 7.3% in 2006 to 6.6% in 2010 and the increase in the elderly employment rate from 41.7% in 2006 to 43.0% in 2010.

The Government will concentrate its efforts on the three priorities laid down in the Re-launched Lisbon Strategy: attract and uphold more people in the labor market improve adaptability and boost investments in human capital, correlated with the demographic problem and migration, social exclusion as well as the associated elements such as population's health and sensitive aspects of poverty.

In the context of the ongoing adjustment of the labor market, the government focuses to ensure equal access and reinsertion for the youths, women, elderly people and the persons considered disadvantaged. Thus, special attention will be paid to the consolidation of the institutional capacity, especially at local level, with a view to efficiently use the grants of European Social Fund. The objectives set by the government regard the decrease in the long-term unemployment rate from 4.1% in 2006 to 3.4% in 2010, the ILO unemployment rate from 7.3% in 2006 to 6.6% in 2010 and the increase in the elderly employment rate from 41.7% in 2006 to 43.0% in 2010.

For the implementation of the measures and activities necessary in the objective "improvement and consolidation of the business environment", an *Action Plan* was drawn up in order to develop and consolidate the Romanian business environment, the implementation of which led to a gradual reduction of the administrative barriers in the business environment, through the simplification of legal and administrative procedures necessary to start up and develop businesses, with a significant impact on the efficiency of the authorization and approval process.

The concrete measures and actions in this respect, as set for the next period, aim at: boosting the quality of regulations; further developing the administrative capacity required for a homogenous implementation of the legal provisions at a territorial level, modernizing procedures and laws regulating the intellectual property, improving the IT infrastructure of the public administration, reviewing the system of taxes and contributions representing own revenues and analyze the opportunity and efficiency thereof from an economic perspective, extending the one stop administrative offices for making various formalities and continuing the effort to internalize the document flow within the administration, improving the dialogue with the business environment and the civil society, etc.

Table no. 1 Regional disparities indicators*

	2003	2004	2007	2010
N-E Region	0.723	0.693	0.673	0.679
S-E Region	0.857	0.908	0.867	0.872
South Muntenia Region	0.812	0.836	0.813	0.820
S-W Region	0.847	0.835	0.830	0.832
W Region	1.129	1.147	1.155	1.141
N-W Region	0.966	0.973	0.951	0.951
Centre Region	1.072	1.043	1.060	1.054
Bucharest-Ilfov Region	1.940	1.906	2.027	2.007

Source: 2003 and 2004 NIS; 2007 and 2010, NCP forecasts

*) Calculated as ratio between the GDP per capita at region level and the national average

Through the National Development Plan (NDP) and the National Strategic Reference Framework (NSRF) drawn up for the programming period 2007 - 2013, Romania intends to promote a regional policy in which the general objective is a balanced regional development of the country and the reduction of social and economic disparities between regions.

Romania and EU Member States, by improving the competitiveness of the regions and attaining an additional GDP growth of 15% by 2015 as a result of the absorption of the EU grants (Table no.1).

In the field of public policies management, Romanian Government started the implementation of an improved system of taking decisions, aiming at increasing the responsibility of public institutions against the results of the promoted public policies. The main achievements estimated as a result of implementing this new system are as follows: training for 150 public administration specialists in the field of impact analysis and assessment techniques; the use in a proportion of 70 percent of performance indicators within the monitoring and assessment of the public policies by the end of 2008, followed by a 100% use of these indicators by 2010.

More modernization measures of the public function will be gradually applied by 2010 envisaging the public servants career, development of motivation policies and instruments and accomplishment of training requests.

Advantages and disadvantages of the extreme solutions regarding the EURO adoption schedule

The EURO adoption schedule proposed by the NBR corresponds to a balanced approach, representing a middle way between the two extreme options: postponing on a long term of adopting the unique currency and it's adopting in a relatively short term. The approach proposed by the NBR insures a complementarily relation between the desirable character and the proposed trajectory feasibility. The adjustment time between the moment of adherence to the European Union and the start to participate at ERM II is necessary due to point of view of:

- approaching in a sustainable way of the annual inflation rates with comparable levels to the specific criteria from Maastricht and to the definition of price stability in the Central European Bank's view;

- surpassing the top period of capital inputs;

- continuing to synchronize the national economy business' cycle with the one of the EURO area and achieving a real convergence process, not just of the convergence nominal dimension;

- creating ex ante of the conditions in order that Romania's attendance to the ERM II to limit probably in a minimum time of two years, which would assume compliance with the Maastricht criteria during the attendance time to this mechanism.

Postponing on a long term the EURO adoption

Advantages:

1. a longer time to prepare the economy in achieving uncompleted adjustments;
2. achieving substantial progress in the real and nominal convergence plan;
3. synchronizing the Romanian business cycle with the EURO area;
4. keeping for a longer time the autonomy of the monetary and exchange course policy.

Disadvantages:

1. the persistence of higher transaction costs associated to the currency risk, having inhibiting effects upon the investments and upon the sustainable economic growth throughout the entire period until adopting the unique currency;

2. the possibility to generate a contrary effect of the longer preparation period of the economy, manifested by postponing the structural reforms and also a relaxing of the macro economical policy especially on a fiscal and income plan, in the conditions of establishing a far targeted – horizon of adopting the EURO;

3. the unclear message sent to the international capital markets, the postponing on a long term being assigned to structural weaknesses or of economical policy less visible to investors rather than the decision of the authorities; in the conditions of full liberty of the capital movement without anchoring credible data of adopting the EURO, this message can diminish the inputs or the outputs of capital, that could perturb the convergence process.

Adopting the EURO in a short-relative term

Advantages:

1. a faster submission of the benefits of currency risk loss, having a stimulating effect upon the economic growth;
2. the minimization of relaxing structural reforms rhythm motivation;
3. stimulating the consequence in time of the macro economical policies ensemble.

Disadvantages:

1. shifting the entire burden of the considerable structural adjustments which are to be made upon the level of the economic activity and occupation, in the conditions of a still limited flexibility of the Romanian economy;

2. the rise of generating asymmetrical shocks as a result of insufficient synchronizing between the business cycles within Romania and the EURO area;

3. the difficulty to detect a central parity representative for the RON/EURO balance exchange currency, which would probably lead to increase the attendance to the ERM II, situation that could be pressured upon the exchange currency or speculative attacks to the national currency;

4. limiting the time in which it could be made the inflation target efficiency of the strategy, that achieving step by step an influence upon anchoring the anticipations, in the extent of increasing the credibility of the central bank's within the process of confirming reaching the proposed deflation trajectory.

According to the NBR vision, it is essential that the precursor time before joining the ERM II to be used by the authorities for the purposes mentioned and not be interpreted as a timeout to postpone potential painful adjustments. It is also important to insure public support for the

convergence Schedule, the existence of a consensus close formula being favorable to the idea of continuing the efforts within the structural adjustments despite the sequence of the electoral cycles, and that is why it is imposed a transparent and credible public communication of the strategy to pass to the EURO and keeping an active dialogue with the international markets throughout its implementation.

The NBR balanced approach regarding adopting the EURO is found in the convergence Schedule, the calendar of the process being established after a cost-benefit analysis, submitted to the following demands: (i) durable fulfilling the nominal convergence criteria; (ii) achieving a satisfying level of real convergence criteria; (iii) reduce the period spend inside the ERM II, mandatory minim period is 2 years.

The schedule proposed by the Romanian authorities for joining the ERM II and, eventually, for adopting the EURO currency, meets the following conditions:

- insures a time interval sufficient for achieving substantial progress in the nominal and real convergence plan;

- it is ambitious enough to embody the political will in continuing the reforms.

Concluding the seven years time (2000 – 2006) of E.U. adherence preparation and the start of another time, having almost the same period (2007 – 2013), of preparing the Romanian economy to enter the EURO area, constitutes an opportunity for continuing the reforms and cutting the dissimilitude of the regional economies. The progress in the real convergence plan must be achieved in a manner not to affect the macro economical balances and not damage the nominal convergence criteria achievement process.

Stopping now at the convergence issue, we must show that officially, the European deciders have given a greater importance to the nominal than real convergence. About achieving the nominal convergence we can make two important conclusions:

1. In a certain measure the criteria are interpretable in both ways: both the possibility to have a rigid interpretation and the possibility to have an easier interpretation (see the case of attendance term to the MRS 2, and the public debt issue);

2. The states aspirant to the EURO must understand that it is not important only the criteria within the reference time (one year before the exam), but it also is important the dynamic of these criteria, which assumes their tracking for a 4-5 year period, and also other conditions such as the adequate function of the capital market on a long term.

That is why the correct evaluation of the attendance conditions to the UEM shall be determinant in preparing the convergence schedules for the states that want to adhere to the EURO area. Through the real convergence, expressed first through the PIB / habitant level, the situation is more complicated, especially if we look to the new member states. The issue is the more burning that the economic measures necessary to eliminate the economical deviations are sometimes at conflict with the ones necessary to reach the nominal convergence in order to attain the "entry ticket" into the EURO area. The Eastern states have much to learn from Ireland's experience which looks like an optimal combination between it's own efforts, direct foreign investments and structural instruments can lead to a fast recovery of the development differences. Regarding us, we strongly believe that achieving the established objectives through the National Development Plan, having as base the efficient use of the funds, in a great part with co financing from the communitarian budget, it can represent the key of Romanian success, through that being insured the real and structural convergence of Romania to the EURO area, so that we could benefit of the advantages to passing to the EURO in 2012 – 2014. Moreover, this term estimated by the authorities coincides with concluding the first schedule period through which Romania shall benefit from the structural instruments granted by the European Union.

Conclusions

The coordination of the economic and budgetary surveillance policies is one of the European Commission's permanent concerns, as it represents a requirement for increasing the interdependence generated by the completion of the Internal Market and the Economic and Monetary Union. Moreover, according to the provisions stipulated in the EC's Stability and Growth Pact, budgetary assistance in the EU is based on the in-depth and correlated analysis of the Stability or Convergence Programs.

The first edition of this Program, underlines the fact that macroeconomic and budgetary scenarios in the Convergence Program are plausible, but, at the same time, there are risks related to meeting the budget objectives after 2008. As a global appreciation, the European Council shows that Romania has positive perspectives for a strong economic growth, but only with an increased foreign deficit and moderate progress in the fiscal sustainability, the MTO requirements being envisaged to be met only after the programming period.

The recommendations in the "European Council Opinion" refer to setting more restrictive budgetary targets for the following years and improving the quality of the public expenditure structure.

The second edition of the Convergence Program presents – as an answer to these recommendations – Romania's capacity to bring the structural deficit down to less than 1% by 2011, thus ensuring a sufficient safety margin to avoid exceeding the 3% threshold of the budget deficit in the GDP.

Moreover, there is presented a medium term budgetary framework characterized by a restructuring of the expenditures with the aim of sustaining the economic sectors with a high value added, as well as the investment in knowledge, education and research in a move to improve the capacity of the Romanian economy to cope with global competition and to provide qualified labor supply for the services sector, under the circumstances of the labor force cost inevitably going up as a result of the convergence process.

The updated Convergence Program took into account the latest developments of the internal and international economic environment and was based on the current legal framework as well as on the provisions stipulated in the 2008 budget draft currently under parliamentary approval procedure.

Adopting euro in the short-run is dangerous because of the lack of real convergence and this may cause asymmetrical shocks in the Romanian economy. In the long-run the real convergence will be achieved at some level, but with the cost of a rising exchange rate risk and this will affect the foreign investments and so, the economic growth. The outcomes from the Convergence Program and from the macroeconomic policies needed were important for establishing the scenarios of adopting euro in the short-run and in the long-run. Still, the paper is more focused on the macroeconomic policies (less on revenue policy) and less focused on studying the structural reforms that need to be taken in order to realize the real convergence. These reforms will also impact on the scenarios presented above. This may represent a subject for future research.

References:

1. Beaulande, Janique. „Competition in quality inside Monetary Union: What about Intra-Industry Trade and Asymmetric Shocks?”. 21èmes Journées Internationales d’Economie Monétaire et Bancaire, Nice, (10-11 June 2004).
2. Centre of Financial and Monetary Research „Victor Slăvescu ”*Monitorizing adopting euro of the new EU member states. Analysis and synthesis*, (Research Projects Centre of Financial and Monetary Research, Second Tom, Bucharest, 2005 and 2006).
3. Ciupagea, Constantin (coordinator), Atanasiu, Isabela, Câmpeanu, Virginia, Turlea, Geomina. „Analysis and evaluation of the economic, institutional and social developments for the new EU member states, after 1st May 2004”. *Impact Studies III*, Study no. 9, Bucharest, European Institute of Romania, (2006).
4. Van de Coevering, Clement. “Structural convergence and monetary integration in Europe”. (december 2003).
5. Demertzis, M., Hughes Hallet, A. and Rummel, O. „Is the European Union a Natural Currency Area, or Is It Held Together by Policy Makers?”. *Weltwirtschaftliches Archiv* 136 (4), 657-79, (2000).
6. Pop, Napoleon (coordinator), Lupu, Iulia, Criste, Adina, Glod, Alina, Moşneanu, Elena Ana, Nagy, Ágnes, Imre, Székely. „Adopting euro – how the new EU memers states are preparing for this. Comparative analysis”. Centre of Financial and Monetary Research „Victor Slăvescu”, Research Project, Bucharest, (2007).
7. Sebea, Mihai, Ionescu, Alexandru. „Realizing EMU and the necessity of convergence”. European Institute of Romania, Studies Colection, no.18, Bucharest, (October 2006).
8. *** Convergence Programs of Czech Republic, Poland, Slovak Republic, Slovenia, Hyngary, Estonia, Latvia, Lithuania, (2004-2005).
9. *** *Convergence Program for Romania 2007-2010*, Bucharest, (november 2007).
10. *** *Convergence Report of European Central Bank*, (May 2007).
11. *** European Comission, *European Economy no2/2006. Economic Forecast*, (Spring 2006).

THE UNDERSTANDING OF NEW PUBLIC ADMINISTRATION

Halil I. ULKER*
Gulcin KARAKOC**

Abstract

Neo-liberal system has formed a new world order in order to overcome the last crisis, it experienced in 1980. This new formation –that is called globalization is basically the struggle of overcoming the recession in the world economy. The main tools that are used by globalization for solving the crisis are the followings; minimal state, privatization, de-regulation policies, international corporations, and so on. Globalization has reduced the area of public administration by proposing a minimal state and has opened the public spear to the private sector.

Increasing public duties and expenses of prosperous state have been shown as the reason of 1980 crisis that is characterized by recession and stagflation. Thus, public services have been decreased to minimum, the duties that were done by government in the past have been opened to the private sector and the moving area of the capital has been widened.

The basic qualifications of new public administration can be categorized as follows:

- *Government is a force that steer, not a force that row. It should be director instead of an actor.*
- *Public duties should be reduced.*
- *Good governance should absolutely be provided. This administrative method is formed by local administrator, the civil public agents, and entrepreneur community.*
- *Citizen should be regarded as customer and customer satisfaction should be adapted.*
- *The authorities of central administration should be transferred to local administrations.*
- *Public administration should be transparent, countable, effective and efficient.*
- *Total Quality, localness, customer oriented, legitimacy and propriety are the inalienable parts of the public duties.*

In conclusion, public administration has transformed to public management. This is a mentality in which consumer is more important than producers. This is the implementation of a public administration in which economy controls politics and social life.

Keywords: *Good governance, countable, Total Quality Management, effectiveness, public management.*

Globalization and the reconstruction of the state

Globalization is a word that has been often used for last thirty years. Some says that it is a tool for development, while the others say that it is a contemporary colonization. Either being positive to the globalization or not, globalization is a fact that is experienced and its being should be accepted. On the other hand, globalization did not begin –as it is believed- in twentieth century, but it began in fifteenth century when the travel was first begun by ships among continents.

Peter Marcuse, in his article ‘The Language of Globalization’, gives fourteen different definition. These can be counted as followed; the improvement of information technology, the widespread of air transportation, financial speculation, the fast circulation of capital throughout the world, the transformation of the culture to the Walt Disney Culture, the actualization of widespread marketing, global warming, genetic engineering, the power of the multi-national firms,

* Professor Ph.D., University of Ankara, Turkey.

** Professor Ph.D., University of Ankara, Turkey.

the new international labor division, the international mobility of labor, the corrodation of nation-state, post-modernism, post –fordism. (Marcuse,2000) Additions can be made to the author’s definitions. However, we do not make additions in order not to make a more complicated globalization definition. We should accept that anything will be the same in the newly emerged global world or in the small village. The description of the globalization, its effects, the place that it takes the people will be discussed for a long time. In addition to this, as Hablemitoglu states, (Hablemitoglu, 2007, 16) Globalization is not only in socio-political analysis, but it also affects all the communal textures like the sector of cinema and music, new communal trends, art, the consumption behavior of the people, their thoughts and their individual attitudes deeply. Everyday, 1.5 billion dollars money change hand, millions of people change place... Business, trade and business life do not depend on land, place and time anymore. This is such a power that does not recognize any state boundary and state power. In other words, state is there to serve the power other than the ones in its boundaries. Governments take the local collaborator and facilitator role of global policy and economy. States and the relationship among states are shaped in economical axis.

People have established different communal structures, have formed different political,economical and cultural instutions, but the most radical change has emerged by the capitalism that is come into the stage in seventeenth century in West Europe. Related with this topic, modern “national state” is also the outcome of the capitalism.(Ulker, 2001,7)

Capitalism has both an economical and communal and political meaning. Capitalism emerged as process and economical contents like division of labor, specialization, consumption structures, sharing at first, and then, it becomes a life style that determines communal form and organization. Capitalism is a dynamic system. It goes in to the crisis in a circular movement and then it quits form this crisis after re-structuring itself. (Saylan, 1998, p.18-19) The last crisis is the one that began with 1976 Opec petroleum rate increase and has already continued with the globalization issue. The basic problem in the last crisis depends on the world capital. In other words, it is based on the recession in the world economy and stagflation. Capitalist world has expressed some policies like minimal state, deregulation policies, wide privatization, the distinction of politics and economics in order to overcome this crisis. The ascending public expenses of prosperous state was shown as the main cause and the reduction of public officers and public expenses was shown the solution of the crisis. As understood from this perspective that the main operation is made through state and the government officers.

The distinction of public and private sphere

This distinction went to the ancient Greek. In the city-state, there is a similar distinction between the Polis (koine) that is used as a common place for free citizens and the area that is owned by individuals (oikos). (Habermas,1997,60). Public is used in law as open to everyone, general. In Latin, it draws its own boundaries by the meaning of using something for everyone’s sake in contrast to the private that have the root of “privare” (using something for his own) . (Sarıbay, 2003,3) These two sphere have been defined in different times, in different shapes and become widen and tighten against eachother or they have taken different names. By the liberal expressions, the materialization of all communication among people has tightened the public sphere. In today’s neoliberal understanding, it is noticed again that the diminishing of the state, the tighten of the public service sphere. The basic public services that were provided to the people as a right are ommitted from the duties of the state and are alienated to the private sector and the services has became commercialized.

In capitalist economy, the gainings increase at the same amount with the circulation of capital. Because of this reason, after the 1976 Opec petroleum crisis, neoliberal expression was suggested with claiming the excessiveness of public expenses. In other words, the basic sectors like education, health were omitted from the public services and it takes a form that capital can get profit.

Globalization and the change of state

In prosperous state, a balance among state, labor and business life has been maintained. State has interfered to the economy (invisible hand or the original operation of the market) as responsible from the prosperity of the community. After leaving prosperous state understanding, as Hayek stated, politics and economy separated from each other and state quitted from economy. In other words, state took the responsibility of the well being of the capitalism instead of regulating economy. (Saylan,1995,90-94) These improvements were in contradiction with the basic principles of nation-state. Nation-state is a state that has state qualification in international area, that makes its own decisions in its own, and applies them and it is a land in which a community lives and which has boundaries. (Hurst-Thompson,1998,16) The most important thing is the sovereignty of nation-state on a determined land, determining rules and applying them. The dramatical speed of the globalization on informatics and transportation technologies makes re-structurization of nation state difficult. This restructurization has emerged in both the form and the function and the responsibilities of state. These changes are, with one sentence, making easy the organization of market economy in a shape that suits globalization conditions. Because of this, the first two of the basic principles of globalization are deregulation policies and widespread privatization. Because the basic aim of the globalization is the circulation of the capital without any obstacle. However, it is not the same for labor.

As it is stated below, the political and economic duties of state have emerged as a debate issue but especially its economic duties has changed. These changes are; the reduction of public expenses, financial discipline, tax reform, fiscal exemption, foreign currency regulation, commercial exemption, permission for foreign investors, extended privatization, irregularization. (Maria, 1999, 160)

Both form and political and economical duties of the nation-state have been tried to change by the inner and outer dynamics. This alteration process should be completed by the multinational institutions and firms from abroad and the transfer of authorities from centre to local administration inside. Thus, while nation-state's moving ability is being removed, the national integrity begins to be discussed by the help of localization.

Globalization and public administration

Until 1980s, administrative reform processes actualized as a re-structurization in public administration and bureaucratic operation. After that years, reforms have been directly through state. With this alteration, state has transformed from prosperous state to minimal state and has become firm-like state. Related with this issue; giving traditional bureaucratic structure up, thighten of public sphere, putting localization on first row, the reduction of labor unions' activities and creating a administrative tool that is suitable for the market are the main aims.

Effective state and maladministration

Maladministration is an administration style that its activity and operations do not satisfy governed people and make them unpleasant. In other words, maladministration is an

administrative style in which arbitrary manners, discriminative manners, ignoring citizen demand for service supply, being late without any reason, insufficiency in services, ineffectiveness and irregularness, secrecy, unnecessary operations and legal regulations are dominant. (Wennergren, 1998, 100-101) Neoliberal understanding claims that nation-state generally produce cumbersome central and maladministration. It is argued that an effective state can only be generated by a minimal state that is requested by the global world. The characteristics of effective state is as followed: (Saygılıoğlu, Arı, 2002, 62, 63)

- Takes into consideration that the demand of the citizens.
- Accepts the citizens who pay tax as customers.
- Gets rid off the bureaucratic obstacles.
- Distributes the authorities according to the subsidiarity principle.
- Is suitable for the conditions and the market mechanism.
- Is based on strategic administration.
- Is proactive against improvements.

Effective state and good governance

Until 1980s, administrative reform struggles generally comprised the issues related with bureaucratic structure and operations. After that year, it was realized that it was not possible to constitute a desired public administration with only this approach. It was accepted that a new culture should be maintained. This new approach was an approach that wanted to judge the role of the state and re-define it and wanted to administrate the state as a firm. Instead of Weber's bureaucratic and hierarchic understanding, more flexible and more contributinal administrative understanding has emerged. That is governance.

Administration means managing public. Governance means managing with citizens. The basic characteristics of this understanding can be counted as followed: transparency, decentralization, enabling public contribution, openness, providing the being informed right to the citizen, effective and efficient usage of public sources, accountability, law state, customer-oriented, less legislation, less authority, much more market. (Saygılı, Arı, 2002, 129-142)

Thus, state was designed as a steering but not rowing and smaller but more effective institution. In this new understanding, while creating public policies, the contribution of civil community institutions, public and private groups was enabled.

In short, the governance model suggests a state and administration understanding which is suitable for world economy and is affected by globalization. In political life, state should not be the only actor, public - private, state - out of state, national – international power should contribute to this process. Public administration resembles to the management and the state is operated as a firm. (Sahin, 2008 , 86 , 94).

Conclusions

At first Fukuyama, and then all globalisation theoreticians, capitalists, effective media had advocated neoliberal economy and global new world design for thirty years but the result shows that the outcomes of the globalisation is not the as it is said. Since, global prosperity and global democracy results could not be reached. The result was seen in world and country economies as more unfair distribution, global crime, poverty, depression. While Fukuyama was renewing his book by saying "I want my state", the president of World Bank and IMF repeated the necessity for the interference of state to the economy. While the crisis in agricultural sector is being said to be

originated from the globalisation policies, it is discussed that there might be a world war related with this issue.

Globalisation, which is called as a contemporary colonization , is useful only for the transfer of sources from the surrounding countries to the centre countries. There are really problems related with the application of nation-state. On the other hand, there are much more problems in the minimal state of global world, most importantly, the lost national sovereignty and the regional power that is caused from the weakness of state authority. Selling of public services with high prices (like health, education), insecurity and terrorism, unemployment, the expectancy of crisis risk are some of the problems that are created by globalisation.

The issue which is used for putting mass off is that: Is there any humanistic way of globalisation?

References

1. Habermas,J., Kamusalığın Yapısal Dönüşümü, Ceviren: T.Bora, M. Sancak, İstanbul, 1997
2. Hablemitoglu, Sengul,Küreselleşme ve Ulus Devletin İşlevselliği,16 Mayıs Dergisi, Vol 4, Ankara, 2007
3. Hirst,P.,Thompson,G.Küreselleşme Sorgulanıyor, Cev: Çağla Erdem, Elif Yücel, Ankara,1998
4. Marcuse, Peter, Monthly Review, Vol 52, No 3, 2000
5. Maria,Lavinga, The Economics of Transition From Socialist Economy to Market Economy, London, 1999
6. Sahin Ozgur, Devlet Düşüncesi ve Kamu Yönetiminin Gelişimi, Atılım Univ.Yüksek Lisans Tezi, Ankara,2008
7. Sarıbay, Ali Yaşar, Kamusal Alan,Diyalojik Demokrasi Sivil İtiraz,İstanbul, 2000
8. Saygılıoğlu,N., Arı, S., Etkin Devlet, İst 2002
9. Saylan, Gencay, Değişim Küreselleşme ve Devletin Yeni İşlevi,İmge Yayınevi, Ankara ,1995
10. Ulker, Halil, Eğitim ve Kamusal Alan, A.I.B.U Sosyal Bilimler Dergisi, Sayı 2, Bolu, 2001
11. Wennergren, Bertil, La aladministration en Suede, Reveue Française d'Administration Publique,No 45, 1998

EDUCATION AND LIFE LONG LEARNING ARGUMENT FOR THE DEVELOPMENT OF KNOWLEDGE BASED ECONOMY AND SOCIETY

Nicoleta GUDĂNESCU*
Anca CRISTEA**

Abstract

The scientific paper work's idea is generated by the Lisbon Strategy objective „creation of more and better jobs in competitive domains”. Only this way can be developed a new society, knowledge based, which is centered on the human capital and all the aspects related to human wellness, needs for education and life long learning etc.

The theme is important in the actual European and global context that emphasizes the progress based on the economic and social development, in fact, the main goal is reaching „sustainable development”. The existing relations between economy and society knowledge based is the result of the human development. In this context the human education have not to be seen as only the tool for the improvement of the economic competitiveness, but as a chance for them to become better individuals. Knowledge based society is not referring limitative to the best prepared individuals in a specific society and high technologies used. The goal has to be the improvement of the professional preparation during the whole life, thorough investments in human capital and the increased access to the knowledge for the members of the society.

The paper work is the following of my anterior studies and is considered an actual subject matter for the entire scientific and economic society.

Keywords: Education, Knowledge Society, Knowledge Economy, Lifelong Learning, Competitivity

Introduction

The scientific paper work is emphasizing the Lisbon Strategy objectives on the one hand the goal to have in the future a competitive human capital and on the other hand the society and the economy have to be capable to create more and better jobs all over the EU space. The main contribution in accomplishing these goals is brought by life long learning, the new Lisbon concept of preparation during the entire life of the individual. Only this way can be developed a new society, knowledge based, which is centered on the human capital and all the aspects related to human wellness, needs for education and life long learning etc.

Very important in this context is the link between the sustainable development as a main objective of this century's humanity and the concept of human sustainable development which is centering the entire process on the human being and his evolution in the next years.

The paper work is presenting the main concepts „knowledge society and knowledge economy”, concepts that are considered the basis for the society of the future. In the mean time is

* Lecturer, Ph.D., Ecological University, Bucharest.

** Assistent, Ph.D. candidate, Ecological University, Bucharest.

emphasized the role of the education primary to tertiary and life long learning, including a proposed model of the knowledge society development.

That's why this work is going to be concentrated on the European space and also the European Policy regarding education in the new knowledge society and their influence on the Lisbon strategy main objectives and the economic evolutions.

The paper work is considered an actual subject matter for the entire scientific and economic society.

Main Concepts

What is knowledge society?

Knowledge society is that phase in the capitalist society evolution which represents: basic resource;

- main source of power and wellness;
- main space for generating and existing of new jobs;
- the way of acting for the main social actors;
- the zone for social conflicts;
- the base for governmental and managerial innovative decisions;
- competition existence (knowledge means innovation);
- criteria for national wellness.

What is knowledge economy?

In order to delimitate the post-industrial knowledge society the scientists proposed a new sectorization for the economy: **first sector** - direct nature exploitation: agriculture, mining, forestry, fishing, hunting; **second sector – industry includes: subsector <<a>>** - new industry (electronics, computers, robots, IT); **subsector <>** - traditional industry; third sector – economic services (transportation, commerce, warehousing etc.); fourth sector – social services (health, banking, insurance, tourism etc.); fifth sector – IT services (R-D, education, collecting and managing information, management etc.)

From the prospective of technologic and professional the post-industrial knowledge society is defined as the society in which the great majority of the work force is working in the IT services sector (fifth sector) and in a subsector of industry.

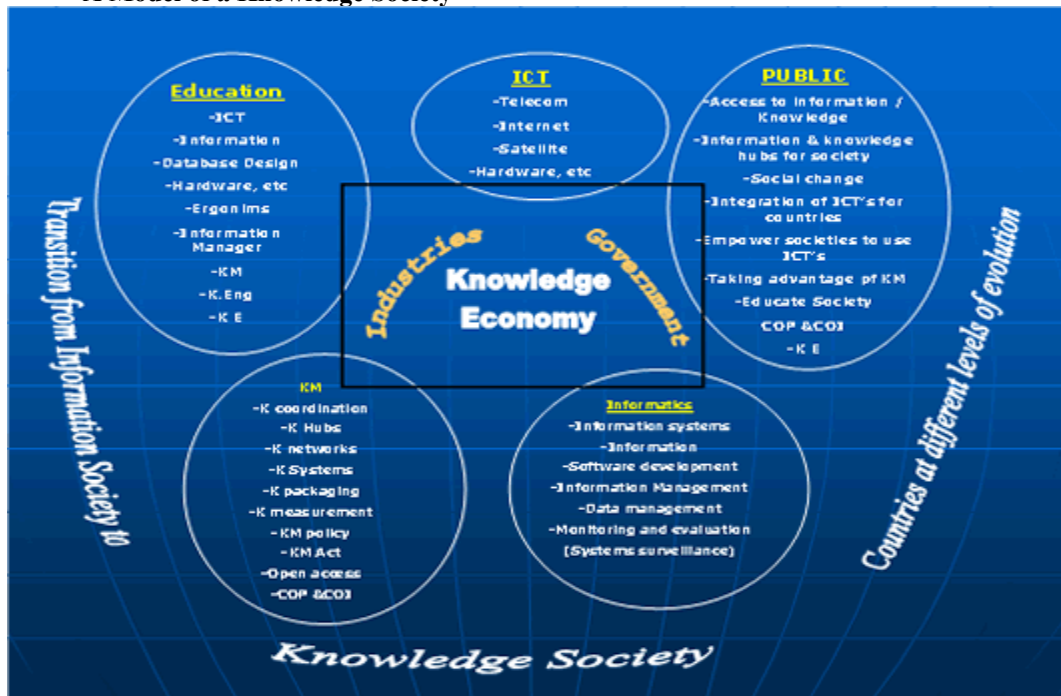
The **knowledge economy** is a term that refers either to an **economy of knowledge** focused on the production and management of knowledge, or a **knowledge-based economy**. In the second meaning, more frequently used, it refers to the use of knowledge to produce economic benefits. The phrase was popularized if not invented by Peter Drucker as the title of Chapter 12 in his book *The Age of Discontinuity*.

Various observers describe today's global economy as one in transition to a “knowledge economy”, as an extension of “information society”. The transition requires that the rules and practices that determined success in the industrial economy need rewriting in an interconnected, globalised economy where knowledge resources such as know-how, expertise, and intellectual property are more critical than other economic resources such as land, natural resources, or even manpower. According to analysts of the “knowledge economy”, these rules need to be rewritten at

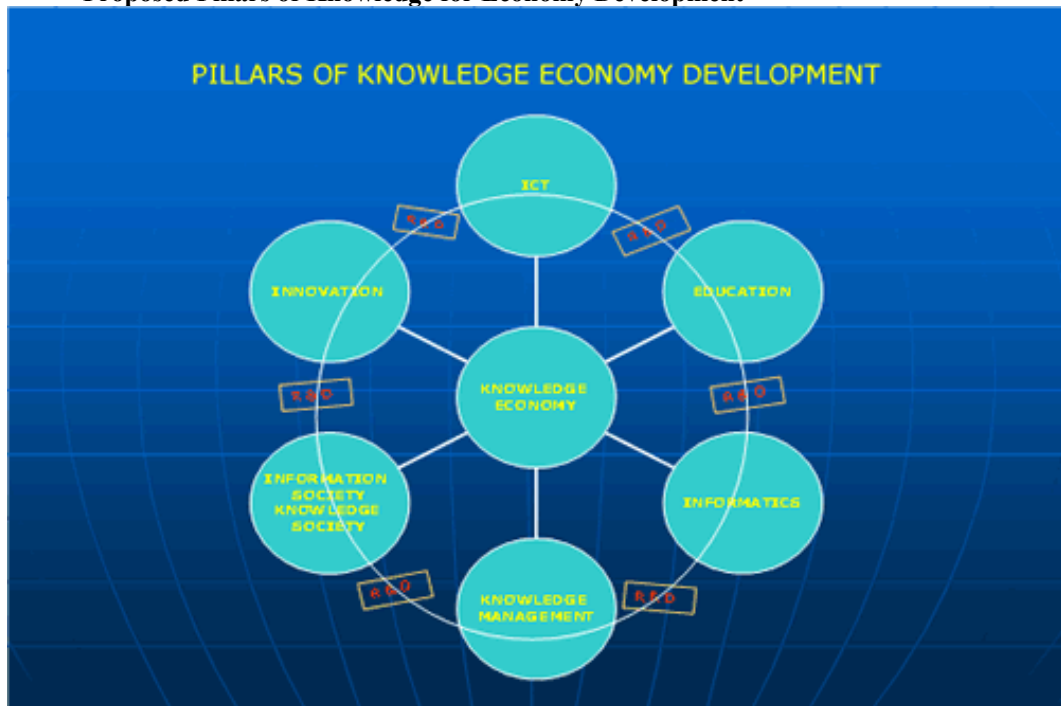
the levels of firms and industries in terms of knowledge management and at the level of public policy as knowledge policy or knowledge-related policy.

However, this concept has grown and expanded beyond the definition developed by Drucker. As depicted in the diagrams below the concept does not focus on IT developments or innovation only but a whole range of matters related to: *information, information flows, information management, knowledge, knowledge flows, knowledge production, knowledge management, knowledge flows, knowledge transfer, knowledge sharing, knowledge translation (innovation) access, knowledge institutions/ industries, knowledge services, knowledge trades, Research and Development, Education, knowledge supplies and demand and knowledge society.* The interpretation will change depending on the area of focus and issues to be addressed. For any country to begin with matters of knowledge economy there is a need for conceptual operationalization for different sectors. A need for countrywide participation and involvement, massive creation of awareness of the concept and how it applies to different sectors and impact people at national and individual levels. An important point to make is that knowledge economy does not refer to science knowledge only but all forms of knowledge as long as such knowledge and or activities lead to economic growth and job creation.

A Model of a Knowledge Society



Proposed Pillars of Knowledge for Economy Development



This is the main reason for which the World Bank initiated a Program for assistance that helps different countries to accede to this society. In the mean time, Education for the Knowledge Economy refers to World Bank assistance aimed at helping developing countries equip themselves with the highly skilled and flexible human capital needed to compete effectively in today's dynamic global markets. Such assistance recognizes first and foremost that the ability to produce and use knowledge has become a major factor in development and is critical to a nation's comparative advantage. It also recognizes that surging demand for secondary education in many parts of the world creates an invaluable opportunity to develop a workforce that is well-trained and capable of generating knowledge-driven economic growth.

What is the World Bank doing to support work in this area?

World Bank assistance for EKE is aimed at helping countries adapt their entire education systems to the new challenges of the "learning" economy in two complementary ways:

Formation of a strong human capital base: A framework for knowledge-driven growth requires education systems to impart higher-level skills to a rising share of the workforce, foster lifelong learning for citizens, and promote international accreditation of a country's educational institutions. Efforts along two dimensions are needed: to provide quality and relevant education to a larger share of each new generation of young people through expanded secondary and tertiary education; and to train and retrain the existing labor force to provide opportunities to those who were unable to complete secondary or enter tertiary education.

Construction of an effective National Innovation System (NIS) : A national innovation system is a well-articulated network of firms, research centers, universities, and think tanks that

work together to take advantage of the growing stock of global knowledge, assimilate and adapt it to local needs, and create new technology. Tertiary education systems figure prominently in NIS, serving not only as the backbone for high-level skills but also as the main locus of basic and applied research.

EKE encompasses a wide range of efforts, comprising:

- Secondary education to lay the foundation of a healthy, skilled, and agile labor force
- Tertiary education to create the intellectual capacity to produce and utilize knowledge
- Lifelong learning to promote learning throughout the life cycle and help countries adapt to changing market demands
- Science, technology, and innovation capacity to continually assess, adapt, and apply new technologies
- Information and communications technology (ICT) to multiply access to learning opportunities for those who need them most (such as out-of-school youth and children with disabilities) and to improve the quality of teaching and learning outcomes
- Cross-cutting efforts to rethink the role of the state away from sole provider to enabler and quality assurer, identifying options for sustainable financing, strengthening labor market linkages, and addressing the political economy of reforms

Education in knowledge society context

The revitalized Lisbon Strategy underlines the crucial role of education and training to Europe's future prosperity and social cohesion.

Beyond their broad mission to serve society as a whole, education and training systems are of particular importance in helping to deliver sustainable growth and creating more and better jobs. Over recent years, Member States have made significant progress in working together under the Education and Training 2010 work programme – the education and training component of the Lisbon strategy for jobs and growth – to modernize Europe's education and training systems to meet the demands of the knowledge-based economy and society.

Information and communication technologies have the potential to significantly advance our progress towards the Lisbon objectives. New open and flexible forms of ICT-supported learning (eLearning) are increasingly being used for the re-skilling of workers, and are opening the way to new forms of education and training for the knowledge society. Consequently, ICT is a cross-cutting theme in the new Lifelong Learning programme for the period 2007-2013, which aims to promote greater mobility and stronger links among education and training institutions.

The Commission's 2010 initiative, a European Information Society for Growth and Employment, takes on board this revised policy agenda. It highlights the opportunities and challenges of eLearning, its key role in creating knowledge and new innovative learning content and services, and the role of lifelong learning together with innovation and research in the triangle of knowledge.

It also emphasizes the growing need for digital literacy as an essential competence in the knowledge society and skills for the workplace.

Education is a primary concern in all European countries. It assumes particular importance in the context of the Lisbon strategy to boost EU growth: in the emerging knowledge-based economy success – both for individuals and for Europe as a whole depends crucially on realizing human potential. Making this happen requires a fundamental transformation of education and training throughout Europe. This process of change is being carried out in each country according

to national contexts and traditions and is being driven forward by co-operation between Member States at European level.

Although Member States invest significantly in education, we still have some way to go to ensure that opportunities are open to all. Almost 16% of young people in the EU still leave school early, often without any qualifications, and nearly 20% of 15 year-olds continue to have serious difficulty with reading literacy. Only about 77% of 18-24 year-olds complete upper secondary education – still far below the EU's target of 85% – and only 10% of adults aged 25-64 take part in life long learning.

Moreover, there is little evidence of an increase in employers' investment in continuing training.

The role of traditional educational institutions – schools, colleges and universities – in educating younger generations has never been more important than it is today.

To succeed in tomorrow's knowledge based economy and society, we have to equip young people with the knowledge and skills necessary to cope with continuous change in their private and professional lives. They need not only the technical skills necessary to engage with the new technologies – so-called 'digital literacy' – but also the <<softer>> skills such as creativity, problem-solving and team work.

Approaches to training are changing too. As the world of work becomes ever more complex and portfolio careers become the norm, barriers between work and learning are disappearing. Employees are moving in and out of work and between working tasks in a world where skills, disciplines and jobs mutate rapidly. Organizations require a flexible workforce with broad competencies and increasingly individuals are taking responsibility for their own professional development as part of their life long learning.

Hence, learning today is no longer confined to educational institutions, companies or training centers. New technologies and tools offer learners greater flexibility, easier access to information and the opportunity to match learning to their specific needs, circumstances and learning profile. The home is increasingly important as a learning environment.

The boundaries of learning are changing all the time. Technological developments, such as the internet, mobile communications and virtual environments, create possibilities to support learning in new ways. In addition, our definitions of learning are changing, as we gain new insights into how people learn and what they need to learn to adapt to changing economic and social conditions.

Challenges for Education and Training in EU

To ensure their contribution to the Lisbon strategy, in 2001 Ministers of Education adopted a report on the future objectives of education and training systems in the EU, agreeing for the first time on shared objectives to be achieved by 2010. This resulted in a 10-year work programme, Education and Training 2010, approved by the European Council.

These agreements constitute the EU strategic framework of co-operation in the fields of education and training, and are implemented through the open method of coordination.

Member States have agreed on three major goals to be achieved by 2010 for the benefit of citizens and the EU as a whole:

- to improve the quality and effectiveness of EU education and training systems;
- to ensure that they are accessible to all; and
- to open up European education and training to the wider world.

Actions to achieve these goals are based around specific objectives covering the various types and levels of education and training (formal, non-formal and informal) and aimed at making

a reality of lifelong learning. Systems have to improve on all fronts: teacher training; basic skills; integration of ICT's; efficiency of investments; language learning; lifelong guidance; flexibility of the systems to make learning accessible to all; mobility; citizenship education, etc.

In order to avoid having the next generation facing social exclusion, each EU member state have to speed up the education reforms and achieve the Lisbon strategy main goals. These include the ability of the EU citizens to communicate in foreign languages, basic competences in mathematics, science and technology, digital competence, and interpersonal and intercultural skills.

The reality we face is that national reforms are moving forward but there is too little progress against those benchmarks related most closely to social inclusion. The pace of reforms should be accelerated in order to ensure a more effective contribution to the Lisbon strategy and the strengthening of the European social model.

Education and Training 2010 integrates all actions in the fields of education and training at European level, including vocational education and training (the "Copenhagen process"). As well, the Bologna process, initiated in 1999 is crucial in the development of the European Higher Education area. Both contribute essentially to the achievement of the Lisbon objectives and are therefore closely linked to the Education and Training 2010 work programme.

Education and Training Policy

The crucial role of information and communication technologies (ICT) in building Europe's social and human capital is reflected in the strong emphasis given to technology in educational action programmes.

The EU eLearning Programme supports actions that foster new approaches to education and training and the development of quality multimedia content and services. Various projects are actually ongoing, focusing on a series of priority areas chosen for their strategic relevance to the modernization of Europe's education and training systems. These include: promoting digital literacy; encouraging exchange and sharing schemes; strengthening networking between European schools; and sharing and dissemination of best practices.

The opportunities brought by ICT also feature prominently in the EU's policy on lifelong learning. In its Communication entitled, *Making a European Area of Life Long Learning a reality*, the Commission notes the need to develop education and training measures for lifelong learning across Europe. Member States should adapt their formal education and training systems to the demands of the modern environment, breaking down barriers between different forms of learning and giving all EU citizens the chance to develop ICT skills.

These concerns were reiterated in the latest policy review in 2005, which again underlined the key role of ICT in the future of Europe's education and training systems. The new 2010 initiative, a European Information Society for Growth and Employment, also recognizes the importance of learning and skills to Europe's digital economy. It will highlight the opportunities and challenges of eLearning, and its key role in creating knowledge, new innovative learning and content services.

It emphasizes the role of life long learning, together with innovation and research, in the triangle of knowledge, and underlines the growing needs for digital literacy as an essential competence in the workplace and in the knowledge society. Support for digital literacy and lifelong learning will be a key focus of a proposed European initiative for eInclusion, under 2010, which is planned for 2008.

The European eSkills Forum, a stakeholder group on ICT and e-business skills, has noted the crucial importance of e-skills for the future EU workforce and population and has invited the

EU to adopt a comprehensive strategy for improving ICT skills and training. These issues have been taken up by the ICT Task Force, an expert group set up under the 2010 strategy. Based on input from the eSkills Forum, the ICT Task Force and other stakeholders, the Commission is expected to issue an action plan on "eSkills for Competitiveness, Employability and Workforce Development" in early 2007. Building on the achievements of earlier education and training programmes such as Socrates, the Commission is launching a new Integrated Lifelong Learning programme for the period 2007-2013.

The programme covers four areas: schools (Comenius), higher education (Erasmus), vocational training (Leonardo), and adult education (Grundvig). These are complemented by four horizontal areas of activity: policy development, language learning, ICT and dissemination work.

This Communication intends to take the ICT-enabled learning agenda a step forward and to develop a coherent strategy framework for the best possible integration and exploitation of ICT for lifelong learning.

Where the Information Society meets Education

Information Society Main Activities

1. Research and Development

European research in this field was part of the Information Society Technologies (IST) programme, one of the thematic priorities in the Sixth Framework Programme (FP6) for Research and Technological Development. Research activities are managed by the **Learning and Cultural Heritage Unit** within DG Information Society and Media.

Technology-enhanced learning (TeLearn for short) research aims at improving our knowledge of how learning can be supported by information and communication technologies. The focus is on intelligent solutions tailored to individual learners, motivating and supporting people who learn on their own or collaboratively with others.

Research priorities are to:

- enhance our capacity to *reflect the complexity of learning* in complex and dynamic environments;
- reinforce learning as a *social process* through new collaborative models;
- *customize learning to individual needs* – at school, work, throughout life;
- *build competence* – by linking organisations' objectives and learning goals of individuals;
- support pedagogical approaches that *offer new and traditional ways of learning*.

2. Other Activities

The **eTEN** Programme is concerned with the large-scale roll-out of public interest services, primarily in support of the 2010 initiative. In this context, eTEN projects address eLearning as a main action line. Activities support the efforts of the Member States to accelerate the adaptation of education and training systems for all in the EU and the development of virtual campuses.

The **eContent plus** Programme (2005-2008) supports the production, use and distribution of European digital content and promotes linguistic and cultural diversity on global networks. Improving the accessibility and usability of educational material is a key priority.

For the future, and with particular reference to the 2010 strategy, the main such instrument will be the **ICT Policy Support Programme**, which is part of the Competitiveness and Innovation Framework Programme (CIP). With a budget of €728 million, it will stimulate converging markets for electronic networks, media content and digital technologies, test new solutions to speed up the deployment of electronic services, and support modernisation of the European public sector.

Computer-enhanced tools and methods of education have the potential to raise the performance and extend the availability of Europe's educational systems.

Policy Context

Open and flexible forms of technology-enhanced learning contribute increasingly to the quality of education and training systems. ICT make teaching and training processes more tailored to the needs of the learner, help foster and support innovation in pedagogy, and make learning more engaging. They also support organizational transformation within education and training institutions, which will help to improve educational quality, and to extend access to learning beyond traditional educational settings.

Nevertheless, integrating ICT as a natural part of teaching and learning at all levels in educational and training systems remains a major challenge for Europe. The European Commission has been very active in supporting and complementing the efforts of EU Member States to modernise education and training systems. At practitioner level, current efforts in this direction focus on the eLearning Programme. This initiative has four components: to equip schools with multimedia computers, to train European teachers in digital technologies, to develop European educational services and software, and to speed up the networking of schools and teachers. In addition, the European eLearning portal has been set up (<http://elearning.europa.info>) to provide the support structure and act as a hub for promotion and exchange of best practice.

Future of eLearning

eLearning is progressing from the basic use of ICT for learning (e.g. as a research tool and replacement for books), to new forms of education and training – which emphasise creativity and collaboration – and new skill requirements for the knowledge society. This, in turn, requires a significant change of emphasis, away from a focus on technology, connectivity and the internet, towards a greater consideration of the context of learning, and of the need for collaboration, communication and innovation. Despite the considerable efforts undertaken, the eLearning sector is still fragmented and there are many open questions on how to exploit the potential of ICT in education and training. A broad partnership between the various stakeholders of industry, education and training, public sector and civil society is needed for Europe to reap the full benefits of ICT and learning in the knowledge society.

Virtual Campuses and Sharing for Higher Education

With the world of higher education increasingly competitive, many institutions are looking to virtual working to achieve critical mass as centers of high-quality learning. IST-FP6 project **iCamp** has the vision to become the educational web for higher education in the enlarged Europe. It will provide an infrastructure, the “iCamp Space”, for collaboration, content sharing and social networking across systems, countries and disciplines. Interoperability amongst different open source learning systems and tools is the key to sustainability of iCamp.

Scientific and technical skills are crucial to Europe's future. For Europe to be able to compete on global markets and to meet the Lisbon targets for growth and jobs, it needs a pool of highly skilled scientists, engineers and mathematicians. Moreover, as the everyday world becomes ever more complex, it is essential for all citizens to have a good understanding of mathematical concepts, and a reasonable level of literacy on science and technology. Indeed, in a Recommendation published in 2005 as part of the Commission's lifelong learning policy, MST was identified as one of eight key competences necessary for every European to prosper in a knowledge - based society and economy.

The EU benchmark for the total number of graduates in MST has been set to increase by at least 15% by 2010 with, at the same time, a decrease in the gender imbalance. Reaching the benchmark implies an increase of about 100,000 graduates, to 748,000 in 2010. Despite the progress observed, the percentage of new graduates in these areas is not enough to fulfill the increasing demand from academia, industry and service sectors.

Thus, Europe must encourage children and young people to take a greater interest in MST and to ensure that those already in scientific and research professions find their careers, prospects and rewards sufficiently attractive to keep them there.

MST education should be an entitlement for every child and introduced at an early age. More effective and attractive teaching methods should be introduced, in particular by linking learning to real life experiences, working life and society, and by combining classroom based teaching with appropriate extracurricular activities such as science fairs, competitions, science camps, visits and museums. A broad approach is necessary, since no single measure alone will be sufficient to achieve the overall goal, and different students will be influenced by different kinds of measures.

Lifelong learning occupies an increasingly central position in the EU's education and training policies. The knowledge-based economy, along with wider economic and societal trends such as globalization, changes in family structures, demographic change and the impact of ICT, present the European Union and its citizens with many potential benefits as well as challenges. To take full advantage of these opportunities we need to be open to acquiring knowledge and developing new skills and competences throughout our lives. Although lifelong learning is gaining ground in Europe, too few adults are benefiting from it.

According to the latest estimates, only around 10% of adults in the EU aged 25-64 take part in lifelong learning. Almost 16% of young people in the EU still leave school early, and nearly 20% of 15 year olds continue to have serious difficulty with reading literacy. Only around 77% of 18-24 year olds complete at least upper secondary education, still far from the EU benchmark of 85%. In a world that is increasingly reliant on knowledge and skills, such a situation is storing up problems for the future.

A Council Resolution on lifelong learning in 2002 stressed the need for all Member States to develop coherent and comprehensive strategies. Relevant actions are reflected in the work programme for Education and Training 2010, which also includes specific actions for vocational education and training (the Copenhagen process) and higher education (the Bologna process). This work programme is the education and training strand of the Lisbon strategy and aims to modernize Europe's education and training systems.

In the latest policy review, published as a Communication in November 2005, the Commission calls for Member States to speed up the pace of reforms in education and training systems to avoid large proportions of the next generation facing social exclusion. To help achieve this, the Commission has set out what it sees as eight key competences every European citizen should have to prosper in a knowledge-based society and economy. These include the ability to communicate in foreign languages, basic competences in mathematics, science and technology, digital competence, and interpersonal and intercultural skills.

The goal of lifelong learning implies a culture where people regard knowledge and skills acquisition as a continuous part of everyday life. Learning cannot, therefore, be confined to traditional settings, such as school or university, and then left behind as a finished and acquired asset. It must be maintained, refreshed and extended.

Learning needs to coexist harmoniously alongside normal life, and must be accessible whatever a person's inherent intellectual capability, family situation, health, culture, gender, language or geographical context. Education has to meet people where they are. It must break

down the barriers of distance. ICT has an indispensable role to play. It can bring educational materials to people. It can bring people together in real and virtual communities. It can help them find what is available, matching aspirations with resources. And ICT can provide measurement and assessment services, defeating some of the cross-cultural and interpersonal biases that creep into traditional systems of reward and assessment.

Conclusions

The “Knowledge revolution” is the ability of the society to create, access and use knowledge that becoming fundamental determinant of global competitiveness.

Seven key elements of “Knowledge Society”

- Increased codification of knowledge and development of new technologies
- Closer links with science base/increased rate of innovation/shorter product life cycles
- Increased importance of education & up-skilling of labor force, and life-long learning
- Investment in Intangibles (R&D, education, software) greater than Investments in Fixed

Capital

- Greater value added now comes from investment in intangibles such as branding, marketing, distribution, information management
- Innovation and productivity increase more important in competitiveness & GDP growth
- Increased Globalization and Competition

Bottom Line: Constant Change and Competition Implies Need for Constant Restructuring and Upgrading

For the knowledge economy is - an economy that creates, acquires, adapts, and uses knowledge effectively for its economic and social development.

Four Key Functional Areas

- Economic incentive and institutional regime that provides incentives for the efficient use of existing and new knowledge and the flourishing of entrepreneurship
- Educated, creative and skilled people
- Dynamic information infrastructure
- Effective national innovation system

The link between society, economy, knowledge and education is created introducing the eLearning that represents the progress for education and training - which emphasise creativity and collaboration – and new skill requirements for the new society.

The research related to this subject matter is an actual one and the challenges of the subject are more and more important in order to develop the future society and to create new models for the education and learning in equal conditions for all the individuals and in a competitive society.

References

- [1] Anohina Ana. 2005. *Analysis of the terminology used in the field of virtual learning*, *Educational Technology & Society*, 8 (3), 91-102, http://www.ifets.info/journals/8_3/9.pdf
- [2] Immo Seppanen, 2001. Finish national programs and industrial development in micro technologies, Grenoble, MINATEC, 2-6 April.
- [3] Kevin Kelly.1998. *New rules for the new economy*, London Fourth Estate
- [4] Peter Drucker.1969. *The Age of Discontinuity*, the title of Chapter 12 , London, Heinemann
- [5] Richard E.S. Boulton, Barry D. Libert, Steve M. Samek.2000, *Cracking the value code. How successful businesses are creating wealth in the new economy*”, New York, Harper Bussiness,
- [6] Robin Mansell and Uta Wehn (Editors).1998. *Knowledge societies. Information technology for sustainable development*”, published for and on behalf of the United Nations, Commission on Science and Technology for Development, New York, Oxford University Press
- [7] Roger E. Bohn.1998. *Measuring and Managing Technological Knowledge*, pp. 295-314 in Dale Neef a.o., Eds, *The Economic Impact of knowledge*, Butterworth-Heinemann, Boston and Sloan Management Review, vol. 36, number 1, <http://irps.ucsd.edu/faculty/faculty-directory/roger-e-bohn.htm>
- [8] Samuel K. Moore. 2001. *Making chips to probe genes*, *IEEE Spectrum*
- [9] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. *Towards a European Research Area*, Commission of the European Communities, Brussels, 18 January 2000.
- [10] *Concerning the multiannual framework programme 2002-2006 of the European Community for research, technological development and demonstration activities aimed at contributing towards the European Research Area*”, Proposal for a decision of the European Parliament and of the Council, Commission of the European Communities, Brussels, 21 February 2001.
- [11] Commission of the European Communities. *Commission Staff Working Paper, Building the Knowledge Society: Social and Human Capital Interactions*, Brussels, 28.05.2003
- [12] Commission of the European Communities, *Report from the Commission – The Concrete future objectives of Education Systems*, Brussels, 31.01.2001
- [13] European Commission. Directorate General for Education and Culture, *Implementation of Education and Training 2010. Work Programme, Progress Report*, Brussels, November 2003
- [14] Commission of the European Communities – *Commission Staff Working Paper, Progress towards the Common Objectives in Education and Training. Indicators and Benchmarks*, Brussels, 21.01.2004
- [15] Declaration of the Presidency of the European Council, Lisbon, March 2005.
- [16] <http://portal.edu.ro/index.php> , www.advancedelearning.com , <http://www.siveco.ro/>
- [17] *Intel Education Services*, <http://www97.intel.com/education/>
- [18] *Bersin & Associates*, <http://www.bersin.com/>
- [19] *HP Education Service*, <http://www.hp.com/education/>
- [20] Portalul SEI, <http://portal.edu.ro>
- [21] 2020 Science, Microsoft Research Cambridge, UK

MOTIVATION FOR DISTANCE EDUCATION

Răzvan ȘTEFĂNESCU*

Ramona DUMITRIU**

Liliana MOGA***

Abstract

Beginning with the 1980's the new information, communication and computer based technologies stimulated the development of the distance education. In Romania the universities adapted rapidly to this type of learning that became an important financing source for most of them. In this article we approach the causes of attraction for the distance education. For this purpose we use an investigation we did on a group of students at Distance Education including interviews regarding their reasons for choosing this type of learning.

Key words: *Distance Education, Romanian Universities, Students' Perceptions, Labor Market, Knowledge.*

Introduction

The Lisbon Strategy ambitious aim to make the European Union "the most dynamic and competitive knowledge-based economy in the world" implies a rethinking of the European education system, giving it more flexibility and efficiency. Among the ways to reach this objective it is the distance education development.

It is accepted the beginning of distance education or distance learning was in 1728, when a teacher named Caleb Philips made an announcement in Boston Gazette that he offered lessons to be sent weekly for his potential students. This kind of education was stimulated by the development of the postal service in the 19th century. In the twentieth century, new communication techniques were used in distance learning. Beginning with 1980s, the development of Internet services and CD-ROM technologies facilitated the distance learning programs proliferation.

In Romania, the distance learning experienced a significant development in the last decade. It proved to be much more efficient, with lower costs and comparable fees, than the classical type of education. Romanian universities, many of them with financial difficulties, fructified this opportunity offering study programs for distance learning. These programs would become, probably, more important beginning with 2008, when it is expected, because of the demographic processes from the early 1990s, a significant decrease in the number of students from the classical type of education. In these circumstances, the Romanian universities offer for distance learning has to become more attractive for the potential students.

The distance learning in Romania was approached in specialized literature especially from the reform education perspective. In this paper we study the main reasons for choosing the distance education. For this purpose we made an own investigation on a sample of distance learning students from the University "Dunărea de Jos" Galați. Although the results can't be generalized, the perceptions expressed by these students could be considered indices of the motivation for distance education.

* "Dunărea de Jos" University Galați, Faculty of Economic Sciences.

** "Dunărea de Jos" University Galați, Faculty of Economic Sciences.

*** "Dunărea de Jos" University Galați, Faculty of Economic Sciences.

Literature Review

In the specialized literature, distance learning is approached from different perspectives: the changes induced by new technologies, the particularities of teaching, the sociological aspects a.s.o.

Moore (1987) analyzed the effects of the new information, communication and computer based technologies to distance learning in the United States. These inventions determined significant changes in how distance education is designed, delivered and administrated. They also contributed to a new perception of distance learning¹. Holmberg (1991) revealed the students' perceptions to these new technologies².

Ross (1998) studied the main techniques used in distance learning: E lectures, Ask-an-Expert, Mentorship, Tutor Support, Access to Network Resources, Informal Peer Interaction, Structured Group Activity, and Mutual help, stressing that each of them require from teachers ability in communication³. The special efforts that have to be made in teaching in the distance education systems were also revealed by Pereira and Prohmann (1999)⁴.

Some papers approached distance learning from a sociological perspective. They were concerned about the aspects such as repartition on age, gender, location, life roles, and ethnic background a.s.o. Holmberg (1995) found out that, in general, in the USA universities, distance learning students are significant older than the classical type of education students⁵. Several studies indicated the gender distribution of distance learning students is different from country to country, more likely because of the cultural differences⁶. *Kelsey and D'souza (2008)* studied how the perceptions of students about distance learning determined the impact of interaction on the efficacy of distance learning⁷.

Georgescu (1999) stressed the necessity of the Romanian education system reform that implies changes in the distance learning⁸. Also Marga (2000) advocated for new approaches over the distance education⁹.

Theoretical Background

The data used in this paper were provided by an own investigation realized in the period October 2007 – March 2008. We used a sample of 94 distance learning students from the Faculty of Economics – University “Dunarea de Jos”, Galati. In this sample we included students at different specializations and in different years of study.

The investigation implied two stages. First, the data were collected by group interviews, a technique that allowed us to detect the collective mood. Each interview lasted between 45 and 60 minutes and each group had between 8 and 12 students. Second, the students were questioned. We assured to each of them the protection of anonymity.

In our investigation we approached two aspects:

- the students' expectations after graduation;
- the utility of the knowledge supplied by the education process.

Student Expectations after Graduation

In our investigation we tried to find out what distance learning students expect after graduation. It resulted the age and the present jobs had significant influences over the students' attitude (table 1).

Table 1 - Distribution of students by age and the present job

Age Present job	Under 25 years	Between 25 and 35 years	Between 35 and 45 years	Over 45 years	Total
Company	-	-	11	3	14
SMEs	2	23	32	-	57
Public Institution	-	-	7	8	15
Entrepreneur	-	-	3	-	3
Unemployed	5	-	-	-	5
Total	7	23	53	11	94

All eleven students older than 45 years chose the university studies not necessary because they wanted to be promoted but because they wanted their present jobs from companies or from public institutions to be safe. They explained they were worried because of the universities graduates increase that could threaten their jobs. The eleven companies' employees with the age between 35 and 45 years hope, after becoming economists, to be promoted. From the seven public institutions' employees with the age between 35 and 45 years, four wish, after the graduation, to obtain a well paid job to a company, while the other three hope to be promoted. From the 57 students employed by small and medium enterprises (SMEs), 51 wish, after graduation, to be employed by companies. The rest of six students, older than 35 years, chose the university studies mainly because they wanted their present jobs to be safe. From the distance learning the three students who are entrepreneurs hope to achieve the knowledge necessary to run better their business. After graduation the five students who are unemployed hope to achieve jobs as economist to any kind of employer.

The Utility of the Knowledge Supplied By the Education Process

In our investigation we asked students to characterize the importance they perceived for the knowledge supplied by the education process. Many of them complained that in university they receive too much theoretical knowledge and too little practical one. There also resulted major differences in perceptions between the students with jobs similar to the profession of economist (accountants, salesmen, cashiers a.s.o.), and the other students (table 2).

Table 2 - Students' perceptions on the utility of the knowledge supplied by the education process

Degree of importance Categories of students	Students with jobs similar to the profession of economist	Other students	Total
Very big importance	1	3	4
Big importance	4	16	20
Medium importance	26	11	37
Little importance	19	2	21
Very little importance	12	-	12
Total	62	32	94

A half of the students with jobs similar to the profession of economist assigned a little or very little importance to the knowledge offered by the distance learning. From the group

interviews the results show these students consider the experience in their jobs offered enough practical knowledge. Instead, more than a half from the other students assigned a big or very big importance to the knowledge offered by the distance learning.

Table 3 – Descriptive statistics for the importance of the practical knowledge supplied by the faculties perceived by the students

Indicator \ Category	Students with jobs similar to the profession of economist	Other students
Mean	2.40	3.63
Standard Error	0.12	0.13
Median	2.50	4.00
Mode	3.00	4.00
Standard Deviation	0.93	0.75
Sample Variance	0.87	0.56
Kurtosis	0.23	0.04
Skewness	0.10	0.21
Range	4.00	3.00
Minimum	1.00	2.00
Maximum	5.00	5.00
Sum	149.00	116.00
Count	62.00	32.00
Largest (1)	5.00	5.00
Smallest (1)	1.00	2.00
Confidence Level (95.0%)	0.24	0.27

We transpose their answers on a rating scale from 1 to 5 (1 for very little importance, 5 for very big importance) in order to facilitate comparison between the two categories of students. The descriptive statistics that resulted confirmed the significant differences (table 3).

Conclusions

In this paper we approached the motivation for distance learning. For this purpose we realized an own investigation among distance learning students from the University “Dunarea de Jos” Galati. We found out that the reasons they chose the university studies depend on the age and on the present jobs.

We also found out that the utility they perceived for the knowledge supplied by the education process is significant lower for the students with jobs similar to the profession of economist than for the other students. The main reason would be the first consider themselves generally ready for the profession of economist and they want only the diplomas to offer this right.

Although the sample we used was too small for generalization, the results of the investigation may be useful in order to understand the students’ attitude towards the distance learning education. These results may be also useful for the elaboration of the universities policies of calling candidates for this type of education. However, other researches would be desirable, in which to be approached the distance learning situation from other universities.

References

1. Moore, Michael G.. *Distance Learning in the United States: The Near Future*. *Distance Education*, Australia, 8(1): 36-46, 1987.
2. Holmberg, Borje. *Open and Distance Learning in Continuing Education*, IFLA Journal, 17: 274-282, 1991.
3. Ross, E. *Some Thoughts on Distance Learning*, MUTATE, Geneva, 1998.
4. Pereira and Prohmann, *Distance Learning: A Technological Tool*, Social Science Research Network, 1999.
5. Holmberg, B. *The evolution of the character and practice of distance education*, *Open Learning*, 10(2), 47-53, 1995.
6. Thompson, Melody M. *Distance Learners in Higher Education* In Chere Campbell Gibson, ed., *Distance Learners in Higher Education: Institutional Responses for Quality Outcomes*, Madison, WI: Atwood Publishing, pp. 10-18, 1998.
7. Kelsey, Kathleen D. and Alan D'souza, *Student Motivation for Learning at a Distance: Does Interaction Matter?*, *Online Journal of Distance Learning Administration*, Volume XI, Number I, University of West Georgia, Distance Education Center, Spring 2008.
8. Georgescu, D. *Reforma învățământului - o șansă pentru schimbarea de mentalitate*, Editura Trei, București, 1999.
9. Marga, A. *Anii reformei: 1997-2000 cu o listă a reglementărilor învățământului*, Fundația de Studii Europene, Cluj-Napoca, 2000.

THE INTEGRATIVE TENDENCIES OF THE CIVIC CULTURE IN THE AGE OF GLOBALIZATION

Elena NEDELUCU*

Abstract

The aim of this paper is to explore the role of the civic culture and education in the globalization era. Recent sociological studies (G. Devin and others) infirm Norbert Elias' hypothesis according to which the multiplication and the complicate "interdependent connexions" established generate a mechanical tendency towards the integration and even unification of the international communities. One has noticed that the mentioned interdependent relations lead to stable integration forms only if they are supported by an appropriate axiological-normative system: values, beliefs, democratic procedures. In other words, European integration must be supported by a political culture founded on knowledge, communication, civic involvement and tolerance.

The major role attributed to civic culture in accomplishing social inclusion and in creating a "common identity" in the globalization era encourages and justifies the deep and multidimensional analysis that it is subject to, as well as it reveals the importance of performing research work in this field, thus bringing solid arguments for my option. The process of revealing its specific characteristics in a society that has experienced a tough transition process marked by an accentuated anomical state – as the Romanian society has – is not only epistemically but also socially and pragmatically useful. The results of the political culture pattern can direct the evolution and the intensity of the civical socialization process.

In the first part of the paper I will analyse the "aggregate sovereignty" concept in the age of mondialization and in the second part, the interdependencies between democracy and social inclusion. The third part explore integrating tendencies of civic culture in the globalization era.

Keywords: *civic culture, social inclusion, multicultural and intercultural societies, mondialization, aggregate sovereignty*

Introduction

This paper intend to explore the integrative tendencies of the civic culture and education in the globalization era.

Today against the more and more accelerated globalization process, and in the context in which citizenship gains new, supra-national dimensions, the multidimensional exploration of civical culture versus political cultural particularities, as well as of its integrating tendencies has become significantly important.

Recent sociological studies (G.Devin and others) infirm Norbert Elias' hypothesis according to which the multiplication and the complicate "interdependent connexions" established generate a mechanical tendency towards the integration and even unification of the international communities. One has noticed that the mentioned interdependent relations lead to stable integration forms only if they are supported by an appropriate axiological-normative system: values, beliefs, democratic procedures. In other words, European integration must be supported by a political culture founded on knowledge, communication, civical involvement and tolerance.

For discovering the integratives tendincies of civic culture in the contemporary society I intend to begin with the analyse of the following two essential and inerent problems: : The

* Associate Professor, Ph.D., Social and Administrative Sciences Faculty, "Nicolae Titulescu" University.

“Aggregate Sovereignty” concept in the Age of Mondialization and The Inclusion, multiculturalism and interculturality in the democratic societies.

In time, research work has offered a large number of explanations as to the definition and structure of the political culture concept, as to its different levels of fragmentation and homogeneity, the political culture types co-existing in society and the ways in which they influence democratic stability, perception, evaluation and the enforcement of the normative-legislative system, as well as the relationships between civic culture and the human rights domain etc.

In our days, the major role attributed to civic culture in accomplishing social inclusion and in creating a common identity in the globalization era (J.Baudouin, G.Devin and others) encourages and justifies the deep and multidimensional analysis that it is subject to, as well as it reveals the importance of performing research work in this field, thus bringing solid arguments for my option.

I hope the present study will contribute to the completion of some significant knowledge niches in the political research area and it will open new exploring fields regarding the role of civic culture in the Age of globalization.

Literature Review

Civic culture has been a topic of significant interest for a large number of research workers. G. Almond, S. Verba (1956) and L. Pye are known as the parents of political culture, and thanks to their effort the research in this field has drawn the attention to more and more specialists generating an important number of controverses in the course of time. R. D. Putnam, J.Coleman, S.M.Lipset, R.Lane, M.Duverger, Ch. Foster, D.Easton, A. Wildawsky, F.Fukuyama, S.Huntington, G. Sartori, G. Devin are just a few famous names that have brought substantial contributions to the research work performed in this field. After 1989, research work concerning political culture patterns has become more intense in Romania, too. D. Sandu, O. Trasnea, V. Magureanu, A.Craiutu, V. Tismaneanu, D.Pavel, M. Miroiu, V.Pasti, A. Mungiu are only a few of the researchers that have substantially contributed to the study of the particular features concerning socialization and Romanian political culture. Although the number of studies dedicated to socialization and the political - civic domain has continuously increased, research work opportunities in this field are still generous, and they reveal areas of study that remained unexplored or insufficiently explored, of which some will represent the object of our research.

The Complexity of the World in the Age of Mondialization. The “Aggregate Sovereignty” Concept

At the end of the 60s, the general perception of the international scene radically changed: the increase in complexity of the international system, the multiplicity and variety of its actors became more obvious.

The academic researches (especially the extension of the tangible research) have emphasized the emergence of new and significant subjects in the international scene, from individuals to international and supranational organizations.

Ever since 1957, John Herz noticed the decline of the “territorial state” due to the double movement of “vertical intrusions” (which show up with the aviation) and “horizontal intrusions” (which came up with the increase in international exchanges).

In the same context, James Roseneau notices that today we witness a “division into two” of the international scene: on the one hand, a “state-centred” world, articulated around the diplomatic

and interstates classical model, and on the other hand, “multi-centred”, in which national states must confront the more and more harsh competition of other forms of collective governing and individual involvement which, although different between them, have as the common goal to diminish the role of the state, to eliminate the substance and the legitimacy from its actions.

The idea that the state-actor, subscribing to a network more and more dense of international connections and various interests will have a reduced capacity to decide in a sovereign manner, will be made to reduce its autonomy limit, has more and more followers. Today, the world presents itself as a complex network, with multiple trans-national connections which bring together the internal levels (national and subnational) with the external ones (international, supranational). The theorists of the international relations cannot relatively ignore the new international phenomena: the development of the multinational enterprises, of the intergovernmental organizations, nongovernmental organizations, and of the transborder movements: migration, trade, tourism, terrorism (G. Devin, 2002). They ask themselves more and more often to what extent these actors respect the principle of national sovereignty, towards what do the new or the old organizations move, what part do they play, what power do they have? To what extent do the governmental organizations tend to delimit themselves from supranational organizations? Do these organizations stay as active intergovernmental actors (interstate) on the international scene or they are inclined to become suprastatal actors? Does the force of the supranational and subnational actors grow to the detriment of the interstate actors?

In his well-known paper “The New Diplomacy”, Shaun Riordan analyses United Nations, European Union and NATO at the supranational level of the international scene, in other words, he thinks that these organizations are suprastatal actors. He formulates pertinent arguments in support of his point of view, revealing attitudes, rules, and suprastate practices used by these organizations. Instead of the national sovereignty concept he proposes another concept which, he asserts, better reflects the international reality, namely, the concept of “aggregate sovereignty”.

NATO, EU, UN, WTO, “they either limit the freedom to act of its members (states), or take over the defence and the foreign policy”. (Shaun Riordan, 2004).

USA, the only superpower, although it despises UN (it refused to pay its debts for a long time) cannot avoid it. It must at least create the appearance that it acts under its authority. After the 11th of September attacks, the level of acceptance of the UN by the USA has increased. USA understood that isolation, even for a superpower, is not a viable option, and so, they changed their attitude, paid their debts to UN and have entrusted to it the mission to reconstruct Afghanistan. Although WTO is entirely an American creation, USA must take into consideration its rules, just as any other state. USA subjects itself to WTO and NATO rules not because of altruism, but because they want the other states to do the same. USA shares part of its sovereignty in order to build a dignified model to be followed by the other states, and to enjoy the benefits that result from this fact.

With the fall of the Berlin Wall, the role of the supranational organizations has constantly increased, “the concept of national sovereignty aggregation under the auspices of an organization, with regard to a superior good, is connected to the image about the world that diplomats have”. (Shaun Riordan, 2004) On the international agenda there are problems which cannot be solved at a national level: the international environment, crime, drugs, terrorism, etc.

These organizations have the greatest impact over the small and medium countries which have no force to act on their own at an international level. For instance, inside EU, the political coordination and the lobby activity are gathered in Brussels. Already, embassies deal more with internal problems, instead of dealing with traditional issues of foreign policy.

In a globalized world, the only realistic option for the medium and small states is to unite, putting their resources and sovereignty together, if they want to have any influence over the

international events. (Riordan, 2004). The French and German fusion of the steel and coal industries – the founding act of EU – is also a major act of aggregate sovereignty; and so is CFSP (The Common Foreign and Security Policy), which represents not only a intergovernmental collaboration in foreign affairs, but it also proof of the fact that European states taken separately cannot have enough authority and influence to promote and protect the interests of the citizens in the modern world, while EU can do this. Once established, the rights of the European citizens will be easier protected outside with the help of the Union, than with the help of the member states consultancies. A massive body of European laws which regulates the internal affairs of the member states has been adopted. The disappearance of the distinction between internal policy and foreign policy has strengthened the impact of EU on diplomacy. (In fact, the independent activity of some embassies presents the risk of producing confusion and of undermining the impact of the European message).

Diplomacy inside EU is preoccupied with observing the programme of the economic reform, strengthening the legislation in the area of migration, the reform on the subventions for farmers, the enforcing or the annulment of restrictions regarding the commercialization of the potentially contaminated meat. These preoccupations have become key elements of the political work done in the bilateral embassies, instead of the foreign policy or defence activities (Riordan 2004). This fact weakens the connection between the foreign policy ministries and the diplomatic networks, at least inside EU. The diplomats often report not to the Ministry of Foreign Affairs but directly to the Ministry of Agriculture or Economy. (The Ministry of Foreign Affairs is diminishing its role in favour of the Prime Minister or other generalist ministries).

Inclusion and Social Multiculturalism in a Complex World

a. Democracy and Social Inclusion

Inclusion and social multiculturalism are essential demands in a complex world, during the process of globalization – democratisation. The need for inclusion is present in any society, but the chances for its achievement are significantly bigger in a democratic society.

The human being is by definition a social being, belonging to a group: “he cannot survive, can develop and distinguish oneself only in and through society”. Just as it was necessary to affirm more substantially one’s individuality, oneness, one also needs to be “confirmed”, understood, and appreciated by the others, the fellow creatures. In other words, social inclusion plays a fundamental part in a man’s life. Trying different statutes and roles, the interaction with the other members of the group, lead to the shaping of our social identity, strengthen our devotion to the group, the feeling that we are useful, that we are important for those around us. At the same time it gives extra meaning and energy to our actions, it helps us accomplish ourselves as persons; grow our self-esteem and feeling of security.

On the other hand, a society whose members feel included, integrated, is a society that functions well. Its members will tend to respect values, norms, the “behavioural schemes” proposed and appreciated by a certain society, will feel obliged to get involved in the life of the society, to fulfil their “social obligations”. In other words, the life of the society, the way in which it is organized and functions depends on the degree of inclusion of its members.

In the societies with a low level of inclusion we come across a big number of marginal categories such as the unemployed, the poor, the homeless, delinquents, drug addicts, prostitutes, disabled people, discriminated ethnic minorities. In such societies, there is an increasing number of districts, areas and even regions where people lead “a life of misery”: resources to the limit of subsistence or even worst than that, low levels of education and social assistance. Such a life generates and strengthens the frustrations, the anger, “the culture of the street” or the so-called

“subcultures behind the block”, and at the same time leading to the rejection of the projects, institutions, values and norms of the “marginalising” society. *The persons and the groups (ethnic, religious or of any other nature) which feel excluded is marked by anomie, isolation, suffering, becoming part of what is called “underclass”: the class of the underprivileged, of those thrown at the outskirts of society. In such environment frequently there are virulent nationalist manifestations, periodical interethnic conflicts, violent outbreaks without well-outlined goals (with vague goals).* On the other hand, a society which despises and isolates certain persons or social groups cannot expect gratitude, devotion, and civic behaviour.

Lack of social integration through its consequences is a failure both for the individual and for the society. On their own, the persons and the marginalized groups cannot surpass their situation because they lack the resources (economic, educational, and political) they need and so they are subjected to a continuous process of discrimination. Feeling deserted by society, they tend to isolate themselves even more from it, adopting behaviours and ways of life different or even deviated, connected to transgressions, emphasising even more their peripheral condition. In time they can turn into genuine dangers for society.

Among the main democratic processes which support social integration we want to enumerate the following: intercultural cooperation, harmonization of the personal interests with the collective ones, the presence of moral-civic values in the personal values scale, respect for the rights of others, fulfilment of citizenship obligations etc.

By definition, democracy presupposes the participation of its members in the management of the society, in the elaboration and the application of the decisions. Participating in social life, people can satisfy their imperious need for social integration, for belonging and identification with the social universe in which they live and which gives meaning to their life. And the more they will be part of the decision making process, the more they will agree with the governmental decisions.

In democratic society, people have the possibility to express their opinions, interests, and personal values. Harmonising the differences of opinion and interests – condition for integration and social peace – is achieved through dialogue, negotiation, and the art of persuasion. In this way, both the personal and the social needs are accomplished, the responsible involvement of the individuals and of the groups in the socio-political life and the attachment to the civic-democratic values (freedom, responsibility, tolerance, dignity) increase, and social consensus is also achieved.

Society gives important rights to its members, and they are entitled to enjoy them as long as they can pay off their civic obligations. In this way, the rights-obligations exchange takes place between society and its members, which has as main effect the strengthening of the social integration and the consolidation of democracy. The studies have demonstrated that where there are many marginalized people (individuals, groups) democracy is in danger. Democracy is being consolidated as it manages to reintegrate in social life the persons and the groups at the outskirts of society.

To conclude, we may say that democracy favours, more than any society, the active integration of the individuals in society. In return, active integration and social inclusion strengthen democracy.

b. Interculturality in Contemporary Democratic Societies

One of the main functions of culture is to strengthen social cohesion conferring legitimacy upon the social relations. Culture gives meaning to the ties that bring people together, and allows them to integrate in social groups. Sharing the values, norms, customs of the group, the man will attach more to it and will feel more secure. In return, the social group will have no reason to show

him hostility. *Culture explains not only the resemblances and the social integration, but also the differences and even the conflicts between groups and societies.*

Specialized literature explains the existence of many social groups and specific cultures in modern societies with the help of two new concepts: multicultural society and intercultural society. Although similar, in reality the two terms designate different realities. *MULTICULTURAL SOCIETIES* refers to different nationality, religion, culture and ethnic groups sharing the same territory, but which don't have a common point or do not interfere with each other from equal positions. In such a society, the differences can be negatively perceived, and discrimination can be considered legitimate. The minorities are massively tolerated, but are not accepted or taken into consideration. Even where there are laws meant to stop discrimination, in reality they do not truly prove their efficiency.

INTERCULTURAL SOCIETIES are groups of different nationality, culture, etc. living together in the same territory, and which mutually recognize and respect their ways of life and are in good relations with each other. We are talking here not only about a process of tolerance, but also about the maintenance and cultivation of good intentions. In this situation, cultures and ethnic groups are just as important, between them being no hierarchical relations. In other words, Micheline Rey asserts that "who says intercultural, necessarily says, starting from the prefix "inter", interaction, exchange, openness, reciprocity, objective solidarity. It also says "culture": acknowledging the values, the ways of life, the symbolical representations to which human beings, individuals or societies relate to in their interaction with the others, and in understanding the world, recognizing their importance and the interactions which simultaneously interfere with the multiple registers of the same culture but also of different cultures."

History demonstrates that the great civilizations had intercultural vocations (knew how to value the cultural diversity of their time). Art gives us multiple examples of the coexistence of the different cultural universes. The artists were some of the first to understand how profitable the intercultural exchanges are: they feed, freshen up, and revitalize the artistic creation.

Opening towards other systems of values leads to the enriching of imagination, forms of expression, and contents. The history of humanity shows us that in those regions of the world in which different cultures had relations, the artistic creation has reflected this fact enriching itself in terms of form, content, and styles. Such an example is Andalusia of the VIII-XV centuries, which turned Spain into a crossroads where several cultures met: Muslim, Hebrew, Byzantine, etc. The cultural dialogue has generated an extraordinary creative effervescence in the fields of architecture, sculpture, painting, music, poetry, philosophy etc. The so-called Mudejar art came into being, and it will be exported to the "New World" after the Spanish conquest. Another territory with intercultural vocation was also South America and the Caribbean. The Spanish, Portuguese, French, English colonisations, the transfers of European, African, and, later on, Hindus, Chinese, Levantine populations have led, starting with the XVII century, to the increase of the artistic effervescence, to the creation of some works of art which reflect the appearance of a specific culture as the result of the conciliation, coexistence, synthesization of different cultures. At the same time, Andalusia is the birth place of a famous thinker: Averroes of Cordoba (1126 – 1198), considered to be the symbol of an exceptional cultural openness and whose work marked the universal history of literature and philosophy. Other existing evidences of the Oriental, African, Western cultural dialogue are: the famous Giralda Tours and the Golden Tour (Seville), Alhambra Palace and the Arabic University (La Granada), The Great Mosque (Cordoba), etc.

In spite of the cultural syncretism and specific artistic vitality of these places and times, let us not believe that here there have been no manifestations of intolerance and interethnic, religious or racial tensions. Beyond all these, the cultural exchanges have given birth to a specific blooming culture, to some spiritual richness never met before in those areas. The examples taken from

history strengthen our conviction that today, in such a diverse world the conscience of the multiplicity of beings, groups, societies is a necessity.

Accepting diversity, having an adequate behaviour in a multiple reality, and capitalizing the various differences is an obligation (noble one) for each and one of us.

In modern society, human diversity (biological, cultural, linguistic, etc.) is an indisputable reality. Whether we like it or not, we are aware of it or not, *cultural multiplicity in exactly the reality in the middle of which we live*. If we don't want the human relations to suffer, we should start by admitting and being aware of its existence just as we are aware of our own existence. Ignoring it is not only noxious, but also counterproductive. Fundamental characteristic of XXI century, *cultural multiplicity* can be a source of enrichment for the individuals and the society, a factor of progress or, on the contrary, the reason for major conflicts. In itself, it is neither bad, nor good. But the way in which it is administrated can have the above-mentioned effects.

To conclude, cultural diversity – expression of the human generosity – must be known, accepted and capitalized by modern societies for their mutual advantage.

Cultural diversity among and inside societies suggests the fact that there is no singular cultural pattern, “the best”, that there is no inherent good or bad culture, the idea that represents the basis of *cultural relativism*. This is a theoretical principle imposed by modern cultural anthropology in interpreting the cultures of the world and the relations between them. It opposes the tendency of the men to evaluate the practices, traditions, and behaviours of other people as compared to theirs. That is why, the values of a culture must be analysed in close connection to the social context they belong to and not following the criteria of a different culture. For a European, from his cultural perspective, the veneration of the cow – animal considered sacred in India – by the Hindu population is at least bizarre. The principle of cultural relativism rejects ethnocentrism, meaning the act of labelling the habits of other people, ethnic groups, as being “good” or “bad”, “civilized” or “backward”, and to consider their own culture as being morally superior to another one. Rather than doing hierarchies with the world's cultures, we should try to better know and understand them: to find out why do people behave in a certain way, what do they cherish the most, which are the rules that regulate their life. On the other hand, cultural relativism does not mean that any cultural practice is allowed, does not mean relativization, annulment of the normative system and loss of the role to regulate the social relations. Those supporting ethnocentrism perceive the practices of other cultures as deviations from normality, and not only as simple and natural differences between cultures. The ethnocentric manifestations are more frequent in traditional societies, homogenous and isolated, in which the probability of the contact with other cultures is very small. Ethnocentrism operates with expressions such as “the chosen people”, “the blessed nation”, “the superior race”, “treacherous foreigners”, “and backward people”, “barbarians”, “savages”. It has contrary effects on individuals, groups and societies. On the one hand, it strengthens nationalism and patriotism, and protects the ethnic identity; on the other hand it feeds racism, discourages change and blocks the cultural exchanges. In certain circumstances, it helps cultural stability, but in others it can cause the collapse of a culture and the disappearance of a group.

At the other extreme, *xenocentrism* consists of the underestimation of the native cultural values and the overrating of the foreign cultural values. It builds upon the prejudice that everything that is foreign is automatically good. Civic culture has as its central value acceptance and capitalization of cultural diversity. Civic education invites to rejecting both ethnocentrism and xenocentrism, and adopting the position of cultural relativism through which people can distance themselves from their own culture in order to look around with more objectivity and realism.

If in a totalitarian society the values and the norms are imposed upon the members of the society (conformity, collectivism) with the intention to wipe the interethnic, intercultural

differences, then in a democratic society the situation is the other way around. Democracy develops a civic, participatory culture, a culture of the free speech, of the interethnic dialogue, responsibility, consensus and diversity. It is a culture based on communication and persuasion which allows and encourages change by appeasing its excesses, which combines tradition with modernity.

Democratic culture, by proposing a set of values and principles (equality of chances, respect for the dignity and diversity of human beings, assuming responsibility, etc.) creates the premises for achieving and strengthening solidarity and social integration.

To the extent they are shared by the members of the society and are translated into attitudes and behaviours, the democratic values have an inclusive role. They address every member of the society, without regard to ethnic background, religion, sex, age, education, etc.

Democracy is an inclusive society also through the manner it approaches the differences and even the value conflicts. It does not reject differences, on the contrary even, it tends to respect and capitalize them. The value conflicts try to prevent or to administrate them so that they don't turn violent. It was noted that in any society there are *value conflicts*, what differs being the degree in which they are accepted and administrated. While totalitarian societies ignore or suppress them, the democratic societies are preoccupied with their tracking down and manage to a great extent to administrate them. Examples of value conflicts which democratic society manages to neutralize better than any other type of society are the tensions between freedom and order, or between equality and freedom. Regarding the administration of interethnic conflicts, democracies haven't always managed to find the best and prompt strategies.

The Role of Culture and Civic Education in Contemporary Society

The major changes produced on the international scene force us to rethink the role of the civic culture in such a world. It is known that, beginning with the modern societies, political culture has played an essential part both in the life of the community and in the life of the individual. The community was offered a set of values, attitudes, norms and ideals which ensure the functionality and the coherence of its institutions. The individual was given a guide to facilitate his participation in public and political life. Today, the increase in number and diversity of the actors demands the development of a political culture capable to give coherence and to support the process of conciliation, harmonization and making common cause of the international community. This is civic culture: "a pluralist culture, based on communication and persuasion, a culture of consensus and diversity, a culture which has allowed change, but moderating it"(G.Almond, S.Verba,1955). It characterises that society in which there is a great number of individuals who actively take part in public life, own political information, are aware of their rights and liberties and cooperate in order to achieve their common interests. It is that type of culture that promotes social inclusion and multiculturalism.

Education in general and civic education in particular have as their main mission, together with the forming and development of the individual, also the accomplishment of the social inclusion. Thus, it is expected that in school young people are taught not only general knowledge, values and norms, but also cooperation skills, conflict resolution, taking initiatives, taking up responsibilities, participating in the decisions-making process. In other words, they should learn to prepare themselves for their part as future citizens and human beings.

H. Richardson in his paper "National Identity" considers that achieving the following objectives would be essential premises for the young people's integration in school and society:

- practicing group communication and cooperation
- manifesting group and individual responsibility
- democratizing relations, taking part in the decisions-making process (developing decision making competences)
- affirmation and personal development

In achieving these objectives, the trainers have a very important role, as they should administrate with maximum responsibility these processes. The studies show that, although school intends to achieve these goals, often they remain only at the level of aspirations. Instead of personal achievement, the school offers the young person a diploma. Instead of practising cooperation, school rather encourages competition. Instead of encouraging young people's initiative and responsibility, school limits them by imposing on them an overburdened, heavy and rigid syllabus. Often, social control takes the place of the democratization of relations and development of the decision-making abilities of the young people.

Coming back to the goal of personal affirmation and development, we notice that preconditions for its achievement are the importance for the members of the school to know each other and the manifestation of mutual respect.

Maybe the first concern of a teacher should be to know his disciples, to know their abilities, talents, preferences, but also their weaknesses and limits. Only by knowing them we can support and direct them in reevaluation of their talents, capacities, in passing all bounds.

The great privilege of the teacher is to discover a new Mozart, Eliade or Brancusi. But great is also the privilege to be around any young person at the age of the big trials and major decisions and to support them in finding their place and role in this world.

Conclusions

In modern society, human diversity (biological, cultural, linguistic, etc.) is an indisputable reality. Whether we like it or not, we are aware of it or not, *cultural multiplicity in exactly the reality in the middle of which we live*. *Cultural diversity* among and inside societies suggests the fact that there is no singular cultural pattern, "the best", that there is no inherent good or bad culture, the idea that represents the basis of *cultural relativism*. To conclude, cultural diversity – expression of the human generosity – must be known, accepted and capitalized by modern societies for their mutual advantage. Accepting diversity, having an adequate behaviour in a multiple reality, and capitalizing the various differences is an civic obligation for each and one of us.

Today, the increase in number and diversity of the actors demands the development of a political culture capable to give coherence and to support the process of conciliation, harmonization and making common cause of the international community.

Democracy develops a civic, participatory culture, a culture of the free speech, of the interethnic dialogue, responsibility, consensus and diversity. This culture based on communication and persuasion allows and encourages change by appeasing its excesses, and combining tradition with modernity.

Democratic culture, by proposing a set of values and principles (equality of chances, respect for the dignity and diversity of human beings, assuming responsibility, etc.) creates the premises for achieving and strengthening solidarity and social integration

In the future I intend to deeply analyse the influence which Romanian civic culture pattern has on the enforcement of the democratically normative legislative system. The research will pay

particular attention to the characteristics of the political cultural model specific for each social category: young students (18-30 years old). There are studies (Elena Nedelcu, 2000) that indicate that civic involvement is not significant for this age category either, which is different from the countries known as being traditionally democratic (U.S.A., France, Sweden, Holland etc.). An international survey - accomplished between 1999-2000 by the young French sociologists coming from 64 universities in the world and whose results were published in *Le monde* under the title "*The students Planet*" reveals that young people coming from countries that are traditionally democratic are very active when it comes to civic initiatives though they do not seem to be attracted by the political career, preferring instead the professional one. I am interested in proving if these assertions are still true or not.

References

1. Almond Gabriel, Verba Sidney , „Civic culture”, DU Style, Bucarest, 1996
2. Badie B., Une monde sans souveranite, Paris, Fayard, 1999
3. Bennett, C., „Comprehensive Multicultural Education: Theory and Practice, Needham Heights”, MA: Allyn and Bacon, 1995
4. Elena Nedelcu , „Democracy and civic culture”, Paideia, Bucarest, 2000
5. Fukuyama Fr., Trust, Antet, 2001
6. Guillaume Devin, „Sociology of internationals relationship”, La Decouverte& Syros, Paris, 2002
7. Gilles Ferreol, Guy Jucquois, Dictionarul alteritatii si al relatiilor interculturale, Polirom, 2005
8. Gilles Ferreol (coord.), „Identity, citizenship and social relationship”, Polirom
9. Hofstede, Geert, 1996, „The management of multicultural structures”, Economic, Bucarest
10. Jean Baudouin, „Introduction in the political sociology”, Amarcord, 1999
11. Lavinia Barlogeanu(coord.), „Identity and globalization”, Education 2000+, Humanitas, 2005
12. Leleux Claudine , „Demopedie and democracy”, Entre-vues, Bruxelles, 1995
13. Markus H.R., Kitayama S., „Culture and the self: Implications for cognition, emotion and motivation”, Psychological Review, 98, nr.2, 1991
14. Michel Crozier, „Modeste state, modern state”, Ed. Fayard, 1991
15. Peter Rose, Penina Glazer, Myron Glazer, „Sociology”, Prentice Hall, 1990
16. Salat Levente, „Liberal multiculturalism”, Polirom, Iasi, 2001
17. Shaun Riordan, „A New diplomacy”, Antet, 2003

RECENT EVOLUTIONS AND TENDENCIES CONCERNING THE ROMANIAN POPULATION: A CHALLENGE FOR CENTRAL AND LOCAL ADMINISTRATION

Andrei STĂNOIU*

Abstract

After December 1989, Romanian population experienced a sharp decline of its birth rate (as a result of abolishing the very restrictive law about abortion and worsening economic situation) and a rising rate of external migration. The main results from the demographic point of view were a continuous diminution in the population number and a process of population ageing. There are, also, a lot of economic and social consequences (on the level and structure of the labour force, on the medical and social assistance system, on the educational and cultural system, on the professional structure of the population, on family and its status, structure and function and so on). We can not ignore, also, possible serious consequences on nation security and the relations of our country with other countries.

All of these represent real challenges for workers in local and central administration. They have to find solutions to solve the problems which appear and to diminish as much as possible the negative effects of these evolutions.

Key words: *rate birth, fertility rate, natural growth of the population, migration growth, demographic transition.*

Introduction

The transition period, which came after the 1989 December events, encountered profound changes in all the domains of social life in our country: starting with the economic, social and political life and finishing with the spiritual and moral one.

The complex connections and interactions between the population subsystem and the other subsystems of the global social system, as well as the multiple determinations and the social, political and cultural implications characteristic of the demographic phenomena and processes have generated profound and dramatic changes as to the demographic situation of our country. These changes may affect the whole future evolution of our country, and to have serious sometimes predictable consequences over all the social life sectors in Romania, as well as over the position and role of the state within the international context.

The changes that have already appeared, the ones we expect to come in the future, as well as the major risks associated to these changes should be a main concern for all the responsible factors existing at a central and local level, whose role is also to find solutions for mitigating these dangerous demographic evolutions and diminishing their destructive and disorganized effects.

Adopting new measures and initiating new actions also implies a good understanding of the topic in discussion.

Literature review

We have take into consideration the valuable contributions brought by the specialists in the field. First of all we should mention Academician Vladimir Trebici, who, immediately after 1990,

* Associate Professor, Ph.D., Dean of the Social and Administrative Sciences Faculty, "Nicolae Titulescu" University.

was the first to point out at the dangerous demographic evolutions that started to manifest and suggested that a new demographic policy should be adopted in relationship with the new social, economic and political conditions in our country. The remarkable study – “Is a new demographic policy necessary to be adopted in Romania?” – appeared in the magazine “Social Research Works”, nr. 7/1994. Academician Vladimir Trebici was the one who created the Centre for Demographic Studies within the Academy of Romania, a centre which inherits his name and whose role was to stimulate and promote demographic research and to suggest solutions for important decisions and ways of dealing with demographic problems. Professor Vasile Ghețău, the present director of the centre founded by Vladimir Trebici, has analyzed – as his mentor once did – the demographic situations in our country, bringing into evidence how serious our demographic problems are and mentioning the necessity to adopt urgent and efficient measures to at least reduce their extremely serious consequences. One should make reference to the following remarkable studies written by professor Ghețău: “Transition and its Demographic Impact”, the “Social Research Work” magazine, nr. 1/1994, “The Decrease of the Population and Demographic Ageing – One of the Great Contempt Acts in the face of Romania at the Beginning of the XXIst century”, in “Population and Society”, “Supplement”, nr. 1/2001, and “The Demographic Decline and the Future of Romanian Population. A perspective from 2007 over the Romanian population in the XXIst century”, Editura Alpha, MDN, 2007.

Besides these authors one can add others like: Tr. Rotariu, M. Țarcă, V. Sora, I. Hristache, C. Mihăescu, who managed to accomplish profound, scientifically valuable studies on the demographic problems of Romania.

Unfortunately, the results of the numerous research works and the alarming signals pointed out by these works did not generate a significant effect on decision factors. These were either ignored or revealed lack of professionalism and amateurship. The few measures that were adopted were sporadic and quite ineffective.

What do the changes recorded at demographic level in our country consist of?

The first and the most spectacular change was the decrease of the total number of the population. Thus, if on July 1st 1990, the Romanian population was of 23, 206, 720 inhabitants, then the census accomplished on January 7th 1992 revealed a total number of 22, 810, 035, next on March 18th the population number decreased at 21, 680, 974, and on January 1st 2006, the number of inhabitants reached the level of 21, 610, 200 inhabitants. Thus, within 16 years, the Romanian population decreased with about 1.6 million inhabitants, respectively 9.3%. This decrease was **mainly generated by the dramatic decrease of the birth rate** from 16‰ alive born inhabitants in 1989 to 11.9‰ inhabitants in 1992, and to 9.7‰ inhabitants in 2002 and 10.4‰ inhabitants in 2006. This decrease was determined by a series of factors like: legislative factors (the repealing of the laws that prohibited abortion), social and economic factors (the decrease of the living standard, the unemployment generated by the closing of factories, the profound crisis of dwellings, a feeling of uncertainty as to the personal future of the individual etc.), medical and sanitary factors (the family planning programmes, the contraceptive methods existing today at an accessible price and the propaganda used to encourage their usage), demographic factors (reaching the age of maximum fertility of the population born between 1970 and 1984), cultural and value factors (the collapse of the former system of norms and values, including the family values, one of its components being represented by the reproductive behavior, which is clearly influenced by the foreign pattern, even if this behavior is not realistic enough or clearly outlined).

It is difficult to establish with precision the extent to which the above mentioned factors is responsible for the sudden decline registered as to the birth rate. This process can be also influenced by the so-called demographic transition specific for most of the socially and economically developed countries.

Reproductive behavior has recorded other significant changes, among which one can mention: the increase of the number of primogenitures from 42% in 1990 to 50 and 54% in the following years and the decrease of the alive born of the second geniture and especially of the third or more geniture; the increase of the number of women that become mother at a middle age; the decrease of the fertility index (from 2.2 in 1989 to 1.5 in 1992 and 1.3 in 2002 up to the present); the decrease of the rate of weddings (from 7.7% in 1989 to 6.6% in 2006); the decrease if the abortion rates (from 177.6 ‰ women and 3154,4 ‰ newly born alive babies in 1990 to 29‰ women and 736‰ newly born alive babies in 2006). Although the abortion rate is still high (above 60,000 in 2006), still this is incomparably smaller than it was in 1990, when more than 992,000 abortions were made. This determined an important number of companies to adopt different contraceptive means to control fertility and avoid unwanted pregnancy.

The second factor that contributed – to a lesser extent however – to the decrease of the population is the increase of the mortality rate, whose level oscillated between 10.7‰ in 1990, 11.6 ‰ in 1992, 12.4 ‰ in 2002 and 12.1 ‰ in 2006.

As a consequence generated by the evolution of the two components of the natural movement of the population, the natural increase recorded a decrease tendency, becoming negative ever since 1992 and having values that oscillate between the mentioned level and a maximum of -2.7% in 2002 (at present it is of -1.9‰).

Finally, **a third factor responsible for the decrease of the population** is represented by external migration and, especially the sold of external migration. This sold had dimensions that varied between a maximum level of -42.558 persons in 1991 and a minimum level of + 429 persons in 2001. At present it has reached a level of about – 7300 persons. As far as this migration type is concerned, one has to make several observations:

a) the data provided by the National Institute of Statistics concerning the number of immigrants do not reflect the amplitude of this phenomenon, and this is so because of the ambiguity that characterizes the criteria used for defining external immigration. The most likely situation is that the real level of external immigration is higher than the one recorded by statistics.

b) even if we accept the data as being accurate, the level of the external immigration sold has surpassed the level of the natural increase of the population (except the hardly acceptable situation recorded in 2001), which indicates a substantial contribution to the decrease of the population number.

The second major change has been represented by the process of demographic ageing which is more and more prominent. As a consequence the older population has numerically increased, while the younger population has substantially decreased. Thus, the population aged 60 and more than 60 has increased from 15.6% in 1990 to 16.58 in 1992, 19.19% in 2002 and to 19.36 % in 2006. At the same time, the number of citizens aged less than 15 years old has decreased from 23.07% to 22.39% in 1992, 17.34 in 2002 and 15.60% in 2006.

The third important change was the modification of the internal migration flows. On the one hand, the size of the migration growth is changing on the two existing residential levels. For the urban area this growth evolves from + 521.772 persons in 1990 to +74.700 in 1992, - 24.696 in 2002 and -21.537 in 2006. For the rural area, the evolution is uncertain: there is an evolution from -521.422 persons in 1990 to -74.707 in 1992, +24.696 in 2002 and +20.527 persons in 2006.

This evolution was mainly determined by unemployment which affected an important number of persons coming from the rural areas and settled in the urban zone. This evolution is also revealed by the dynamics of the migration flows: rural – urban and urban – rural. If in 1990 the percentage of the persons migrating from the rural area into the urban one was of 69.82% of the total number of migrants and the percentage of the people migrating from the urban to the rural zone was of only 3.52%, then in 1992 the percentages recorded were: 39.21% and 13.73%, in 2002 they were: 22.42% and 30.12% and in 2006 they were 22.08, respectively 29.62%. The situation recorded in 1990 is atypical, the considerably large number of migrants recorded at the time being in fact a transformation of a de facto situation in a de jure situation (most of the ones recorded as migrants were actually living in the urban areas but because of the previous strict legislation these people were not able to settle in the big cities which were considered closed).

However, a significant conclusion is the essential change produced in the migration flows.

The demographic evolution perspectives in our country are not encouraging at all since the demographic situation tends to worsen and multiply the negative effects it has generated.

Birth rate is still low and it will probably decrease more after 2010 when the generations born after 1990 – numerically very reduced – will reach the period of maximum fertility. Birth rate is unlikely to increase since the women of a fertile age are ageing. Consequently the general rate of fertility is unlikely to increase or at least to remain constant.

The death rate will slowly increase and this will lead to an increase of the negative sold in the natural growth of the population.

As to migration significant changes will not be recorded and these will not be able to influence the demographic evolution of the Romanian population.

From a strictly demographical point of view, the forecast evolution of the three components of the population movement will generate the following results:

a) The decrease in the population number. According to the estimations of the United Nations Organization (Population Division of the Department of Economic on Social Affairs of the United Nations, Secretariat, World Population Prospects: the 2004 Revision and World Urbanization Prospects), the population of Romania might reach a maximum number of 20.941 million citizens or 19.858 million citizens – the medium level, or 18.759 million citizens – the lowest level in the year 2025. For 2050 the number of citizens would be of 19.964 millions, 16.757 millions or 14.033 millions in the three possible variants (the highest, the medium and the lowest level).

Figures vary to a smaller or bigger extent from an estimator to another, according to the hypotheses concerning the forecast evolution of the birth rate and death rate. For example, Professor Vasile Ghețău considers that the Romanian population will decrease up to 16 million citizens in 2050. The World Bank appreciates that the population of our country will reach a level of 18.678 millions citizens for the same year.

One can easily conclude that despite the existing differences all estimations indicate a decrease of the population.

b) The demographic ageing process is revealed by the increase of the number of old people living in our country.

c) The possible change of the ethnical composition of the population at a national and territorial level, as a result of the differences existing between the birth rate of the ethnical groups living in Romania, might generate results that are sometimes undesirable. This may happen if the birth rate level differences will increase to the detriment of the Romanian population, especially in some areas of the country, where sometimes unconstitutional methods are adopted in promoting territorial autonomy on ethnical criteria.

The recorded demographic evolutions and the ones that are expected to happen in the future **are a serious reason of concern**, since they affect not only the present but also the future of Romania as a national state, and they might affect the position of our country in the international context and in relationship with the other states in Europe.

The most serious changes are **the extra-demographic implications** (the social, economic, political and cultural ones). The already outlined effects of these changes represent a real challenge for all the responsibility factors in our country for the employees in public administration, at a central and a local level. On the other hand, these changes are difficult to be anticipated and sometimes they occur on the spot.

a) **Economic effects** are mainly due to the decrease of the population number, the ageing of the population and external migration.

The decrease of the population number – according to Professor V. Ghețău – has not generated significant economic effects so far (and it has mainly affected the young generation, which is under the minimum age accepted for legally employed people). According to the same professor, the decrease of the population number has had positive results (the cut of the family and state expenses for holidays, post and pre-natal holidays, for children allotments, their medical assistance and education fees etc.).

The same thing can be said about the ageing of the population. In 1990 a pensioner was supported by 2.7 employees and in 2006 a pensioner was supported by 1.30 employees. This situation was not generated by demographic factors since the percentage representing the relationship between the labour force and the pensioners did not change almost at all. This evolution was generated by a reduction in the number of workplaces and of the number of people who contributed to the pension funds.

In the far and near future things are changing step by step and according to the same professor, V. Ghițău, everything that has been good so far will take revenge in the future and it will be demographically determined on a long term.

The economic effects of the population decrease and of the population ageing will be more and more evident as the generations born after 1990 will get employed. The labor force will become insufficient and it will generate a dramatic effect as to the percentage represented by the employed population and the one that is unemployed because of being too young or too old to work. Thus, in 2050, an employed adult will have to support the pensions of 9 persons.

The decrease of the work force will lead to the ageing of the employed population and this will have negative consequences on the physical and intellectual potential of the employees, on its capacity to innovate and be open towards the new etc.

High external migration might have dramatic effects on the economy, too, especially migration on labor reasons. Young and adult populations will be mainly affected by external migration for labor reasons. Important sectors of our national economy will also be affected. Besides, social life, the building industry, light industry, the medical sector and education will also be affected. There are sector in which the lack of labor force is significant and in order to cover this deficit we accept work force from abroad (especially from Asia). Romania might become, under these conditions, a country for emigrants and for immigrants.

b) **The social effects** like **a crisis in the educational system** might occur. The decrease of the population of a school, high school age or college age is a serious problem. Many schools will be closed, many teachers will remain without a workplace.

- A crisis of the medical system is also a potential danger since many medical assistants; nurses leave the country for a better salary in Western countries;

- The crisis of the service sector is a reality which cannot be denied since many companies that offer services have not managed to meet all the necessary requirements so far;

- There will be an over-usage of the insurance sector and of the medical assistance offered for the old population;
- There may be a potentially stronger generation gap determined by different expectations, different values etc.;
- A possible change in the cultural identity and the national spirituality of our country;
- It is likely to have inter-ethnic tensions, xenophobic attitudes etc.

c) **Effects that endanger national security.** The decrease of the population number and the deterioration of its age structure will lead to a decrease of the number of the population that is able to work in the military field. Even if during peace time this does not matter, since the Romanian army has become an army of professionals, based on volunteers, however in case of war things change. On the one hand, it is necessary for the population number to be enough to get involved in the military defense of the country and, on the other hand, there must be enough people involved in the production activities necessary to economically support war actions.

A potential risk for national security, which is insufficiently tackled or even ignored, is represented by the substantial and forced change of the ethnical composition of the Romanian population in certain areas of the country.

Such effects, as others that are easily identifiable, require well conceived and scientifically grounded measures to be taken at cultural, national and local level.

c) Adopting social and economic measures to limit the exodus of the work force towards more developed societies and “to repatriate” those that have left abroad.

d) Including the systematic degradation of the country on the mentioned dimensions among the major dangers for the national security and redundancy, and, consequently, of all the factors implied in it.

Conclusions

On an administrative level, the necessary methods will be applied with a view to ensure territorial economic development that will generate stability of the work force, to create a building system that may offer enough dwellings for the young people especially, to develop the medical system, especially for children and mothers, to diversify the family planning programmes, by laying stress on pro-pregnancy education, to ensure efficient educational services for children etc.

All these require initiative spirit and, above all, a deeper sense of responsibility. They are defining characteristics for any employee that works in the public administration field and whose formation and development are main tasks for the whole training system applied to all future specialists in the field.

References

1. Ghețău, Vasile – *Tranziția și importul nou demographic*, revista Cercetări Sociale, nr. 1/1994 ;
2. Ghețău, Vasile – *Scăderea numărului populației și îmbătrânirea demografică – una din marile sfidări ale României la începutul secolului XXI*, în *Populație și Societate*, Supliment nr. 1/2001 ;
3. Ghețău, Vasile – *Declinul demografic și viitorul populației României. o perspectivă din anul 2007 asupra populației României în secolul 21*, București, Editura Alpha MDN, 2007 ;
4. Andrei, Stănoiu – *Influența factorilor demografici asupra capacității de apărare a țării*, Analele Universității Spiru Haret, Seria Psihologie – Sociologie, Nr. 1/2000 ;
5. Trebici, Vladimir – *Este necesară o nouă politică demografică în Romnânia?*, în revista Cercetări Sociale, nr. 2/1994 ;
6. * * * Anuarul Statistic al României, București, I.N.S., 2007.

ETHICS VERSUS MANIPULATION: ABOUT CHARISMA AND OTHER TYPES OF COMMUNICATION

Corina RĂDULESCU*

Abstract

The ethics of communication is the most significant branch of the applied ethics; it comprises everything that means common aspect within the other professional ethics (e.g. legal ethics, business ethics, etc.) and, moreover, it has, its own topics with their own dynamics – whom we will pay attention hereby given their significance for public communication (specific for administration). Thus, we will first address the charisma (which we rather consider a hindrance against healthy communication, rather than its catalytic) and we will continue with the definition of manipulation and persuasion and we will draft a taxonomy of the communication pathological types or potentially pathological. The invoked pathology is, obviously, a moral one and we want to point out that, the difference specific to public communication related to other communication forms is exactly the fact that the types described hereby do not have to manifest themselves within it (as we sometimes notice nowadays). But, necessarily for the ethics of communication – the lie is the most important subject (= sine qua non conditions which makes the difference between moral and immoral) and thus we will approach it in our paper.

Key words: communication ethics, manipulation, charisma, lie, public communication.

Introduction

Nowadays not only people trained to govern have public offices or political functions. Actors (for instance, Arnold Schwarzeneger), poets, musicians, journalists and even porn stars have been elected for different administrative levels. Is it possible for their success to be the result of their personal magnetism, their charisma? Is it possible for such people to have outstanding communication skills meant to counter-balance the lack of strict specialized training? May be social influence considered a specific form of power? Is it natural to meet within the public communication environment (specific for administration) the two forms of social influence: persuasion and manipulation? Which is the difference between persuasion and manipulation? All these questions and similar ones are the object of study for communication ethics.

The ethics of communication is the most important branch of the applied ethics, comprising everything that means communicational aspect within the other professional ethics (journalist ethics, business ethics, legal ethics, medical ethics, ethics of public servants, etc). However, necessarily for the ethics of communication – the lie (with its variant – deceit) is the most significant subject and we will address it throughout our research. This is the concept within makes the difference between moral and immoral on the level of communication means and according to which there is traced the border between good and bad upon purpose level. The lie, more exactly its inexistence, is a minimal threshold in terms of moral.

Before discussing in terms of moral the communication pathological types or potentially pathological, we believe it is necessary to examine what can be considered either as a favoring factor for communication or as hindrance or jam, as ante-chamber of the “diseases” of communication, but which may not be ignored, namely **charisma**. It might be defined as the personality trait, mainly expressed by non-verbal language (attitude, gestures, look, voice, etc.),

* Lecturer, Faculty of Bussines and Administration, University of Bucharest.

but as well by verbal language – which triggers an abnormal receptivity condition of the interlocutors or audience.

Is charisma a catalytic of communication? If it acted biunique (as the communication process should develop), the answer would be positive. But charisma seems to catalyze the communication in a single way, from the charismatic speaker to the receiver (audience). Even so, it seems a positive factor. But charisma does not increase the speech's clarity and does not add to a more efficient, clearer decoding of the message, but it only amplifies its persuasive effect (sometimes it transforms persuasion into manipulation). The communication process is impaired anyhow because, objectively speaking, "the code of the transmitter is not identical with the receiver's code"¹. Thus, we rather tend to deem it an obstacle against healthy communication, a "pathologic" communication, the invoked pathology being a moral one.

Decomposing charisma in its key-elements: the art to speak in public, to adjust to the perceptive horizon, to the audience's "code", the art to listen and the power to persuade, the art to inspire trust, to benefit of a kind of gift in relation with others, to have trust in your personality, to penetrate the heart's secrets, to seduce by your own charm, to have a sort of aura for those who surround you, to know what decisions must be made for the respective group or team, to foresee future events – we would rather believe that it is important to learn them and to apply them immediately, to refine them in order to ensure success. As it could be easily noticed from the above enumeration, charisma is a sort of climax of communication, in its both forms: verbal and non-verbal. But, are its consequences only benefic, as it might seem on first sight? We say it again, if its cultivation becomes a purpose in itself, we may rather consider it an obstacle against healthy and efficient communication. More exactly, we refer to the semantic entropy which is reached during the coding-decoding process within communication, which entropy arises from the fact that a word's meaning is extrinsic and not intrinsic (= arbitrary feature of the linguistic sign) and it depends, on a large scale, on our perceptive experience (linguistic and not only). Charisma, on its turn, increases the entropy degree, thus, the recollection of the two codes (transmitter and receiver) and the communication act is twice difficult.

Charisma, manipulation, persuasion, lie:

But, to begin with, let's understand what charisma is. The word charisma has, first of all, a religious origin: it is the mane given to extraordinary spiritual gifts. In Greek, **charisma means "divine grace or favor"**. Charis was one of the three dainties and it symbolized the divine attributes every human being has in itself. Only later, the word charisma meant the authority of a known, prestigious person, **the influence such person exercises on someone else**. The root "charis", which names grace, means, on its origins – and this is decisive for the word's meaning and "color" – what shines, what enjoys (the eye).

Therefore, the three classic meanings of the word "grace" deserve our attention:

- Charm (in French the word "charme" has as first meaning "spell") of beauty, joy, pleasure;
- Favor, benevolence, courtship, signs of respect, condescendence, desire to like (la bonne grace);
- Acknowledgement, reward, remuneration, wage, gifts received only because one is king, deity;

When we say to a person that she/he is gifted with charisma, we generally refer to a particularly exceptional quality in the relation with others. This quality is often difficult to define, it is like a sort of aura or magnetism, something unclear which makes us intimidated by the

¹ Mihai Dinu – Comunicarea, Ed. Științifică, București, 1997, p. 67;

presence of the respective persons or subdue, seduced, caught by the charm that person has over us. But, this quality needs to be acknowledged by a number of people to be able to speak about charisma, therefore a **social acknowledgement** is necessary. We can give countless examples of contemporary characters we name charismatic. The conductor Herbert von Karajan has a charisma which charms, casts its spell over musicians and allows them to search for perfection constantly with him, between them it creates complicity close to osmosis. High level athletes, like the soccer player Zidane is often assimilated to heroes and, thus, he benefits of a prestige that triggers trust in his words; at this point his prestige may be successfully used in advertising.

Regarding the **nature of the charismatic power**, “the sociologist Max Weber relates the charismatic power with someone who has received from gods, demons or nature a gift others have not received”²; then, he associates the idea of gift with the one of capacity and exceptional skills. The one who has this kind of gift has an ascendant, attraction, informal power over others. That person is vested with a sort of authority which is not based on success or demonstrations. The person’s speech convinces by means of evidence and not because it is more rational or eloquent. The person’s orders are not questioned. He/she is seen by people around, as someone who knows what decisions need to be made. We cannot assess if the charismatic boss (=charismatic management) has exceptional gifts, but it is important for those around to believe. Usually, he/she is related to the classes of scared, heroes, exemplary because that person exercises a real fascination over people around.

We cannot justify in a rational way the existence of the charismatic power. It would turn us back to an ancient age (Moses and Romulus are classic examples). But, the notion of charismatic leadership becomes autonomous again with Fr. Nietzsche and the theory of super-human. In the contemporary age, we speak about the “providential human being”, who appears during crises and is able to cope with dangers and defeats. That person is “by nature” the leader. Thus, such power is grounded on the leader’s personality additionally to the adhesion triggered by such personality. This sort of adhesion is addressed by Napoleon when he said: “trust comes from below”; it is a phenomenon of faith with religious, mystic nature. The charismatic leader is not in opposition with the collectivity, he/she is not imposed or inspired by it, but he/she is not distinct: on the contrary, he/she is deemed as expressing perfectly a given historic moment. All his/her power resides in this relation.

When we speak about (moral) authority, prestige over other person, about strong personality, we have to admit that such persons are more gifted than others, without being able to say if such gifts are natural or transmitted by culture (education). At least, we can consider that all gifts (sharp, “open” mind) rarely lead to positive accomplishments if they are not backed up by work. At the same time, it is certain that education, the way the child is considered by people around, the trust the child gains in his/her own force, the acknowledgement of its abilities – play an essential part for the capacity to be able later to use freely such gifts.

But not all gifts entail automatically charisma, they do not imply by themselves such **capacity of presence over the other**- which remains very difficult to explain. There are, of course, relation techniques which can be learnt, taught. For instance, elocution may improve, similarly listening, silence management, respect for other’s speech (it is known that the word’s meaning is external, not internal, thus, it is necessary to be cautious and very careful upon decoding). We can point out “its mark images” necessary to seduce, to inspire trust, to increase the influence and weight of one’s words. “But, in all cases, we speak about acquisitions, of new images about one self. They may help to improve the relation, which we may call charisma – if such new images relate to the pure definition of prestige, ascendant, authority over others, but in

² Emilian Dobrescu – Sociologia comunicarii, Ed. Victor, Bucuresti, 1997, p. 37;

such case it is clearly an acquired skill and which does not last (for instance, a new manager may cause enthusiastic unanimity on first contacts and then to disappoint on people get to know him/her better)³. In exchange, age, experience, difficulties, sufferance often bring a life approach closer to the scared dimension – which is represented by the relativity of all images which only mean to have (we all know the classic difference between to be and to seem).

Thus, charisma involves a sacred dimension and gives the **presence of the person** who has it “a dimension of to be” which exceeds it (namely, it does not have it) and which is transmitted to those around. It is not accidentally that the word charisma has the same etymologic root with the word enthusiasm (“en-theos” = to release God from us).

Generally, **charisma is associated with power**. The liaison between them seems to be like a reverse connection, with synergic effect. There are, along the history, many examples of charismatic leaders, but the most useful for our endeavor (=to prove the ethics free effect of charisma and of other forms of “pathological” communication) seems to be the example of Adolf Hitler.

A key in understanding the gradual expansion of Hitler’s power may be found in a notion of Max Weber (already mentioned) – the one of **charismatic leadership**. Contrary to the domination based on the traditional authority of the inborn leaders or on the impersonal bureaucracy, with the legal authority characteristic to most modern politic systems, the charismatic authority is based – as already seen – on the perception of heroism, greatness and mission of a leader proclaimed by a “flock of believers”. Thus, in the beginning of the 30’s, Hitler came along and he claimed power and proved his heroic personal capacities. He had the support of an organization having all the marks of a charismatic community. It comprised, in the beginning, Hitler’s close entourage, those immediately subordinated to him in the top of the Nazi leadership, people who were the initial force for the promotion of the personality cult. Beyond this small group of Nazi leaders, the main promoters of Hitler’s charisma were movement supporters, commissioner and suppliers of the message of his great deeds. Other cornets and exploiters of Hitler’s charisma were officers and employees of organizations, out of which the most important was SS and which owed their existence and the expansion of the power by proving a strong attachment to the Fuhrer. There was the mass of Hitler’s loyal people, among the German population, whose adulation gave him a popularity platform and which strengthened dramatically his position. All those added to the increase of the charismatic image of the German leader.

Hitler’s powerful personality must not be over-estimated as integrant part of his power, neither must it be overlooked. Hitler’s charisma, which was so influential over his close supporters and which had its origin in the power inspired by his idea, especially for those already subdued by his political credo, but, also, his remarkable capacity to influence masses, proved useful when he actively involved in politics. It may be said that **the grounds for his persuasion and manipulation power were his ideas**, which, irrespective of how irrational and infamous they were, he managed to put them in an attractive and coherent ideology for his target audience. But these (fix) ideas, which did not change until his death, cannot explain by themselves the attraction exercised over masses or the ascension of the German Workers’ Party.

Therefore, part of **his power was due to charisma**. The first step Hitler took in politics was represented by the impact he has as speaker to masses; during his army period he was identified as natural born speaker, who, by means of his fanatic and populist style, made the audience share his ideas. Later, he created a network of relations (less known) in the high society of Berlin, attending the salons of several ladies whom, apparently, he impressed significantly. The statements of the

³ Charles Gellman, Chantal Higy-Lang – L’art du contact; Mieux vivre avec les autres, Editions d’ Organization, Paris, 2003, p.128.

Nazi leaders from his close entourage represent another proof regarding the fact that part of his power was due to his charisma (for instance, Joseph Goebbels – after reading Hitler’s “Mein Kampf” – asked: “Who is this man? Half ignoble, half God! A real Christ or only John the Baptizer?” he considered Hitler a genius, he wanted him as friend and he wrote in his journal, on April 19, 1926: “Adolf Hitler, I love you”). All these Nazi leaders were the “devoted dogs” of Hitler and not opportunists. According to different statements, during the last weeks of the Third Reich, Hitler said that he needed 20 years to make an elite that would have assimilated his ideals, but – he added – the problem was that “time had always been working against Germany”.

The power of Hitler’s personality, the fanaticism, the adherence of the self-taught prophet, the ideological trust and self trust, that something hard to define – his charisma – were essential to manipulate the German community. However, the attraction exercised by a charismatic leader over masses has only an indirect connection with his real personality and character. More exactly, **impressions are more important than reality**. Let’s not forget that few of the 13 million Germans who voted for Hitler in 1932 knew him personally. His prefabricated and embellished image suited what people heard about him, read about him in newspapers or saw at electoral meetings. The promotion of his image was essential.

Equally important was **their initial predisposition to accept such image (charisma)**. Most supporters of Nazis were half converted before meeting Hitler in person. The German dictator inspired million of people attracted by him because of their convictions that only him, supported by his party, could end daily misery, the economic crisis at that time and that he could lead Germany to a new greatness.

“The image promoted by the Nazi propaganda without interruption was one of power, force, dynamism and youth, inexorable march to triumph, future to be conquered by belief in the Fuhrer. The movie “Triumph of the Will” (by Leni Riefensthal) portrays the grand manifestation of the Congress of the German National Socialist Party on September 1934. The movie begins with a panoramic view of the spotless blue sky. Then, from the mountains shorn with white clouds, comes a silver plane. Beneath it, the camera starts recording the towers and the majestic walls of a medieval town: Nurnberg. The shadow of the plane crosses over a huge column of people marching. Other streets with people marching. At last, the plane lands and stops in a lavishly adorned place. From the shiny cockpit, appears Adolf Hitler like a deity descended from the skies. An exalted crowd greets him”⁴.

Although made as propaganda, “The Triumph of the Will” comprises real, shocking images, which uncover some of the methods used for the manipulation on large scale of human collectivities and its outrageous results, of the pathological communication (=profoundly immoral) to which charisma leads. Approximately a million and a half of people gathered at Nurnberg in September 1934 and they were not brought by force.

Manipulation is pathological communication, understanding by this communication hidden and malicious intentions, at the extent that the interlocutor’s interests are, in the best case, ignored by the manipulator and its self-determination undermined. The pathology invoked here is, obviously, a moral one. The manipulator replaces the will of the manipulated with its own will, kidnaps its free arbiter either by offering false pretenses for an apparently free choice or by exploiting the fundamental needs (subsistence or information, integration and affirmation) and of social reflexes or by inducing emotions and mobilizing the individual or collective subconscious.

Therefore, what is manipulation? In the work of Stefan Buzarnescu „Sociologia opiniei publice” (Sociology of public opinion), **manipulation is defined as** “action determining a social actor (person, group, collectivity) to think and act in a way compatible with the interests of the

⁴ Bogdan Ficeac – Tehnici de manipulare, Ed. Antet, Bucuresti, 1998, p. 56.

initiator and not with its interest, but letting the impression of free choice and thinking. Unlike the influence of the rational conviction, manipulation does pursue a more accurate and profound understanding of the situation, but the inoculation of a opportune understanding, using false arguments and non-rational ideas. The real intentions of the transmitter are unknown to the receiver”⁵.

The specialized literature notices that **there are types of communication having an exclusively pathologic nature** (=manipulations): propaganda, misinformation, intoxication and imposture. And there are **communication types** which may be seen as having or which **may acquire a pathologic nature**: lie, rumor, debate, negotiation and advertising. Charisma may be seen as a sort of “ante-chamber” of everything mentioned above, that’s why we have stopped upon its search. We repeat, by pathology we understand lack of the ethic element in their manifestation.

The permanent diversification of the sources regarding the conception and transmission of messages has led to a manipulative practice based on concrete codes, which may be identified only by professionals and are entirely inaccessible to outsiders. One of the fundamental purposes of communication is to convince the message’s receiver (receivers) of a certain opinion and to adjust its behavior. If a transmitter plans to change the behavior of another person, he/she must identify the factors of the communication process which might trigger such change.

The message intending to make a behavioral change on the receiver is called persuasive message. People are daily subject to lots of persuasive messages. Research conducted on this topic shows that the reaction to message often depends on the features of the person trying to convince, without having any connection with the message’s value. In this respect, psychologists have highlighted and analyzed three characteristics: the communicator’s credibility, the communicator’s physical qualities and charm and the communicator’s intentions.

Unlike manipulation, **persuasion is** the activity meant to influence people’s attitudes and behaviors in order to make the changes according to the purposes or interest of the initiator (persons, groups, politic, social, cultural, commercial institution or organization, etc.). Persuasion is achieved if the reaction and receptivity features of the influenced persons are taken into account. Persuasion is **an activity meant to convince people contrary to a choice imposed or forced**, so that it leads to the personal adoption of the expected change. The persuasion’s effects depend on personal factors and factors regarding the influences’ organization. Personal factors are synthesized in the so-called persuasion capacity, namely the individual predisposition of being receptive to influences and of accepting attitude and behavioral changes. The factors regarding the influence’s organization are often focused on the communication process, respectively on the relations between source, message, transmission channel, reception and social context which make it persuasive.

Gustave Le Bon notices the existence of **four main convincing factors**, which he presents as a sort of “persuasion grammar” and namely: “source prestige (suggests and imposes respect), ungrounded affirmation (removes discussion, creating the impression of an erudite documentation of those who represent the message source), repetition (makes it accepted as a certain affirmation compatible with the source’s objectives) and mental influence (which strengthens the individual convictions, new or characteristic to people without personality)”⁶.

Both – manipulation and persuasion – may be classified in the wider class of social influence, representing different degrees of its manifestation. **Social influence is defined** as the action exercised by a social entity (person, group, etc) oriented towards modifying the action and manifestation of another. It is associated with the environment of power relations and social

⁵ Stefan Buzarnescu – Sociologia opiniei publice, Ed. Didactica si Pedagogica, p.83;

⁶ Gustave Le Bon – Psihologia multimei, Ed. Paideia, Bucuresti, 1997, p. 35;

control, but it stands apart from those as it does not use coercion. It is associated with socializing processes, social learning or communication. In this respect, “Raymond Boudon and F. Bourricaud deem that social influence may be considered a specific form of power, whose main resource is persuasion. The social influence’s effects depend deeply on context, as it stimulates or blocks receptivity and creates acceptance grounds, change manifestations (to the eventual products)”⁷. Two conditions must be met in order for the influencing process take place:

- The initiator of the intentional influence must have an acceptable degree of competence and information, being animated by intentions considered by the receiver as well oriented;
- The influencing relation must be grounded on a mutual consent of the involved entities and upon the shared values and probable effects.

We have mentioned that, certain types of manipulations – propaganda, misinformation, intoxication and imposture - are exclusively pathologic (=immoral) while other forms – lie, rumor, debate, negotiation, advertising may acquire, under certain circumstances, such immoral nature. We will briefly analyze in the following the lie, which, on large scale, means manipulation, regardless of its form. It is used by all of us, daily, but it is not necessarily for it to occur during public communication (as it happens sometimes).

The lie is defined (in the Explanatory dictionary) as “intentional distortion of the truth usually having the purpose of deceiving someone”. In Romanian, the lie has as synonyms deceit, ruse, but also fiction and invention. The adjective liar has as synonyms false, untrue and ungrounded.

For our purpose, **the lie as pathologic communication means** does not refer to fiction, which is not characterized by the immoral purpose, or to error, where misses the intention to distort the truth. Starting from the pattern reality – representation – discourse (implied by the act of communication), we notice that the lie is fundamentally different from error by means of the fact that, while error operates strictly on the representation level, **the lie works on the level of discourse, in order to change the representation and, ultimately, the reality**. Thus, the lie might mean manipulation, in a wide meaning, under any of its forms - either we speak about misinformation, propaganda, intoxication or imposture. Said clearer, the ethic behavior – either we speak about communication, public relations or other activity - excludes the lie completely. In this respect, we share the idea of Immanuel Kant who says that it is not ever justified to lie and the obligation to say the truth may not be limited by any sort of collateral arguments.

If we approach **lie from the perspective of the humankind’s religions and major cultures**, we notice two significant ideological trends (both for the laic and religious environments), which have been structured by contemporary thinkers in two models of ethic theory: the deontological model and the theological one.

The deontological model (also called legal or juridical) understands ethics as a theory of duty. From the perspective of the source of moral laws, this model has several variants:

- The theory of divine command, where the authority of the moral legislation is God’s rationality. The fundament of this theory is represented by the biblical precepts enforced by the Western Christianity;
- The ethic theory of Immanuel Kant according to which the authority of the moral legislation is the human rationality itself, grounded by “god will”;
- The contractual theory, where the authority of the moral legislation resides in the mutual political will of the human beings to organize a society which would remove them from their primitive “natural condition”. This theory, belonging to J.J. Rousseau, was shared by other rationalists of that period.

⁷ Tran Vasile, Stanciugelu Irina – Teoria comunicarii, Ed. Comunicare. ro, Bucuresti, 2003, p.126.

The theological theories represent the other major ethic source of the humankind's thinking, having a tradition and a force at least equal with the option of the deontological theory. **The theological model** understands by ethics an art and a practical science, like medicine, and places on top of the human behavioral options – values, embodied in good and desirable purposes. According to the criterion of the supreme value chosen as purpose, the theological theories may be classified as follows:

- Eudemonist theories (pleasure as ultimate value: hedonism, epicureism);
- Theories of virtue (focused on the way the moral characteristics of human beings must be built and on the definitive purposes of a happy life – Plato, Aristotle);
- Utilitarian theories (which subordinate moral to the individual or group interests - Th. Hobbes, J. S. Mill etc.);
- Perfectionist theories (which place perfection at the zenith of ethics – Windelband).

From such perspective, we can remind briefly the **position of major religions**, which ground various cultures, with respect to lie.

The word of the Scripture and Old Testament is clear regarding the moral behavior of the human being and the capital sin represented by lie. The tablets of the laws, given by God to Moses on the Sinai Mountain, comprise the 10 commandments and the 9th commandment: "Thou shalt not bear false witness against thy neighbor." (Exodus 20:16). The 9th commandments requires honesty, rejection of duplicity, simulation and hypocrisy, it forbids lie, libel, ungrounded suspicions. Thus, lie appears as non-truth and consists of telling the false with the intention of deceiving, being always illicit, and a capital sin. Moreover, the Ten Commandments are completed by the Book of Law, written with ink by Moses himself and which forbids: to lie or to bear false witness (Leviticus 6:3-8), to swear easily/irrationally (Leviticus 5: 4), to spread false rumors (Exodus 23:1), to join the crowd in bad things and to bear false witness (Exodus 32:1).

The lie is negatively seen in Psalms, as well: "Fear your tongue from evil and your lips from lies!" (Psalm 34:13), in Sayings: "Deceitful lips are ugly for God" (Sayings 19-22), as well as throughout the entire Old Testament. According to the Scripture, the origin of lie, its father, is the devil itself, having no connection to God. According to the Holy Scripture, God is very severe with lies and ethic behavior. The New Testament strengthens God's command against lie: "Leave all these: anger, hate, wrath, gossip, shameful words which come out of your mouths. Don't lie to each other as you have undressed of the old man, with his deeds" (Colossian 3:8-9). Lie destroys those who exercise it at first, being for the human nature what stain is for iron and manna for grape. At the same time, it is a choice and a vice, because God has given humans their free arbiter. And as any vice, it is developing daily. Lie is serious matter – one must not even try exaggerations, convenience lies - the so-called white lies as it is not good to take easy fire or poison. Moreover, Christians must not swear they tell the truth: "our way of speaking must be Yes, yes: No, no. what goes over these words, comes from the evil one" (Mathew 5:37), (Jacob 5:12).

"The imperative of not altering the truth is a meta-concept common to all older or newer religions, regardless of the geographical area of their manifestation"⁸. The religions of all cultures state that telling the truth is absolutely good and the lie is absolutely wrong, thus punishable. Thus, Hindu texts blamed the lie's capacity to occult reality: "a well sacrifice is hidden by lie". Buddhism equals the communication of the false with the hiding of the shameful deed, also mentioning the dark path of the liar: "a speaker of false words shall go to the purgatory and one who making an error says he hasn't done it shall be equal in the underworld". (Dhammapada). Brahmanism extrapolates the vice of lie as connection of all other illegal deeds: "all things are entailed by words, words are their roots and from words they arise. That's why, the one who speaks false words, is false in everything". (Manu's laws). And Hinduism states as clear as crystal: "there is not virtue above the truth or sin greater than lie" (Mahabharata).

⁸ Mircea Eliade – Istoria credintelor si ideilor religioase, Ed. Stiintifica, Bucuresti, 1999, p.9.

The Jains consider lie is grounded on the pathological soul impulses: “falsity involves a false vow by someone who is destroyed by intense passions” (Upasakadasanga Sutra), and Sikhism underlines the boomerang effect of the lie on its speaker: “deceit in commerce or the use of lies leads to sorrow.”

The two main Chinese religions – Taoism and Confucianism – have also stated clearly against lie: “don’t say what your heart denies” and Confucianism as warning, an impulse to resistance against manipulation: “I can’t see what a man can do whose words are not believed. Who can a cart roll without yoke or a carriage without bridles?”

If in the main religions of the world, lie is seen as capital sin, which cannot be justified under any circumstances according to the divine laws (only, rarely, having as goal to prevent a grater sin), apparently the Islamic religion sees it differently. The lie’s morality is one of the most confusing aspects of Mohammedanism, giving the impression that a person can be seen as honest or liar according to the situational ethics, the circumstances that person faces. Obviously, Islam does not admit two classes of leis: leis about Allah and lies about Mohammed. On the other hand, a series of lies is admitted, such as: lies told in battle to bring peace between opponents or lies between spouses; the lies told to save your own life; the lie told to gain peace and understanding; the lies told to influence a woman (and to make false promises to your wife).

Statistically, the weight of lie as deceit in the communication act has been measured by **Buller and Burgoon** (1994), and the findings show that lies has a significant percent, as follows: lie = 30%; exaggerations = 5%; half of truth = 29%; secrecy (as hiding) = 4%; diversion = 32%. Another series of research has shown that: more than 60% of people lie regularly, men lie 2-3 time more than women (D. Perry, 1995), women lie more often to protect others while men lie to point themselves out (Thierry Pfister, 1999), people hid the truth in their social relations 1-6 times/hour and the main reasons for lying are: to avoid personal troubles, to gain others’ appreciation and to avoid troubles caused to others.

Public relations act within the human communication field more than any other profession. Belonging to this field, they are in permanent contact with the transmission of potentially false information and when it happens on purpose, the lie territory is crossed. Public relations specialists in various organizations, spokesmen of famous politicians, businessmen or stars, representatives of public relations or communication agencies build and promote the public image of their employers or customers, strengthening their fame and credibility before their business partners or domestic and international public opinion. In this respect, there is always a tendency to embellish reality, to rapidly reach the goal and to save money and time in reaching such goals. Up to a certain point, such inadvertences remain benign, but if it said about a person having a public office that such person has academic studies while he/she has not passed the high school leaving exam, it becomes malign and the immorality threshold has be obliviously crossed.

Conclusions

We have undertaken this brief trip through charisma, manipulation, lie in order to underline the following idea: the **public communication** specific to administration (or, as it is called – social communication) – irrespective of its manifestation environment – must be, by excellence, **an ethic form of communication** and thus it must be “cleaned” of everything mentioned above. The moral desideratum within it is mandatory; it is the one that makes the difference between this communication form and others: political, governmental, advertising, economic, artistic, etc. each society tries to promote the collective values necessary for its development and comfort and, in this respect, to fight against the social evil which hits it – accidents, insecurity, diseases, environment degradation, etc. Or, usually, it is not enough for a measure to be mandatory in order to adjust individual behavior. Very quickly, regulations and controls prove unable to achieve the

results expected. Therefore, it is better to try to obtain everyone's voluntary adhesion, trying to train people in this movement which implies, at the same time, the individual and collective good. This is the **goal of the public communication**.

That's why, for Bernard Miege (the "Society conquered by communication"), public communication "represents a way by means of which state administration use more clearly and organized advertising methods and public relations"⁹. This is due to the fact that, on one hand, the state must face new responsibilities, and, on the other hand, it uses new management procedures, including procedures to manage the opinion within the business environment.

The usage of the public communication expression needs several explanations. At first, we have to make the difference between **public communication and political communication** as they are often mistaken one for another. During electoral periods, a government or minister is tempted to rather capitalize the personal and public policies and not the actions undertaken by the led administration. Or, public communication is not limited to the minister campaigns and the interest to avoid transforming it into an annex of the politic communication is more and more obvious. Secondly, **public communication must not be associated with institutional communication**. The highlight on the institutional or organizational aspect triggers a dissimulation of the characteristics specific to company communication, on one hand, and public communication, on the other hand.

Thus, **public communication endorses four classes of deeds**:

1. To bring up-to-date the administrations' functioning (the devices for public relations or systems for the information presentation and transmission). Administrations must face more complex and precise demands; the administered people expect to obtain information they consider themselves entitled to and do not accept answers hidden by the secret of administrative decisions or which give de impression of arbitrariness; the administrations' adjustment and modernization depend a lot on the behavioral changes of those administered which see themselves more like consumers and even customers.

2. Some companies set as goal behavioral changes;

3. For some administrations, the main concern is to ensure by communication a modern image;

4. To seek the citizens' adhesion regarding a certain problem, by sensitive actions.

The main feature of public communication is to act on the level of social representation and to allow a fast adjustment of public speech. We point out the fact that it **is essentially different from other types of communication by its end-purpose, by its remarkable moral connotations**.

Thus, **public communication** mainly endorses the citizens' personal life by mass-media; it addresses its message in a special way to citizens as particular individuals (prevention of diseases and accidents). It is focused on effects, studied results; it develops interactive relations within the field of humanitarian progress. Public communication has a goal of pure individual value, preventive actions on behalf of health and safety, promotion of patrimony resources. It is a neutral transmitter, which is not enthralled to any particular entity, power, group or person. It acts independently according to politic circumstances, until the disappearance of the evil had in mind. Unlike it, **propaganda** (=manipulation) transmits belief in its primary meaning, it fights in order for the public opinion to accept certain political and social opinions, to support a certain political orientation, a government, its representatives. It is an ensemble of informational means intentionally serving a theory, party or person in order to collect adhesions and the support of the

⁹ Bernard Miege – Societatea cucerita de comunicare, Ed. Polirom, Iasi, 2004.

majority. It serves whatever political strategy under circumstances of favorable exploitation with scientifically issued conquering techniques.

Also, public communication is different from advertising: while the first contemplates behavioral changes in order to change habits, it is against consumption and addresses the ideal behaviors of citizens regarding their own persons and it is financed by collectivity (funds from the state or associates, where most part of resources collected from the population), **advertising** (=manipulation) encourages the purchase of a new product, so it favors consumption. It highlights more the brand than the product, it wants to convince rather than to inform. It transforms the customer into a conqueror and it is financed by the products bought by them.

“Regardless of any opinion, by interposed organisms, may certain individuals arrogate to the privilege to try to adjust legally the behaviors of other humans?”¹⁰ By the virtue of ethic imperatives, of the priority of general interest against personal interest? When public communication serves general welfare, the collectivity has no reserve. Usually, public communication has an essentially governmental origin and the campaigns’ signatory party is not neutral regarding the undertaken action and its outcomes (regardless of the topic, often the minister in question notices the communication’s impact on the public and tries to benefit from its success in terms of image). Regarding the economic legitimacy of public communication, we point out that any prevention of social dangers (heart diseases, alcoholism, tabacism, drug addiction, etc.) entails significant savings regarding the costs of social and medical care when such actions prove to be efficient. Environment protection, economic information, brand image improvement of social organizations have, of course, a financial explanation, they trigger earnings which help the improvement of the entire community and of the individuals forming it. Public communication acquires a sort of economic legitimacy, concretely assessable. In fact, it names a moral desideratum in the politic, institutional and advertising communication. From this perspective, the respective communication forms have an inherent pathological nature, namely immoral.

In conclusion, we name public communication any form of communication with profound moral connotations, namely any process which accompanies the public institutions’ activity in order to please general interest. The transmitted messages must comprise public use information, such as: to inform citizens about the organizations within the public sector, their functioning and duties. Moreover, public communication attempts to discover the population’s needs and desires in order for public institutions, by their role and duties, to meet public interest.

¹⁰ P. Zemor – La communication publique, Ed. PUF, Paris, 1995.

VIRTUALIZATION TECHNOLOGY FOR SMB

Adriana BARNOSCHI*

Abstract

Data is growing at an alarming rate. Storage administrators are struggling to handle a spiraling volume of documents, images, audio and video files and large emails. Virtualization is a general term that could be applied to: storage systems, databases and networks. In this article, I present an overview of server virtualization architecture. I also specify the goals and benefits of virtualization for a SMB. The article points out some issues about server virtualization: definition, implementing problems and security features. In case of major calamity, you need a disaster recovery plan. The article lists a series of differences and similar parts of DR planning and business continuity plan. I give some ideas that guide you to protect yourself against disaster, what to back up and how backups should work.

Keywords: *storage management, server virtualization, disaster recovery plan, business continuity planning.*

Introduction

The earthquakes, 9/11 event, summer storms and California fires have drawn attention to the importance of protecting data and applications. Most companies rely on computing system as their business infrastructure. So, companies need to backup their information in order to limit data loss and people started to think about disaster recovery. In other words, companies need to stay in business and people are ware of the value of lost data.

I achieved this conclusion by collecting data about natural and human induced disasters correlated with business process, by studying different points of view of IT experts in storage network solutions for consolidation, by judging from the laws and standards addressed to BCP for improving an organization's information security, by analyzing disaster survival statistics, by making the choices for storage systems from SMB market.

The first question was: "Where shall I start from?" I found the answer: disaster recovery (DR) and business continuity plan (BCP). When I paid attention to the disaster planning, I attempt to find out what choices of storage system do I have (both conventional and new solutions) and if the researches are viable options for SMBs with limited resources and budgets.

I collected statistical data from analysts of IDC, of Forester Research Inc., of famous companies and I selected the ideas concerning the promised benefits of virtualization technology. I was thinking it's important to know about their work and performances, not just because their word does matter, but their experience facilitates us at storage management into IT departments, it helps us to well-formulate the goals of our projects and business and it contribute to state the metrics of software quality.

The paper is organized as follows:

In sections 2 and 3, I give an overview of virtualization that contains a short history of this technology [1, 9], preferred definitions of concepts [2, 6] and one simple description of host/guest paradigm from the base of virtual machines [4, 5, 6].

Section 4 presents the goals of virtualization when it is used to put into practice a wide range of applications, a few suggestions for SMEs intended for successful virtualization implementations and the benefits of desktop virtualization for SMEs, since this technology has become so popular in storage management.

* Associate Professor, Ph.D., Social and Administrative Sciences Faculty, "Nicolae Titulescu" University.

Section 5 tells us what disaster continuity planning (DRP) is; why virtualization in a disaster recovery environment is very high on the managers' list; what the gain of using virtualization in DR is? It is important to understand that business continuity planning (BCP) is a methodology and backup is a process. The logistical plan is called a Business Continuity Plan. DRP is a part of BCP. That's why, when I design a disaster recovery plan I have to go through the methodology phases.

According with the chosen virtualization solution from section 5 and going from the idea that "everything starts with the business" [16], I proposed a disaster recovery plan that protects business data and applications of company. There are simple steps SMBs can take to prepare for the worst [15]. The business sets the IT budget and therefore the RTO and RPO metrics need to fit with the available budget.

The last section summarizes the contributions of this paper and discusses for future work.

Literature review of virtualization

Virtualization is almost as old as enterprise computing itself. First introduced in the 1960s to allow partitioning of mainframe hardware, it has been a foundation of high-end proprietary server environments ever since. Today, virtualization is once again a hot topic of conversation in the data center because emerging technologies have the potential to remedy issues relating to resource utilization, efficiency, scalability and manageability [1].

The idea of virtualization in computing systems is to add a layer of abstraction between two layers in that computer system. This layer allows reducing the management reliance on complicated elements, like building new servers or deploying new applications, while also enabling transiency of the underlying virtualized elements:

- *By virtualizing a software application*, we eliminate its direct hooks into its host operating system (OS) allowing to more easily install, remove and modify that software installation without affecting the host OS.

- *By virtualizing an entire computer system*, we encapsulate its configuration into a data structure that is more portable, easier to manage and has more capability for being backed up and restored [2].

Virtualization refers to the pooling of IT resources in a way that masks the physical nature and boundaries of those resources from resource users. In more concrete terms, virtualization is the decoupling of software from hardware. It is the abstracting of the software from the underlying implementation [1].

Server virtualization is the masking of server resources, including the number and identity of individual physical servers, processors, and operating systems, from server users. The server administrator uses a software application to divide one physical server into multiple isolated virtual environments. Server virtualization means the ability that allows multiple independent operating systems to run on the same hardware at the same time [3].

Virtualization software runs like an application on a computer, separate from the operating system and it avoids hardware and software incompatibility problems. Because the software runs separately from the OS, the different versions of operating systems or other applications can run at the same time [4].

Server virtualization provides a path toward server consolidation that results in significant power and space savings, while also offering high availability and system portability. Today, vendors are building hardware and software platforms that can deliver virtualization solutions at near-native performance.

Products from Microsoft and VMware lead in domain. VMware Infrastructure 3 running on Intel-based platform creates high performance virtualized environments that meet today's requirements, giving customers confidence, reliability and security [5].

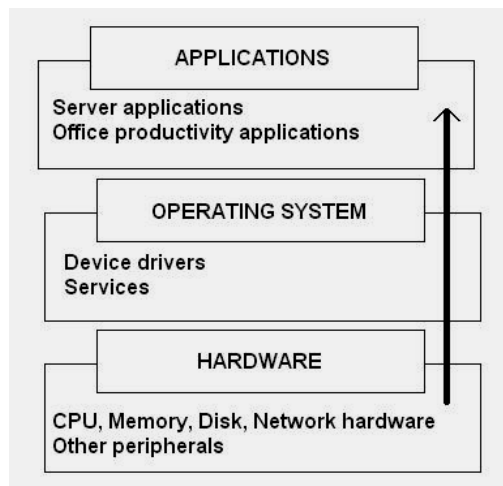


Figure 1: Standard server stack

Theoretical Background

There are three popular *approaches* to server virtualization [3, 6]:

1. The virtual machine model,
2. The paravirtual machine model, and
3. Virtualization at the operating system (OS) layer.

Moving up from the bottom there is the hardware layer, followed by the operating system and finally the applications. Figure 1 provides a high level overview of the areas of a standard server stack that can be virtualized.

Virtualization is being widely embraced by IT industry and smaller organizations are now looking to make use of this technology. This is a resulting in an increased number of product offering as vendors compete to capture a share of emerging SMB market. This reduces a major obstacle to deploying virtualization at the SMB level: *cost*.

Virtual machines are based on the *host/guest paradigm*. [3, 6] Each guest runs on a virtual imitation of the hardware layer. This approach allows the guest operating system to run without modifications. It also allows the administrator to create guests that use different operating systems. The guest has no knowledge of the host's operating system because it is not aware that it's not running on real hardware. It does, however, require real computing resources from the host -- so it uses a *hypervisor* (VMM) to coordinate instructions to the CPU. The hypervisor (called a virtual machine monitor - *VMM*) is referred as a virtual manager; it is a program that allows multiple operating systems, which can include different operating systems or multiple instances of the same operating system, to share a single hardware processor. [7]

VMware and Microsoft Virtual Server both use the virtual machine model. [8, 5]

Two new major developments will have a dramatic effect on virtualization technology adoption. On the hardware side, x86 architecture- based microprocessor manufacturers have released a new generation of chips that support virtualization natively. On the software side, the emergence of the open-source Xen* hypervisor virtual machine technology has eliminated much of the performance impact associated with the mediation layer that accompanies full virtualization and software emulation. These developments could completely decouple software from the underlying physical implementation [1].

Successful virtualization implementation

The key *goals of virtualization* are:

1. To ensure independence and isolation between the applications and operating systems that run on a particular piece of hardware,
2. To provide access to as much of the underlying hardware system as possible,
3. To do all of this while minimizing performance overhead. That's no small set of goals, but it can be done (and in more ways than one).

Although server virtualization can provide great benefits, it's not the only option out there for using virtualization.

Natalie Lambert, a senior analyst at Forrester Research Inc. in Cambridge, Mass, makes a few *recommendations* for SMBs for a successful virtualization implementation:

- Break down users into groups based on mobility, resource requirements and sensitive data requirements.
- Conduct a pilot program with specific user groups, such as contractors using unmanaged PCs.
- Consolidate and standardize machines to support the desktop virtualization effort.
- Conduct pilot projects running problematic applications.

To get the most out of virtualization technologies, keep in mind that the answer to every consolidation or availability problem may not be a single virtualization technology, but instead a combination of complementary solutions.

Hosted virtualization solutions are good options for SMBs that need to fast offer mobile and contact workers with secure, corporate-approved desktops, Lambert said. "The virtual machine image has all the attributes of a file, so IT staff can blow away the PC image very quickly if they need to." [9]

Virtualization has proven its *benefit* to the organization. "The No. 1 reason [benefit] is efficient use of resources," says Dan Thompson, network engineer at Young America. "Secondary reasons include ease of backups and disaster recovery."

There are other performance issues with server virtualization that will be addressed using optimized hardware chipsets, such as Intel Corp's vPro Processor Technology and Q35 Express Chipset [4].

Desktop virtualization eliminates the testing of multiple configurations, it increases data security and it improves system stability.

Virtualization is not a panacea. Without the right infrastructure and management tools, virtualization may do very little to stem the tide of complexity and inefficiency that has overwhelmed even administrators' best plans.

Virtualization in DR

Disaster recovery (DR) becomes more and more vital aspect of SME computing. In the past, it has been expensive to get one server to replicate to the other because those two servers had to be identical, so we needed the same hardware in both the main and backup locations. With virtualization technology, the hardware costs are cut down significantly, since the ability to host several machines on one server [6].

Disaster recovery plan (DRP) - sometimes referred to as a *business continuity plan (BCP)* or business process contingency plan (BPCP) - describes how an organization is to deal with potential disasters. Just as a disaster is an event that makes impossible the continuation of normal functions, a disaster recovery plan consists of the precautions taken so that the effects of a disaster will be minimized and the organization will be able to either maintain or quickly resume mission-critical functions.

Disaster recovery planning always involves an analysis of business processes and an investigation of continuity needs; it may also include specifications about disaster preventions.

Business continuity planning refers to any methodology used by an organization to create a plan for how the organization will recover from an interruption or complete disruption of normal operations. International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) 17799:2000 Information Technology is the Code of Practice for Information Security Management, an international version of the British Standards 7799-1:1999, published in December 2000 [14]. It contains major sections, one of which is Business Continuity Management (Section 11) [15]. ISO/IEC Technical Report (TR) 13335 – Guidelines for Management of IT Security, 13335-2: Managing and Planning IT Security contains requirements for procedural security, including business continuity [15, 13].

Business continuity and disaster recovery are closely related concepts that often exist as a point of contention between information technology (IT) and business management. Unlike disaster recovery, which focuses on IT infrastructure, business continuity represents the processes and procedures that an organization puts in place to ensure that essential functions can continue during and after a degradation or complete loss of critical people, processes or technology.

One big similarity between business continuity and disaster recovery planning is how quickly the plans become obsolete. Changes in core technology, such as server platform, are major indicators that a disaster recovery plan needs to be revisited. Minor changes can quickly insert as well that will put the disaster recovery plan out of alignment with organizational needs.

The *advantages* of using virtualization as opposed to going with a more traditional DR solution are [12]:

- One advantage to using virtual servers instead of physical servers is in the testing. When we build the test environment, we basically have two virtual servers running on the same hardware.

- Using virtual servers, it is easy to test because we can shut down and turn on these virtual servers easily. We can simulate server failure. We don't need remote hardware access to power down.

Disaster recovery plan

Disaster recovery plan is a plan for business continuity in the event of a disaster that destroys part or all of a business's resources, including IT equipment, data records and the physical space of an organization. The goal of a DRP is to resume normal computing capabilities in as little time as possible.

The design of any disaster recovery system should be driven by the ability to make available to the business the critical systems and information systems required to conduct normal production activities, without making those systems and information available to the wrong people [13].

“Everything starts with the business!” said W. Preston [15].

a. Define the Core Competency of the Organization

It means understanding an organization's activities and how all of its resources are interconnected. Answer at the first question: “What are the core products and/or services that the organization offers?”

The second question is: “What is the required information that provides that product or service, and what applications are required to effectively use this information?” The answer to the second question defines your organization's intellectual property (IP).

b. Prioritize the Business Functions Necessary to Continue the Core Competency

It is important to review an organization's vulnerability in all areas, including operating procedures, physical space and equipment, data integrity and emergency planning.

c. Correlate Each System to a Business Function, and Prioritize

A great example of this type of prioritization can be found in a publication of the U.S. Federal Communications Commission. It shows the FCC's different types of data and its criticality, and it is published at <http://www.fcc.gov/webinventory/>.

d. Define RPO and RTO for Each Critical System

The Recovery Time Objective, or RTO, means the time you want the system to be recovered. RTOs can range from zero seconds to many days, or even weeks. Each application serves a business function, so the question is how long you can live without that function. The Recovery Point Objective, or RPO, defines the point in time that is reflected once you have recovered a system, also referred to as how much data you can afford to lose.

You must create an RTO and RPO for each *protected* system. You should also know what your *budget* is, how much data needs to be backed up, how much data changes and what your RTO and RPO requirements are.

e. Create Consistency Groups

It is often necessary to recover several systems to the same point in time. This is first and foremost caused by applications that pass data to one another. If your company has several systems that perform related business processes, those systems need to be in the same consistency group. In addition to determining an RTO and RPO, you must identify those systems that are related to each other because they need to be recovered to the same point in time [13].

f. Determine for Each Critical System What to Protect from

After you have made a list with prioritized business functions and you have assigned each system to a business function, you should identify the things that can happen, that trigger a recovery scenario. You'll make a list of levels and types of disasters on each level that are expected for your area and type of business. The *Disaster Recovery Institute* states that each company should define its own levels of disasters.

g. Determine the Costs of an Outage

Once you have created the list from above, establishing all types of disasters and their associated probability, you must assign a cost to each type of disaster, for each type of system.

h. Plan for all types of disasters

Do not allow to go any particular type of disaster! Thinking “that will never happen”. Murphy's Law will find you. The disaster you do not prepare for, is the one that will strike you!

An *example* of planning a disaster recovery solution is given by Michael Osterman [19] beginning from the answers to several important questions: How much e-mail data loss is

acceptable following a disaster? How much time between the beginning of an e-mail service loss and e-mail recovery is acceptable? What quantifiable or other benefits would there be in speeding up the recovery process?

The *best plan* in the world is not worth much, if people aren't available to implement it!

Conclusions

Virtualization is transforming every part of data center operations management.

Server virtualization can be viewed as part of an overall virtualization trend in enterprise IT that includes storage virtualization, network virtualization, and workload management. This trend is one component in the development of autonomic computing, in which the server environment will be able to manage itself.

In general, as you move up, from hardware- to server- to application-level virtualization, you gain scalability at the cost of overall independence. Many companies are seeing the benefits of virtualization software because they can reduce their capital expenditures.

Server virtualization can be used to eliminate server sprawl, to make more efficient use of server resources, to improve server availability, to assist in disaster recovery, testing and development, and to centralize server administration.

Users could implement virtualization with software applications or by using hardware and software hybrid appliances. The technology can be placed on different levels of a storage area network.

Interest in virtual machine technology has been growing. IDC says the market reached more than \$300 million in 2004 and is on pace to grow at a rate of about 18% over the next few years. "It's been one of the faster growing technologies that we've encountered," says Galen Schreck, a senior analyst at Forrester Research [16]

According to the Disaster Recovery site: "Despite the number of very public disasters since 9/11, only about 50 percent of companies reports having a disaster recovery plan. Of those that do, nearly half have never tested their plan, which is equivalent to not having one at all."

References

1. NOVELL, Virtualization in Data Center, 2006 www.novell.com/collaboration/
2. <http://searchservvirtualization.techtarget.com/Definitions>, *Powered by Whatis.com*
3. CHAD MARSHALL, Creating Business Continuity through Enterprise Storage Solutions, Realtime publishers, 2007, chap. 1
4. Intel & VMWare, Virtualization Basics for SMBs, *TechTarget Data Center Media*, 2007
5. ANIL DESAI, A look at different approaches to virtualization, *Storage Magazine*, July, 2006
6. www.virtualization.info/glossary
7. www.searchvmware.techtarget.com
8. HERMAN MEHLING, Virtual desktops: Cheap and effective, *CIO Magazine*, June, 2007
9. DON JONES, Selecting the Right Virtualization Solution, Realtime publishers sponsored by SWSoft, 2007, Chapter 1
10. JOAN GOODCHILD, IT Consultant discusses virtualization for disaster recovery, *Storage Magazine*, August, 2006
11. MARK SCOTT, PC Restoration and Disaster Recovery, *Realtime publishers*, sponsored by Attachmate, 2007, chapter 4: Managing the Disaster Recovery Process
12. National Institute of Standards and Technology, Special Publication 800-34: Contingency Planning Guide for Information Technology Systems, June 2002, Section 2.2
13. NIST, Special Publication 800-12: An Introduction to Computer Security: The NIST handbook, October 1995, Chapter 11
14. Texas Department of Information Resources, Business Continuity Planning Guidelines
15. W. CURTIS PRESTON, Backup and Recovery, O'Reilly Media, 2007, chapter 24: It's all about Data Protection
16. MICHAEL OSTERMAN, Recovering from disasters, *Network World's Unified Communications Newsletter*, November, 2007
17. JENNIFER MEARS, *The rush is on to virtualized servers*, *Network World*, January, 2005

BUSINESS INTELLIGENCE AND E-GOVERNANCE

Marius COMAN*

Abstract

As a majority of the population lives in rural areas and are illiterates how to bring them into the new system will be a big challenge to the government. Further, still there are some villages which are not accessible and do not have electricity. To train the entire population on how to use, how to communicate with the officials in case of any issue, one has to have a detailed working strategy for its better utilization. In the e-governance environment, the cost of providing infrastructure would be a big challenge. The costs of new technologies get distributed and in comparison to the value generated, it is worthwhile to invest in such infrastructure only when all the three participants effectively put it into use.

Keywords: *Business Intelligent system, E-governance, Data Warehouse, OLAP*

Introduction

The advent of Information and Communication Technology (ICT) in the recent years has presented an opportunity for the IT managers and the senior officials in the government to change the way organizations leverage and value their information assets. With the ability to easy access of information mission delivery, resource management and data dissemination can be raised to levels which were previously not at all possible. In contrasts to the private industrial and business/government organizations are measured not by profits and losses, but by their ability to deliver upon their mission. Regardless of this mission, the ability to understand the citizen and the ability to use the resources are the key factors in matching services to citizen needs.

At times, government departments might have come across shortages or resources in one department and excess of resources in the other. This could be due to non-availability of proper data and facilities to disseminate information. Even if government departments are computerized and networked more for the purpose of Internet usage and mail transfer, the information available in one department, which possess the data could not be utilized in other department. This is because the information is stored in different formats, in different platforms and in heterogeneous different data base systems.

By deploying the latest ICT the government departments can not only maximize access to information, but also can bid farewell to the massive paper trail often associated with various government agencies. Rather than providing non-detailed information to uninterested constituents, the departments can now direct the right information to the right people at the right time. Further, the enterprise-wide information can be an asset to the government as well as to the entire population. This will help the departments in detailed micro level analysis and decision-making.

E-Governance System

E-governance is to governance processes in which Information and Communications Technology (ICT) play an active and significant role.

* Lecturer, Ph.D., "Valahia" University, Târgoviște.

E-governance is the application of information & communication technologies to transform the efficiency, effectiveness, transparency and accountability of informational & transactional exchanges with in government, between governments, agencies of National, State, Municipal & Local levels, citizen & businesses, and to empower citizens through access & use of information.

E-Governance solutions are oriented towards helping government organizations transform into enterprise infrastructure-based end-to-end digital governments that:

- Build services around citizen's choice
- Make government more accessible
- Facilitate social inclusion
- Provide information responsibly
- Use government resources effectively
- Reduce government spending
- Deliver online services
- Involve citizens in the governing process

Governments are increasingly looking to cut down on operating costs and improve delivery of services to citizens and employees. The focus is slowly shifting towards giving self-service process improvements through online web based applications. The three main target groups that can be distinguished in e-governance concepts are government, citizens and businesses/interest groups. The external strategic objectives focus on citizens and businesses and interest groups, the internal objectives focus on government itself.

The major components involved in E-governance are:

1. Government to Government (G2G);
2. Government to Citizens (G2C);
3. Government to Business (G2B);
4. Citizen to Government (C2G).

Government to Government (G2G) - All the G2G interactions and dealings are required for planning, decision support and implementation of its action plans. The goal of the Government-to-Government (G2G) system is to forge new partnerships among various levels of government. These partnerships facilitate collaboration between levels of government, and empower state and local governments to deliver citizen services more effectively. The time gap can be greatly reduced once the E-governance system is in place.

It requires a single interface to government offices and staff, to effectively carry out functions like human resource management and financial resource planning in an integrated environment. Further, all government agencies to be linked through a modern computerized network that allows secure communications and interaction. Existing government systems are either replaced or integrated into the new technology, depending on the functionality and adaptability of legacy systems.

Government to Citizen (G2C) - is basically serving the customers on the Web. The customers need not to visit, each time, the government departments with Xerox copies of documents. The documents submitted at any of the facility center is made available across the departments so that carrying of volumes of documents and feeding them into computers is totally eliminated or minimized to a maximum extent. Each citizen will have a unique identification number and all the facilities and services rendered to a particular citizen can be tracked easily. Once implemented, this will drastically reduce the workload of the government departments. For example, as the government units are functioning in silos, it requires issuing various certificates to the general public for availing some facilities. Instead if common general-purpose citizen identification is given to each citizen, there won't be any further need for issuing the same set of certificates again and again. The concerned departments can verify the details from the central database.

Citizen to Government (C2G) is the online relationship between the citizen and all of the various government departments one would like to interact to so that the citizen gets some services without actually physically visiting the various government offices. The role of C2G is to introduce the citizen to websites that one will find the most useful, in daily life and times of need. This is an application to make public-to-government transactions more efficient, effective and productive, while enhancing the quality of services, by facilitating public transactions with government using various electronic channels. The association between citizens and the government as a grievance redresser in an online environment can easily be leveraged to provide many more services to citizens from different providers.

Government to Business (G2B) and Business to Government (B2G) - In order to implement the government's various plans and projects it needs the business communities' services. Services like e-procurement, e-payment, and project monitoring and implementation forms part of this model. E-Procurement is an application to transform the existing manual system of government procurement into an efficient electronic based one.

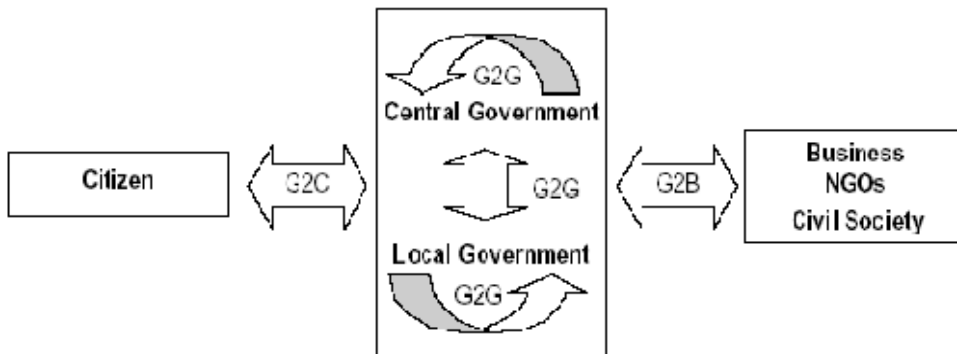


Figure 1 Interactions between main groups in the e-governance

Gartner, an international e-business research consultancy firm, has formulated a four-phase E-governance model. This e-governance model can serve as a reference for governments to position where a project fits in the overall evolution of an e-governance strategy. In most cases, governments start with the delivery of online information, but soon public demand and internal efficiency ask for more complex services. Of course this change will take effect gradually, some services will be online earlier than other services. In some cases the public demand is the driving force, in other cases cost saving aspects for the government are leading. According to Gartner, e-governance will mature according to the four-phase e-governance maturity model.

E-Governance Maturity Model (Gartner)

Early 90's	Information	→ Presence
Mid 90's	Interaction	→ Intake process
Present	Transaction	→ Complete transaction
Future	Transformation	→ Integration and organizational changes

In each of the four phases, the delivery of online services and use of ICTs in government operations serve one or more of the aspects of e-governance: democracy, government, business.

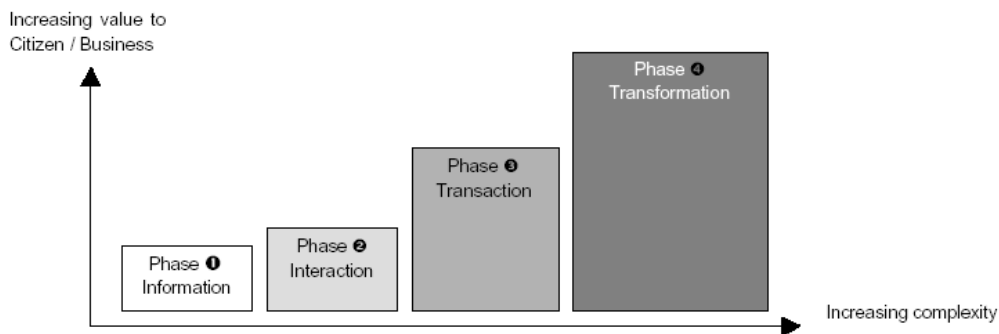


Figure 2 - E-Governance Maturity Model (Source: Gartner, 2000: 11)

The model does not mean that all institutions have to go through all phases and all at the same time.

In the *first phase* e-governance means being present on the web, providing the external public (G2C and G2B) with relevant information.

In the *second phase* the interaction between government and the public (G2C and G2B) is stimulated with various applications. People can ask questions via e-mail use search engines for information and are able to download all sorts of forms and documents. These functionalities save time.

With *phase three* the complexity of the technology is increasing, but customer (G2C and G2B) value will also be higher. Complete transactions can be done without going to an office.

The *fourth phase* is the transformation phase in which all information systems are integrated and the public can get G2C and G2B services at one (virtual) counter. One single point of contact for all services is the ultimate goal.

	External: G2C	External: G2B	Internal: G2G
Phase Information	Local / Departmental / National information (mission statements and organizational structure Addresses, opening hours. employees, telephone numbers Laws, rules and regulations Petitions Government glossary	Business information Addresses, opening hours, employees, telephone numbers Laws; rules and regulations	Knowledge base (static intranet) Knowledge management (LAN)
Phase Interaction	Downloading forms on websites Submitting forms Online help with filling in forms (permits, birth / death certificates) Intake processes for permits etc. E-mail Newsletters Discussion groups (e-democracy) Polls and questionnaires Personalised web pages	Downloading forms on websites Submitting forms Online help with filling in forms (permits) Intake processes for permits etc. E-mail Notification	E-mail Interactive knowledge databases Complaint handling tools

	Notification		
Phase Transaction	License applications / renewals Renewing car tags vehicle registration Personal accounts (mytax, myfines, mylicenses etc.) Payment of (property) taxes Payment of tickets and fines Paying utility bills Registering and voting online	License applications and renewals via website Payment of taxes Procurement	Inter-governmental transactions
Phase Transformation	Personalized website with integrated personal account for all services	Knowledge base (static intranet) Knowledge management (LAN)	Database integration

Table 1 - Overview e-governance solutions

Business Intelligence Technology

Information is one of the valuable assets to any Government. When used properly, it can help planners and decision makers in making informed decisions leading to positive impact on targeted group of citizens. However, to use information to its fullest potential, the planners and decision makers need instant access to relevant data in a properly summarized form.

In spite of taking lots of initiative for computerization, the government decision makers are currently having difficulty in obtaining meaningful information in a timely manner because they have to request and depend on IT staff for making special reports which often takes long time to generate. An information warehouse can deliver strategic intelligence to the decision makers and provide an insight into the overall situation. This greatly facilitates decision makers in taking micro level decisions in a timely manner without the need to depend on their IT staff. By organizing data into a meaningful data warehouse, the decision makers can be empowered with a flexible tool that enables them to make informed policy decisions for citizen facilitation and accessing their impact over the intended section of the population.

The need to improve the decision making capabilities using the ever increasing computing power, availability of RDBM Systems across heterogeneous platforms led to the use of more and more information in the decision makes process. Though the information base in each of the sector has grown into hundreds of thousands of GBs/MBs, the peculiarity of database structure does not allow one to perform a detailed analysis on the data from the way one wants to do. Further, even if one does the analysis on large volume of data one should know the complete designing of the data model and the contents of it. It is practically not possible for any one to know the complete data modelling and the contents and ad hoc query analysis is simply not possible. This implies that only an expert in data modelling can do any sort of desired analysis. This clearly shows the limitations in the conventional systems. As the top-level officials/decision makers want to do detailed analysis before taking a decision the departments are now looking for a framework by which one can accomplish multiple goals.

Three types of spontaneous questions that arise while dealing with the data include:

- **Those that produce a number:** *How many families are benefiting?*
- **Those that fit into a report:** *What are the industries broken out by the proposed districts realignment?*

▪ **Those that require analysis:** *How many additional acres of land will get benefit with the new irrigation scheme? Will it make any difference in the life style of the farmers? Is there any chance of stopping the migration of farmers?*

How and from where one can find answer for the above queries. It is here that the Business Intelligence –a new database technology in IT helps in analyzing and selecting the right answer.

Relationship between e-governance and business intelligence

Business Intelligence is a broad category of applications and technologies for gathering, storing, analyzing and providing access to data to help the decision makers in making decisions. Typically, BI applications include decision support systems, query and reporting, On Line Analytical Process (OLAP), statistical analysis, forecasting and data mining (a technology to extract unknown and hidden patterns and knowledge from within the data). Business Intelligence therefore is well suited for e-governance applications in the G2G and G2C environment. For effective implementation of a BI solution, the de facto condition is a solid and reliable data warehouse.

Data warehouse is a subject-oriented, integrated, time-variant, non-volatile collection of data, cutting across the enterprise. Until there is a repository of accurate data across the enterprise value chain, application of BI tools to analyze and aid in strategic business decisions is impossible. Currently, data integrity, found wanting in most enterprises is the most difficult and resource consuming stage of BI development and deployment.

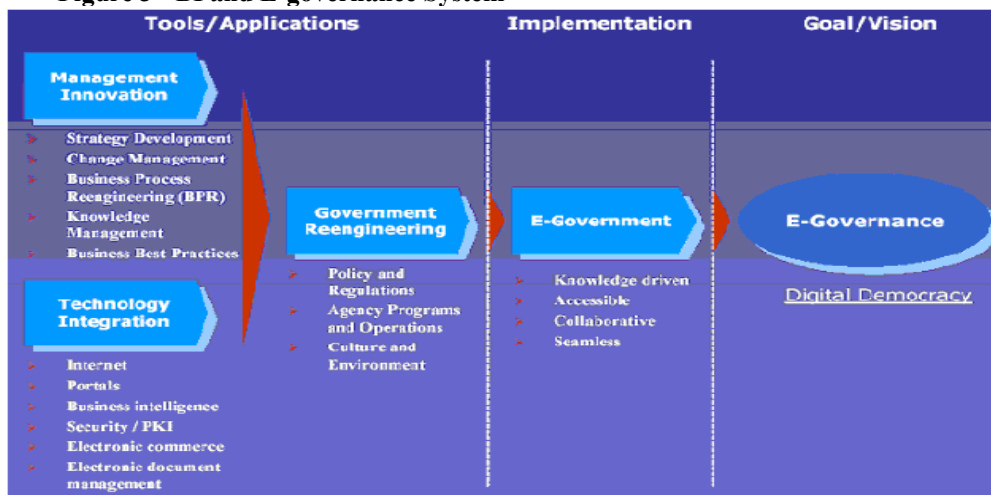
Benefits of BI for better E-governance is:

1. Do not have to deal with heterogeneous and silo’s systems
2. Dependence on IT staff minimized
3. Can obtain easily decipherable and comprehensive information without the need to use sophisticated tools.
4. Can perform extensive analysis of stored data to provide answers to exhaustive queries.

This helps them to formulate more effective strategies and policies for citizen facilitation

Going by the E-governance definition, Business Intelligence technologies, which help policy makers draw key conclusions from data, become a critical component of any e-Governance initiative, as is shown in the figure below.

Figure 3 - BI and E-governance System



The benefit of the BI system can summarize in this way. From a layman's angle the BI technologies are more towards G2G than other forms. All the government plans and decisions can be arrived with the help of detailed multi-dimensional analyses of all the relevant data. In fact it helps the citizens more than the government. The citizens can have a compact and compiled profile of each individual from the government and everything the citizen can have it as a web based report and the same can be used wherever the citizen feels.

Conclusions

A framework for BI in E-governance is presented here. A large number of e-governance applications are already in operation in most of the state centers. The necessary BI infrastructure has been created at the head quarter and sufficient number of officials was trained on BI. This is the right time for introducing BI in the e-governance and to further strengthen the e-governance system. In order to incorporate the BI system and implement this, initially one or two sectors may be identified and the BI system built over it as a proof of concept. Once the desired results are achieved the same can be replicated in other sectors of the government. Once the complete system is in place at the national level for use a knowledge bank can be created for the entire E-governance environment.

References

1. Noe Gutierrez “Business Intelligence (BI) Governance” <http://www.businessintelligence.com/>
2. Richard Kingston (2006) “Intelligent Cities: developing new methods of public service management and delivery”, www.ccsr.ac.uk/methods/festival/programme/urb/kingston.ppt
3. Beyond eGovernment , www.eg2km.org/download/workingpapers/
4. e-governance portal, [www.search.techrepublic.com.com/search/e-governance +portal.html](http://www.search.techrepublic.com.com/search/e-governance+portal.html)
5. www.e-guvernare.ro

A PROJECT WITHIN MICROSOFT PROJECT 2007

Emil COSMA*

Abstract

The main purpose of this article is to emphasize the innumerable advantages of the Microsoft Project 2007 projecting environment that a project manager could benefit of. More exactly,

*Project Management stands for a function that is recognized within the majority of domains. A project is defined as “a temporary effort made for creating a product or a unique service”. A projects’ administrative programme within an informational system (such as **Microsoft Project**, Primavera Planner) represents a “database that is in concordance with time”. It should help proceeding the required operations and, at the same time, to look and behave the same way other frequently utilized productive programmes. It keeps accounts of all information regarding the job requests, period and the project’s needed resources and visualizes the project’s plan in standard, well-defined formats, organizes the activities and resources consistently and efficiently, shares information regarding the project with all **persons involved** in an intranet or Internet network, and communicates efficiently with the resources and other involved persons, permitting at the same time the project manager to take the final control/decision as his/her responsibility.*

Key words: Project, Microsoft Project 2007, triangular method.

Introduction

A project is temporary. A project’s length of time varies from one week, for example, to even a few years, yet every project has a deadline. When starting to work at the project, there is the possibility of being unaware of its deadline, yet one knows that it occurs in the future. Even if they have a lot in common, the projects are not similar to the *progressing operations*. The name suggests the fact that the progressing operations continue indefinitely; one can not establish a deadline. For instance, one could mention the majority of the activities within the accounting and human resources departments. The projects are different from the processing operations because of an already established deadline.

① **A project requires effort.** Just like human and equipments, the **resources** also work. The effort is *undertaken* by a team or an organization, so that the projects appear as intentional, scheduled events.

① **Every single product creates an unique service or product.** The result or the project’s final product represents the reason for which the project has been undertaken. A gas refinery doesn’t produce a unique product. On the other hand, the commercial planes do stand for unique products.

Microsoft Project (or MSP) is a project management software program developed and sold by Microsoft which is designed to assist project managers in developing plans, assigning resources to tasks, tracking progress, managing budgets and analyzing workloads. The first version, Microsoft Project for Windows v1.0, started in 1987 on contract to a small external company. In 1988 the company was acquired by Microsoft, bringing the development project in-house where it was finished and released in 1990 as part of the company's applications offerings for Microsoft Windows 3.0. Microsoft Project was the company's third Windows-based application, and within a couple of years after its introduction **WinProj** was the dominant PC-based project management

* Lecturer, Ph.D., “Ovidius” University, Constanța.

software. Further versions were released in 1992 (v3), 1993 (v4), 1995, 1998, 2000, 2002, 2003 and 2007. There was no Version 2 on either platform; the original design spec was augmented with the addition of macro capabilities and the extra work required to support a macro language pushed the development schedule out to early 1992 (Version 3). The application creates critical path schedules, although critical chain and event chain methodology third-party add-ons are available. Schedules can be resource leveled, and chains are visualized in a Gantt chart. Additionally, Project can recognize different classes of users. These different classes of users can have differing access levels to projects, views, and other data. Custom objects such as calendars, views, tables, filters and fields are stored in an enterprise global which is shared by all users. Microsoft Project and Project Server are the cornerstones of the Microsoft Office Enterprise Project Management (EPM) product.

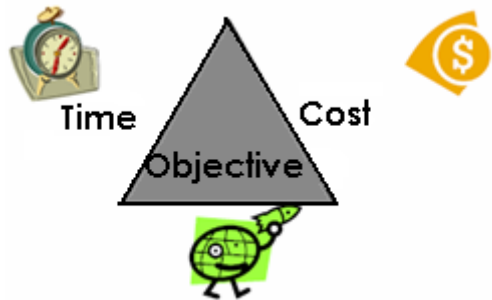
Literature review

Schedules, budgets, communications, resources-projects big and small include them all, and Microsoft Project 2007 can help you control these variables - not be controlled by them. But Project is complex software, and learning it is, a project in itself. Over the years and versions, Project has collected improvements. Yet one feature has gotten worse: Project documentations. To use Project successfully, you need to understand something about project management, but that is an exercise Microsoft leaves to its customers. There are many Internet resources, books and papers which serve as manuals that should have accompanied Project 2007, for example: Bonnie, Biafore, 2007, *Microsoft Project 2007: The Missing Manual*, Pogue-Press: O' Reilly; Carl, Chatfield, and Timothy, Johnson, 2007, *Microsoft Office Project 2007 Step by Step*, Microsoft Press; Dave, Gochberg, and Rob, Stewart, 2008, *Microsoft Office Project Server 2007: The Complete Reference*, McGraw-Hill Osborne; Dale, A. Howard, and Gary, L. Chefetz, 2007, *Ultimate Learning Guide to Microsoft Office Project 2007*, Soho Corp; Elaine, Marmel, 2007, *Microsoft Project 2007 Bible*, John Wiley & Sons. The purpose of this article is to present in detail an example of a project, using Microsoft Project 2007 called *Dream House*.

Theoretical Background

① The project's "triangular" method

One may visualize the projects' work in different ways, but the most favourite one is the so-called **project triangle**, having numerous options, however, the main idea is that every project includes a certain time restriction grade, a definite type of budget and requires a certain work tasks quantity (it has a defined objective).



Time. For many projects that create a product or a result when relating to an event, time represents the most important restriction that should be administrated. There is the possibility that the project's budget or the work's objective may be unknown, yet it is likely that one knows the project's time limit.



Cost. The costs represent all necessary resources for the project's realization. The cost includes people and equipments that work effectively, needed materials and all events and elements that require money or a person's involvement within a project. For almost all

projects, the cost stands finally for a restriction; there is also the possibility of projects exceeding the budget, without being necessary to make eventual corrective actions.



Objective. One should take into consideration two aspects of the objective:

✓ **Project's objective.** Every single project results in a unique product: an element or a palpable service. Usually, customers expect a series of characteristics and functions regarding the products they consider to buy.

✓ **Product's objective** describes sometimes in details the qualities, the characteristics and the desired functions regarding the product. The documents that offer such information are sometimes called *products specifications*. The services and the events have usually a series of foreseen characteristics. On the other hand, the project's objective describes the required operations of a product or service's delivery, having the product's desired specifications and objective. Even though the project's objective focuses on the client or the product's consumer, it is preoccupied mainly with the persons who will finalize the project. The project's objective is usually measured by *activities and phases*.

The product's objective and the project's objective are very similar. The project manager who administrates the project's objective should also realize that he/she should also know well the product's objective or how to communicate with people who are acknowledged with this type of data.

① Restrictions administration in regards to projects

The most sensible aspect which concerns the project's management is that of maintaining equilibrium between the restrictions of projects' objective, time and cost. The project triangle shows the process of realizing equilibrium between restrictions because all three triangle sides are connected, and one triangle side's alteration could affect at least one of the two remaining sides:

- If the project's plan duration (**time** ↓) is reduced, it might need the budget (**cost** ↑) increase, due to the fact that one needs to employ many resources that do the same work within a short time period. If one doesn't achieve to increase the budget, then it may need to reduce the objective (**objective** ↓) because the available resources are not able to execute all operations that are scheduled for a short time period.

- If the project's budget (**cost** ↓) decreases, one may possibly need a little bit more time (**time** ↑) because it's impossible to pay so much resources with the same efficiency. If the time period doesn't increase, it is needed to reduce the project's objective, because fewer resources are not able to perform all scheduled operations in the remaining available time period. If a project's budget should be reduced, one should analyze the material resources **classes** for which the budgetary resources were established. An inferior class material is not necessarily a bad quality material. As long as the material class corresponds with the desired utilization, it could have good quality. One should also analyze the costs of human resources and equipment that were scheduled for utilization. A project manager should take into consideration (or better discuss with a decision factor) the advantages and risks of costs reduction.

- If the project's **objective** ↑ increases, one may need more **time** ↑ or many resources (**cost** ↑) for the additional operation's performance. If the project's objective extends itself after the project's starting, then it is called **expanded objective**. The objective's modification of a project that was executed partially is not necessarily a negative fact; for example, there could be the possibility that the project's beneficiary was changed and a different product should be delivered to the new customer. A change in the project's objective has a negative influence only if the project manager doesn't execute the planning and the acknowledgment for the new requests – this situation occurs when the other restrictions (cost, time) are not analyzed correspondingly or, if it's the case, corrected.

Short Presentation of the Microsoft Project Display Environment

Introduction

Microsoft Projects is part of the Microsoft Office program 'family' for desktop computers, that's why many elements included in Microsoft Project are similar to those of Word, Excel and Access. For instance, the organization of the general menus bar and the instruments bar are very alike. Microsoft Project offers access to the same assistance instruments (*Help*), *Office Assistant* and *ToolTips*. On the other hand, many operations performed by *Microsoft Project* are different from those within other Office programs. Most of the elements displayed in the *Microsoft Project* program accept **indications** or **ToolTips labels**. In order to observe some of the available *ToolTips* labels, one should put the mouse cursor on the bars and data within *Gantt Chart* or on the buttons included in the instruments bars.

The creation of a project file

Project is mainly based on the time parameter. Almost all projects have a start date and finish to a subsequent date. Sometimes it is known only the intended start date for the project, the planned finish date, or maybe both dates. Yet, when working within *Project*, one specifies only a date, and not both: whether the project's start date or the finish date. After introducing the project's start date or finish date and the activities' **durations**, *Project* automatically calculates the other date. *Project* represents not only a static storage with information regarding the project, but also an active schedule instrument.

Even though one knows already the project's deadline, most projects should be scheduled beginning with a start date. The schedule based on the start date determines the actions' performance as soon as possible and offers the best flexibility in planning.

A *Project* file can be created (*New*), but one may also create a file based on a pattern. One may save any *Project* file as a pattern. When doing so, one could choose information that could be excluded from the pattern, such as planned or real programmes or information about the costs.

The work interface within *Project* is called **view**. *Project* contains tens of views, yet normally, at a given time one should work only with one (and sometimes with two). The views are used for introduction, editing, analyzing and displaying the information regarding the project. The already established view is the *Gantt Chart View*.

There are many commuting methods between views:

- One should select a view out of the most frequent used, which are displayed in the *Views* bar that is situated in the left margin of the *Project* window.
- One selects a view from the same view set within the *View* menu.
- One could visualize all available views by selecting the *More Views...* command from the *View* menu.

Every view focuses on the details in regard to **task**, **resource** or **assignment**. In many views, these details are organized into **tables**. The pre-established table from the *Gantt Chart View* is known as the **Entry** table and contains information about tasks. A table stands for a data grid which is similar to a calculation sheet that is organized into rows and columns. Every row contains information about a single task or resource. Every column describes a single value of that particular task or resource.

The *Resource Sheet View* is concerned with the resources' details. The pre-established table for this view is an *Entry* type one. One may also commute to another table in order to see other details about resources.

Using the *Task Usage View* one may visualize tasks within the left numbered rows, and under these, the resources assigned to every task. There is a *timescale grid* that contains daily work

values for every allocation. Just like *Gantt Chart* and other views within *Project*, the *Task Usage* view is divided in two zones. Every single zone has its own horizontal scroll bar.

In order to change the table which appears in a view, one needs to position the mouse cursor on the *Table* option within the *View* menu and select the table. By commuting the tables, the information displayed in the view modifies, but the effective information does not.

The methods used for controlling data displayed in *Project* are:

- One should select the view that organizes and presents in big raws information regarding tasks, resources or assignments.

- Within the selected view, one chooses a task or a resource (not all views accept tables).

- One may filter, sort or organize the data, using another way which fits the purpose.

Besides using this incorporated tables and views, one may also personalize or create his/her own.

Within the *Project* window, one may display simultaneously two views. For instance, one could display the *Gantt Chart* view in the upper panel and the *Task Usage* view in the window's below panel. If this arrangement is used, the task that is selected in the upper panel changes what one may see in the below panel. In a similar way, scrolling the temporary grid in the below panel modifies the temporary grid from the upper panel of the *Gantt Chart* view.

The *Resource Allocation* and *Task Entry* views are both pre-defined views for divided screens and other combinations. One may also display two chosen views by using the *Split* option from the *Window* menu. After the *Project* window gets divided in two panels, one may choose the desired view in order to display it in that particular location. If one wishes to get back to the one-view mode, he/she should select the *Remove Split* option from the *Window* menu.

Case study: dwelling house construction –"Dream House"


Tasks introduction

Tasks stand for fundamental constitutive blocks of a project- they represent the actions that should be made for accomplishing the project's objectives. The tasks describe the project's work in terms of sequence, duration and resources request.

Within *Project*, one of the locations where views are introduced is the *Gantt View*. In the pre-established *Gantt View*, the bar diagram appears in the right side, and a table is displayed in the view's left side (the *Entry* table appears in a pre-established way, but one could also display any other table). Even though the *Entry* table may look similar to a grid from a Microsoft Excel spreadsheet, it behaves more like a database table. Every row within an Excel table describes a single activity, to which a **task identifier (task ID)** is attached.

Task identifiers appear in the task row's left side and the column titles, such as *Task Name* and *Duration*, are field patterns. The meeting point between a row (or task) and a column is called cell or field. Actually, the internal architecture of a *Project* file has much more in common with that of a database file such as Microsoft Access, than to the architecture of a spreadsheet application such as Excel.

Within the *Entry* table, on the *Task Name* column, one may introduce the tasks. *Projects* allots a one day period for all new tasks. The question mark shows that there is an estimated duration.

	 Task Name	Duration
1	Schedule finalization and estimations of owner and architect	1 day?
2	Contract signing and work progress's official reports	1 day?
3	Foundation project consent at the Civil Defence	1 day?
4	Construction affiliated consent with the four poles	1 day?
5	Electric plant project consent	1 day?
6	Sanitary installation project consent	1 day?
7	Ventilation installation project consent	1 day?
8	Other diverse security consents	1 day?
9	Terrain cleaning	1 day?
10	220V generators installation	1 day?
11	Inner terrain equipments installation	1 day?


Task duration stands for the estimated time quantity till the task finalization. The total project's **duration** is determined by means of calculating the difference between the start date and the last date of finishing the tasks that compose it. The project's duration is also influenced by other factors, such as the relationships between the tasks. Due to the fact that *Project* makes a distinction between the working time and the off time, task duration is not necessarily connected with the elapsed time. Yet, there is the possibility to plan tasks to run both during working periods and off periods. In order to do so, one needs to assign an **elapsed duration** to a task. The *PERT analysis* (Program Evaluation and Review Technique) may be considered a useful tool for estimating the tasks duration. The *Project's Office Assistant* modulus ("*Estimate task durations by using PERT analysis*") offers more information in regard to this subject.

When using the *Project* application, one may use duration abbreviations:

Abbreviation	Display	Meaning
m	min	Minute
h	hr	Hour
d	day	Day
w	wk	Week
mo	mon	Month
em	emin	Elapsed minute
eh	ehr	Elapsed hour
ed	eday	Elapsed day
ew	ewk	Elapsed week
emo	emon	Elapsed month



The pre-established values are necessary: 8 hours/day, 40 hours/week and 20 days/month. When creating those tasks, *Project* allots one day estimated duration for each (the question mark within the *Duration* field shows the fact that duration represents an explicit estimation, even if actually, all task durations should have been taken into consideration as estimations until the task's ending).



One introduces the following data for tasks:

	 Task Name	Duration
1	Schedule finalization and estimations of owner and architect	20 days
2	Contract signing and work progress's official reports	1 day
3	Foundation project consent at the Civil Defence	2 days
4	Construction affiliated consent with the four poles	2 days
5	Electric plant project consent	1 day
6	Sanitary installation project consent	2 days
7	Ventilation installation project consent	1 day
8	Other diverse security consents	3 days
9	Terrain cleaning	1 day
10	220V generators installation	1 day
11	Inner terrain equipments installation	1 day

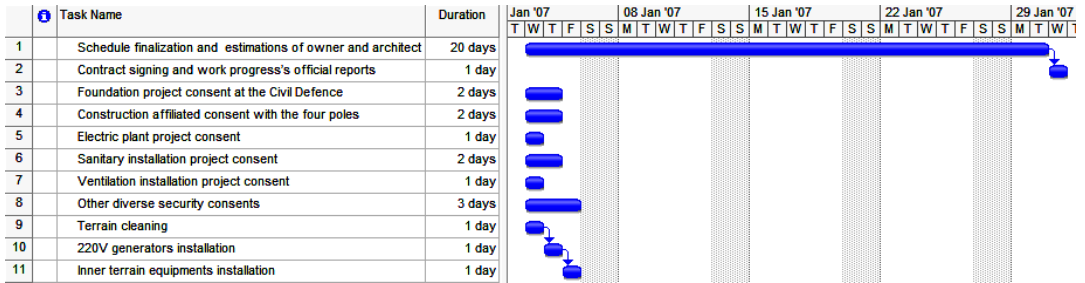
The projects assume the tasks' performance, having a certain order. There is a Start-to-Finish **relationship** between two tasks, so that one could define four types of relationships between tasks:

FS	Finish-to-Start	The finishing date of the preceding task determines the starting date of the subsequent one
SS	Start-to-Start	The starting date of the preceding task determines the starting date of the subsequent one
FF	Finish-to-Finish	The finishing date of the preceding task determines the finishing date of the subsequent one
SF	Start-to-Finish	The starting date of the preceding task determines the finishing date of the subsequent one

The tasks 1 and 2 are connected through a Finish-to-Start relationship (one should select the tasks 1 and 2 on the button and press the  (*Link Tasks*) button from the Standard Toolbar). *Project* changes the start date of the task 2 in the next working day that follows the task 1's finalization. In order to cancel the relationships between the tasks, one should select those tasks among which the relationship must be cancelled and then press the  (*Unlink Tasks*) button. If one cancels a relationship for a single task which is part of a task chain connected with a Finish-to-Start relationship, *Project* remakes the relationships between the chain remaining tasks.

 Task Name	Duration	Start	Finish	Predecessors	Rt	January 2007												Fe		
1	Schedule finalization and estimations of owner and architect	20 days	Wed 03.01.07	Tue 30.01.07			26	29	01	04	07	10	13	16	19	22	25	28	31	C
2	Contract signing and work progress's official reports	1 day	Wed 31.01.07	Wed 31.01.07	1															

The 3-8 tasks have the same start date, but the 9, 10, 11 tasks are chained:



In order to change the scale time in the *Gantt Chart* view, one should use the buttons (*Zoom In and Zoom Out*).

Project duration

A simple method of finding out the project's total duration is the examination of the *Project Information* dialogue box, the *Statistics* button. One could edit the starting date but he/she can not edit directly the finish date because this project is adjusted to be planned on a start date basis. One may visualize the project's total duration, based on the duration of tasks and relationships between the inserted tasks.

	Start	Finish
Current	Wed 03.01.07	Thu 02.08.07
Baseline	NA	NA
Actual	NA	NA
Variance	0d	0d

	Duration	Work	Cost
Current	152d	1.528h	\$4.688,00
Baseline	0d	0h	\$0,00
Actual	0d	0h	\$0,00
Remaining	152d	1.528h	\$4.688,00

Percent complete:
 Duration: 0% Work: 0%

Tasks' organization into phases

Within Project, the phases are represented by **summary tasks**. A summary task behaves different from other activities. One can not directly edit duration, starting date or other scheduled values because these are derived from detailed tasks. The summary tasks are useful for those who want to obtain information about the project work's phases.

The main project management's objective: *the top-down and the down-top schedule*:


The top-down planning	The down-tip planning
Identifies the important project's phases and products before specifying the necessary tasks for finishing these phases. The complex projects may have more phase levels.	Identifies as many low level detailed tasks as possible, before organizing them into logical groups that are also known as phases or summary tasks.
It works from general to detailed.	It works from detailed to general.


The project objectives evolve usually from top to bottom; whereas project's scheduled details tend to have a down-top development. The creation of correct activities and phases for more complex projects implies a combination between the top-down schedule and the down-top one.


Summary task and additional tasks' introduction:

- ✓ Within the *Entry* table, click on task 1;
- ✓ Within the *Insert* menu, click on the *New Task* command;
- ✓ Within the new task that corresponds to the *Task Name* field, one introduces the **Dream House** text (in fact the project);

- ✓ One should further add other tasks (phases): **General conditions, Notifications and Approvals, Building Sites work**;

	 Task Name	Duration
1	Dream House	1 day?
2	General conditions	1 day?
3	Schedule finalization and estimations of owner and architect	20 days
4	Contract signing and work progress's official reports	1 day
5	Notifications and Approvals	1 day?
6	Foundation project consent at the Civil Defence	2 days
7	Construction affiliated consent with the four poles	2 days
8	Electric plant project consent	1 day
9	Sanitary installation project consent	2 days
10	Ventilation installation project consent	1 day
11	Other diverse security consents	3 days
12	Building Sites work	1 day?
13	Terrain cleaning	1 day
14	220V generators installation	1 day
15	Inner terrain equipments installation	1 day

- ✓ One defines the phases. For instance, for the **Notifications and Approvals** phase, one selects the 5-10 tasks and press the  (*Indent*) button;

- ✓ One links the tasks. For example, for the **Building Sites work** phase, one selects the 13-15 tasks and press the  (*Link Tasks*) button.

Resources Configuration

	Task Name	January 2007										February 2007			
		31	03	06	09	12	15	18	21	24	27	30	02	05	08
1	[-] "Dream House"	[Gantt bar]													
2	[-] General conditions	[Gantt bar]													
3	Schedule finalization and estimations of owner and architect	[Blue bar]													
4	Contract signing and work progress's official reports	[Blue bar]													
5	[-] Notifications and Approvals	[Gantt bar]													
6	Foundation project consent at the Civil Defence	[Blue bar]													
7	Construction affiliated consent with the four poles	[Blue bar]													
8	Electric plant project consent	[Blue bar]													
9	Sanitary installation project consent	[Blue bar]													
10	Ventilation installation project consent	[Blue bar]													
11	Other diverse security consents	[Blue bar]													
12	[-] Building Sites work	[Gantt bar]													
13	Terrain cleaning	[Blue bar]													
14	220V generators installation	[Blue bar]													
15	Inner terrain equipments installation	[Blue bar]													

The resources are represented by people, equipments and needed materials for project’s task performance. *Project* focuses on two resources’ aspects: the *availability* and the *cost*. The availability determines the moment when a certain resource deals with a certain task and the amount of time for working; the costs refer to the amount that is necessary to be paid for that particular resource.

Comparing to the planning tools that focus on the task (agenda), the resources administration is effectively the most important advantage of using the *Project* application.


Project deals with two types of resources: work and material resources. The work resources stand for the persons and equipments that execute the project’s effective work.

The resources are inserted in the *Resource Sheet* view, on the *Resource Name* column. One needs some explanations regarding the *Max. Units* field. This represents the maximum capacity of a resource performing any task. If the maximum number of units for a resource is mentioned, it means that 100% of resource’s time is available for working its allocated tasks. *Project* gives a warning if a resource’s is attributed more tasks than it could execute at a maximum work capacity (in other words, it becomes overallocated). Within the *Type* field, one should select the *Work* (or *Material*) option for each and every resource.

Personnel and equipment resources are adjusted in the same way. There are several important differences regarding the way in which these two types of resources may be scheduled. For instance, the majority of the personnel resources do not have working days that last more than 12 hours, yet, the equipment resources may work more slowly. Moreover, the personnel resources may be more flexible in regard to tasks they can perform, while the equipment resources tend to be more specialized. One doesn’t need to keep book of all equipment pieces that are going to be used in the project, however, it is recommended to configure the equipment sources when:

- Many teams or persons need simultaneously an equipment piece for performing different tasks and the equipment could be reserved in many more places than it can afford.
- There is a desire for organizing and recording the costs related to the equipment.

The budget or the cost stands for one of the *project triangle* model's components. Almost all projects have a certain financial aspect and the costs control numerous projects' objectives. The purpose for assigning a standard paying rate (*Std. Rate*) for a material resource is that of estimating as correct as possible the materials' costs compared with the project's plan (and subsequently keeping track of them). Not all resources are paid at a direct standard rate. For some resources, one needs to pay overtime (*Ovt. Rate*), due to the fact that it works more than an estimated number of hours for an estimated time period. The cost doesn't increase in the same way for all resources. For example, when renting an equipment, it might be necessary to pay a rental fee, yet the employees tend usually to rise the price once the time goes away. Within *Accrue At*, one specifies the way how *Project* should deal with a resource's cost increase (for instance, if the rental fees must be paid until using the equipment, one fixes *Start* in the *Accrue At* field).

		Resource Name	Type	Max. Units	Std. Rate	Ovt. Rate	Accrue At
1		Works contracted firm	Work	100%	\$0,00/hr	\$0,00/hr	Prorated
2		Excavation firm	Work	100%	\$2,00/hr	\$4,00/hr	Prorated
3		Architect	Work	100%	\$8,00/hr	\$12,00/hr	Prorated
4		Possessor	Work	100%	\$0,00/hr	\$0,00/hr	Prorated
5		Terrain concession	Work	100%	\$0,00/hr	\$0,00/hr	Prorated
6		Electricians	Work	100%	\$3,00/hr	\$6,00/hr	Prorated
7		Electricians firm	Work	100%	\$10,00/hr	\$20,00/hr	Prorated
8		Plumbers	Work	100%	\$3,00/hr	\$5,00/hr	Prorated

Resources' assignment to tasks

An **allocation** or an **assignment** stands for an association between a resource and a task in order to perform operations. Speaking from the tasks' perspective, this could be known as a task assignment, whereas from the resources' perspective, it could be called resource assignment. A task plus a resource represent an assignment. One doesn't need to assign resources to tasks within *Project*; he/she could operate only with task. If resources are allocated to tasks, then the following questions could be answered:

- Who should work, perform what tasks and when?
- Is there a corresponding number of resources for accomplishing the work quantity requested by the project?
 - Is there the possibility that a resource work at a task in a period of time when that particular resource is unavailable for work (for example, when will the resource be absent)?
 - Was there a resource allocated to so many tasks that the resource's work capacity exceeded – in other words, the resource become overallocated?
 - Could one evaluate the resource's performances while comparing to a pre-established plan? A resource which seems to be very busy and need double amount of time for performing a task, compared to other resource, may not be as productive as it appears.

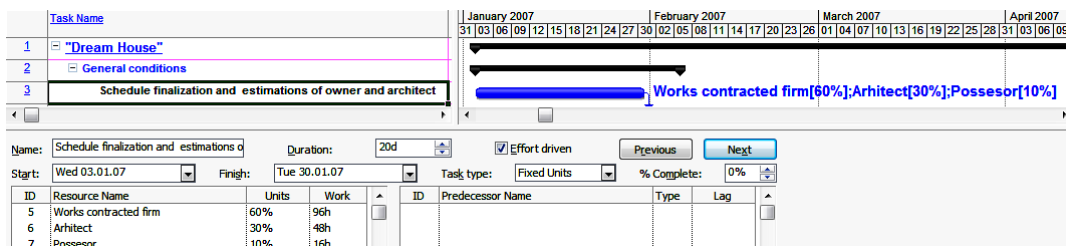
Assigning a resource to a task allows an evaluation of the resource's progress while working with that particular task. If information regarding costs is introduced, *Project* also calculates the costs for the resource and activity. A resource's work capacity is measured by units and is recorded within the *Max.Units* field. Except the case when it's not mentioned, *Project* assigns 100% of resource's units to the task. If the resource has less than 100% of the units' maximal number available, *Project* assigns the maximal value of the resource's units.

Project calculates work, using the so called sometimes sheduled formula method:

$$Duration \times Units = Work$$

The Task 8 lasts for one week. For the existing project, one week covers 40 hours (one could find out how many hours a week is made of, by opening the *Tools* menu, choose the *Options* command and click on the *Calendar* etiquette).

Within the *Gantt Chart* view, one clicks on the 3rd activity’s name – “Schedule finalization and estimations of owner and architect”; then choose the *Slip* option from the *Windows* menu. On the screen appears the *Task Form* box, within the bottom panel of the *Project* window. *Task Entry* displays the *Gantt Chart* view in the *Project* window’s upper panel and the *Task Form* view in the panel below. *Task Form* simultaneously displays all three variables from the scheduled formula: task’s duration in the *Duration* field, resource’s units within the *Units* column and the resulted work value for attaching to task in the *Work* column.



If one adds resources to tasks after an initial assignment, the total amount of work hours remains the same, yet, it is distributed between the assigned resources. The task’s duration decreases correspondingly, the validation sign (implicit) within the *Effort Driven* validation box shows the fact that the effort driven schedule is activated for the task 3. It is not compulsory the effort driven schedule to be applied to all project’s task; when needed, one may deactivate it (in this case, the task’s duration remains the same, no matter how much resources are assigned).

Conclusions

Microsoft Office Project 2007 gives you robust project management tools with the right blend of usability, power, and flexibility, so you can manage projects more efficiently and effectively. You can stay informed and control project work, schedules, and finances; keep project teams aligned; and be more productive through integration with familiar Microsoft Office system programs, powerful reporting, guided planning, and flexible tools.

Project 2007 integrates smoothly with other Microsoft Office system programs. Build projects with a few keystrokes by converting existing task lists in Microsoft Office Excel and Microsoft Office Outlook into project plans. With Project 2007, you can easily assign resources to tasks and adjust their assignments to resolve conflicts over allocations. Control finances by assigning budgets to projects and programs. Improve your cost estimates with Cost Resources.

References

1. Bonnie, Biafore. 2007. *Microsoft Project 2007: The Missing Manual*. Pogue-Press: O' Reilly.
2. Emil, Cosma. 2006. *Aplicații Excel, Project, FoxPro.ExPonto*.
3. Carl, Chatfield, and Timothy, Johnson. 2007. *Microsoft Office Project 2007 Step by Step*. Microsoft Press.
4. Dave, Gochberg, and Rob, Stewart . 2008. *Microsoft Office Project Server 2007: The Complete Reference*. McGraw-Hill Osborne.
5. Dale, A. Howard, and Gary, L. Chefetz. 2007. *Ultimate Learning Guide to Microsoft Office Project 2007*. Soho Corp.
6. Elaine, Marmel. 2007. *Microsoft Project 2007 Bible*. John Wiley & Sons.
7. Elaine, Marmel. 2006. *How to Do Everything with Microsoft Office Project 2007*. McGraw-Hill.

DIGITAL DIVIDE IN THE EUROPEAN UNION

Radu HERMAN*

Abstract

This paper aims to demonstrate that income, education and infrastructure play a critical role in shaping the divide.

The global challenge for the new millennium is to build a society where everyone can access and share information. A fully integrated digital world has become a reality, and all segments of society must embrace it in order to be contributing partners to future success in the EU.

As they are fast becoming an essential tool for economic activity, Information and Communication Technologies (ICT) became a vital engine of economic performance. The problem, however, is that in many countries technological diffusion is obstructed by the limited capacity of networks to carry large amounts of knowledge swiftly and the limited access of individuals even to networks in which knowledge products are minimal.

Keywords: *digital divide; information society; Information and Communication Technologies (ICT); education; ICT infrastructure.*

Introduction

If you want to know what difference communication technologies make? Answer: Try living without them from tomorrow...

At the World Summit of the Information Society in December 2003, presidents and prime ministers from all over the world declared that the global challenge for the 21st century is to build a society where everyone could access and share information. We must encourage individuals and communities to achieve their full potential in promoting their development and improving their quality of life.

The growth of E-commerce and general expansion in the use of information technology (IT) in all organizations have created profound issues that reflect racial, educational, and income disparities. Among the challenges is an increased demand for IT workers and a significant shortage of potential employees with the necessary technical skills.

Information and Communication Technology (ICT) is becoming very fast a distinct part of national Development strategies across the globe. ICTs have a significant role in enhancing efficiency and productivity in the process of economic growth..

The UNSC in its 38th Session presented a "Report of the Partnership on Measuring Information and Communication Technologies for Development: information and communication technology statistics" wherein it noted that "*During the last decades, advancements in the access to and usage of information and communication technologies (ICTs) have been a driving force for changes in business and in society. While ICT diffusion and usage presents an opportunity to developing countries, the digital divide between developed and developing countries persists, posing a new challenge for development.*

The Digital Divide is the gap between individuals, households, business and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICTs) and to their use of the internet for a wide variety of activities.

* Lecturer, Faculty of Business and Administration, University of Bucharest.

The OECD defines it as follows: „The term Digital Divide refers to the gap between individuals, households, business and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities.”

First step in understanding the digital divide

A knowledge base is required in today's knowledge based society in order to be efficient as a social or economic agent. Those without qualifications are consequently less likely to participate effectively in lifelong learning. Also the risk in being left by the wayside is increasing in today's knowledge based society. However is very important on long term to diminish the percentage of early school leavers - is essential on long term the effort on trying to achieve the magic trio for European Union: Economic Growth, Sustainability and Equity.

In the year 2000, the „digital divide” was defined: „It is a precondition for better economic performance that we create a society with greater social cohesion and less exclusion.[...] The emergence of new information and communication technologies constitutes an exceptional opportunity, provided that the risk of creating an ever-widening gap between those who have access to the new knowledge and those who do not is avoided”.(Source: European Council on Employment and Social Policy, Introductory Note to the „Objectives in the fight against poverty and social exclusion”.

Why should we study The Digital Divide?

1. Long-Term Employment in The European Union; basic ICT skills are basic requirements for a growing number of jobs.

2. An Equitable participation of society members in the „Information society”; not having ICT access or skills will increasingly be a major disadvantage in social and economic life (Example: buying my books on-line.

3. Economic reasons (demand side economics); part of the population not having ICT access won't be able to be e-consumers.

The European Union needs an adequate output of scientific specialists in order to become the most dynamic and competitive knowledge-based economy in the world. The rising demand for scientific specialists is underlined by the conclusions of the Barcelona European Council (2002) “that overall spending on R&D and innovation in the Union should be increased with the aim of approaching 3% of GDP by 2010”.

The digital divide and „social exclusion”

The important role of ICT has been acknowledged and is wide reflected in official policy documents including: Social Policy, Health Policy, Education Policy, Employment Policy and Info-society Policy.

We can determine a vicious circle between :

Unemployment		
Poor skills		
Low income	and	Social exclusion
Poor health		
Digital exclusion		

In a knowledge society individuals must update and complement their knowledge, competencies and skills throughout life to maximise their personal development and to maintain and improve their position in the labour market.

The Lisbon European Summit called for a “substantial annual increase in the per capita investment in human resources”. In the Communication “Investing efficiently in education and training: an imperative for Europe”, the European Commission proposes a number of issues of relevance for the efficient investment in education and training that should be analysed in detail. The Council is looking forward to the outcome of ongoing work before deciding on further action.

IT tools can help soften on absorbing the knowledge generated anywhere on the globe and thus help raise income but cannot jump obstacles in improving or implementing institutions.

We must pay attention when we construct policies in reducing the digital divide because we must consider the real inefficiencies in the management of the organizations. In the same time the digital exclusion is also a factor of the effective demand for the technology, or rather for the services that it can provide, from society and its component individuals. This is a much more difficult matter to identify, partly because it is so entangled with other social issues, and thus less popular as a policy target.

Overcoming ‘material access’ has been the primary target of digital inclusion policy in most Western countries: make the technology physically accessible to people, and usage will follow.

In many countries the access to the information technologies represents a problem. There are cases in which the access is limited by its high cost. In others, international differences in technology standards may make it impossible to eliminate technological heterogeneity. What would help overcoming the costly access is a strengthening of the collaboration in open-source technologies, which provide tremendous opportunities to lower the cost of access, and to make the information society more inclusive.

Governments and legislators should have an interest in investing in robust national information infrastructures, which enable the access of these groups since such investments can help removing communications and information access barriers that restrict business and social interactions.

On one side the consumers are not fully aware of the potential use of their personal information for purposes other than the original ones, or of its delivery to third parties. On the other side, governments throughout the world have a poor track record in protecting personal privacy.

Towards e-development

Adam Smith defined land, labor and capital as the key input factors of the economy in the 18th century. Joseph Schumpeter added technology and entrepreneurship as two more key input factors in the early 20th century, recognizing the role and dynamic nature of technological change and innovation, as well as path dependencies in shaping the health and future of the economy and moving away from the static approach of neoclassical economics.

In the late 20th and the beginning of the 21st century, numerous scholars and practitioners, such as Peter Drucker, have identified knowledge as perhaps the sixth and most important key input and output factor of economic activity.

ICT have brought about significant changes in the way people create, share and consume information. It has changed and continues to change the way organisations within the for-profit, public and nonprofit sectors run their businesses and provide services. As ICT become embedded in daily life, there is a growing need for ICT literacy in public and private life.

ICT may allow commodity-based economies to evolve into knowledge-based and possibly knowledge-driven economy. The need for e-Development interventions is also stressed by the development of the e-Economy and the increased competitiveness and openness that it brings about. The knowledge economy is fostering market transparency, integrating separate geographical markets and facilitating integration into innovative global markets.

The need for standardization, of both processes and policies, calls for action of an overarching organization that can provide appropriate guidance and advisory services to transitional economies willing and able to take advantage of knowledge economy. The benefits for EU-accession candidate countries from engaging in the knowledge economy development framework are those generally predicted for the intra-industry integration.

Re-conceptualising the digital divide in terms of digital inclusion and exclusion requires policy and projects to focus attention on the social, cultural, economic, educational and material factors that continue to exclude people from participating in society generally and specifically the information economy. This approach recognises technology use and skill as a complex milieu of physical, digital, human and social resources and relationships. Thus, at least as much attention, planning and resources need to go into the human and social systems that supports technology use. Using technology to promote social inclusion is a more productive approach to ensuring digital inclusion.

The barriers to digital inclusion cover social, economic, technical and cultural issues that may be experienced by many groups in society. Some groups may experience a number of these factors which need to be addressed holistically. Addressing the broader reasons and impacts of non-participation is critical to developing appropriate solutions. Digital inclusion therefore recognizes how the combination of elements may limit participation in the information economy. The range of elements to focus on include:

- access;
- integration;
- support;
- technical-specifications;
- applications.

Europe's Information Society

In 2004 an average 54% of the households in the EU had a personal computer at home while 43% had a home Internet connection. About one in three connected households had a broadband connection to the Internet (15% compared to 43%).

As expected, the presence of children in the household has a big impact on the take-up of ICTs. A personal computer can be found in 70% of all homes with children but in only 46% of all childless households.

From the regional dimension, we can observe that the degree of urbanisation is an important factor of accessing ICTs. Internet penetration has a low degree of penetration in the rural areas of the European Union. The availability of broadband technology in remote areas probably plays a role in this discrepancy.

Discrepancies can be observed when we compare prosperous economic regions with relatively poorer regions (regions where the GDP per capita is below 75% of the EU average). The internet penetration is almost twice as high (55% compared to 29%) in the relatively prosperous regions of the European Union. The main reasons why people did not have internet at home in 2004 were that equipment costs are too high and they lack the skills of using the internet connection.

„The first objective of i2010 (Information Space. Innovation & Investment in R&D inclusion) is to establish a Single European Information Space offering affordable and secure high-bandwidth communications, rich and diverse content and digital services.” (European Commission). EU Commission’s aim is to create a modern market that can absorb the digital economy.

The creation of the Single European Information Space means solving the problems of digital convergence. This is the main issue of the telecommunications market that should be discussed in governments countries from EU.

The main European Commission’s actions for 2008-2009 are to:

- Develop a broadband performance index and invite Member States to set national targets for high-speed internet usage to reach a 30% penetration rate among the EU population by 2010;
- Help prepare the information society for the future internet economy by issuing a Communication on the future of networks and internet;
- Propose measures to ensure a high level of resilience of critical communication networks and information infrastructure (like the internet) and to guarantee continuity of services;
- Support the adoption of the regulatory package for e-Communications and in particular the creation of the European Electronic Communications Market Authority (EECMA);
- Make spectrum management more efficient by facilitating the harmonisation and trading of the pan-European part of frequencies;
- Publish a guide that explains users' rights and obligations in the digital environment;
- Respond to the challenges to privacy and trust stemming from new converging services in the future ubiquitous information society;
- Address issues concerning the interoperability and transparency of digital rights management systems (DRMs) for consumers in the Recommendation on Content Online.

The main challenges of The European Information Space are:

- The infrastructure challenge – EU must promote incentives to long-term investment which can ensure sustainable competition to all intermediary levels;
- Achieving an Internal Market for SMEs which have e-profile
- Removing barriers to developments in fixed-mobile convergence;
- Problems with online distribution of illegal content;
- Developing a community with wide licensing process for digital copyright protected material.

Innovation and investment in ICT research in EU

„This priority of i2010 focuses on the EU’s research and development instruments and sets priorities for cooperation with the private sector to promote innovation and technological leadership. Actions implemented under this priority aim to strengthen European innovation and research in ICT through instruments such as the „Seventh Research Framework Programme (FP7)” the „European Technology Platforms” and „Joint Technology Initiatives (JTIs).” (European Commission)

Propose improvements to the EU's ICT standardisation system;

- Adopt an Action Plan to further promote e-Signature and e-authentication;
- Launch the Joint Technology Initiatives as the first true Europe-wide public-private research partnerships;
- Promote the European Technology Platforms, in particular closer cooperation among them;

- Promote the role of the public sector as a first buyer of innovation;
- Launch a process to ensure Europe's leadership in ICTs with a Communication on ICT Research and Innovation;
- Promote the role of e-Infrastructures in a changing and global research environment.

ICT adoption and the Digital Divide

The rapid development of ICT accelerates the transmission and use of information and knowledge and reduces the gap of the Digital Divide. This powerful combination of forces is changing the way we live, and redefining the way companies do business in every economic sector.

The introduction of high-speed Internet access is particularly important for the transformation of Information Societies since it opens up new possibilities and visions on how the Internet can provide a platform for enhancing countries social and economic development. Besides opening up new markets and revenue streams to businesses, broadband has proven an important driver for the delivery of e-government, e-learning and other services. The uptake of e-commerce is also closely linked to growing broadband penetration rates.

The phenomenal growth in information and communications technologies (ICTs) has important implications for economic growth in both developed and developing countries. The ICT-producing sectors (both services and manufacturing) create direct and indirect benefits in the countries where they are located. Growth of these industries results directly in new jobs and revenue. The size of these direct benefits depends on how large the ICT goods and services producing sectors are relative to the economy, and how fast they have grown.

The telecommunication sector deserves special recognition for its impact on the economy worldwide. The telecommunication services sector, which in most countries is larger than the ICT manufacturing sector, is growing rapidly in literally every part of the world. Access to telecommunication services (in terms of telephone subscribers) has been growing at high speed, exceeding global economic growth over the last two decades. Besides telecommunication users, the now largely privatized and competitive telecommunication services sector is reaping the benefits of growth.

Most studies analyzing the impact of ICTs on the economy (outside the ICT sector itself) center around 'productivity' effects. In developed countries, considerable resources and creativity have been devoted to analyze productivity gains in the whole economy, and at sector and firm levels. Several comparative studies have been carried out to analyze the difference in productivity gains in different countries and regions of the world. While the extent of the impact may differ, there is a general consensus that ICTs have a clear impact on economic growth by increasing productivity.

Macro economic research, as well as firmlevel data, confirms that ICT investment and higher infrastructure and usage levels alone are not sufficient to produce tangible benefits. This has been described as the "Wal Mart phenomenon" and refers to Wal Mart's (the world's largest retailer) enormous productivity gap, which it was able to develop over its competitors in the industry by combining managerial with technological innovations. It highlights that ICTs have the largest beneficial impact in conjunction with other changes, including a new set of ICT skills/training, structural changes within business models and the economy, and institutional and regulatory adjustments.

There are clear indications that in countries with relatively high ICT levels, B2B (business to business) and B2C (business to consumer) transactions are taking up an increasing market share. Broadband uptake is closely linked to this development. In the UK, the value of Internet sales rose

by 81 percent between 2003 and 2004, by when Internet sales accounted for about 3.4 percent of the total value of sales by businesses in the non-financial sector. In Canada, combined private and public sector online sales rose to over 28 billion \$ in 2004, from 19 billion \$ in 2003, an increase of almost 50 percent. By 2004, close to 80 percent of Canadian public sector businesses and 43 percent of private sector businesses used the Internet to buy goods or services.

There are a number of financial benefits linked to e-commerce, which allow companies to reduce production, administrative and sales costs and increase revenues. The major barriers to e-commerce uptake include concerns on authentication and security of transactions. Other impediments include the lack of credit cards and convenient payment methods, legal issues, and the lack of broadband Internet access. There are many examples of the beneficial impacts of teleworking and a number of countries and businesses have acknowledged the public and business interest of having people work from at home. Besides reduced congestion and environmental impacts due to reduced traffic, telework saves people and businesses time and money.

By early 2006, eleven thousand of the 100000 employees at British Telecom (BT) were working from home. These teleworkers each save the company accommodation costs of some GBP 6'000 per year; they have an increased productivity rate between 15 and 31 percent, and each average only three days sick absence per year against an industry average of 12 days. Based on these changes alone, British Telecom estimates that ICT enabled telework allows the company to save over GBP 60 million per year. In addition, British Telecom also has 70000 flexible (nomadic or occasional home based) workers, which helps the company to make efficiency savings by cutting down on travel costs.

While it is not easy to measure the impact of ICTs in the area of government, health and education, the repercussions that information and communication technologies are having in these sectors are real and a number of studies and surveys have produced some concrete results.

There are a number of impacts that can be identified with regard to e-government, including improved information flows, reduction of process time and cost, and an increase in efficiency and transparency. There have been some efforts to measure benefits, including a 2005 study by the EU, which confirmed that e-government services were producing real benefits for EU citizens, governments and businesses – namely in terms of saving time and gaining flexibility. Online income tax declarations save European taxpayers an estimated seven million hours per year. When generally available and widely used in all member states, such e-services could save over 100 million hours each year. Compared to the same transaction completed offline, the average online transaction saves 69 minutes for citizens and 61 minutes for businesses.

Conclusions

- Access to information and communication technologies continues to grow at high speed and the digital divide – in terms of mobile subscribers, fixed telephone lines and Internet users – keeps getting smaller.

- The world continues to be separated by major differences and disparities in terms of ICT levels. High growth rates in some areas, and particularly the mobile sector, are not sufficient to bring digital opportunities to all and many developing countries risk falling behind, particularly in terms of Internet access and newer technologies such as 3G and broadband.

- It is important to counteract the new technology divide, particularly since broadband is playing a crucial role in transforming countries into Information Societies. Some of the applications that are having the greatest impact on people and businesses are closely linked to broadband uptake.

▪ Since the access to basic communications in the developing world has largely been achieved through mobile communications, broadband wireless access is expected to play a key role for developing countries seeking to foster the Information Society.

▪ The world has made some important progress in agreeing upon a common set of Information Society access and usage indicators and efforts continue to improve the availability and comparability of core Information Society indicators.

▪ The work carried out in the area of impact measurement is still at the beginning stage, and often restricted to developed countries. Despite the potential of ICTs to be an engine for social and economic development, there is limited quantifiable proof and little internationally comparable data.

▪ The debate on the role of ICTs for development and their potential to reduce major development concerns calls for the identification of appropriate impact indicators.

References

- [1] E. Hargittai, The digital divide and what to do about it, in: D.C. Jones (Ed.), *New Economy Handbook*, Elsevier Academic Press, New York, 2003, pp. 821–839.
- [2] ITU, *World Telecommunication Development Report: Access Indicators for the Information Society*, ITU, Geneva, 2003.
- [3] M. Jolles, G. Dang, Does the European Union create the foundations of an information society for all? *ICT and Inequalities: The Digital Divides International Conference*, Paris, 2004.
- [4] OECD, *Guide for Measuring the Information Society*, OECD, Paris, 2005.
- [5] *World Summit on the Information Society, Tunis Commitment, WSIS*, Tunis, 2005.
- [6] Europe's Information Society, „Digital Divide Forum Report: Broadband Access and Public Support in Under-Served Areas”, http://ec.europa.eu/information_society/eeurope/i2010/docs/implementation/ddf_report_final.pdf
- [7] Alliance for Global Business, „Seizing Digital Opportunities: A Business Perspective”, <http://www.witsa.org/papers/Dubai.pdf>
- [8] Digital Divide Network, „The European Union on the Digital Divide”, <http://www.digitaldivide.net/articles/view.php?ArticleID=41>

NATIONAL UNIC NUMBER REGISTRAR. UTOPIY OR “A MUST HAVE”

Lect. Eng. Cosmin Olteanu
Nicolae Titulescu University
contact@olteanucosmin.ro

Abstract:

In the context where 4 universities have been discovered to enroll students on fake faculties or fake form of faculties and moreover to print diplomas for them, a change is needed. This change is to be made by a national database of unique numbers for every student (license studies, master studies or doctoral studies). The general idea is to have a strong unique informatic system where all the data to be collected from all universities.

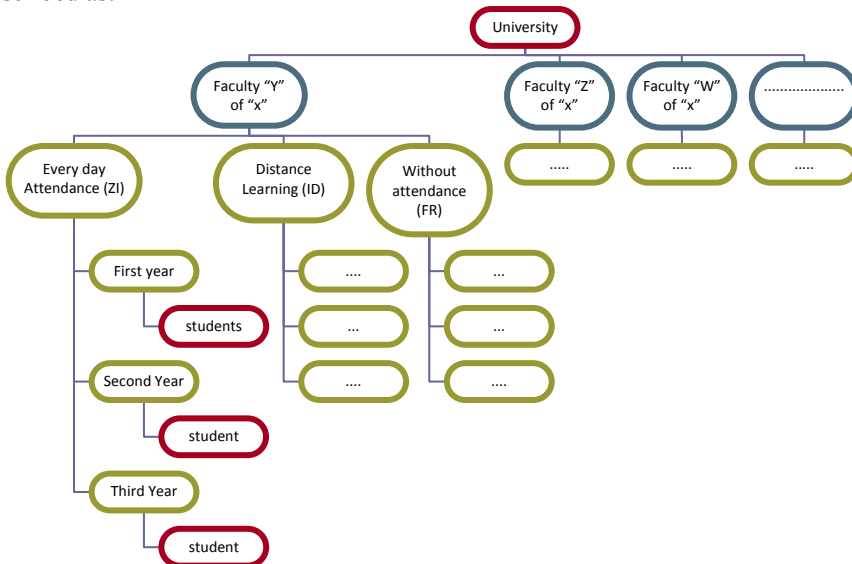
Key words: *Informatic System, ID student number, education, software*

Actual higher education image is a bit crumpled. In the context where 4 universities have been discovered to enroll students on fake faculties or fake form of faculties and moreover to print diplomas for them, a change is needed. This change is to be made by a national database of unique numbers for every student (license studies, master studies or doctoral studies).

This national database should provide a clear view on enrolment for every university and for every diploma printed there and not to have just a general distribution for diplomas without the coverage of a clear statistic system like we have now.

The general idea is to have a strong unique informatic system where all the data to be collected from all universities.

Right now, and this should be mentioned, in one university there are more faculties, with a couple of study forms and with attendance or not and the ID student number is not unique. This may be described as:



So, the rule for ID student number generator is quite simple. For every student in the red circle (in the upper diagram) is generated a number from 1 to

This means that in one faculty from one university there are minimum 9 students with 1 as ID student number.

If we extrapolate at 3 faculties from an university basis (small university) we get more than 18 students with the same ID.

Go ahead and make a small calculation on 30 or 40 universities with an average of 4 faculties.

$$30 \times 4 \times 9 = 1080$$

So at national coverage there are 1080 students with 1 as ID student number.

This problem is unusual and should be repaired if we want to have a fair system without errors.

For this case study all the teachers thought that we need a national database where every student has a unique ID number and on an a national meeting of rectors the UNIQUE ID STUDENT REGISTER (Registrul Matricol Unic) has been started.

This was done by starting a joint venture of main Education Institutions from Romania like MECI, UEFISCU, ARACIS and others witch where reunited on the web site <http://www.rmu.ro>

Registrul Matricol Unic

Acasa | Despre proiect | Evenimente | Rezultate | Media | Contact

cauta

Proiectul Registrul Matricol Unic are ca scop crearea unui sistem informatic integrat unic la nivel național, privind participanții din sistemul de învățământ superior (SIS). Pe lângă o mai bună gestionare a datelor la nivelul instituțiilor SIS, viitoarea bază de date va oferi o imagine reală a dezvoltării capitalului uman prin învățământ superior.

Stadiu actual

Pachetul de lucru 1 - rapoarte de analiză
În urma derulării activităților în cadrul primului pachet de lucru au fost realizate trei rapoarte de analiză...
[...mai mult](#)

Pachetul de lucru 2 - documentația de atribuire
În luna iulie a fost finalizată documentația de atribuire a contractului privind achiziția publică de servicii de dezvoltare a unui sistem informatic integrat...
[...mai mult](#)

Conferinte

Conferința RMU
Vineri, 12 Iunie 2009, în sala Aula Magna (Academia de Studii Economice din București) a avut loc Conferința „Starea actuală a sistemului de evidență a studenților în România. Etape de realizare și implementare a Registrului Matricol Unic”...
[...mai mult](#)

Prezentarea proiectului
Scopul principal al unui sistem național integrat privind participanții din sistemul de învățământ superior (SIS) este acela de a furniza informații și rezultate obiective și credibile, în timp real, atât factorilor de decizie ai unei instituții cât și altor persoane fizice sau instituții interesate, în funcție de nivelul de acces atribuit acestora. Proiectul își propune să răspundă următoarelor nevoi identificate la momentul actual.
[...mai mult](#)

Calendar evenimente

Septembrie 2009

L	Ma	Mi	J	V	S	D
1	2	3	4	5	6	
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

septembrie | 2009

Inscriere newsletter
adresa e-mail | trimite

RSS

Obiective

Obiectivul general al proiect

Proiectul strategiei pentru învățământ superior

Acasa | Despre proiect | Evenimente | Rezultate | Media | Contact

Copyright © 2009 | Toate drepturile rezervate. Utilizând acest site, sunteți de acord cu [termenii și condițiile de utilizare](#).

Moreover on 30 July 2009 is published order 4651 where Education Minister Ecaterina Andronescu establishes exact fields for national database.

Here is mentioned that for every student candidate must be collected a lot of personal information like (tabel is in romanian for an accurate information) :

Nr. crt.	Câmpuri	Subcâmpuri	Observații
	Secțiunea I.1. Date personale ale studentului ¹ cu cetățenie română/străină		
1	Numele de familie la naștere (din certificatul de naștere)		
2	Numele de familie actual (după căsătorie, înfiere, modificare la cerere, dacă este cazul, conform actului doveditor)		
3	Prenumele		
4	Inițialele tatălui/mamei ²		
5	CNP ³		
6	Data nașterii	Anul	
		Luna	
		Ziua	
7	Locul nașterii	Țara de origine	
		Județul / (cod țară ⁴)	
		Localitatea	
8	Sexul	F/M	
9	Starea civilă ⁵	Căsătorit(ă)	
		Necăsătorit(ă)	
		Divorțat(ă) / Văduv(ă)	
10	Starea socială ⁶ specială	Orfan (de un părinte sau de ambii părinți) / Provenit din case de copii / Provenit din familie monoparentală	
		Student cu dizabilități	
11	Cetățenia	Română, cu domiciliul în România/ străinătate	
		Alte cetățenii	
		Cetățenie anterioară, dacă este cazul	
12	Etnia ⁷		
13	Domiciliul stabil	Țara	
		Județul ⁸ / (cod țară ⁹)	
		Orașul / Comuna/Satul	
		Adresă (strada, număr,	

		bloc, scara, etaj, apartament, sector) ¹⁰	
14	Actul de identitate / Documentul de călătorie ¹¹	Seria	
		Numărul	
		Eliberat	
		Data eliberării	
		Perioada de valabilitate	
15	Alte date personale ale studentului	Telefon, adresă de e-mail (cu afiliere la universitate)	
16	Candidat care se încadrează în categoria persoanelor cu dizabilități	Se bifează numai de persoanele aflate în această situație, pe bază de documente	
	Secțiunea I.2. Date privind școlaritatea studentului ¹²		
1	Universitatea		
2	Facultatea / Departamentul		
3	Ciclul de studii	Licență, masterat, doctorat	
4	Domeniul fundamental de artă, știință și cultură		
5	Domeniul de studii		
6	Programul de studii / specializarea	Denumire	
		Localitatea în care se desfășoară programul de studii	
		Limba de predare în care se desfășoară programul de studii	
		Durata programului de studii / specializării	
		Număr de credite	
7	Anul universitar		
8	Anul de studii		
9	Forma de învățământ	Zi	
		Frecvență redusă	
		Învățământ la distanță	
10	An pregătitor (pentru studiul limbii române de către studenții străini)		
11	Forma de finanțare a studiilor	Susținut de la buget	
		Cu taxă (CPL, CPV, bursier, CPNV)	
12	Tipul de bursă	Nebursier	
		Bursier	

		Bursier, cu bursă acordată pe criterii profesionale (de excelență, de merit, de studiu)	
		Bursă de excelență	
		Bursă de merit	
		Bursă de studiu	
		Bursier, cu bursă acordată pe criterii sociale	
		Alte tipuri de bursieri	
		Bursă olimpic internațional	
13	Situația școlarității la începutul anului universitar	Admis prin concurs	
		Admis ca olimpic (național / internațional)	
		Admis la continuare de studii	
		Repartizat de minister (bursier al statului român) ¹³ - numai pentru studenții străini	
		Admis la studii paralele	
		Transferat în interiorul universității	
		Reînmatriculat	
		Promovat (integralist)	
		Promovat (promovat prin credite)	
		Revenire din întrerupere de studii	
		Prelungire școlaritate	
		Transfer interuniversitar	
		universitatea de la care s-a transferat	
		Înscriș pentru prima oară ca student în ciclul respectiv de studii	
		Provenit din promoția curentă / anterioară (de liceu, licență, mașter, în funcție de ciclul la care este admis)	
		Admis / Student la un al doilea program de studii	

		din același ciclu de studii universitare	
14	Situția școlărității la sfârșitul anului universitar	Promovat (integralist)	
		Promovat (promovat prin credite)	
		număr de credite (atât pentru promovare integrală, cât și pentru promovare parțială)	
		Exmatriculat	
		Prelungire școlăritate	
		Retras de la studii	
		Înterupere de studii semestrul I	
		Înterupere semestrul II	
		Absolvent (cu sau fără diplomă)	
		Student în semestru de mobilitate Erasmus / Socrates	
		Cu situația neîncheiată	
15	Alte date privind școlăritatea studentului		
Secțiunea I.3.a - Date privind pregătirea anterioară a studentului ¹⁴ (absolvent de liceu)			
1	Studiile preuniversitare absolvite, nivel liceu	Denumirea instituției unde a absolvit	
		Țara	
		Localitatea	
		Județul	
		Profilul / Domeniul	
		Durata studiilor	
		Anul absolvirii	
		Forma de învățământ (Zi / Seral / FR / IDD)	
2	Datele de identificare ale diplomei	Tipul (diploma de bacalaureat sau echivalentă pentru candidatul care a absolvit studii anterioare în străinătate)	
		Seria	
		Numărul	
		Emitentul	

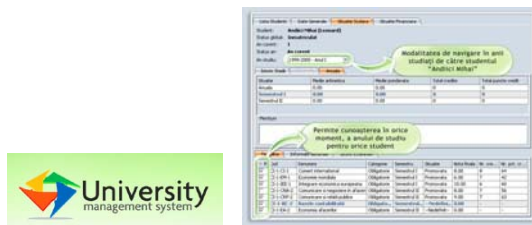
		Anul emiterii	
		Foaia matricolă care însoțește actul de studii	
3	Alte observații (pentru cazurile în care candidatul care a absolvit studii anterioare în străinătate)	Vizarea / Recunoașterea diplomei prezentate (DGRIAE - acorduri bilaterale / CNRED / Direcția cetățeni străini din MECI) Nr. / Serie act de recunoaștere / echivalare (eliberat de DGRIAE / CNRED) ¹⁵	
Secțiunea I.3.b - Date privind pregătirea anterioară a studentului ¹⁶ (absolvent de facultate)			
1	Studiile universitare absolvite	Țara	
		Localitatea	
		Județul	
		Denumirea instituției de învățământ superior	
		Facultatea	
		Domeniul / Profilul	
		Programul de studii / Specializarea	
		Titlul obținut	
		Forma de învățământ ¹⁷ (ZI / FR / ID / Seral)	
		Forma de finanțare a studiilor ¹⁸ (buget / taxă)	
		Durata studiilor (numărul de ani sau numărul de semestre, după caz)	
		Anul absolvirii	
2	Datele de identificare ale actului de studii	Tipul / Denumirea (diplomă / diplomă de licență / echivalentă)	
		Seria	
		Numărul	
		Emitentul	
		Anul emiterii	
		Supliment diplomă / Foaia matricolă care însoțește actul de studii ¹⁹	

3	Alte observații	Vizarea / Recunoașterea diplomei prezentate (DGRIAE - acorduri bilaterale CNRED) Număr / Serie act de recunoaștere/echivalare (eliberat de DGRIAE/CNRED) ²⁰	
Secțiunea I.4 Date de tip administrativ privind studentul			
1	Numărul matricol din registrul matricol (al facultății)	Din registrul facultății	
2	Informații privind cazarea studenților	Căminist	
		Căminist, cu unul dintre părinți cadru didactic	
		Necăminist, cu subvenție cazare	
		Necăminist	
		Alte informații privind cazarea studenților înregistrate la nivelul instituției dumneavoastră	
3	Alte categorii de informații având caracter administrativ	Trebuie să fie detaliate	
4	Alte opțiuni ale candidatului român	Moldova - Ordin cifră / Ordin DGAERI	
Secțiunea I.5 - Date privind absolventul			
1	Ciclul de studii absolvit	Licență / Masterat / Doctorat	
		Licență / Masterat / Doctorat	
		Seria, nr.	
2	Diploma de absolvire	Data eliberării	
		Instituția emitentă	
		Data susținerii examenului de finalizare studii	
3	Alte date suplimentare	Media examenului de finalizare studii (calificativ de absolvire)	
		Nr., seria atestatului de echivalare eliberat de CNRED ²¹	

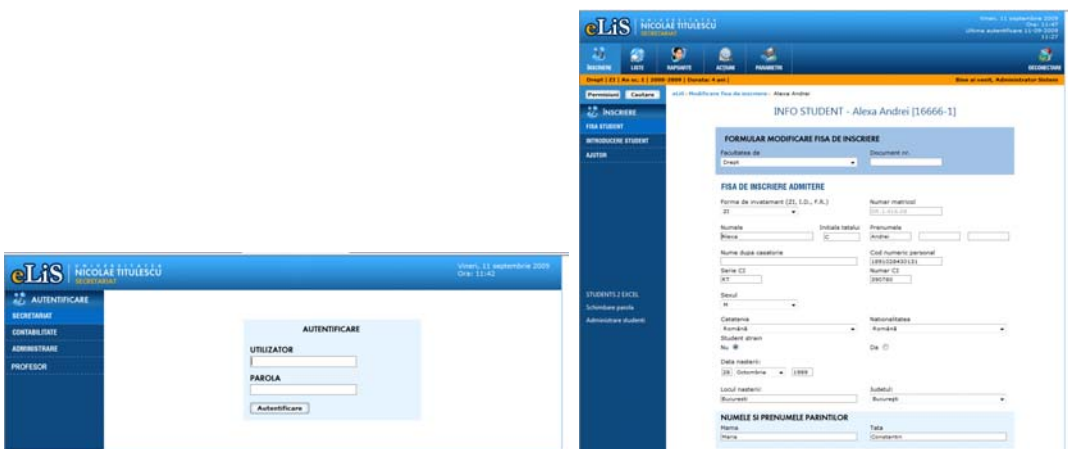
For the moment, the basis for national database are established and all universities that have a centralized informatic system should modify their database.

For that reason should be mentioned that several universities already have this database and are fully functional. These universities are:

- Bucharest University with UMS system (University Management System)



- Nicolae Titulescu University from Bucharest with ELIS system (Electronic Learning Information System)



BIBLIOGRAPHY:

<http://www.edu.ro>
<http://www.rmu.ro>
<http://www.univnt.ro>
<http://elis.univnt.ro>
<http://www.ums.ro>